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## Information and Notices

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2020/C 22/01

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## IV

(Notices)

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## SINGLE RESOLUTION BOARD

**Report (pursuant to Article 92(4) Regulation (EU) No 806/2014) on any contingent liabilities arising as a result of the performance by the Single Resolution Board, the Council or the Commission of their tasks under this Regulation for the financial year 2018, together with the replies of the Single Resolution Board, the Commission and the Council**

(2020/C 22/01)

**About the report:**

The Single Resolution Mechanism is the EU system for managing the resolution of failing banks in the euro area, with the Single Resolution Board (SRB) as central player. Other key players are the Commission and Council. The SRB oversees the Single Resolution Fund (SRF), which can be used in bank resolutions. The ECA has an annual obligation to report on related contingent liabilities.

So far, the SRF has not been used, but there are a large number of legal challenges relating to a first resolution and other decisions as well as *ex-ante* contributions to the SRF. For the financial year 2018, the SRB reported contingent liabilities relating to legal challenges to *ex-ante* contributions, but none relating to a resolution decision. We saw no evidence that would contradict the SRB's assessment, but we make two recommendations relating to the SRB's reporting of contingent liabilities.

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## EXECUTIVE SUMMARY

I. The Single Resolution Mechanism (SRM) is the EU system for managing the resolution of failing banks in the euro area. The key player is the Single Resolution Board (SRB), an EU body based in Brussels. It administers the Single Resolution Fund, which can be used to support bank resolutions. Other key players in the resolution process are the European Commission and Council of the European Union.

II. We have an obligation to report annually on any contingent liabilities of the SRB, the Commission, or the Council arising from the performance of their resolution tasks. Contingent liabilities and provisions reflect the financial risk to which they are exposed.

III. A contingent liability is an obligation arising from past events whose existence will be confirmed by future events; or a present obligation which is not recognised either because it is improbable that there will be an outflow of resources, or because the amount cannot be measured with sufficient reliability. In practice, if an outflow of resources is not assessed as being remote, a contingent liability needs to be disclosed.

IV. At end-2018 there were outstanding judicial proceedings in EU courts against the SRB and the Commission (but not the Council) concerning their resolution tasks, which could generate contingent liabilities. These numbered 104 in total, of which one was against the Commission only, 74 against the SRB only, and the remaining 29 against both. Our audit involved a review of a sample of documents related to litigation against the SRB and the Commission, as well as representations concerning proceedings at national level.

V. Two actions by the SRB are being challenged in the EU courts:

- In June 2017, the SRB adopted a resolution scheme in relation to Banco Popular Español S.A., which was endorsed by the Commission. The scheme involved a write-down and conversion of capital instruments, together with the sale of the bank for one euro. These actions are subject to more than one hundred judicial proceedings from impacted creditors and shareholders seeking annulment or damages.
- In February 2018, the SRB decided not to take resolution action in respect of ABLV Bank AS and ABLV Bank Luxembourg.

VI. In all of the above cases, the SRB decided not to disclose a related contingent liability, as it assessed the related risks as remote. We found no evidence that would contradict the SRB's assessment. However, the SRB's assessment was not made on the basis of any reasons or supporting arguments.

VII. The resolution of Banco Popular Español S.A. was implemented at national level by the Spanish National Resolution Authority (Fondo de Reestructuración Ordenada Bancaria). The Spanish National Resolution Authority is facing legal proceedings at national level and the SRB did not disclose any related contingent liabilities based on the National Resolution Authorities reporting, as these proceedings largely depend on the outcome of proceedings at EU level.

VIII. Following the resolution of Banco Popular Español S.A., the SRB is carrying out a 'right-to-be-heard' process for the shareholders and creditors affected, relating to any potential compensation under the no-creditor-worse-off principle. As this process has not concluded, the SRB is not in a position to assess whether there are any related contingent liabilities.

IX. The SRB also collects (via the National Resolution Authorities) *ex-ante* contributions to the Single Resolution Fund. It has disclosed contingent liabilities of €50 million relating to legal proceedings to these contributions at EU level, and a further €40 million relating to legal proceedings to these contributions at national level. We conclude that the SRB made a fair effort to disclose these cases as contingent liabilities, although several National Resolution Authorities stated that they were not in a position to assess whether contingent liabilities exist. As no judicial proceedings were pending, the SRB did not disclose any contingent liabilities relating to the contributions it collects from banks to fund its administrative budget.

X. The Commission is also subject to judicial proceedings in the EU courts relating to the Banco Popular Español S.A. case, on its own and jointly with the SRB. The Commission has not disclosed any contingent liabilities, since it assessed as remote the related likelihood of an outflow of resources. We did not find evidence that would contradict the Commission's assessment. We note that the Commission has a process in place for systematically assessing the probability of a negative outcome from judicial proceedings and, consequently, judging whether contingent liabilities are necessary for each case.

XI. The Council is not involved in any legal challenges related to its resolution tasks, and therefore has disclosed no contingent liabilities.

XII. We conclude that the SRB's assessment of contingent liabilities for Banco Popular Español S.A. cases was not supported by any reasons or supporting arguments. While the SRB's accounting presentation has improved, there are shortcomings in how contingent liabilities from national level are reported. We recommend that:

- I. when assessing the likelihood of an outflow of economic resources as a result of legal proceedings, the SRB should include adequate reasons and supporting arguments per individual case;
- II. if National Resolution Authorities are unable to assess the likelihood of contingent liabilities at national level, the SRB should disclose a contingent liability.

**ACRONYMS AND ABBREVIATIONS**

Acronym or abbreviation	Explanation
BPE	Banco Popular Español S.A.
CFREU	Charter of Fundamental Rights of the European Union
CJ	Court of Justice (Part of the Court of Justice of the European Union)
CJEU	Court of Justice of the European Union
FOLTF	Failing or likely to fail
FROB	Fondo de Reestructuración Ordenada Bancaria (Spanish National Resolution Authority)
GC	General Court (Part of the Court of Justice of the European Union)
NRA	National Resolution Authority
NCWO	No creditor worse off
SRB	Single Resolution Board
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SRM Regulation	Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).
TFEU	Treaty on the Functioning of the European Union

## INTRODUCTION

1. The Single Resolution Mechanism (SRM) was established by Regulation (EU) No 806/2014 (SRM Regulation) and is the second pillar of the EU's Banking Union. The purpose of the SRM is to manage the resolution of a failing bank with the aim of minimising the negative impact on the real economy and recourse to public funds. The Single Resolution Board (SRB) is the key player within this mechanism and is the resolution authority for all significant banks <sup>(1)</sup> and less significant cross-border banking groups established in the euro area <sup>(2)</sup>. The SRB became an independent agency on 1 January 2015 and has had full resolution powers since 1 January 2016.

2. The process leading to the decision to place a bank under resolution involves the European Central Bank, the SRB, the European Commission and, potentially, the Council of the EU <sup>(3)</sup>. Under certain conditions, the Single Resolution Fund (SRF, see paragraph 38) may be used to support the resolution. The SRB and the SRF are entirely financed by the banking sector.

3. Article 92(4) of the SRM Regulation specifically requires the ECA to draw up a report on any contingent liabilities (whether for the SRB, the Council, the Commission or otherwise) arising as a result of the performance by the SRB, the Council or the Commission of their tasks under this Regulation. The ECA may request any information relevant for performing its task <sup>(4)</sup> from each of these bodies.

## AUDIT SCOPE AND APPROACH

### Audit scope

4. This audit report deals exclusively with contingent liabilities arising as a result of the performance by the SRB, the Council and the Commission of their tasks under the SRM Regulation <sup>(5)</sup>. It covers the financial year 2018. In addition to contingent liabilities arising during 2018, the accounting officer is obliged to take into account any relevant information obtained up to the date of presentation of the final accounts <sup>(6)</sup>. Thus, adjustments or additional disclosures may be required for a true and fair presentation of the accounts and may include information obtained in the course of 2019. The 2018 accounts were presented:

- by the Single Resolution Board on 21 June 2019;
- by the European Commission on 21 June 2019;
- by the Council of the European Union on 26 June 2019.

5. The ECA has also audited the European Commission and the Council <sup>(7)</sup> annual accounts for the financial year 2018, as well as those of the SRB <sup>(8)</sup>, which are presented in other reports.

### Audit approach

6. Contingent liabilities must be disclosed in the annual accounts as laid down in EU Accounting Rule 10, which is based on International Public Sector Accounting Standard 19 on provisions, contingent assets and contingent liabilities (see Box 1). In essence, contingent liabilities and provisions reflect financial risk to which the entity is exposed.

