

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

SINGLE RESOLUTION BOARD

Report pursuant to Article 92(4) of Regulation (EU) No 806/2014 on any contingent liabilities (whether for the Single Resolution Board, the Council, the Commission or otherwise) 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 2017 together with the replies of the Single Resolution Board, the Commission and the Council

(2019/C 48/01)

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ABBREVIATIONS

BPE	Banco Popular Español S.A.
GCEU	General Court of the Court of Justice of the European Union
COM	European Commission
NRA	National Resolution Authority
NCWO	No creditor worse-off principle
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).

INTRODUCTION

1. The Single Resolution Mechanism (SRM), established by Regulation (EU) No 806/2014 (SRM Regulation)⁽¹⁾, is the second pillar of the EU's Banking Union. When a bank fails, the mechanism aims to manage its resolution effectively with no negative impact on the real economy or the taxpayer. The Single Resolution Board (SRB) is the key actor within this mechanism and the resolution authority for all the significant banks⁽²⁾ and less significant cross-border banking groups established in the euro area⁽³⁾. 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 an entity under resolution involves the European Central Bank, the SRB, the Commission and, possibly, the Council⁽⁴⁾. If necessary and under certain conditions, the SRB can use the Single Resolution Fund (SRF) to the extent necessary to ensure the effective application of the resolution tools. 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 can request any information relevant for performing its task⁽⁵⁾.

AUDIT SCOPE AND APPROACH

Audit scope

4. This audit report deals exclusively with contingent liabilities as referred to in Article 92(4) of the SRM Regulation, and covers the financial year 2017.

5. In other products, the ECA also audited the annual accounts of the Commission and the Council⁽⁶⁾ as well as of the SRB⁽⁷⁾ for the financial year 2017.

Audit approach

6. Contingent liabilities are to be disclosed in the annual accounts as laid down in International Public Sector Accounting Standard 19 and EU Accounting Rule 10 on provisions, contingent assets and contingent liabilities (see *Box 1*).

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 the amount of the obligation cannot be measured with sufficient reliability.

⁽¹⁾ 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).

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

⁽³⁾ A list of banks for which the SRB is the resolution authority can be found at: <https://srb.europa.eu/en/content/banks-within-remit-srm-and-srb>

⁽⁴⁾ Article 18 of the SRM Regulation.

⁽⁵⁾ Article 92(8) of the SRM Regulation.

⁽⁶⁾ ECA Annual reports concerning the financial year 2017.

⁽⁷⁾ Report on the annual accounts of the Single Resolution Board for the financial year 2017.

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

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

8. In addition to contingent liabilities arising during 2017, the accounting officers have to take into account any relevant information obtained up to the date of presentation of the final accounts. 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 2018 ⁽⁸⁾. The 2017 accounts were presented:

- by the Single Resolution Board on 1 July 2018;
- by the European Commission on 22 June 2018;
- by the Council of the European Union on 12 June 2018.

9. The audit evidence consisted of information gathered through meetings and interviews with staff and by reviewing, inter alia, internal documentation, representation letters from external lawyers and publicly available data.

10. In the end of May 2018, there were litigations against the SRB, the Commission and the Council in relation to their tasks under the SRM Regulation. To audit related contingent liabilities, the ECA drew a sample of litigation cases ⁽⁹⁾, and reviewed the relevant litigation files (see Table 1).

11. The sample also contained nine cases against *ex-ante* contributions to the Single Resolution Fund before national courts. The total population of appeals and litigations before national courts was 499 cases. However, for these cases, the SRB did not provide the litigation files, which are kept by national resolution authorities (NRAs). The SRB stated that it does not possess the files and thus, did not provide them to the ECA during the audit. Therefore, the ECA could not review this part of the sample.

Table 1

Sample selected and reviewed by the ECA

Litigations or appeals related to:	Brought before	Overall population	Sample reviewed
Single Resolution Board			
Resolution of BPE	General Court of the EU	103	10
Decision on non-resolution of ABLV	General Court of the EU	2	2

⁽⁸⁾ Article 155 Financial Regulation of the Union.

⁽⁹⁾ The litigation files were presented in the languages chosen by the applicants for the proceedings (Spanish, Italian, German). Related documents were also provided in French and partially in English. In addition to the sample of litigation cases, the SRB provided the ECA with documents of other litigation cases, when this was considered helpful background information.

