



EUROPEAN
COURT
OF AUDITORS

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 2019

Together with the replies of the Single Resolution Board, the Commission and
the Council

About the report:

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

So far, the SRF has not been called upon, but there are a large number of legal proceedings relating to a first resolution and other decisions, as well as ex-ante contributions to the SRF. For the financial year 2019, the SRB reported contingent liabilities relating to some 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 note that subsequent judgments in 2020 may have implications for contributions to the SRF.

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Executive summary

I The Single Resolution Mechanism (SRM) is the EU system for managing the resolution of banks failing or likely to fail in the euro area and participating Member States. 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, the Council of the European Union and National Resolution Authorities.

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 these bodies are exposed. In practice, if an outflow of resources is not assessed as being remote, a contingent liability needs to be disclosed or a provision recognized.

III On 15 June 2020, there were various on-going legal proceedings against the SRB and the Commission (but not the Council) concerning their resolution tasks before EU courts, as well as at the national level. There were 104 proceedings before EU courts related to resolution and non-resolution decisions, 7 cases related to the no-creditor-worse-off principle and 23 cases against ex-ante contributions to the Single Resolution Fund. Furthermore, 2 112 cases at the national level were reported to the SRB. 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.

IV Most cases at EU level are related to the resolution of Banco Popular Español in 2017. Applicants are seeking the annulment of the SRB's resolution scheme and the Commission's endorsing decision. Furthermore, some applicants have brought pleas of illegality against the underlying legal framework and damage claims against the EU. More than a thousand cases against the resolution of Banco Popular Español were brought at national level. Additionally, there are in total three actions seeking the annulment of the SRB's non-resolution decisions for two ABLV banks and PNB Banka before EU courts.

V The SRB decided not to disclose contingent liabilities, in any of the cases described in paragraph IV, as it assessed the related risk as remote. We note that the assessment of legal cases is inherently subjective, as it is based on expert judgment. Additionally, it is difficult to predict the outcome of these legal proceedings at this stage, as there is

no related case law. However, we found no evidence that would contradict the SRB's assessment.

VI Following the resolution of Banco Popular Español S.A., the SRB carried out a process for the potential compensation of shareholders and creditors, which could have been affected under the no-creditor-worse-off principle. In March 2020, the SRB concluded that no creditor affected was worse-off than they would have been under national insolvency proceedings and consequently decided not to compensate shareholders and creditors. Seven cases against this decision were brought before EU courts close to the signature of the SRB's final accounts. Thus, the SRB had not yet assessed their related risk and therefore did not disclose related contingent liabilities.

VII The SRB collects ex-ante contributions to the Single Resolution Fund via National Resolution Authorities. On June 2020, there were 23 cases against decisions on ex-ante contributions to the Single Resolution Fund. It has disclosed contingent liabilities of €186 million relating to legal proceedings against its ex-ante contributions decisions at EU level, and a further €1 861 million relating to legal proceedings against the notifications at the national level. We conclude that the SRB made a fair effort to assess the risk per case and to disclose related contingent liabilities. However, we note that in a recent judgment, which has not yet become final, the General Court found the legal framework for ex-ante contributions, to be partially unlawful. Therefore, it held that the SRB was not in a position to sufficiently reason its decision. Furthermore, recent case law also made clear that only EU courts can rule on the validity of the SRB's decisions on ex-ante contributions. Thus, it is very unlikely that any risk arises from national proceedings against ex-ante contributions to the SRF.

VIII The Commission is also subject to legal proceedings before EU courts relating to the resolution of Banco Popular Español, on its own and jointly with the SRB. The Commission has not disclosed any contingent liabilities, since it assessed the related likelihood of an outflow of resources as remote. We did not find evidence that would contradict the Commission's assessment. The Council is not involved in any legal challenges related to its resolution tasks, and therefore has disclosed no contingent liabilities.

IX We conclude that the SRB and the Commission made a fair effort to disclose contingent liabilities where they had reason to do so. In particular, the SRB improved its accounting presentation related to legal cases against ex-ante contributions to the Single Resolution Fund. We note that some new legal cases had not been assessed by the SRB, as they were brought only in May and June 2020. We recommend that the new cases as well as the new judgments should be considered for the 2020 accounts.

As we found that not all legal cases were considered for the SRB's accounts, we recommend that the SRB also takes into account available information on proceedings at national level against resolution decisions.

Introduction

01 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 bank failing or likely to fail with the aim of minimising the 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 banks¹ and less significant cross-border banking groups established in the euro area and participating Member States². The SRB became an independent agency on 1 January 2015 and has had full resolution powers since 1 January 2016.

02 The process leading to the decision to place a bank under resolution involves the SRB and the European Commission. It may also involve the European Central Bank (ECB) and the Council of the EU³. Under certain conditions, the Single Resolution Fund (SRF, see paragraph **41**) may be used to support the resolution. The SRB and the SRF are entirely financed by the banking sector.

03 Article 92(4) of the SRM Regulation 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 task⁴ from each of these bodies.

¹ The term "bank" in this report refers to entities as defined under Article 2 of the SRM Regulation.

² 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>.

³ Article 18 of the SRM Regulation.

⁴ Article 92(8) of the SRM Regulation.

Audit scope and approach

Audit scope

04 This audit report deals exclusively with contingent liabilities arising as a result of the performance by the SRB, the Commission and the Council of their tasks under the SRM Regulation⁵. In the case of the SRB, the ECA considers all potential contingent liabilities in this report. It covers the financial year 2019. In addition to contingent liabilities arising during 2019, the accounting officer is obliged to take into account any relevant information obtained up to the date of presentation of the final accounts⁶. 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 2020. The 2019 accounts were presented:

- by the Single Resolution Board on 15 June 2020;
- by the European Commission on 18 June 2020;
- by the Council of the European Union on 28 May 2020.

05 The ECA has also audited the European Commission and the Council⁷ annual accounts for the financial year 2019, as well as those of the SRB⁸, which are presented in other reports.

06 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 the financial risk to which the entity is exposed.

⁵ Article 92(4) SRM Regulation.

⁶ Article 98(4) Commission Delegated Regulation (EU) 2019/715 (OJ L 122, 10.5.2019, p. 1).

⁷ ECA Annual reports concerning the financial year 2019.