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<sup>(1)</sup> The term 'bank' in this report refers to entities as defined under Article 2 of the SRM Regulation.

<sup>(2)</sup> A list of banks for which the SRB is the resolution authority can be found at: <https://srb.europa.eu/en/content/banks-under-srbs-remit>.

<sup>(3)</sup> Article 18 of the SRM Regulation.

<sup>(4)</sup> Article 92(8) of the SRM Regulation.

<sup>(5)</sup> Article 92(4) SRM Regulation.

<sup>(6)</sup> Article 98(4) Commission Delegated Regulation (EU) 2019/715.

<sup>(7)</sup> ECA Annual reports concerning the financial year 2018.

<sup>(8)</sup> Annual report on EU agencies for the financial year 2018, Section 3.35.



## Box 1

**Definition of a contingent liability**

A contingent liability is:

a possible obligation that arises from past events and of which the existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the European Union,

or a present obligation that arises from past events but is not recognised because it is not probable that an outflow of resources embodying economic benefits or service potential will be required to settle the obligation, or because the amount of the obligation cannot be measured with sufficient reliability.

7. To determine if a contingent liability needs to be disclosed or a provision recognised, the probability of an outflow of resources must be assessed. If a future outflow of resources is:

- certain, a liability needs to be recognised;
- probable, a provision needs to be recognised;
- possible, a contingent liability needs to be disclosed;
- remote, no disclosure is necessary.

8. The SRB, the Commission and the Council have further specified these probabilities in their respective accounting policies. In line with market practices, the SRB and the Council defined 'remote' as a probability of less than 10 % and therefore 'possible' as between 10 % and 50 % (see *Table 1*). In contrast, the Commission defined 'remote' as a probability of less than 20 % and consequently 'possible' as between 20 % and 50 %.

Table 1

**Probabilities defined by the relevant EU bodies**

EU body	Remote	Possible	Probable	Certain
SRB	< 10 %	≥ 10 % to ≤ 50 %	> 50 % to < 100 %	100 %
Commission	< 20 %	≥ 20 % to ≤ 50 %	> 50 % to < 100 %	100 %
Council	< 10 %	≥ 10 % to ≤ 50 %	> 50 % to < 100 %	100 %

Source: Accounting practices of the SRB, the Commission and the Council.

9. The audit evidence consisted of information gathered through meetings and interviews with staff and by reviewing, inter alia, documentation at the SRB and Commission, documentation from the SRB's private external auditor <sup>(9)</sup> and representation letters from external lawyers, as well as publicly available data.

10. As at 21 June 2019, there were ongoing judicial proceedings against the SRB and the Commission in relation to their tasks under the SRM Regulation (see *Table 2*). There were no ongoing judicial proceedings against the Council. To audit related contingent liabilities, we selected a sample of court cases pending in front of the EU courts and reviewed the relevant case files.

<sup>(9)</sup> Based on Article 104(1) Commission Delegated Regulation (EU) 2019/715, a private external auditor shall verify the annual accounts. The ECA shall consider the audit work performed by the private external auditor for preparing its specific annual report on the Union body as required by Article 287(1) TFEU.

Table 2

**Judicial proceedings against the SRB and/or the Commission in relation to their tasks under the SRM Regulation (May 2019)**

Cases related to	In front of EU courts	In front of national courts or administrative proceedings	Paragraphs of report
Resolution of BPE	102	1 325	<b>18, 19, 25, 26, 30-32; 56-59.</b>
Decision on non-resolution of ABLV	2	N/A	<b>27, 28</b>
No-creditor-worse-off process for BPE	0	0	<b>34-37</b>
Ex-ante contributions	16	625	<b>38-48, 59</b>
Administrative contributions	0	N/A	<b>49-52</b>

Source: ECA based on SRB and Commission data; for further details see the relevant chapter.

11. Based on our Treaty rights and the SRM Regulation, the SRB, the Commission and the Council must provide us with all information and documents we consider relevant for performing our tasks <sup>(10)</sup>. However, the SRB and the Commission required us to review the sample of files at the SRB and Commission premises, respectively, with the rationale of protecting confidential information. These working arrangements increased the resources required for the task. In contrast to the requirements imposed on us, the SRB enables its own staff and some contracted third parties to work remotely with direct access to its servers and confidential information.

## OBSERVATIONS

### *Part I: Contingent liabilities of the SRB*

12. In a representation letter covering the annual accounts for the financial year 2018, the SRB's accounting officer confirmed that all contingent liabilities referred to in Article 92(4) of the SRM Regulation had been disclosed. In its report on the SRB's 2018 accounts, the private external auditor concluded that it had gained satisfactory assurance in respect of contingent liabilities. Furthermore, based on the available information, it concurred with the SRB's assessment that provisions for legal cases are not necessary.

13. In comparison to the position in mid-2018, the SRB has further developed its accounting guidance for administrative appeals and court cases <sup>(11)</sup>. The guidance has been drafted in line with the applicable standards (compare paragraph 6) and adequately defines the relevant terms based on market practice (compare paragraph 8). The accounting officer has used this guidance for the preparation of the final accounts for 2018. As contingent liabilities reflect financial risk to which the SRB is exposed, the accounting guidance, in line with the applicable standards, requires the following minimum disclosures:

- estimate of its financial effect;
- indication of the uncertainties relating to the amount or timing of any outflow; and
- the probability of any reimbursement.

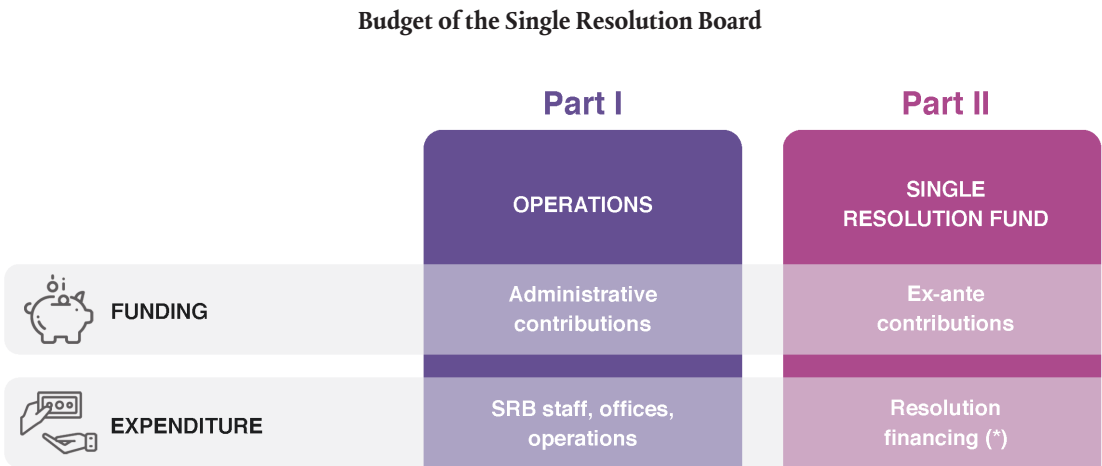
14. The SRB's accounts consist of two parts (see *Picture 1*). Part I reflects the SRB's daily operations. It is funded through annual administrative contributions from all banks. These contributions are used for the administration and operations of the SRB. Part II is the SRF, which is managed by the SRB. The SRF is funded by banks through annual *ex-ante* contributions until it reaches its target level. In addition, under certain circumstances, the SRB can collect *ex-post* contributions. If necessary, the financial resources of the SRF can be used to support a resolution through specific tools, if a number of conditions are fulfilled <sup>(12)</sup>.

<sup>(10)</sup> See Article 287(3) TFEU and Article 92(8) SRM Regulation.

<sup>(11)</sup> This was the first recommendation of our report on 2017 contingent liabilities.

<sup>(12)</sup> See Article 76 SRM Regulation.