Litigations or appeals related to:	Brought before	Overall population	Sample reviewed
Ex-ante contributions to the SRF	General Court of the EU	13	4
	National courts	499	(9) (*)
Administrative contributions	General Court of the EU/SRB appeal panel	0	0

European Commission

Resolution of BPE	General Court of the EU	30	5
Ex-ante contributions to the SRF	General Court of the EU	1	1

Council of the European Union

Resolution of BPE	General Court of the EU	1	0
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(*) Could not be reviewed (see paragraph 11).

Source: ECA; cases brought until end of May 2018.

12. As this report contains information about on-going litigations, the SRB and the Commission asked the ECA to assess the sample at their premises under the highest confidentiality standards. The establishment of the necessary process to ensure highest confidentiality contributed to a delay of the publication of the report.

OBSERVATIONS

Part I: Contingent liabilities of the SRB

13. The accounting officer of the SRB confirmed in a representation letter covering the annual accounts for the financial year 2017 that all contingent liabilities referred to in Article 92(4) of the SRM Regulation had been disclosed. In its report on the SRB's 2017 accounts, the independent external auditor stated that there were no material findings.

14. The SRB started work on accounting guidance regarding contingent liabilities, but was not able to finalise it by year-end 2017. As of June 2018, the SRB expected the current draft to be approved by the end of 2018. The SRB's draft accounting guidance defined *possible* as a probability of an outflow of resources of between 10 % and 50 %, and *remote* as a probability of less than 10 %. Furthermore, the SRB defined the required disclosures for contingent liabilities as:

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

Contingent liabilities related to litigation following resolution decisions

15. On 7 June 2017, the SRB took its first resolution decision (see Box 2) ⁽¹⁰⁾.

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 4,1 bn euro in application of Art. 21 SRM Regulation:
 - Share capital: 2 098 429 046 euro
 - Additional Tier 1 instruments: 1 346 542 000 euro
 - Tier 2 instruments: 685 315 828 euro
2. Sale of business to Banco Santander S.A. for 1 euro in application of Art. 24 SRM Regulation.

16. A number of lawsuits concerning this first resolution decision have been filed. Ninety-nine legal cases against the SRB had been brought before the General Court of the Court of Justice of the European Union (GCEU) by year-end 2017. Four further cases had been filed by the end of May 2018. By the end of September 2018, three of these 103 cases had been declared inadmissible by the GCEU.

17. To appeal a decision taken by the EU or one of its bodies, applicants have to present their applications within two months of the publication of the relevant decision ⁽¹¹⁾. Accordingly, most cases were filed within two months of the publication of the SRB's resolution decision and asked only for the SRB's resolution decision to be annulled. These applications cannot lead to contingent liabilities other than legal costs (see paragraph 45).

18. As the time limit to bring claims for damages against the EU based on alleged non-contractual liabilities ⁽¹²⁾ is five years, more litigations could therefore possibly arise over the next few years. By the end of May 2018, out of 103 litigation cases, 36 applications had sought compensation for alleged damages in addition to their request for annulment of the resolution decision. Out of 103 litigation cases, nine applications had brought claims only for damages allegedly suffered.

19. The SRB concluded that for the cases pending, particularly given their complexity and the relatively new legal framework, no reasonable criteria could be identified in order to produce an acceptable estimate of the potential financial impact involved ⁽¹³⁾. As the SRB was not able to estimate the possible financial impact it decided to provide information on these cases in its final accounts for 2017 under the heading 'Additional information related to legal cases' ⁽¹⁴⁾.

20. The ECA understands that the SRB was not in a position to predict the possible consequences of the judicial proceedings pending before GCEU, as it is difficult to predict the outcome of these litigations at this stage due to the complex, specific and unprecedented legal system created by the new resolution legal framework (see paragraph 19). In accordance with Accounting Rule 10, 'A contingent liability is disclosed unless the possibility of an outflow of resources embodying economic benefits or service potential is remote' ⁽¹⁵⁾. Thus, the SRB has correctly disclosed information about the nature and timeframe of these proceedings.

21. Some applicants claim that the SRB and the Commission caused the illiquidity and consequent resolution of Banco Popular Español S.A. (BPE). These applicants allege that there were breaches of professional secrecy and an asserted leakage of information by an anonymous EU official. They are seeking compensation for damages equal to the market value of the listed shares of BPE at the end of May 2017, potentially exceeding the amounts written down or converted in resolution (see Box 2).

⁽¹⁰⁾ Resolution decision concerning Banco Popular Español S.A.

⁽¹¹⁾ Article 263 of TFEU.

⁽¹²⁾ Article 87(5) of SRM Regulation and Art. 46 of the Statue of the Court of Justice.