⁸ Annual report on EU agencies for the financial year 2019, paragraph 54.

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.

07 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.

08 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 define “remote” as a probability of less than 10 % and therefore “possible” as between 10 % and 50 % (see [Table 1](#)). The Commission defines “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.

09 Based on EU Accounting Rule 10, the disclosures required for each class of contingent liability are:

- A brief description of the nature of the contingent liability;
- An estimate of its financial effect;
- An indication of the uncertainties relating to the amount or timing of any outflow;
and
- the probability of any reimbursement.

Audit approach

10 As at 15 June 2020, 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. For the financial year 2019, the SRB disclosed contingent liabilities amounting to €2 047 million while the Commission did not disclose any contingent liabilities. The disclosed contingent liabilities are all related to ex-ante contributions to the SRF. To audit contingent liabilities, we selected a sample of 21 cases pending before the EU courts and reviewed the relevant case files.

Table 2 – Judicial proceedings against the SRB and/or the Commission in relation to their tasks under the SRM Regulation (15 June 2020)

Cases related to	Before EU courts	Before national courts or administrative proceedings	Paragraphs of report
Resolution of BPE	104	1 455	19-31 ; 67-68
Decisions on non-resolution of ABLV and PNB Banca	3	Not applicable	32-36
No-creditor-worse-off decision for BPE	7	Not applicable	37-40
Ex-ante contributions	23	657	41-57 ; 70
Administrative contributions	0	Not applicable	58-60
Other matters	2	0	61-64
Total	139	2 112	

Source: ECA, based on SRB and Commission data; for further details see the relevant chapter; the table does not include cases solely requesting access to documents.

11 In addition to the sample of court cases, the audit evidence consisted of information gathered through interviews with staff and by reviewing, inter alia, documentation from the SRB, the Commission and the Council and representation letters from external lawyers and some National Resolution Authorities (NRAs), as well as publicly available data. Furthermore, we reviewed documentation from the SRB's private external auditor (see [Box 2](#)).

Box 2 – The SRB's private external auditor

Based on Article 104(1) Commission Delegated Regulation (EU) 2019/715, a private external auditor shall verify the SRB's 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.

12 Based on our Treaty rights, the SRM Regulation and the Financial Regulation, the SRB, the Commission and the Council must provide us with all information and

documents we consider relevant for performing our tasks⁹. The SRB and the Commission provided the required documentation via secure virtual dark rooms and remote access platforms.

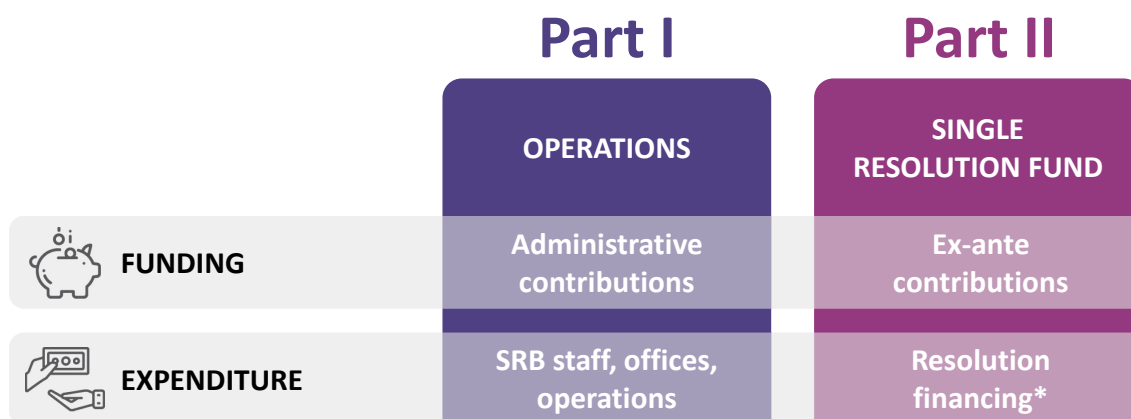
⁹ See Article 287(3) TFEU, Article 92(8) of the SRM Regulation and Article 257(1) of the Financial Regulation.

Observations

Part I: Contingent liabilities of the SRB

13 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 (see [Box 10](#)). 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 fulfilled¹⁰.

Picture 1 – Budget of the Single Resolution Board



Source: ECA, based on Regulation (EU) No 806/2014; *subject to certain limitations.

14 In a representation letter covering the annual accounts for the financial year 2019, 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 2019 accounts, the private external auditor concluded that it had gained satisfactory assurance in respect of contingent liabilities. Furthermore, it highlighted the disclosed contingent liabilities in an emphasis of matter paragraph.

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

¹⁰ See Article 76 SRM Regulation.

Contingent liabilities related to legal proceedings following resolution and non-resolution decisions

16 On 7 June 2017 the first, and so far only, resolution at EU level took place for Banco Popular Español S.A. (BPE). A number of judicial proceedings concerning this first resolution decision and the SRB's later decisions not to place the two ABLV banks and PNB Bank under resolution have been brought against the SRB and the Commission (see [Table 3](#)).

Table 3 – Legal proceedings against the SRB and the Commission before the Court of Justice of the European Union at 15 June 2020

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.	25	78	1	104
Decision on ABLV Bank AS and ABLV Bank Luxembourg	0	2	0	2
AS PNB Banka	0	1	0	1
TOTAL	25	81	1	107

Source: ECA, based on SRB data; the table does not include cases solely requesting access to documents or cases related to the NCWO process.

17 As the following paragraphs refer to legal proceedings at the Court of Justice of the European Union (CJEU), it is important to recall the working arrangements at the CJEU as well as available legal remedies against decisions of EU institutions, bodies, offices and agencies (for details see [Annex I](#)). The CJEU consists of two courts: the Court of Justice (CJ) and the General Court (GC). There are different judicial remedies, which natural and legal persons may use against decisions of EU institutions, bodies, offices, and agencies:

- Action for annulment¹¹ within two months of a legally binding decision which has either been addressed to the person or is of direct and individual concern;

¹¹ Article 263 TFEU.

- Action for damages¹² within five years if applicants 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;
- Plea of illegality¹³ against a legality of provision of law can be only raised as an ancillary plea, e.g. in the context of an action for annulment.