Picture 1

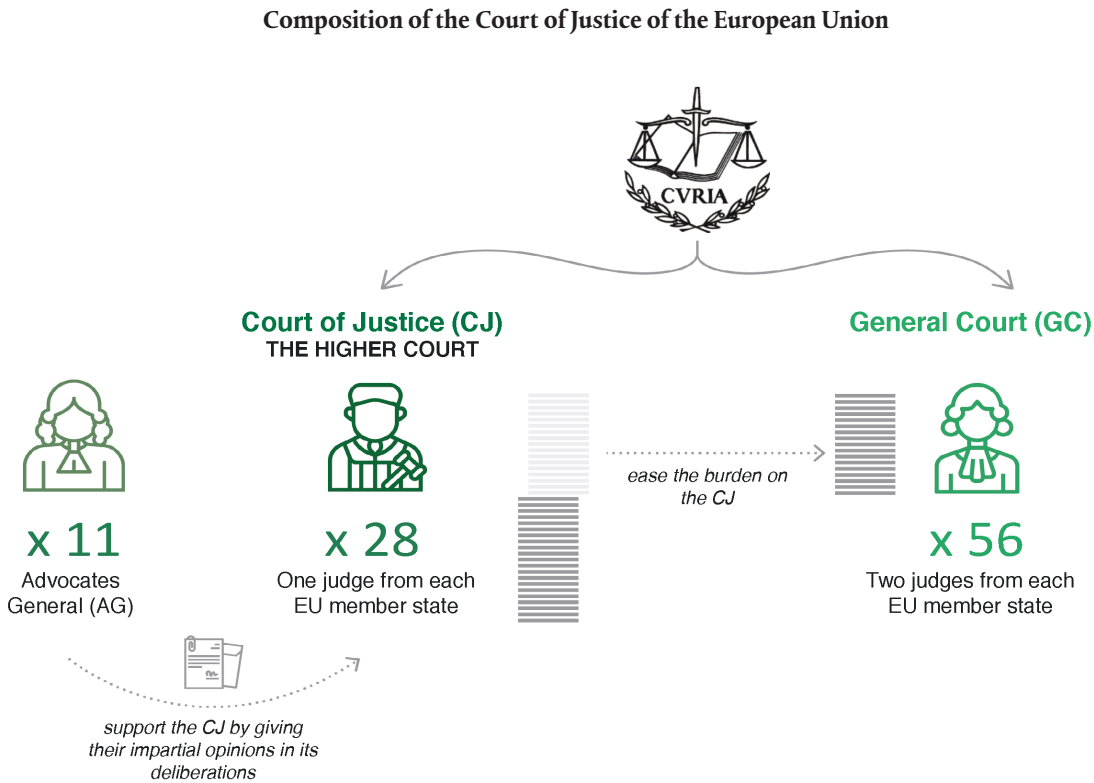


(\*) subject to certain limitations.

Source: ECA based on Regulation (EU) No 806/2014.

15. As the following paragraphs refer to legal proceedings at the Court of Justice of the European Union (CJEU) (see Picture 2), it is important to recall the structure and working arrangements at the CJEU. The CJEU consists of two courts: the Court of Justice (CJ) and the General Court (GC). Within the CJ, Advocates General are assigned cases and provide their opinions in order to support the CJ in its deliberations.

Picture 2



Source: ECA.

16. The GC was established to ease the burden on the CJ and mainly hears cases brought by individuals and companies against EU acts and regulatory acts which concern them directly, as well as actions seeking compensation for damages caused by EU institutions, bodies, offices or agencies. Judgments of the GC can be appealed before the CJ within two months, but are limited to points of law.

17. The contingent liabilities disclosed by the SRB, as well as issues relevant to potential contingent liabilities, are set out in the following paragraphs.

### Contingent liabilities related to judicial proceedings following resolution decisions

18. On 7 June 2017 the first, and so far only, resolution at EU level took place for Banco Popular Español S.A. (BPE). The SRB adopted the resolution scheme and the Commission endorsed it. BPE had been assessed as failing or likely to fail (FOLTF). The SRB concluded that there was no reasonable prospect that any alternative private sector measures could prevent BPE's failure, and that resolution was in the public interest. This saw the write-down and conversion of capital instruments and the sale of the bank for €1 (see Box 2).

#### Box 2

#### Summary of the main elements of the SRB's resolution decision concerning Banco Popular Español S.A.

- (1) Write-down and conversion of capital instruments amounting to €4 130 million in application of Article 21 of the SRM Regulation:
  - Share capital: €2 098 million;
  - Additional Tier 1 instruments: €1 347 million; and
  - Tier 2 instruments: €685 million.
- (2) Sale of business to Banco Santander S.A. for €1 in application of Article 24 of the SRM Regulation.

Source: Decision of the Single Resolution Board of 7 June 2017 (SRB/EES/2017/08).

19. A number of judicial proceedings concerning this first resolution decision and the SRB's later decisions not to place the two ABLV banks under resolution (see paragraph 27) have been brought against the SRB and the Commission (see Table 3).

Table 3

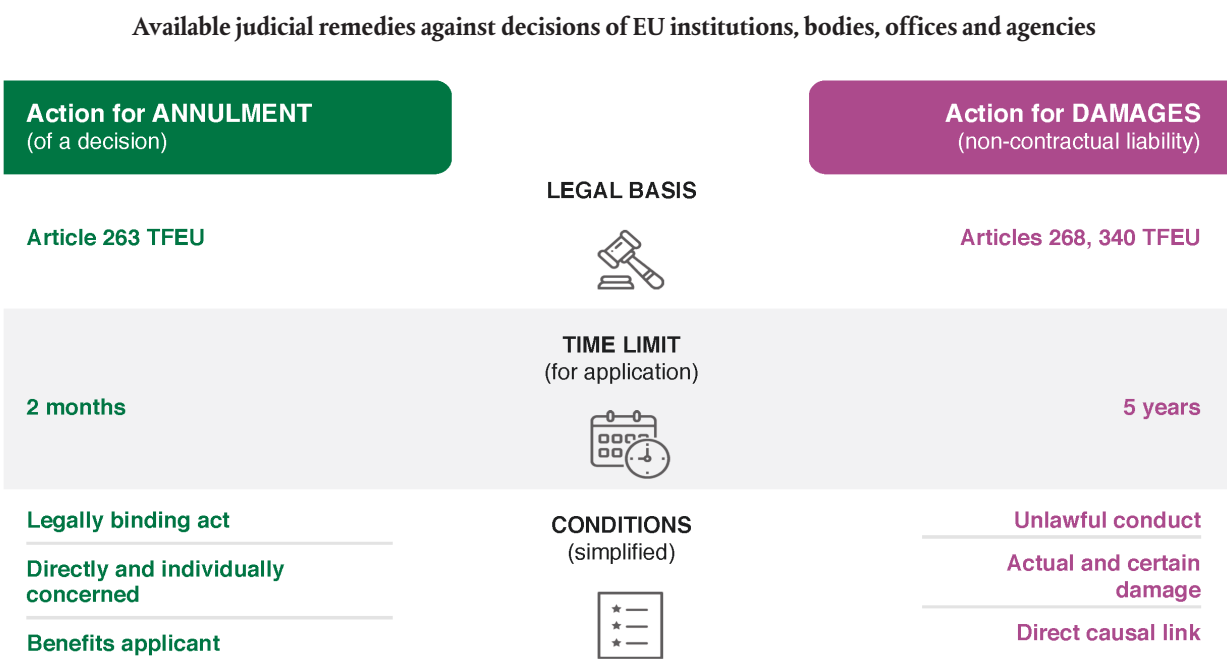
#### Judicial proceedings against the SRB and the Commission in front of the CJEU at the end of May 2019

Cases related to	Number of joint SRB and Commission cases	Number of SRB-only cases	Number of Commission-only cases	Total
Resolution decision on Banco Popular Español S.A.	29	72	1	<b>102</b>
Decision on ABLV Bank AS and ABLV Bank Luxembourg	0	2	0	<b>2</b>
<b>TOTAL</b>	<b>29</b>	<b>74</b>	<b>1</b>	<b>104</b>

Source: ECA based on SRB data.

20. There are different judicial remedies which natural and legal persons may use against decisions of EU institutions, bodies, offices, and agencies (see *Picture 3*). One type of remedy is an annulment action against a legally binding decision which has either been addressed to the person or is of direct and individual concern. To annul a decision taken by the EU or one of its bodies, applicants must present their applications within two months of publication of the relevant decision <sup>(13)</sup>. Accordingly, most cases were filed within two months of the publication of the resolution decision and asked only for the resolution decision to be annulled. It needs to be noted that some applicants claim that they are entitled to compensation if the SRB’s decision is annulled <sup>(14)</sup>. However, based on EU case law, actions for annulment and actions for damages pursue different purposes. Therefore, these applications do not appear to lead to contingent liabilities other than legal costs.

Picture 3



Source: ECA based on the TFEU and case law.

21. Another type of remedy is an action for damages, claiming a non-contractual liability of the Union. Claims for damages against the EU based on alleged non-contractual liabilities <sup>(15)</sup> can only be brought within five years. For a successful action for damages, applicants must demonstrate a sufficiently serious breach by the institution of a rule of law intended to confer rights on individuals, actual damage suffered by the applicant, and a direct causal link between the unlawful act and the damage. By the end of May 2019, out of 102 cases related to decisions on whether to adopt a resolution scheme, 23 involved applicants seeking compensation for alleged damages in addition to their request for annulment of the resolution decision. Of the 102 cases, 13 involved applicants who had brought claims only for damages allegedly suffered.