⁽¹³⁾ SRB final annual accounts, K) page 33.

⁽¹⁴⁾ The SRB's draft accounting guidance states that this option can be taken in extremely rare cases, in which no reliable estimate can be made.

⁽¹⁵⁾ EU Accounting Rule 10, 4.6(1).

22. In addition to its 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 after the European Central Bank declared the banks as 'failing or likely to fail'. In May 2018, the SRB was notified of two legal cases brought before the GCEU against its decision not to take any resolution actions.

23. The ECA considers that contingent liabilities other than legal costs (see paragraph 45) are not necessary, as both applicants are currently only asking the GCEU to annul the SRB's decision. While the applicants have not yet claimed damages suffered, the possibility that respective claims might subsequently be brought cannot be ruled out.

24. The SRM Regulation⁽¹⁶⁾ provides that under certain circumstances the SRB may have to compensate NRAs for damages they have been ordered to pay by a national court. The SRB did not provide the ECA with the number of proceedings against NRAs before national courts, nor was the SRB informed of any rulings so far. In any case, the SRB is of the opinion that the European Court of Justice is solely competent to decide on any compensation to be paid by the SRB⁽¹⁷⁾.

25. In addition to the litigations described under this heading, at the end of May 2018 several cases were brought before the SRB's appeal panel. However, these cases only concerned access to documents, so no contingent liabilities could arise.

Contingent liabilities related to the 'no creditor worse off' principle

26. To safeguard fundamental property rights, 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⁽¹⁸⁾, any creditors who would have received better treatment under normal insolvency proceedings must be compensated from the SRF⁽¹⁹⁾. A valuation of difference in treatment in resolution⁽²⁰⁾ 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.

27. On 13 June 2018, the SRB announced that it had received from the independent valuer its report on valuation of difference in treatment in the resolution for BPE. Based on the outcome of this valuation, on 2 August 2018, the SRB published its notice regarding its preliminary decision not to pay compensation to the shareholders and creditors in respect of which the resolution actions concerning Banco BPE have been effected⁽²¹⁾. There were therefore no contingent liabilities related to the 'no creditor worse off' principle for the 2017 accounts. Once the SRB has approved and published its final decision, parties concerned could bring new actions, asking for the decision to be annulled or claiming compensation.

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

28. Banks in the euro area are required to contribute to the SRF (see Box 3).

Box 3

The Single Resolution Fund (SRF)

The target level of the SRF is defined as 1 % of the total amount of covered deposits in the euro area by end of 2023. Based on covered deposits at the end of 2017, this would amount to 56 billion euro. To reach the target, annual contributions were collected from 3 315 banks in 2018. Forty-nine percent of these banks were small institutions, which pay a lump sum. Twenty-eight percent were medium-sized and 21 % were large institutions, which pay 96 % of all contributions based on their risk, size and business model.

⁽¹⁶⁾ Article 87(3) and 87(4) of SRM Regulation.

⁽¹⁷⁾ Article 87(5) of SRM Regulation and Article 268 of TFEU.

⁽¹⁸⁾ Articles 15(1 g) and 20(16) of SRM Regulation.

⁽¹⁹⁾ Articles 20(16), 20(18) and 76(1e) of SRM Regulation.

⁽²⁰⁾ Often referred to as valuation 3.

⁽²¹⁾ 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).

29. The contributions for the year 2015 were calculated and collected by the NRAs and finally transferred to the SRB in January 2016⁽²²⁾. From 2016 onwards, the SRB calculated the contributions itself. The SRB provides every NRA with a standard form containing information for each bank, including the amount of *ex-ante* contributions and the underlying bank data. The 2017 and 2018 contributions were collected by the NRAs based on the SRB's calculations and transferred in June 2017 and June 2018 to the SRB⁽²³⁾.

30. The NRAs collected 6,6 billion euro and 7,5 billion euro in contributions for 2017 and 2018 and transferred them to the SRF. In 2018, the contributions were collected from 3 315 banks in comparison with 3 512 in 2017. A total of 24,9 billion euro in contributions was collected from 2015 to 2018.