18 Based on data up to the end of 2019, the average duration of proceedings before the CJ was approximately 14,4 months¹⁴. The average duration of proceedings before the GC decreased to 16,9 months, compared to 20 months the previous year¹⁵. Although most BPE cases were filed in summer 2017, the proceedings for most of the pilot cases are still on-going. This is due to the complexity of the cases, the novelty of the legal framework, the number of pleas in law, the length of written exchanges and the COVID-19 pandemic since March 2020 (see [Box 3](#)).

Box 3 – COVID-19 impact on on-going proceedings

Due to the outbreak of the COVID-19 pandemic, both the CJ and GC have been obliged, since March 2020, to make changes to their working arrangements, including in particular:

- extension of certain time limits for the filing of parties' statements or observations during the written phase of proceedings (until 31 August 2020);
- suspension of oral hearings from 16 March 2020 until 25 May 2020 for the CJ and until 11 June 2020 for the GC.

Source: ECA, based on CJEU¹⁶.

¹² Articles 268 and 340 TFEU.

¹³ Article 277 TFEU.

¹⁴ Court of Justice of the European Union: Annual report 2019, p. 26.

¹⁵ Court of Justice of the European Union: Annual report 2018, p. 18.

¹⁶ Court of Justice of the European Union: COVID-19 information – Parties before the Court of Justice and Parties before the General Court on 15 July 2020.

Actions against a resolution decision

19 On 7 June 2017, the SRB adopted the resolution scheme for BPE and the Commission endorsed it. BPE had been assessed as failing or likely to fail. 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 4](#)).

Box 4 – 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).

Note: Tier 1 instruments usually consists of shareholders' equity and retained earnings *inter alia*; Tier 2 instruments can include hybrid capital instruments, subordinated debt and reserves.

20 By the end of June 2020, out of the 101 cases related to decisions on whether to adopt a resolution scheme, 24 involved applicants seeking compensation for alleged damages in addition to their request for annulment of the resolution decision. Of the 101 cases, 13 involved applicants who had brought claims only for damages allegedly suffered. Five of them were declared inadmissible by the GC¹⁷ and two partially inadmissible¹⁸. As most applicants brought an action for annulment, these were filed within two months of the publication of the resolution decision.

21 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 hearing¹⁹. Of these six

¹⁷ Cases T-473/17, T-522/17, T-557/17, T-618/17 and C-731/17P.

¹⁸ Cases T-553/17 and T-555/17.

¹⁹ SRB annual report 2018, section 5.4.1.

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 these six pilot cases. On 24 October 2019, the GC ruled on the first of the pilot cases and declared it inadmissible (see [Box 5](#))²⁰. The applicants have brought an appeal against this order²¹.

Box 5 – GC considers first pilot case inadmissible

The GC dismissed an action seeking amongst other things the partial annulment of the BPE resolution decision lodged by a bondholder, on the ground that the annulment of the conversion of certain Tier 2 instruments would alter the substance of the resolution decision.

Furthermore, the applicant asked for the compensation of the damage caused by the conversion of a Tier 2 instruments ordered by the BPE resolution decision. In the written procedure, the applicant indicated that the compensation request is not to be regarded as an action seeking to engage the non-contractual liability of the SRB, but an action based on Article 266 TFEU. That article requires the institution whose act has been declared void to take the necessary measures to comply with the judgment of the CJ. According to the applicant, this includes financial compensation when it is not possible anymore to restore the situation preceding the resolution of BPE. However, a request for compensation based on Article 266 TFEU is dependent upon the annulment of the contested decision (the BPE resolution decision), in which the applicant was not successful. As such, the compensation request was also dismissed.

22 Resolution has to be based on the valuation of the bank which is failing or likely to fail. As resolution can become urgent within a short timeframe, the legal framework foresees the use of a provisional valuation²². The resolution scheme for BPE was based on such a provisional valuation. While the SRM regulation foresees that an ex-post definitive valuation is carried out to replace or complement the provisional valuation as soon as practicable, the SRB announced that it would not request an ex-post definitive valuation of the net asset value of BPE from the independent valuer. Applicants have brought actions against this decision (see [Box 6](#)).

²⁰ Order of the General Court on 24 October 2019 in case T-557/17.

²¹ Case C-947/19 P brought on 23 December 2019.

²² Article 20(10) SRM Regulation.

Box 6 – No compensation based on an ex-post definitive valuation

Some applicants brought actions for annulment before the GC against this SRB decision. The GC already issued an order in two cases²³, rejecting the actions as inadmissible since the decision was of no direct and individual concern to the applicants. In addition, the orders confirmed that an ex-post definitive valuation cannot lead to compensation to shareholders and bondholders²⁴ in the case that the resolution tool used is the sale of business tool. The GC's rulings have been appealed before the CJ²⁵.

23 Some applicants claim that they are entitled to compensation if the SRB's or Commission's decisions are annulled. 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.

24 For its final accounts 2019, 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"²⁶ and therefore the SRB did not disclose any contingent liabilities. The SRB's legal service based its conclusion on its assessment of the argumentation brought forward by the parties, whilst recognizing the novelty and complexity of the relevant legal framework and the absence of relevant case law.

25 We note that BPE was the SRB's first resolution case and that the assessment of legal cases is inherently subjective as it is based on expert judgment. While numerous cases have been filed, there are not yet any judgments on material pleas in law and therefore no case law at EU level. Based on the reviewed audit evidence, the ECA found that some applicants have claimed that the conditions for a non-contractual liability of the union are fulfilled. Furthermore, the SRB's external legal counsel confirmed to us that while it considers an outflow of resources unlikely, the risk is more than "remote" given the absence of relevant case law. While it is difficult to predict the outcome of these legal proceedings at this stage due to the complex, specific and unprecedented legal system created by the new resolution legal

²³ Cases T-2/19 and T-599/18.

²⁴ Article 20(12a) SRM Regulation.