22. Within their actions for annulment and/or damages, some applicants have also brought pleas of illegality <sup>(16)</sup> (see *Picture 4*). They claim that the legal framework underlying the resolution of BPE, such as provisions of the SRM Regulation, is not compliant with the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (CFREU). If the EU courts agree, the disputed provision of the legal framework may hence be considered inapplicable. Some applicants have also brought actions against the ECB’s FOLTF decision. However, contingent liabilities of the ECB are not within the scope of this audit (see paragraph 4). Furthermore, annulment actions were brought against the Commission’s endorsing decision (see **Table 3** and paragraph 54) and the implementing decision by the National Resolution Authority (NRA) of Spain, Fondo de Reestructuración Ordenada Bancaria (FROB).

<sup>(13)</sup> Article 263 of TFEU defines the timeframe as within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter.

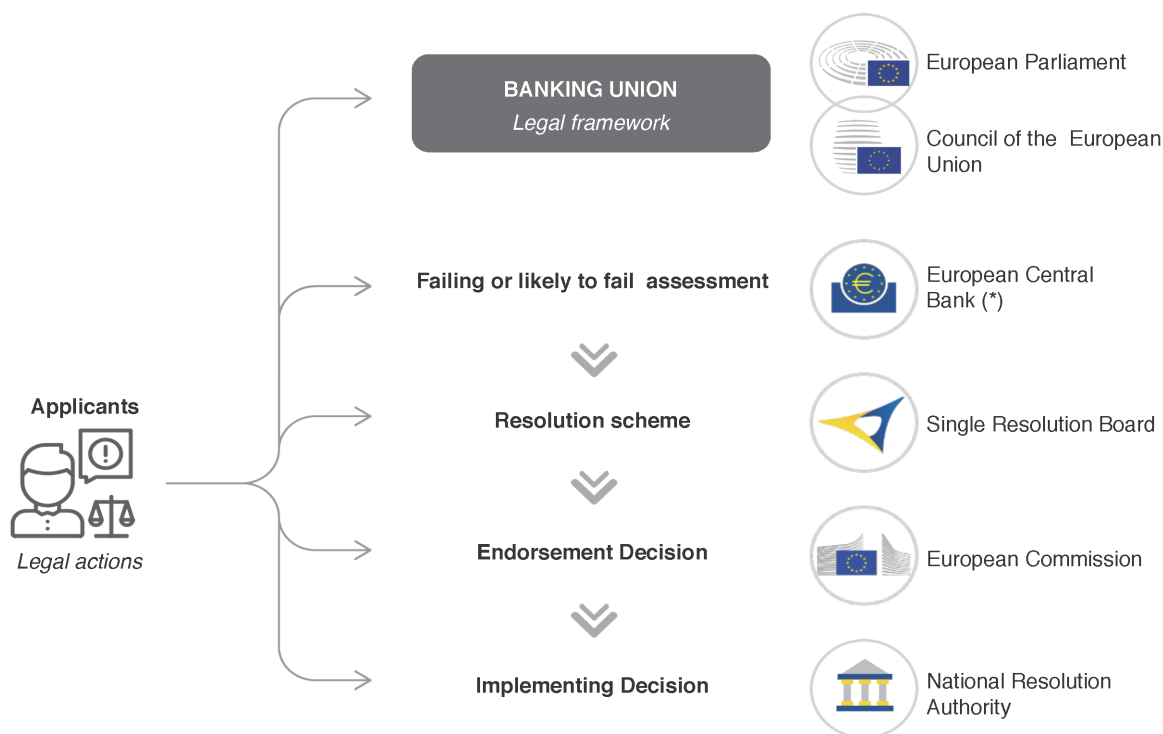
<sup>(14)</sup> See Article 85(4) Directive 2014/59/EU.

<sup>(15)</sup> Article 268 TFEU, Article 87(5) of SRM Regulation and Article 46 of the Statute of the Court of Justice.

<sup>(16)</sup> Article 277 TFEU.

Picture 4

## Decision process leading to a resolution and current disputes



(\*) the ECB is not within the scope of this audit; in exceptional cases, the failing or likely to fail assessment can also be performed by the SRB.

Source: ECA based on the legal framework.

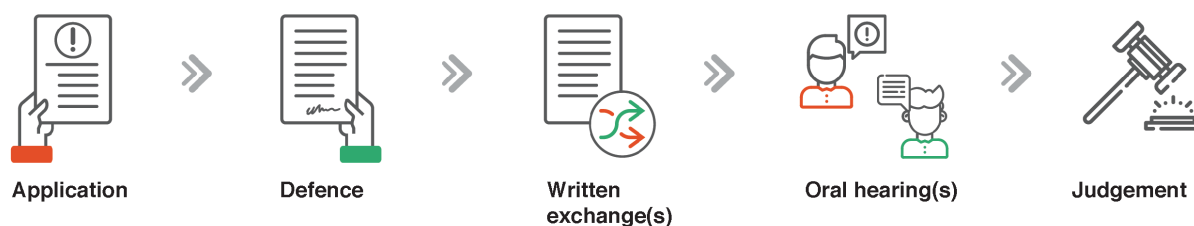
23. Each judicial proceeding starts with the filing of an application by the applicant, specifying the pleas in law and arguments relied upon, as well as the form of order sought. Within two months <sup>(17)</sup>, the defendant is obliged to provide a written defence. Typically, the applicant can then provide a reply to the defence and the defendant can provide a rejoinder in reply. Parties who can demonstrate an interest in the outcome of the case may intervene in the proceedings by filing a statement in intervention, supporting the conclusions of one party. Additionally, the EU courts can choose to ask specific questions of the parties, to which they are obliged to respond. At the end of this written procedure, the EU courts can decide to hold a public oral hearing at the CJEU. The judges then deliberate and deliver their judgment at a public hearing (see Picture 5).

Picture 5

## Typical process of cases at the CJEU

## WRITTEN PROCEDURE

## PUBLIC HEARING



Source: ECA.

<sup>(17)</sup> In exceptional circumstances, this time limit may be extended upon a reasoned request of the defendant, based on Article 81 Rules of Procedure of the General Court (OJ L 105, 23.4.2015, p. 1). This happened in most cases concerning the resolution of BPE.

24. Based on data up to 2018, the average duration of all proceedings at the CJEU was approximately 18 months <sup>(18)</sup>. The duration of cases in front of the GC was approximately 20 months. Given the number and complexity of cases in relation to the resolution of BPE and the similar pleas in law, the General Court has identified and selected six pilot cases to proceed to the second round of written procedure and oral hearing <sup>(19)</sup>. Out of these six proceedings, the SRB is the sole defendant in two, the Commission in one, while the SRB and Commission are joint defendants in the remaining three. All other cases have been suspended by the GC, pending a final judgment in those six pilot cases. Although most cases were filed in summer 2017, the proceedings for most of the pilot cases are still on-going <sup>(20)</sup>.

25. For its final accounts in 2018, the SRB's legal service assessed the likelihood of an outflow of economic resources as a result of the pending BPE cases to be 'remote' and therefore the SRB did not disclose any contingent liabilities. This conclusion by the SRB's legal service was not made on the basis of any reasons or supporting arguments as to whether it felt that an outflow of economic resources was remote or not.

26. We note that BPE was the SRB's first resolution case. While numerous cases have been filed, there are not yet any judgments and therefore no case law at EU level. Based on the reviewed audit evidence, the ECA found that applicants have claimed that the three conditions for a non-contractual liability of the Union are fulfilled. While it is difficult to predict the outcome of these judicial proceedings at this stage due to the complex, specific and unprecedented legal system created by the new resolution legal framework, based on the audit evidence examined we did not find any evidence that would contradict the conclusion made by the SRB.

27. In addition to the first resolution decision, the SRB announced on 24 February 2018 that it would not take resolution actions in relation to the ABLV Bank AS and its subsidiary ABLV Bank Luxembourg, as a resolution would not be in the public interest <sup>(21)</sup>. The SRB's decision followed the ECB's assessment that the banks were 'failing or likely to fail' due to a significant deterioration of its liquidity situation <sup>(22)</sup>. In May 2018, the SRB was notified of two court cases brought before the GC against its decision not to take any resolution actions. These cases are still pending and the SRB assessed the likelihood of an outflow of economic resources as a result of these pending cases as 'remote' <sup>(23)</sup> and therefore did not disclose a contingent liability. No GC judgment is expected in 2019.