31. In its final annual accounts for 2017, the SRB disclosed contingent liabilities of 1,4 billion euro related to *ex-ante* contributions. Of these, 1,2 billion euro relates to appeals to NRAs and court cases before administrative Member State courts, determined based on NRA declarations. *Tables 2 and 3* below show the details and development of these amounts and the number of appeals and court cases up to 31 May 2018:

Table 2

Development of the disputed amounts of contingent liabilities arising from *ex-ante* contributions to the SRF

Contingent liabilities (in EUR)	31.5.18	31.12.17	31.12.16	31.12.15
Appeals with NRAs and cases before administrative courts of the Member States	1 805 809 719	1 228 745 681	800 791 513	437 125 144
Related to 2015 <i>ex-ante</i> contributions	84 149 051	84 149 051	84 149 051	437 125 144
Related to 2016 <i>ex-ante</i> contributions	565 465 854	585 509 613	716 642 462	0
Related to 2017 <i>ex-ante</i> contributions	559 087 017	559 087 017	0	0
Related to 2018 <i>ex-ante</i> contributions	597 107 797	0	0	0
Legal cases before the GCEU (*)	181 133 405	181 133 405	41 034 633	0
Related to 2015 <i>ex-ante</i> contributions	0	0	0	0
Related to 2016 <i>ex-ante</i> contributions	116 612 541	116 612 541	41 034 633	0

⁽²²⁾ Some NRAs did not transfer the 2015 contributions to the SRF in full, due to national resolution actions before the end of 2015. These amounts will be adjusted over the next few years.

⁽²³⁾ Based on the Intergovernmental Agreement (IGA) on the transfer and mutualisation of contributions to the Single Resolution Fund.

Contingent liabilities (in EUR)	31.5.18	31.12.17	31.12.16	31.12.15
Related to 2017 <i>ex-ante</i> contributions	64 520 864	64 520 864	0	0
Related to 2018 <i>ex-ante</i> contributions	0	0	0	0
Total	1 986 943 124	1 409 879 086	841 826 146	437 125 144

(*) Double counting of some claims (see para 39).

Source: ECA based on SRB data.

Table 3

Development of appeals and number of cases arising from *ex-ante* contributions to the SRF

Number of appeals, court cases and legal cases	31.5.18	31.12.17	31.12.16	31.12.15
Appeals with NRAs and cases before administrative courts of the Member States	499	393	261	67
Related to 2015 <i>ex-ante</i> contributions	5	5	6	67
Related to 2016 <i>ex-ante</i> contributions	241	257	255	0
Related to 2017 <i>ex-ante</i> contributions	131	131	0	0
Related to 2018 <i>ex-ante</i> contributions	122	0	0	0
Legal cases before the GCEU	13	13	9	0
Related to 2015 <i>ex-ante</i> contributions	0	0	0	0
Related to 2016 <i>ex-ante</i> contributions	10	10	9	0
Related to 2017 <i>ex-ante</i> contributions	3	3	0	0
Related to 2018 <i>ex-ante</i> contributions	0	0	0	0
Total	512	406	270	67

Source: ECA based on SRB data.

32. One of the plaintiffs' main objections is an alleged lack of transparency regarding the calculation of the *ex-ante* contributions. This refers in particular to the calculation of the risk adjustment multiplier and an alleged formal breach of administrative procedures.

33. In its 2017 annual report on EU agencies, the ECA noted that the methodology laid down in the legal framework for calculating contributions is very complex, resulting in the risk of inaccuracy. Moreover the Board cannot release details of risk-based contribution calculations per bank, as they are interlinked and include confidential information about other banks⁽²⁴⁾. This inevitably affects the transparency of these calculations.

34. In 2017, the total amount of contingent liabilities increased significantly by 567 million euro (from 842 million euro to 1 409 million euro). The increase is mainly caused by new legal proceedings initiated in relation to 2017 *ex-ante* contributions. The current data available for 2018 suggests a further increase of 558 million euro in contingent liabilities to 1 986 million euro, due to new claims the 2018 *ex-ante* contributions to the SRF.

35. With regard to the underlying process for the 2016 final annual accounts, the NRAs submitted their respective declarations as aggregate amounts only. This process was improved in 2017 when the NRAs started delivering individual details in Excel spreadsheets. However, the SRB still did not obtain or see any documents or further information for any of the cases. Instead, the SRB relied entirely on the amounts provided by the NRAs to draw up its own accounts for 2017.

36. In its report on the 2016 accounts, the ECA stated that the improved process revealed that the disputed amounts concerning appeals against NRAs and cases before administrative courts of Member States related to 2016 *ex-ante* contributions had been overstated by approximately 120 million euro⁽²⁵⁾. In preparing the 2017 annual accounts, two further errors related to the year 2016 were reported by the NRA responsible, resulting in an understated amount of 19 million euro, which was corrected in the final accounts. In addition to these errors in the Excel sheets used, the chosen method of receiving only limited information means that there is no audit trail and does not enable the SRB to perform basic quality checks on the information provided.