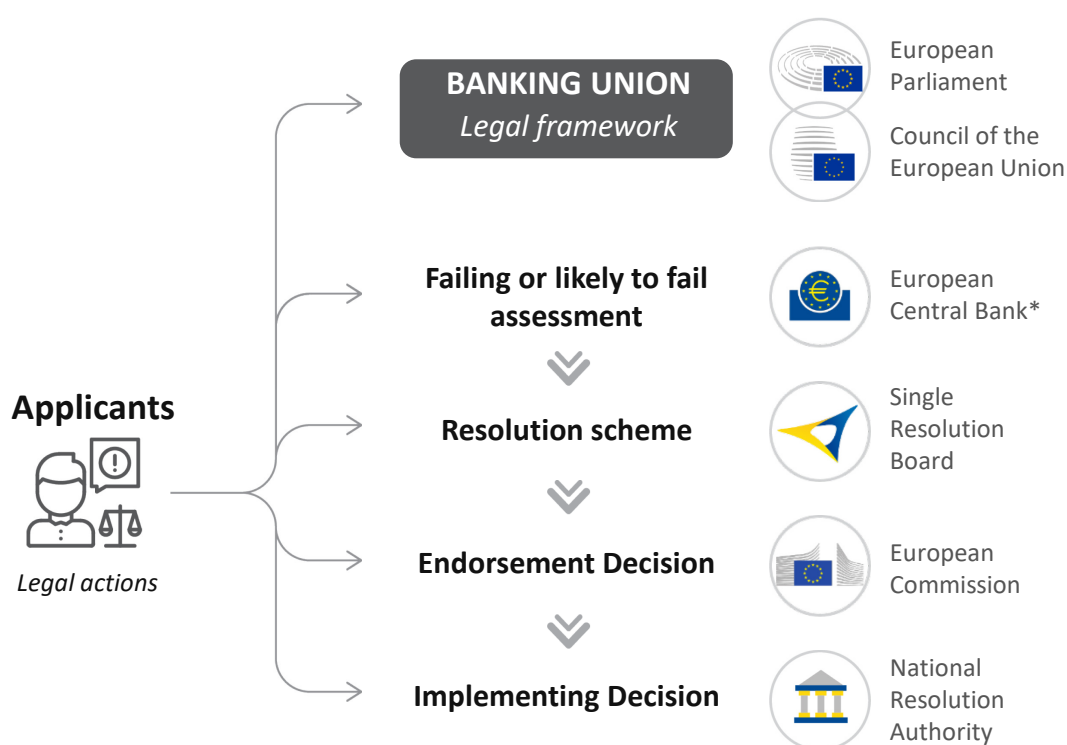
²⁵ Cases C-874/19 P and C-934/19 P.

²⁶ Final annual accounts of the Single Resolution Board – Financial Year 2019, p. 36.

framework, based on the audit evidence examined we did not find any evidence that would contradict the conclusion made by the SRB.

26 Within their actions for annulment and/or damages, some applicants have also brought pleas of illegality (see [Picture 2](#)). 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.

Picture 2 – Decision process leading to a resolution and current disputes



Source: ECA, based on the legal framework; *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.

27 Furthermore, annulment actions were brought against the ECB's failing or likely to fail decision (see [Box 7](#)), the Commission's endorsing decision (see [Table 3](#) and paragraph [65](#)) and the implementing decision (see paragraph [29](#)) by the NRA of Spain, Fondo de Reestructuración Ordenada Bancaria (FROB).

Box 7 – Failing or likely to fail decisions cannot be challenged

Contingent liabilities of the ECB are not within the scope of this audit (see paragraph 04). However, it is worth mentioning that the GC considers failing or likely to fail decisions²⁷ as “preparatory measures in the procedure, which are designed to allow the SRB to take a decision regarding the resolution of the banks in question and cannot, for that reason, form the subject of an action for annulment”²⁸. Furthermore, the GC considered that the ECB “has no decision-making power within the framework for the adoption of a resolution scheme”²⁹.

Those orders are currently subject to appeals before the Court of Justice³⁰.

Actions against the implementing decision of a resolution scheme

28 The SRM Regulation provides that following a resolution decision the SRB may have to compensate NRAs for damages they have been ordered to pay by a national court, subject to the conditions laid down in Article 87(4). Therefore, it is important that the SRB is aware of damage cases pending against NRAs in participating Member States.

29 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 2017³¹. 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 has to provide the SRB with a monthly report on the implementation of the resolution scheme and any related appeals and claims³².

²⁷ Article 18(1) of Regulation (EU) No 806/2014.

²⁸ Orders of the General Court in cases T-281/18 (paragraph 36) and T-283/18 on 6 May 2019.

²⁹ Ibidem, paragraph 34.

³⁰ Appeals lodged on 17 July 2019 in cases C-551/19 P and C-552/19 P.

³¹ 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/ProyectedoAcuerdoReducido_EN_v1.pdf.

³² Article 28(1)(b)(iii) SRM Regulation.

30 By July 2020, FROB had received 117 administrative appeals against the above-mentioned implementing decision and dismissed or declared inadmissible all of them. FROB had also received 1 070 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, 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. Six suspension decisions have been appealed before the Spanish Supreme Court, which declared inadmissible five appeals while one appellant eventually withdrew the other.

31 We note that the national proceedings depend to a large extent on the validity of the resolution scheme and the Commission’s endorsing decision. Consequently, it has to be assumed that the risk for the SRB depends largely on that in the cases at EU level. We found that FROB provided the SRB with regular information on national proceedings. However, the SRB did not request an assessment of related risks for its 2019 accounts and the available information was not provided to the accounting officer for the creation of the final annual accounts. In October 2020, the SRB requested and received an assessment of related risk.

Actions against non-resolution decisions

32 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 (see [Box 8](#)). The SRB’s decisions followed the ECB’s assessments that the banks were “failing or likely to fail” due to a significant deterioration of their liquidity situation³³.

³³ ECB Failing or Likely to Fail assessment of ABLV Bank AS adopted by the ECB on 23 February.

Box 8 – Public interest assessment

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 interest³⁴. To be in the public interest, resolution needs to be necessary for the achievement of the resolution objectives and proportionate. The public interest assessment is performed by the SRB based on the legal framework and its published approach³⁵.

33 In May 2018, the SRB was notified of two court cases brought before the GC against its decisions not to take any resolution actions. One of the cases is still pending, for which the SRB assessed the likelihood of an outflow of economic resources as “remote”³⁶ and therefore did not disclose a contingent liability. The other case, which was brought by shareholders of ABLV Bank AS, was dismissed as inadmissible by the GC³⁷, on the grounds that the SRB contested decisions do not directly concern the applicants, within the meaning of the fourth paragraph of Article 263 TFEU³⁸. The GC order is currently under appeal³⁹.