28. We consider that contingent liabilities other than legal costs are not necessary, as both applicants are currently only asking the GC to annul the SRB's decision.

29. The SRM Regulation provides that following a resolution decision and under certain circumstances the SRB may have to compensate NRAs for damages they have been ordered to pay by a national court <sup>(24)</sup>. Therefore, it is important that the SRB is aware of damage cases pending against NRAs in participating Member States.

30. Any resolution scheme approved by the SRB and endorsed by the Commission needs to be implemented at national level. Therefore, following the Commission's endorsement of the BPE resolution scheme, the Spanish NRA (FROB) issued an implementing decision on 7 June 2017 <sup>(25)</sup>. A number of administrative appeals, liability claims and court proceedings were brought against FROB's decision. The implementing decision is based on national law and therefore subject to national judicial review. FROB provides the SRB with a monthly report on the implementation of the resolution scheme and any related appeals and claims.

<sup>(18)</sup> Court of Justice of the European Union: Annual report 2018; p. 18.

<sup>(19)</sup> SRB annual report 2018, section 5.4.1.

<sup>(20)</sup> On 25 October 2019, the GC dismissed the action in the pilot case T-557/17 as inadmissible.

<sup>(21)</sup> The SRM Regulation foresees that banks should normally be wound-up under national insolvency proceedings. The exception is resolution, when it is in the public interest.

<sup>(22)</sup> Failing or Likely to Fail assessment adopted by the ECB on 23 February: [https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.2019\\_FOLTF\\_assessment\\_ABLV\\_Bank\\_AS~48046b4adb.en.pdf](https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.2019_FOLTF_assessment_ABLV_Bank_AS~48046b4adb.en.pdf).

<sup>(23)</sup> SRB final annual accounts, J) p. 35.

<sup>(24)</sup> Article 87(4) of SRM Regulation.

<sup>(25)</sup> Decision adopted by FROB's Governing Committee on June 7, 2017 concerning Banco Popular Español S.A.: [http://www.frob.es/en/Lists/Contenidos/Attachments/419/ProyectoAcuerdoReducido\\_EN\\_v1.pdf](http://www.frob.es/en/Lists/Contenidos/Attachments/419/ProyectoAcuerdoReducido_EN_v1.pdf).



31. By the end of 2018, FROB had received 115 administrative appeals against the above-mentioned implementing decision and dismissed all of them. FROB had also received 1 063 requests for the initiation of administrative proceedings on non-contractual liability of the state under Spanish national law. Furthermore, applicants had brought 262 court cases against FROB. However, it needs to be highlighted that the latter judicial proceedings have been suspended by the Spanish '*Audiencia Nacional*' until the GC has adopted its ruling on the legality of the resolution decision and related aspects such as the confidentiality of related administrative files.

32. After a request by the SRB, FROB has assessed the probability of an outflow of resources as a result of the administrative proceedings to be remote. It has informed the SRB that it is not in a position to estimate the outcome of the suspended judicial proceedings, as these proceedings largely depend on the outcome of proceedings at EU level.

33. In addition to the judicial proceedings described under this heading, several new cases were brought before the SRB's appeal panel <sup>(26)</sup> in relation to the resolution of BPE. However, these cases only concerned access to documents, so no contingent liabilities could arise.

### Contingent liabilities related to the no-creditor-worse-off principle

34. To safeguard fundamental property rights <sup>(27)</sup>, the SRM Regulation provides that no creditor shall be worse off under resolution than under normal insolvency proceedings. Based on the 'no creditor worse off' (NCWO) principle <sup>(28)</sup>, any creditors who would have received better treatment under normal insolvency proceedings must be compensated from the SRF <sup>(29)</sup>. To assess the treatment of creditors and shareholders, a valuation of difference in treatment has to be conducted (see Box 3).

#### Box 3

#### Valuation of difference in treatment

A valuation of difference in treatment in resolution is conducted by an independent valuer after any resolution to determine whether shareholders and creditors in respect of which resolution actions have been effected are entitled to such compensation. The valuation is often referred to as valuation 3. The valuation of difference in treatment assumes that instead of resolution, the respective bank would have been subject to normal insolvency proceedings based on national insolvency law starting at the date of resolution. It then compares how creditors and shareholders would have been affected in such a scenario in comparison to the resolution.

Source: ECA analysis of SRM Regulation.

35. On 13 June 2018, the SRB announced that it had received from the independent valuer, Deloitte, its report on valuation of difference in treatment in the resolution for BPE. Based on the outcome of this valuation and the preliminary conclusion that no creditor would have been better off under national insolvency, on 6 August 2018, the SRB published a notice regarding its preliminary decision not to pay compensation to the shareholders and creditors affected by the BPE resolution <sup>(30)</sup>. The SRB estimates that there are around 300 000 of them <sup>(31)</sup>.

<sup>(26)</sup> Certain SRB decisions, such as on administrative contributions and access to documents, can be appealed at the SRB's appeal panel, based on Article 85 SRM Regulation.

<sup>(27)</sup> Article 17(1) CFREU.

<sup>(28)</sup> Articles 15(1g) of SRM Regulation.

<sup>(29)</sup> Articles 20(16) and 76(1e) of SRM Regulation.

<sup>(30)</sup> Notice of the Single Resolution Board of 2 August 2018 regarding its preliminary decision on whether compensation needs to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular Español S.A. have been effected and the launching of the right to be heard process (SRB/EES/2018/132).

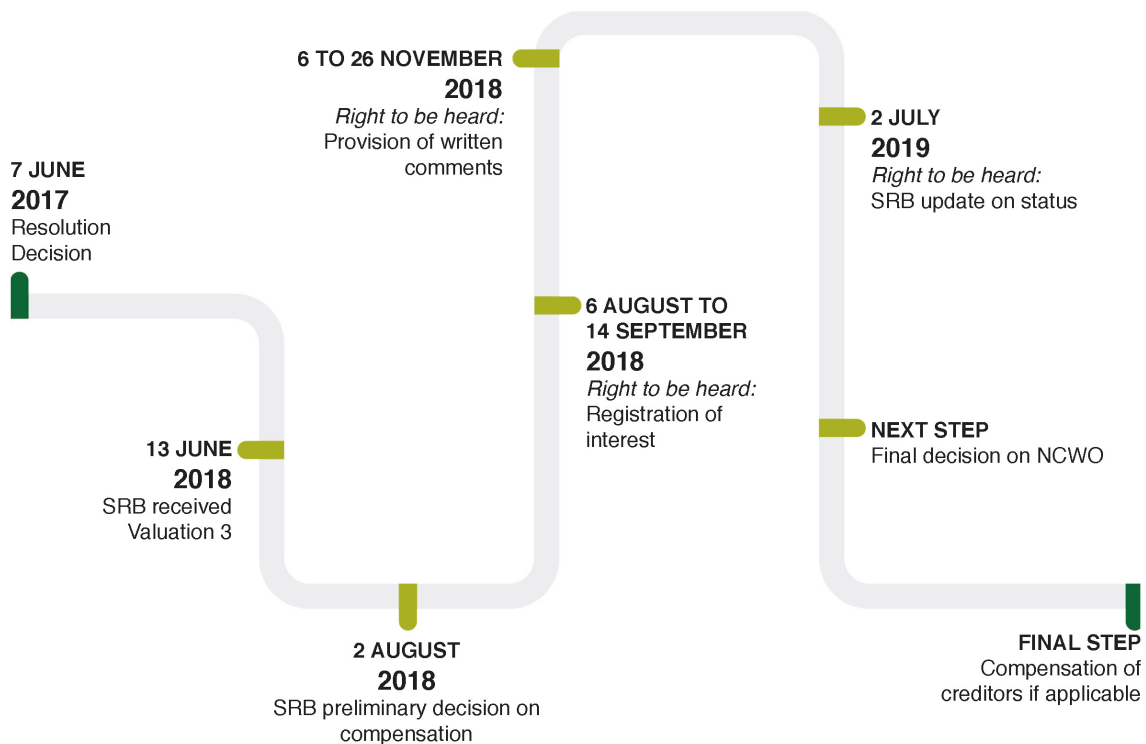
<sup>(31)</sup> SRB annual report 2018, footnote 16, p. 32.



36. The SRB then began a ‘right to be heard’ process <sup>(32)</sup> for affected creditors and shareholders (see *Picture 6*). This allowed registered parties, or their representatives, to submit written comments between 6 and 26 November 2018, in respect of the preliminary decision not to grant them compensation and its underlying reasoning. The SRB stated that it is currently reviewing comments received from around 12 000 registered individual parties <sup>(33)</sup> and will take them into account as appropriate in order to take its final decision on whether compensation is payable to those affected.