37. An adequate knowledge of the financial risks to which the SRB is exposed is essential to ensure appropriate risk management and accounting. In its internal control standards, the SRB defined, in line with applicable standards⁽²⁶⁾, that 'Adequate procedures and controls shall be in place to ensure that all data and related information used for preparing the SRB's annual accounts and activity reports are accurate, complete and timely⁽²⁷⁾'. However, there are not yet controls in place to ensure that information reported by NRAs are accurate, complete and timely.

38. The SRB disclosed contingent liabilities amounting to the full contributions against which the banks had appealed. The SRB did not calculate the estimated amount that would actually have to be reimbursed if the applicants won their cases. This inevitably led to a significant overstatement of the contingent liabilities. For instance, most appeals do not challenge the contribution itself, but its calculation. If the plaintiffs won these cases, only the difference between the new contribution decision and the appealed contribution decision would need to be reimbursed. However, in the absence of any related case-law, it is difficult for the SRB to adequately estimate potential reimbursements. It should be noted that any potential reimbursements as a result of appeals or litigations would be compensated by *ex-ante* contributions to be raised in the following years. Thus, they would not have an impact on the final target level of the SRF by the end of 2023.

39. In some cases, banks filed complaints regarding the same contributions with both the national courts and the GCEU. As the SRB has noted in its accounts, the disclosure of the full amounts as contingent liabilities at both European and national level leads inevitably to double counting. Even if the applicants won their cases, they would only be reimbursed once. Therefore, the SRB double-counted an amount of 149 million euro, which was challenged before national and EU courts at the same time.

40. The 2017 national appeals and the cases brought before national courts are handled by the three NRAs respectively responsible. Two of these NRAs stated that due to a lack of any previous judgement on the matter it was not possible to assess the probability of the outcome of the proceedings initiated.

⁽²⁴⁾ ECA — 2017 annual report on EU agencies, Chapter 2.7., p. 25, and Chapter 3.35.9., p. 371.

⁽²⁵⁾ ECA Report pursuant to Article 92(4) of Regulation (EU) No 806/2014 for the financial year 2016; paragraph 18, p. 7.

⁽²⁶⁾ Such as Article 62 of SRM Regulation and the EU Financial Regulation.

⁽²⁷⁾ Chapter 13 of SRB Internal Control Standards (as adopted on 23 December 2016).

Contingent liabilities related to administrative contributions

41. Every year, the SRB collects administrative contributions to finance its operating costs. In January 2018, the final system of contributions to the administrative expenditures of the Single Resolution Board ⁽²⁸⁾ has come into force, creating a permanent system for administrative contributions. Based on the new Regulation, all banks that fall within the scope of the SRM Regulation in the 19 participating Member States will have to contribute to the administrative expenditure of the SRB. Unlike for *ex-ante* contributions to the SRF, administrative contributions are not collected via the NRAs but directly by the SRB.

42. Until the end of 2017, provisional instalments for administrative contributions were collected under the transitional system ⁽²⁹⁾. Under this previous Regulation, the SRB collected instalments from banks under its direct responsibility (see Table 4). These advance instalments on administrative contributions were used solely to cover its administrative expenditure during the provisional period from November 2014 to December 2017. In line with the EC accounting guidelines, these advance instalments were recognised as revenue up to the level of the year's expenditure. The outstanding amounts of advance instalments were booked as long-term pre-financing received (from contributors).

Table 4

Instalments collected by the SRB under the provisional and final systems for administrative contributions

Provisional system	2018	2017	2016	2015
Number of banks	0	103	112	114
Total amounts paid	0	83 004 442	56 673 870	21 829 111
Final system	2018	2017	2016	2015
Number of banks	2 729	2 819	2 963	3 060
Total amounts paid	91 368 435	83 004 442	56 673 870	21 829 111

Source : SRB; amounts in euro.

43. In 2018, the SRB calculated its final administrative contributions for the period from 2015 to 2018 ⁽³⁰⁾. For 2017, they amounted to around 83 million euro ⁽³¹⁾ and were collected from 2 819 banks ⁽³²⁾ (see Table 4). Instalments paid under the provisional system reduced the outstanding amounts to be paid by the respective banks.

44. No appeals or litigations against provisional instalments or (in 2018) calculated administrative contributions are currently pending. The SRB therefore did not disclose contingent liabilities for the years 2017 and 2016.