34 On 15 August 2019, the ECB declared AS PNB Banka as failing or likely to fail. The SRB concurred with the ECB’s assessment and concluded that no supervisory or private sector measures that could prevent the bank’s failure were available. However, the SRB also concluded that resolution action was not in the public interest. In particular, it concluded that AS PNB Banka did not provide critical functions, and its failure was not expected to have a significant adverse impact on financial stability in Latvia or other Member States. The SRB communicated the decision to the Latvian Financial and Capital Markets Commission⁴⁰.

35 The decision of the SRB not to adopt a resolution scheme in respect of PNB Banka, was challenged by the bank and some of its shareholders in a joint case, which

³⁴ Article 18(5) SRM Regulation.

³⁵ Public Interest Assessment: SRB Approach, 3 July 2019.

³⁶ Final annual accounts of the Single Resolution Board – Financial Year 2019, p. 37.

³⁷ Order in case T-282/18 on 14 May 2020.

³⁸ Ibidem, paragraph 46.

³⁹ Case C-364/20 P.

⁴⁰ SRB annual report 2019, section 3.1.

is pending before the General Court. The GC suspended the case until the CJ decided on the appeal brought in the ABLV case. The SRB assessed the likelihood of an outflow of economic resources as a result of that case as “remote” and therefore did not disclose a contingent liability⁴¹.

36 We consider that contingent liabilities are not necessary in the above cases. Moreover, the applicants are currently only asking the GC to annul the SRB’s decision.

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

37 To safeguard fundamental property rights⁴², 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) principle⁴³, any creditors who would have received better treatment under normal insolvency proceedings must be compensated from the SRF⁴⁴. To assess the treatment of creditors and shareholders, a valuation of difference in treatment has to be conducted (see [Box 9](#)).

Box 9 – 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.

38 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

⁴¹ Final annual accounts of the Single Resolution Board – Financial Year 2019, p. 37.

⁴² Article 17(1) CFREU.

⁴³ Articles 15(1g) of SRM Regulation.

⁴⁴ Articles 20(16) and 76(1e) of SRM Regulation.

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 resolution⁴⁵. The SRB estimates that there are around 300 000 of them⁴⁶.

39 The SRB then began a ‘right to be heard’ process⁴⁷ for affected creditors and shareholders (see *Picture 3*). 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. During this process, the SRB received 2 856 submissions from eligible creditors and shareholders. In March 2020, the SRB published its final decision⁴⁸ stating that since insolvency would have been more costly than resolution, no compensation was due to BPE shareholders and creditors⁴⁹.

⁴⁵ 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).

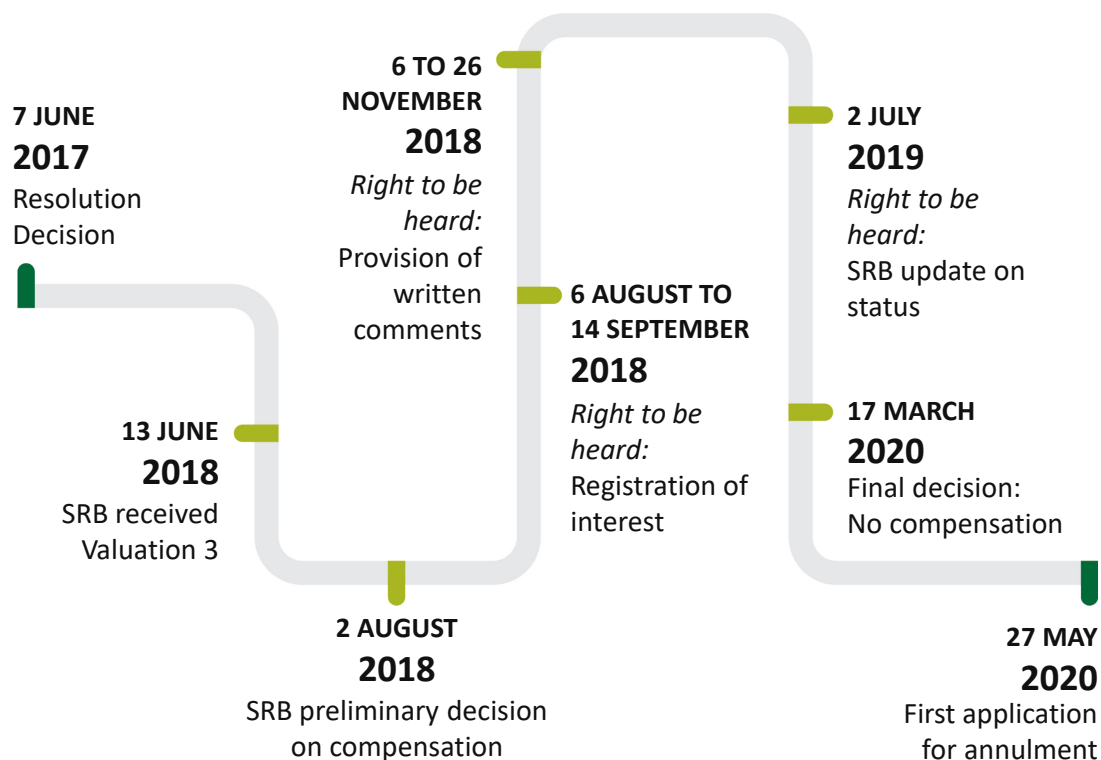
⁴⁶ SRB annual report 2018, footnote 16, p. 32.

⁴⁷ Based on Article 41(2a) Charter of Fundamental Rights of the European Union.

⁴⁸ Decision of the Single Resolution Board of 17 March 2020 determining 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.

⁴⁹ SRB annual report 2019, p. 32.

Picture 3 – NCWO process timeline for Banco Popular Español S.A.



Source: ECA.

40 A number of shareholders and creditors have decided to request the annulment of the SRB's final decision before the GC. They filed seven applications by July 2020⁵⁰. In addition to annulment, one applicant also claims damages. If the GC were to annul the SRB's decision on whether to compensate shareholders and creditors of BPE, this would not automatically cause an outflow of resources, as a new SRB decision would be required. In its 2019 accounts, the SRB did not disclose contingent liabilities related to the NCWO principle stating that it was still assessing the cases, which were only brought recently, the first one having been notified to the SRB on 27 May 2020.