*Picture 6*

**NCWO process timeline for Banco Popular Español S.A.**



Source: ECA.

37. Since there is no final decision on compensation, in its 2018 accounts the SRB did not disclose contingent liabilities related to the NCWO principle.

**Contingent liabilities related to banks' contributions to the Single Resolution Fund**

38. Banks in the euro area are legally obliged to contribute to the SRF (see **Box 4**).

*Box 4*

**The Single Resolution Fund (SRF)**

The target level of the SRF is at least 1 % of the total amount of covered deposits in the Banking Union by the end of 2023. Based on covered deposits at the end of 2018, this would amount to about €60 billion. To reach the target, annual contributions were collected from 3 186 banks in 2019, amounting to €7,8 billion. As of July 2019, the total amount collected is just under €33 billion

Source: SRB.

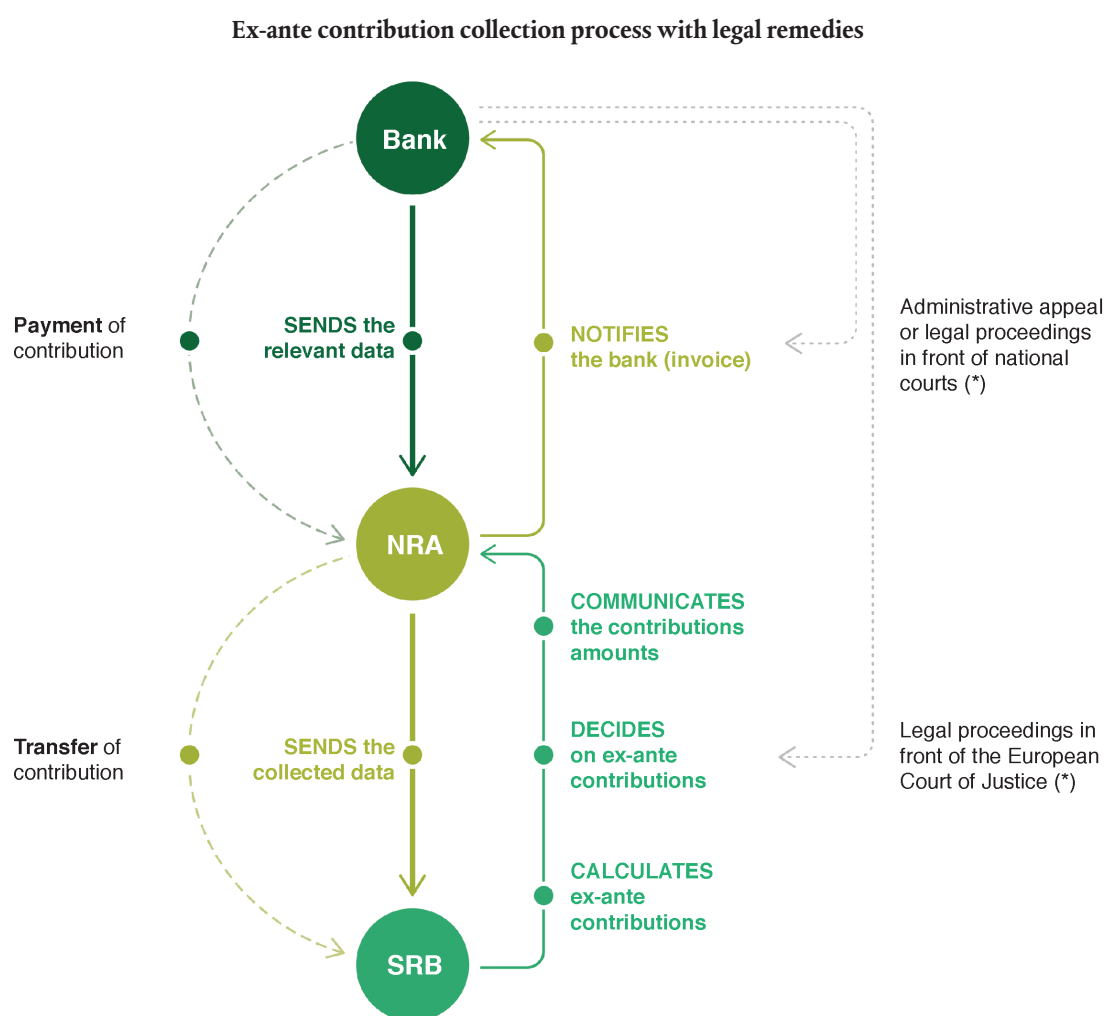
<sup>(32)</sup> Based on Article 41(2a) Charter of Fundamental Rights of the European Union.

<sup>(33)</sup> SRB annual report 2018, p. 32.

39. The *ex-ante* contributions for the year 2015 were calculated and collected by NRAs and transferred to the SRB in January 2016. The annual *ex-ante* contributions are adjusted over the years until 2023 through deductions for amounts already paid in 2015. Some NRAs did not transfer the 2015 contributions to the SRF in full, due to national resolution actions before the end of 2015.

40. Since 2016, the SRB has calculated the contributions itself, in close cooperation with NRAs. The contribution per bank is calculated based on a flat contribution and a risk-adjusted contribution for larger banks. The required information is provided by the banks via NRAs. The SRB provides every NRA with a standard form containing all related information for each bank under its remit, including the amount of *ex-ante* contributions to be paid, the details of the calculation, and the bank's input data. Based on the calculation provided by the SRB, NRAs collect the contributions and transfer the amounts to the SRF, which is managed by the SRB (see Picture 7).

Picture 7



(\*) see paragraph 42.

Source: ECA based on the legal framework

41. A number of banks have brought administrative or court proceedings against the decisions on their *ex-ante* contributions, in a total of four Member States. Most banks brought such actions against the relevant NRA notification <sup>(34)</sup>, as it is the legal basis for their payment. As a result, there were 625 administrative or court proceedings against *ex-ante* contributions pending

<sup>(34)</sup> Depending on the legal framework in participating Member States, NRAs notify banks through administrative acts, decisions or notifications.

at national level, as of 21 June 2019. However, as the contributions are calculated and set by the SRB, applicants have also brought court proceedings at the CJEU against the SRB's decisions on *ex-ante* contributions for the years 2016 to 2018. As of 21 June 2019, 16 proceedings were pending. While 15 of them were pending at the GC, one case was an appeal to a ruling of the GC pending at the CJ. In addition, there was a request from a national court asking for a preliminary ruling of the CJ on the interpretation of EU law related to *ex-ante* contributions <sup>(35)</sup>. However, the action has not been taken against the SRB.

42. As outlined above, the system established to calculate and collect *ex-ante* contributions for the SRF includes shared responsibilities between the EU and Member States. The legal actions against *ex-ante* contributions therefore raise the difficult issue of judicial review of the SRB's decisions regarding contributions to the SRF <sup>(36)</sup>. The SRB stated in the past that it is not yet clear whether applicants can bring legal proceedings against *ex-ante* contributions at European level. The Advocate General stated in an opinion delivered in case C-414/18 on 9 July 2019 that, based on case law, national courts cannot rule on the lawfulness of decisions adopted by the SRB, such as the SRB's decision on *ex-ante* contributions, and that the CJEU has exclusive competence in that matter <sup>(37)</sup>. However, only a final judgment of the CJ can bring legal certainty. In the absence of such a judgment, our working assumption for this report is that a potential outflow of resources can result from administrative and court proceedings at national level brought against legal acts of NRAs, as well as from legal proceedings at EU level brought against legal acts of the SRB concerning *ex-ante* contributions to the SRF.

43. In its final annual accounts for 2018, the SRB disclosed contingent liabilities arising from *ex-ante* contributions due to pending judicial proceedings at the GC. The SRB assessed that there are contingent liabilities of €50 million relating to seven cases <sup>(38)</sup>. For additional transparency, the SRB disclosed that *ex-ante* contributions amounting to €222,7 million in total had been challenged in the CJEU at the end of 2018.

44. An adequate knowledge of the financial risks to which the SRB is exposed is essential to ensure appropriate risk management and accounting. Based on our 2018 recommendations, the SRB improved its internal control system on contingent liabilities arising related to *ex-ante* contributions from court cases at national level. The SRB asks NRAs to provide a detailed list of ongoing proceedings against *ex-ante* contributions. In addition, NRAs are asked to give written assurance on the information provided and to provide an assessment of the likelihood of the success of the proceedings against *ex-ante* contributions.