Contingent liabilities relating to legal costs

45. The SRB might have to compensate any successful applicants for their legal costs. However, the SRB did not book or disclose any provisions or contingent liabilities for legal costs in its 2016 and 2017 final annual accounts. Nevertheless, based on the number and complexity of litigations, a relevant amount could arise.

⁽²⁸⁾ EC Delegated Regulation (EC) No 2017/2361.

⁽²⁹⁾ Established by EC Delegated Regulation (EU) No 1310/2014.

⁽³⁰⁾ November and December 2014 were considered part of the financial year 2015.

⁽³¹⁾ Significant institutions paid about 95 % of these contributions.

⁽³²⁾ The different number of banks in comparison to the collection of *ex-ante* contributions to the SRF is due to different approaches: administrative contributions are collected at a consolidated level, while *ex-ante* contributions to the SRF are collected at solo entity level, as they need to be collected by the NRAs.

Additional information relating to litigation

46. The legal proceedings initiated against the SRB and the National Resolution Authorities (NRAs) negatively affect their financial and human resources. The costs will be borne directly by these authorities and consequently by all banks via their contributions. In 2017, the SRB committed 10,9 million euro on external legal services related to litigation for following years. At year-end 2017, out of eight FTEs in the SRB's legal service, four FTEs were dealing with litigation. In 2018, six further employees were due to be recruited for the legal team.

Part II: Contingent liabilities of the Commission

47. The European Commission confirmed that at 31 December 2017 there were no contingent liabilities arising based on its task under the SRM Regulation.

48. In 2017, the Commission endorsed the first resolution decision ⁽³³⁾, taken by the SRB on 7 June 2017. In this regard, 30 legal cases have been brought before the GCEU against the Commission ⁽³⁴⁾.

49. The Commission decided not to disclose any contingent liabilities for these cases based on its accounting assessment, reasoning that no applicant had sufficiently demonstrated the Commission's non-contractual liability ⁽³⁵⁾ and that therefore an outflow of resources relating to resolution cases is remote. Furthermore, the Commission stated that all claims for damages were premature, given that there was not yet a final decision on whether or not to compensate BPE's shareholders and creditors based on the 'no-creditor worse off' principle and the final valuation of difference in treatment in the resolution. The Commission stated that therefore, based on its comprehensive experience, no financial risk could arise from these cases.

50. Based on the review of the sample, the ECA found that certain applicants have claimed that the necessary conditions for a non-contractual liability of the Union (see paragraph 49) are met. The ECA notes that indeed 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. Given the absence of a final decision by the SRB on the final valuation of difference in treatment in the resolution and the fact that most applicants had not yet quantified their alleged damages for this year, the possible outcome of the proceedings could not be estimated.

51. The Commission also did not book or disclose any provisions or contingent liabilities for legal costs in its 2017 final accounts given that it assessed the risk as remote (see paragraph 49).

52. As additional information it should be noted that the Commission was informed about civil proceedings before an US Court regarding the resolution of BPE, initiated in March 2018. In August 2018, after the presentation of its 2017 accounts, the Commission was also notified about arbitration proceedings in relation to the resolution of BPE against the Kingdom of Spain. However, the Commission is not a party in these proceedings.

Part III: Contingent liabilities of the Council

53. The accounting officer of the Council stated in a representation letter that at 31 December 2017 there were no contingent liabilities arising due to the performance of its tasks under the SRM Regulation.

54. The Council was not involved in any resolution decisions in 2017 but as of 26 October 2017, it was subject to one legal case brought before the GCEU arising from the resolution of BPE. However, no contingent liability was disclosed in the Council's final accounts for 2017 as the probability of an outflow of resources from the EU budget regarding this case was assessed as remote.

⁽³³⁾ Endorsement of the resolution decision concerning Banco Popular Español S.A. (BPE).

⁽³⁴⁾ Only in one of these 30 cases is the Commission the sole defendant.

⁽³⁵⁾ The applicants have to 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.

CONCLUSIONS AND RECOMMENDATIONS

55. The SRB's accounting guidance still has draft status. Although the SRB might have to compensate any successful applicants for their legal costs, it did not book or disclose any provisions or contingent liabilities for legal costs in its 2016 and 2017 final annual accounts.

Recommendation 1

Due to the increase in the number of contingent liability cases and their complexity, the ECA reiterates its recommendation from last year's report⁽³⁶⁾. 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.

Target implementation date: Presentation of the SRB accounts for 2018.