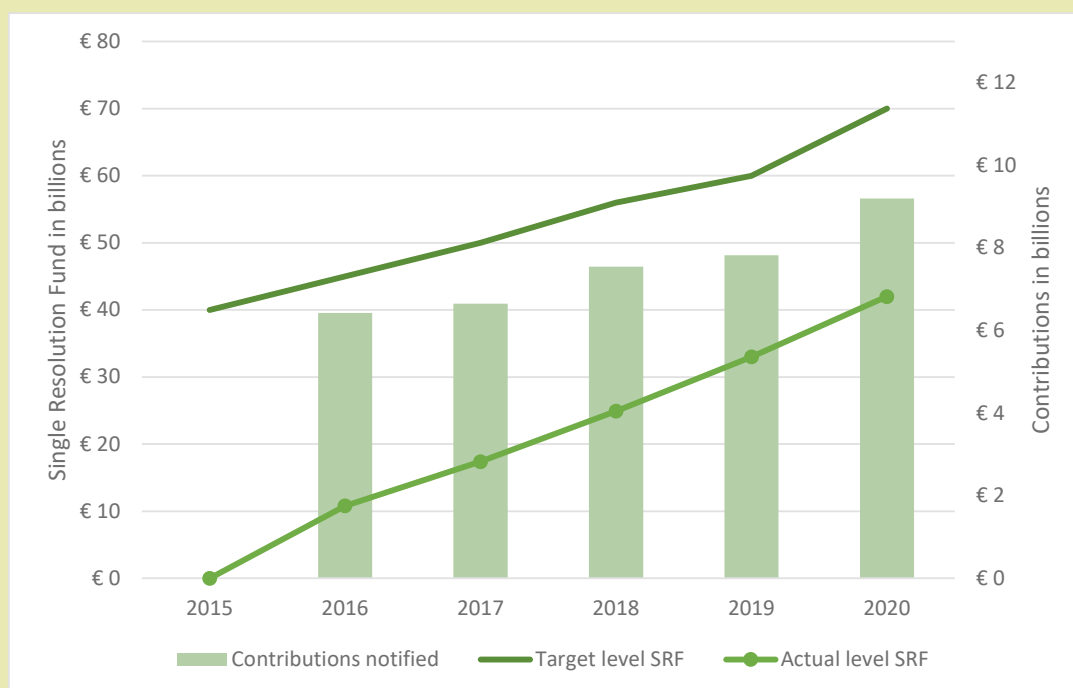
⁵⁰ Final annual accounts of the Single Resolution Board – Financial Year 2019, p. 36.

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

41 Banks in the euro area are legally obliged to contribute to the SRF (see [Box 10](#)).

Box 10 – 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. Taking into account the current annual growth in covered deposits, this would amount to about €70 billion. Annual contributions were collected from 3 066 banks in 2020, amounting to €9,2 billion. As of July 2020, around €42 billion had been collected in total.



Note: Not all banks contributed in 2015. The difference is adjusted every year until 2023.

For completeness, it should be mentioned that the proposed treaty reform of the European Stability Mechanism includes a backstop to the SRF, which would provide a credit line amounting to an equivalent size of the SRF⁵¹.

Source: SRB.

⁵¹ European Stability Mechanism: Draft guideline on the backstop facility to the SRB for the SRF subject to the Draft revised text of the treaty establishing the European Stability Mechanism as agreed by the Eurogroup on 14 June 2019.

Process for the collection of ex-ante contributions to the Single Resolution Fund

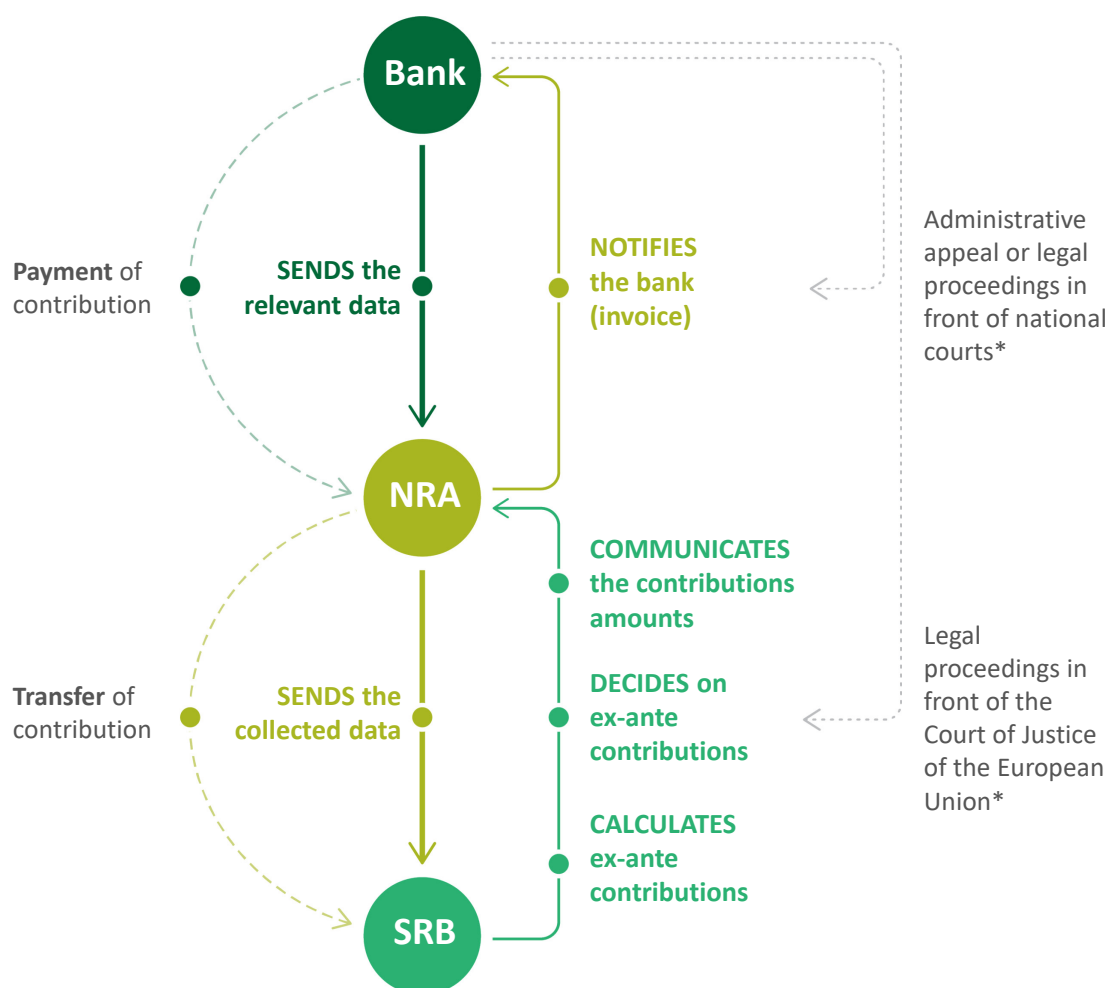
42 Since 2016, the SRB is responsible for calculating the contributions⁵² in close cooperation with NRAs. The contribution per bank is calculated based on a flat-rate contribution for small banks and a risk-adjusted contribution for larger banks⁵³. The information required for the calculation is provided to the SRB by the banks via NRAs. The SRB then 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 SRF⁵⁴, which is managed by the SRB (see [Picture 4](#)). During this calculation and notification process, a number of formal procedural requirements must be met.