45. Based on the information received from NRAs, administrative and judicial proceedings have been brought against contribution decisions made by four NRAs. However, three of the four NRAs concerned stated that they are not in a position to assess the likelihood of a successful outcome of ongoing proceedings, given the uncertainties described in paragraph 42 and as there is not yet any related case law. Only one NRA provided the SRB with a detailed assessment, concluding that the outflow of resources as the result of a case was not remote. While the SRB disclosed contingent liabilities of €40 million related to the proceedings at national level based on this NRA assessment <sup>(39)</sup>, it did not disclose any contingent liabilities related to the cases in the three Member States where the NRAs claimed that they were not in a position to make an assessment.

46. We note that assessment of the exact amounts at risk is complicated. In this regard, the SRB's accounting presentation of contingent liabilities related to *ex-ante* contributions represents an improvement in comparison to previous years where it simply presented the entire amounts challenged as contingent liabilities without any assessment of specific cases. Based on the evidence reviewed from the SRB, we conclude that the SRB made reasonable attempts to ascertain whether these cases represented contingent liabilities, and reported them fairly.

47. In addition to disclosing contingent liabilities related to *ex-ante* contributions, the SRB disclosed the total amounts of *ex-ante* contributions, which are subject to administrative or judicial proceedings. They amount to around €2 billion, of which €1,8 billion are related to national cases and €222,7 million are related to cases at the GC (see Table 4). While only a small part of these amounts might ever have to be reimbursed to applicants and would be offset by future *ex-ante* contributions from all banks under the SRB's remit, this disclosure provides useful background information for stakeholders.

<sup>(35)</sup> Based on Article 267 TFEU, preliminary rulings can be requested by courts of Member States to interpret EU law.

<sup>(36)</sup> Opinion of Advocate General Campos Sánchez-Bordona delivered in case C-414/18 on 9 July 2019, point 26.

<sup>(37)</sup> Opinion of Advocate General Campos Sánchez-Bordona delivered in case C-414/18 on 9 July 2019, points 29-31.

<sup>(38)</sup> SRB Annual Accounts, p. 34.

<sup>(39)</sup> SRB Annual Accounts, p. 33.

Table 4

**Development of disputed amounts at national level related to *ex-ante* contributions to the SRF**

Contribution related to year	Number of cases May 2019	Challenged amounts May 2019 (in million EUR)	Number of cases May 2018	Challenged amounts May 2018 (in million EUR)
2019	135	5,7	n/a	n/a
2018	114	586,8	122	597,1
2017	131	559,1	131	559,1
2016	240	562,9	241	565,5
2015	5	84,1	5	84,1
<b>TOTAL</b>	<b>625</b>	<b>1 765,9</b>	<b>499</b>	<b>1 805,8</b>

Source: ECA based on SRB data; amounts rounded to the nearest million.

48. As stated in the SRB's accounts, it has to be noted that €198 million of the amount challenged has been brought before national courts as well as EU courts. If applications are successful, the relevant amount or a part thereof will only be reimbursed once, if applicable.

**Contingent liabilities related to administrative contributions**

49. Every year, the SRB collects administrative contributions to finance its operating costs. All banks that fall within the scope of the SRM Regulation in the 19 participating Member States have to contribute to the administrative expenditure of the SRB. In January 2018, the final system of contributions to the administrative expenditure of the Single Resolution Board came into force, creating a permanent system for administrative contributions <sup>(40)</sup>. Unlike *ex-ante* contributions to the SRF, administrative contributions are not collected via the NRAs but directly by the SRB. They are collected per banking group, while *ex-ante* contributions are collected per single entity. This results in a different number of banks within their respective scope.

50. In February 2019, the SRB calculated the annual administrative contributions for the financial year 2019 based on ECB data at year-end 2017. Based on these calculations, it provided banks with the respective contribution notices. By the end of March 2019, the SRB had collected administrative contributions amounting to €88,8 million from 2 660 banks (see Table 5). Significant institutions paid around 95 % of these contributions. The amount collected was lower than in 2018, as it was reduced by higher budgetary amounts carried over from 2017. Where necessary, the contributions will be recalculated based on information on changes in scope or status of institutions from end 2019 during the next calculation cycle in the first quarter of 2020.

Table 5

**Administrative contributions collected by the SRB**

	2019	2018	2017	2016	2015
Number of banks	2 660	2 729 (*)	2 819 (*)	2 963 (*)	3 060 (*)
Total amount paid (in million EUR)	88,8	91,4	83,0	56,7	21,8

(\*) for 2015-2018 the number of banks reflect an annual average as the contributions for these years have been recalculated in 2018, when the final system came into force; For the calculation of administrative contributions, 2015 includes November and December 2014.

Source: SRB; amounts rounded to the nearest million;

<sup>(40)</sup> EC Delegated Regulation (EC) No 2017/2361.

51. Administrative contribution notices can be appealed at the SRB's appeal panel within six weeks <sup>(41)</sup>. Decisions of the appeal panel can be contested in the GC. In 2018, banks brought three appeals against administrative contribution notices. While the appeal panel dismissed all three appeals, in one case it noted that the SRB would have to re-calculate the administrative contributions to be paid by the appellant for 2018 during the next cycle and reimburse the resulting amounts <sup>(42)</sup>. The contesting bank had lost its banking license during 2018. It therefore fell out of the scope of administrative contributions for a part of 2018.

52. As envisaged in the framework, during its calculation of administrative contributions for the financial year 2019 the SRB re-calculated the annual contributions for 2018 for banks which changed scope or status during 2018 <sup>(43)</sup>, based on ECB data as at January 2019. As at 21 June 2019, no appeals or court proceedings concerning administrative contributions were pending. Consequently, the SRB did not disclose any contingent liabilities for administrative contributions.

### **Additional information relating to judicial proceedings**

53. The proceedings initiated against the SRB and the NRAs have a cost in terms of their financial and human resources. The costs will be borne directly by these authorities and consequently by all banks via their contributions. In 2018, the SRB committed €5 million to external legal services related to judicial proceedings for the years to come. At year-end 2018, out of fourteen staff in the SRB's legal service, six staff were dealing with litigation. In 2019, three further employees were due to be recruited for the litigation team.

### *Part II: Contingent liabilities of the Commission*

54. The European Commission confirmed that at 31 December 2018 there were no contingent liabilities arising based on its task under the SRM Regulation.

55. EU case law <sup>(44)</sup> limits the delegation of power to EU agencies, such as the SRB, to executive powers and consequently limits the delegation of discretionary powers. Therefore, as provided for in the SRM Regulation, a resolution scheme takes effect only if the Commission endorses it. The Commission may object to any discretionary aspects of the proposed resolution scheme. If the Commission objects to the resolution scheme due to the criterion of public interest or requests a material modification of the use of the SRF, it must propose any such changes to the Council <sup>(45)</sup>.

56. On 7 June 2017, the Commission endorsed the first resolution scheme <sup>(46)</sup>, adopted by the SRB. In relation to this scheme, 30 judicial proceedings have been brought before the GC against the Commission <sup>(47)</sup>. While all 30 applicants brought actions for annulment of the Commission's decision, eight applicants also brought actions for damages. These cases are still in progress and have not been subject to a ruling by the GC. As the resolution of BPE did not involve any public financial support or any use of the SRF (see para 2), the Commission did not conduct a State aid or Fund aid assessment.

57. As was the case for the 2017 accounts, the Commission has decided not to disclose any contingent liabilities for these cases based on its accounting assessment. One reason given for the accounting assessment is that, based on the available information, no applicant has sufficiently demonstrated a non-contractual liability on the part of the Commission. In particular, the Commission stated that there was no sufficiently serious breach of a rule of law intended to confer rights on individuals (compare paragraph 21). Therefore, in the Commission's view, an outflow of resources relating to its endorsement decision is remote. Furthermore, the Commission stated that no applicants can have suffered damage, given that the alternative of resolution would have been insolvency under national rules. Any shareholder or creditor who would have been better off in the case of insolvency proceedings will be compensated under the ongoing 'no-creditor worse off' procedure (see paragraphs 34-37). The Commission therefore stated that, based on its comprehensive experience, the financial risk potentially arising from these cases is remote.

<sup>(41)</sup> Article 85(3) SRM Regulation.

<sup>(42)</sup> Decision of the SRB's appeal panel on 13 August 2018 in case 04/18, para 16.

<sup>(43)</sup> This can be due to the reclassification of a bank as 'less significant' or 'significant' or the removal of a banking license.

<sup>(44)</sup> Meroni doctrine as established in cases 9/56 and 10/56, Meroni & Co, Industrie Metallurgiche v. High Authority, [1957-1958] ECR 133 and case C-270/12, United Kingdom v. European Parliament and Council of the European Union, [ECLI:EU:C:2014:18].