56. In its 2017 accounts, in line with the facts mentioned in paragraphs 19 and 20, the SRB stated that regarding litigations in relation to BPE 'no reasonable criteria have been identified in order to make an acceptable estimation of the potential financial impact involved'⁽³⁷⁾. This can be accepted for the 2017 accounts. The Commission did not disclose contingent liabilities for 2017. For its contingent liabilities arising from *ex-ante* contributions to the SRF, the SRB disclosed the maximum amounts at risk. Contingent liabilities may develop in a way not initially expected. Therefore, they have to be assessed continually.

Recommendation 2

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'.

Target implementation date: Presentation of the accounts for 2018.

57. For its 2017 accounts, the SRB relied fully on the NRAs in relation to national appeals and national court proceedings. The availability of reliable information is of utmost importance, particularly considering the number and complexity of cases and the fact that the NRAs hold information concerning the financial risks of the SRB, which could require the disclosure of contingent liabilities. The SRB did not perform adequate checks on information provided by NRAs, nor did it receive any proceedings-related documents. Consequently, in the absence of any documentation, the ECA could not assess the financial risk of these proceedings for the SRB.

Recommendation 3

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.

Target implementation date: Presentation of the SRB accounts for 2018.

This Report was adopted by Chamber IV, headed by Mr Neven MATES, Member of the Court of Auditors, in Luxembourg at its meeting of 13 December 2018.

For the Court of Auditors

Klaus-Heiner LEHNE

President

⁽³⁶⁾ ECA Report pursuant to Article 92(4) of Regulation (EU) No 806/2014 for the financial year 2016; Recommendation 2, p. 11.
⁽³⁷⁾ SRB final annual accounts, K) page 33.

ANNEX

FOLLOW-UP OF PREVIOUS YEARS' COMMENTS

Year	Court's comments	Status of corrective action (Completed/ Ongoing/Outstanding/N/A)
2017	The SRB should establish a detailed accounting guidance. The accounting guidance should also deal with the provisioning of legal costs.	Outstanding ⁽¹⁾
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.	Outstanding ⁽²⁾

⁽¹⁾ See Recommendation 1.⁽²⁾ See Recommendation 4.

THE SINGLE RESOLUTION BOARD REPLIES

Paragraphs 19-20

The disclosure of information regarding the court cases brought against the SRB before the Court of Justice of the European Union following the resolution of Banco Popular Español S.A. (BPE) in the Section of 2017 Annual Accounts, titled 'Additional information related to legal cases' was made merely for reasons of transparency, without the intention to recognise and report contingent liabilities arising from those cases. On the basis of the SRB's assessment after the adoption of the 2017 Annual Accounts, the SRB would like to note that the outflow of resources as a result of these cases is considered remote.

In particular, the SRB notes that the majority of the above court cases are actions seeking the annulment of the SRB's resolution decision adopted in respect of BPE. The SRB considers that these actions for annulment cannot lead to a direct outflow of resources from the SRB's budget, except for possible litigation costs (with regard to the litigation costs, see comment under paragraph 45).

With regard to actions for damages brought against the SRB in the context of BPE case, in light of the EU case law on the conditions for damages to be granted, the SRB considers that the possibility of outflow of resources from the SRB's budget as result of these actions is remote. In addition, with regard to actions for damages based on the alleged unlawfulness of the SRB's resolution decision, the SRB has also noted that such claims for damages should be considered premature. This is due to the fact that the administrative procedure which will lead to the SRB's final decision whether to compensate former shareholders and creditors of BPE on the basis of the 'no creditor worse off' principle is still ongoing.

Paragraph 33

The SRB would like to note that the legal requirements regarding the calculation of contributions are appropriately taken into account in order to eliminate any potential risk of inaccuracy. Moreover, the SRB would like to note that the SRB discloses all the information underlying its decision on the calculation of the *ex ante* contributions to the maximum extent allowed under the legal framework. In particular, each institution is provided with the methodology and the information related to that specific institution. However, due to professional secrecy obligations arising from the Treaty on the Functioning of the European Union, the SRB is legally prevented from disclosing to a specific institution confidential information of other institutions which is also taken into account in order to calculate the contributions.

Paragraphs 35-37

It is recalled that the national proceedings on *ex-ante* contributions are handled by the NRAs, which are parties to those proceedings. Therefore, the SRB, not being party in such proceedings, has no direct access to this information and inevitably relies on NRAs' input.

The provision of data on the national appeals/court cases regarding *ex-ante* contributions by the NRAs to the SRB is, therefore, done in the context of good cooperation and not on the basis of an explicit legal requirement.