⁵² Article 4 Council Implementing Regulation (EU) 2015/81.

⁵³ Article 4(1) Commission Delegated Regulation (EU) 2015/63.

⁵⁴ Council agreement on the transfer and mutualisation of contributions to the Single Resolution Fund, 14 May 2014.

Picture 4 – Ex-ante contribution collection process with legal remedies



Source: ECA based on the legal framework; *see paragraph 45 and Box 11.

Disputes related to ex-ante contributions to the Single Resolution Fund

43 A number of banks have brought administrative or court proceedings against the decisions on their ex-ante contributions in a total of three Member States⁵⁵ (see [Picture 4](#)). Most banks brought such actions against the relevant NRA notification⁵⁶. As a result, there were 657 administrative or court proceedings against ex-ante contributions pending at national level as of 31 May 2020. This reflects 32 additional cases compared to June 2019.

44 However, as the contributions are calculated and decided on by the SRB, applicants have also brought court proceedings at the CJEU against the SRB's decisions

⁵⁵ Austria, Germany and Italy.

⁵⁶ Depending on the legal framework in participating Member States, NRAs notify banks through administrative acts, decisions or notifications.

on ex-ante contributions for the years 2016 to 2019 (see [Picture 4](#)). At 15 June 2020, 23 proceedings (2019: 16 proceedings) were pending. While 22 of them were pending at the GC, one case was an appeal to a ruling of the GC pending at the CJ. At the time of signature of the SRB's final accounts for 2019, no applications against the 2020 ex-ante contribution decisions of the SRB had been filed. However, between 29 June 2020 and 1 September 2020, 19 applications against the 2020 ex-ante contributions were lodged⁵⁷. Thus, these cases will need to be considered for the 2020 accounts.

45 The shared responsibilities of the ex-ante contributions calculation and collection process led to various questions regarding the related judicial review as we outlined in last years' report⁵⁸. In December 2019, the CJ provided clarifications on the interpretation of the respective EU law in its preliminary ruling (see [Box 11](#))⁵⁹. It determined that only the CJEU can review the legality of SRB decisions concerning ex-ante contributions to the SRF, meaning that those decisions cannot be declared invalid by national courts. Hence, going forward national court cases disputing the SRB's ex-ante contributions calculation or other related issues are very unlikely to cause an outflow of economic resources for the SRB.

Box 11 – General implications of the CJ's preliminary ruling of 3 December 2019 on ex-ante contribution decisions

The CJ confirmed that the SRB has exclusive responsibility to calculate the *ex-ante* contributions to the SRF and that NRAs only provide operational support to the SRB. Consequently, only the CJEU can review the legality of SRB decisions concerning ex-ante contributions to the SRF. As such, those decisions cannot be declared invalid by national courts. Furthermore, the CJ considered that EU Courts have also exclusive jurisdiction to determine, within that legality review, whether acts adopted by a NRA that are preparatory of SRB ex-ante contributions' decisions are vitiated by defects capable of affecting those decisions of the SRB.

Based on the CJ's considerations, it appears that legal challenges before national courts alone asking for the review of the calculation of the ex-ante contributions to the SRF or the legality review of preparatory acts of NRAs preceding the SRB

⁵⁷ Case T-394/20, brought on 29 June 2020, was the first case lodged against the SRB's 2020 ex-ante contributions decision.

⁵⁸ Report 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 the Regulation for the financial year 2018, paragraph 42.

⁵⁹ Judgment of the Court in case C-414/18 on 3 December 2019.

decision on ex-ante contributions or related to its notification and raising of contributions will in principle not lead to an outflow of resources.

Source: ECA, based on CJ judgment in case C-414/18 on 3 December 2019.

Contingent liabilities arising from ex-ante contribution cases at EU level

46 Whether a court case requires disclosure as a contingent liability depends on whether it is likely to cause an outflow of economic resources (see paragraphs **07-08**). An outflow of economic resources can take the form of a cash outflow or a reduction in future contributions to be paid. In its final annual accounts for 2019, the SRB disclosed contingent liabilities of €186 million (2018: €50 million) related to nine (2018: seven) pending cases at the GC⁶⁰. In the nine cases, the plaintiffs are seeking an annulment of the SRB's ex-ante decisions pertaining to the 2017 and 2018 contribution cycles. Therefore, this chapter will first discuss these cases before considering cases related to the 2016 and 2019 contribution cycles.

47 The assessment of the nine cases as contingent liabilities is closely related to a judgment of the GC in November 2019 (see **Box 12**). In the judgment, the GC clarified a number of aspects concerning legal remedies against the SRB's calculation of ex-ante contributions to the SRF in general. Crucially, it affirmed that banks can challenge the SRB's ex-ante contribution decisions directly before the GC, although they are not the addressee of said decision. Furthermore, the GC identified certain flaws related to essential procedural requirements of the decision-making process in 2016, when the SRB was in its start-up phase.