<sup>(45)</sup> Article 18(7) SRM Regulation.

<sup>(46)</sup> Endorsement of the resolution scheme concerning Banco Popular Español S.A. (BPE).

<sup>(47)</sup> Only in one of these 30 cases is the Commission the sole defendant.

58. Based on the review of the sample, we found that certain applicants have claimed that the necessary conditions for a non-contractual liability of the Union have been met. We note that at this stage any predictions are complicated in light of the fact that the resolution legal framework is relatively new and creates a complex, specific and unprecedented legal system. However, we did not find evidence that would contradict the assessment made by the Commission.

59. In addition to cases relating to the resolution of BPE, the Commission was the subject of two court cases related to *ex-ante* contributions to the SRF. In both cases the Commission is the defendant, together with the SRB. While one case is pending at the GC, the second case is a preliminary ruling, pending at the CJ. We agree with the Commission's assessment that disclosing contingent liabilities for these cases is not necessary.

60. We note that the Commission's legal service has an appropriate process in place to assess the probability for each legal case individually and to provide reasons and supporting arguments. The process provides the accounting officer with the necessary assessments to disclose any contingent liabilities or provisions stemming from legal cases.

### *Part III: Contingent liabilities of the Council*

61. We received a representation letter from the accounting officer of the Council stating that at 31 December 2018 the Council had no contingent liabilities arising due to the performance of its tasks under the SRM Regulation.

62. Based on its assessment of a resolution scheme proposed by the SRB, the Commission may object to the resolution scheme. If the objection is related to the criterion of public interest or requests a material modification of the use of the SRF, the Commission must propose the change to the Council (see paragraph 55). To date, the Council has not been involved in any resolution decisions. However, it was the subject of one legal case relating to BPE at the end of 2017. The case was ruled inadmissible insofar as it was directed at the Council <sup>(48)</sup> in 2018. Thus, no contingent liabilities arise for the Council.

## **CONCLUSIONS AND RECOMMENDATIONS**

63. We note that any predictions at this stage concerning the outcome of the judicial proceedings against the SRB, the Commission, and the Council are complicated by the fact that the resolution legal framework is relatively new and creates a complex, specific and unprecedented legal system. However, we did not find evidence that would contradict the assessments made by the SRB, the Commission, and the Council on any contingent liabilities arising as a result of the performance of their tasks under the SRM Regulation (see paragraphs 26, 46, 58, 59 and 62 respectively). Nevertheless, we have found certain weaknesses that require management attention.

64. For its 2018 final accounts, the SRB's legal service assessed the likelihood of an outflow of economic resources as a result of the pending BPE cases as 'remote' and did not disclose any contingent liabilities. However, the assessment as 'remote' was not supported by any reasons or supporting arguments (see paragraph 25). In comparison, the Commission assessed the probabilities related to individual judicial proceedings and provided reasons for its assessment (see paragraph 60).

### *Recommendation 1*

#### **Internal assessment of the likelihood of an outflow of resources**

When assessing the likelihood of an outflow of economic resources as a result of legal proceedings, the SRB should include adequate reasons and supporting arguments per individual case.

**Timeframe: Presentation of the SRB accounts for 2019**

65. In comparison to that provided in previous years, the SRB has improved its accounting presentation of contingent liabilities related to *ex-ante* contributions to the Fund. The SRB has adjusted its approach in order to provide a more precise estimate of the contingent liabilities arising from legal cases related to *ex-ante* contributions (see paragraph 46).

<sup>(48)</sup> Order of the General Court (Eighth Chamber) of 14 June 2018 — Cambra Abaurrea v Parliament and Others (Case T-553/17).

66. However, there are still uncertainties related to the effect of legal challenges at national and EU level (see paragraph 42). In the absence of legal certainty, the SRB has improved its internal control framework for monitoring national cases. Nevertheless, three of the four NRAs informed the SRB that they were unable to assess the likelihood of an outflow of resources as result of national proceedings against NRAs' decisions regarding *ex-ante* contributions. Although these three NRAs stated that they could not assess the probability, the SRB did not disclose any contingent liabilities concerning these cases (see paragraph 44 and 45).

*Recommendation 2*

**Disclosure of contingent liabilities related to cases at national level**

If the probability of an outflow of resources cannot be estimated due to legal proceedings against *ex-ante* contributions, then an outflow cannot be excluded and a contingent liability should be disclosed.

This recommendation is subject to developments in relation to judicial proceedings (see paragraph 42).

**Timeframe: Presentation of the SRB accounts for 2019**

This Report was adopted by Chamber IV, headed by Mr Alex Brenninkmeijer, Member of the Court of Auditors, in Luxembourg at its meeting of 12 November 2019.

*For the Court of Auditors*  
Klaus-Heiner LEHNE  
*President*

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ANNEX

**Follow-up of previous year's recommendations**

Year	Recommendation	Status	Detail
2017	The SRB should establish a detailed accounting guidance. The accounting guidance should also deal with the provisioning of legal costs.	<b>Completed</b>	The SRB has established internal accounting guidance based on the relevant standards.
2017	The SRB should introduce a suitable process including an IT system, which will ensure that all kinds of contingent liabilities are properly accounted for and reported. The NRAs should have access to this IT system to record the contingent liabilities accordingly.	<b>Completed</b>	While the SRB does not yet have a specific IT system in place, instead it has established an internal control system to ensure adequate information from NRAs.
2018	Due to the increase in the number of contingent liability cases and their complexity, the ECA reiterates its recommendation from last year's report. The SRB should finalise and approve its draft accounting guidance. The accounting guidance should be applied in full for its 2018 accounts and should include the provisioning or disclosure of legal costs.	<b>Completed</b>	The SRB has approved and applied its accounting guidance for administrative appeals and court cases.
2018	Based on available data such as quantifiable claims, court rulings and historical data, the SRB and the Commission should thoroughly re-assess the situation for their 2018 accounts. This assessment should be done in line with EU accounting rule 10: 'Provisions, contingent liabilities and contingent assets'.	<b>Completed</b>	The SRB has adjusted its approach to provide a more precise estimate of contingent liabilities arising from legal cases related to <i>ex-ante</i> contributions. The Commission assessed its contingent liabilities based on the available information. However, there is still no case law related to the specific claims.
2018	In line with internal control standards, the SRB should establish adequate procedures and controls to ensure the accuracy, completeness and timeliness of information received from NRAs. Furthermore, it should ensure that there is an adequate audit trail, so that the ECA can perform its mandatory audit tasks.	<b>Completed</b>	The SRB has provided adequate guidance and templates to NRAs for them to assess the relevant amounts at risk.



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**REPLIES OF THE SINGLE RESOLUTION BOARD****Audit scope and approach**

11. The SRB provided the ECA with access to all documents it requested. The SRB is willing to discuss working arrangements with the ECA going forward but would like to note that the ECA is not on equal footing with the SRB's staff or external counsel and adequate safeguards should be in place in order to ensure the protection of confidential information.

**Conclusions and recommendations***Recommendation 1*

The SRB accepts this recommendation. The SRB, when making an internal assessment of the cases, will include adequate reasoning and supporting arguments, on a category-by-category basis when appropriate.

*Recommendation 2*

The SRB accepts the recommendation to disclose a contingent liability regarding those cases where no reliable estimate of the outcome could be made.

However, with the advancement of the existing judicial proceedings, the cases in which the probability of the outflow cannot be reliably assessed will become less and less common.

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**REPLIES OF THE COMMISSION**

The Commission has taken note of the report of the European Court of Auditors.

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**REPLIES OF THE COUNCIL**

53. No contingent liabilities pursuant to Article 92(4) of the SRM Regulation were recorded in the financial statements of the Council of the European Union and European Council for the financial reporting year 2018.

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#### AUDIT TEAM

Based on Article 92(4) of Regulation (EU) No 806/2014, establishing the Single Resolution Mechanism, the ECA shall report each year on any contingent liabilities arising as a result of the performance by the Single Resolution Board, the Commission and the Council of their tasks under this Regulation.

This report was produced by Audit Chamber IV Regulation of markets and competitive economy, headed by ECA Member Alex Brenninkmeijer. The audit was led by ECA Member Ildikó Gáll-Pelcz, supported by Zoltán Lovas, Head of Private Office; Joanna Metaxopoulou, Director; Zacharias Koliass, Principal Manager; Matthias Blaas, Head of Task; Shane Enright, Carlos Soler Ruiz, Auditors; Andreea-Maria Feipel-Cosciug, Legal Advisor.

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