Following the last year's recommendation of ECA, the SRB has undertaken significant steps to enhance the reporting from the NRAs. In particular, the SRB agreed with the NRAs on a practical arrangement involving regular reporting that would allow the SRB to monitor the evolution of national appeals and court cases over time. In more detail, the NRAs report data on the national appeals/court cases on *ex-ante* contributions with relevant details on the date, purpose and amount disputed not on aggregate basis but for each institution separately. Moreover, based on the recommendations of ECA, the SRB would like to note that as of September 2018, the NRAs started to provide data regarding the history of each litigation file, allowing the SRB to have an adequate audit trail. The SRB considers that the reporting of the NRAs includes all the information required for preparing its annual accounts in line with the SRB's internal control standards.

In order to ensure the accuracy of the information, the SRB reconciles the individual amounts declared by the NRAs under the above reporting arrangement, with the amounts of *ex ante* contributions for each institution calculated by the SRB for the respective year.

Moreover, it is noted that the NRAs update the relevant information three times per year, which is sufficient to ensure the timeliness of the information.

In light of the above, the SRB considers that all actions that have been taken with regard to *ex ante* contribution cases contribute to ensuring the accuracy, completeness and timeliness of the information provided by the NRAs and on which the SRB bases its annual accounts.

Paragraph 39

The SRB would like to note that, with respect to the double counting of some amounts, a footnote on page 32 of the Final Annual Accounts was added for a better understanding since some cases at national and European level concern the same contribution amounts. The SRB sees merits in disclosing the amounts concerned at national and European levels as these levels are not fully interlinked and they have their own dynamics. Still, the SRB acknowledges that indicating separately the amounts counted twice provides further insights in the overall exposure.

Paragraph 45

The SRB would like to note that in view of preparing its Annual Accounts, the SRB did a preliminary analysis on the opportunity of booking a provision/contingent liability for legal costs. In the absence of any reliable estimation of the amounts of legal costs that the SRB could be required to pay, the costs paid and accrued during the year 2017 were considered sufficient and no provision/contingent liability was recognised in this respect.

Even if the SRB was required to compensate the legal costs of the applicants in all cases against the SRB (which at this point in time is not expected), this amount would be significantly lower than the level of materiality for the SRB, and thus would not lead to material misstatement of the SRB's financial position.

Recommendation 1

The SRB accepts this recommendation of the ECA.

In applying the accurate treatment for provisions and contingent liabilities arising from amounts in dispute and legal costs, the SRB is acting in full compliance with the EU Accounting Rule no 10 which remains the prevailing rule. Any accounting policy derived from this rule is to better support understanding of requirements, to enable a simplified approach and to ensure the consistent application of this accounting rule. The SRB will add in its accounting policy a specific paragraph on the accounting treatment of the legal costs.

The accounting policy is in the last stage of internal consultations and it will be adopted by the end of 2018.

Paragraph 56

Please see the SRB's reply to paragraphs 19-20.

Recommendation 2

The SRB accepts this recommendation of the ECA.

Paragraph 57

Please see SRB's replies to paragraphs 35-37 and recommendation 3.

Recommendation 3

The SRB partially accepts this recommendation of the ECA.

With regard to the *ex ante* contributions cases, in light of the considerations expressed by the SRB in reply to paragraphs 35-37 above, the SRB is of the opinion that all actions that have been taken contribute to the accuracy, completeness and timeliness of the information provided by the NRAs and on which the SRB bases its annual accounts.

In order to provide the ECA with further assurance that the information provided by the NRAs on which the SRB bases its annual accounts is appropriate, the SRB will explore with the NRAs the possibility that the NRAs will provide the SRB with representation letters regarding the amounts of contingent liabilities arising from the national proceedings related to *ex ante* contributions.

With regard to the resolution cases, the SRB will liaise with the relevant NRAs in order to discuss the practical arrangements which can be put in place.

REPLIES OF THE COMMISSION

OBSERVATIONS

50. The Commission considers that neither the complexity and novelty of the cases, nor the amount of the damages requested influence its assessment that the risk of an outflow of economic resources is remote.

CONCLUSIONS AND RECOMMENDATIONS

Recommendation 2

The Commission accepts the recommendation.

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 2017.

54. The Council was not involved in any resolution decisions in 2017. A legal case brought before the GCEU as of 26 October 2017 arising from the resolution of BPE was declared inadmissible insofar as it was directed against the Council by the GCEU on 14 June 2018.