Box 12 – General implications of the GC rulings of 28 November 2019 on the SRB's 2016 ex-ante contributions decision

- The SRB's decision on ex-ante contributions is not a preparatory but a final act, which is subject to judicial review by the EU courts;
- The addressees of the SRB's decision are the NRAs, as they are in charge of collecting the financial contributions from the credit institutions;
- Banks are directly and individually concerned by the SRB's decision on ex-ante contributions, as they are individually referred to by name in that decision, which also fixes their individual contribution; and

⁶⁰ SRB Annual Accounts 2019, p. 35.

- NRAs do not have any margin of discretion concerning the amounts of individual contributions indicated in that decision. They cannot modify those amounts and are required to collect them from the concerned institutions.

Source: ECA, based on the judgments of the GC in case T-365/16, joined cases T-377/16, T-645/16 and T-809/16 as well as case T-323/16.

48 The SRB claims that flaws identified by the GC related to procedural elements of the decision making process in 2016, when the SRB was in its start-up phase, have since been addressed. Nevertheless, it stated that there is a residual risk in the nine aforementioned cases that the court will find other procedural flaws related to the 2017 and 2018 ex-ante contribution decisions. Furthermore, as applicants have brought pleas of illegality, the SRB stated there is a risk that the GC may rule on the validity of the legal framework for calculating the ex-ante contributions. Indeed, in September 2020, the GC annulled the SRB’s ex-ante contributions decision for three banks due to infringements of essential procedural requirements and declared the calculation methodology outlined in Delegated Regulation 2015/63 as partly illegal (see [Box 13](#))⁶¹.

Box 13 – General implications of the GC rulings of 23 September 2020 on the SRB’s 2017 ex-ante contributions decision

The GC annulled the SRB 2017 ex ante contributions decision due to infringements of essential procedural requirements, which are lack of authentication and insufficient reasoning with respect to the three banks which asked for its annulment. The GC considered that the statement of reasons provided by the SRB does not enable the applicants to verify whether the amount of their contribution has been calculated correctly or to decide whether they should dispute that amount in court. The GC noted that, to the extent that the calculation of the applicants’ contributions depends on data from the other (approximately) 3 500 banks, that calculation is inherently opaque.

The ECA noted in its reports on the SRB’s 2017, 2018 and 2019 accounts that “for confidentiality reasons, the SRB cannot release the banks’ data used for the calculation of ex-ante contributions, which reduces transparency”⁶².

In one case, the applicant submitted a plea of illegality. The GC found that the infringement by the SRB of the obligation to state reasons, in respect of the part of

⁶¹ Judgments in cases T-411/17, T-414/17 and T-420/17 on 23 September 2020.

⁶² ECA Annual report on EU agencies for the financial year 2017, paragraph 2.7.

the calculation of the ex-ante contribution relating to the risk adjustment, derives from the methodology set out in Delegated Regulation 2015/63, which the GC considered to be unlawful in part. Consequently the GC considered that, in order for the SRB to adopt a new decision which would not be affected by insufficient reasoning, an amendment of Delegated Regulation 2015/63 is necessary. For this purpose, the GC maintained in that case the effects of the annulled SRB decision in respect of the applicant for six months from the day on which the judgment becomes final.

The SRB or the Commission may lodge an appeal against these decisions within two months. In absence of a successful appeal, the risk of losing other pending cases against ex-ante contributions decisions due to similar infringements of essential procedural requirements is high. Furthermore, the Commission would be required to adjust the current methodology and the SRB would need to adopt a new 2017 ex-ante contribution decision based on this adjusted methodology, for the three applicants. That recalculation may lead to a claim for reimbursement or compensation, if after recalculation, the amount of the contributions due by a bank is lower than what it actually paid in respect of 2017.

Source: ECA, based on the judgments of the GC in cases T-411/17, T-414/17 and T-420/17 on 23 September 2020.

49 The financial effects of an annulment are in part determined by the grounds on which a court case is annulled. As the GC's annulment of the SRB's 2016 ex-ante contribution decisions for three banks was on procedural grounds only, the calculation remained valid and the SRB proceeded by issuing a new decision on 2016 ex-ante contributions following a revised procedural approach. Further, the SRB's external lawyers confirmed that the GC's judgment in the 2016 ex-ante contributions cases is limited to the three banks concerned, so that the remaining 2016 contribution decisions remain effective vis-à-vis all other banks. Thus, while the annulment led to a legal claim of applicants against the SRB, this claim was only of temporary nature as it was offset by the SRB's new decision. Consequently, no actual outflow of resources occurred. Nevertheless, the SRB recognised a provision, as it will have to compensate the applicants in these three cases for their legal costs⁶³. The total provision amounting to €686 400 also includes estimated legal costs related to the nine aforementioned cases pertaining to the 2017 and 2018 contribution cycles, which were assessed as contingent liabilities (see paragraph 45).

50 In May, June and August 2020 the three banks filed applications at the GC for annulment of the SRB's new decision on 2016 ex-ante contributions. The SRB stated

⁶³ Final annual accounts of the Single Resolution Board – Financial Year 2019, p. 30.

that at the time of our audit it was not yet in a position to assess the risk of an outflow of resources for these cases and therefore did not disclose contingent liabilities. The GC has suspended the proceedings in two of the cases until the GC issues a ruling in several relevant pending ex-ante contribution cases⁶⁴.

51 At the time of signature of the final accounts (see paragraph 04), the SRB deemed the risk of an annulment of its ex-ante contributions decision for 2019 as remote, as it improved its procedures compared to preceding years, taking into account the existing judgments. However, in light of the GC's recent judgments (see **Box 13**) and the fact that the same calculation methodology was used from 2016 to 2020, the risk factors of all pending cases before EU courts changed.

52 In summary, we did not find any evidence that would contradict the conclusions made by the SRB based on available information at the time of the closing of the accounts in mid-June 2020. However, due to the GC's recent judgments (see **Box 13**) the risk factors related to pending cases against the SRB's ex-ante contributions decisions changed. Therefore, the SRB will have to take these developments into account.

Contingent Liabilities arising from ex-ante contribution cases at national level

53 To ensure adequate knowledge of its financial risks, the SRB created an oversight process for contingent liabilities arising from court cases at national level as part of its internal control system. The SRB asks NRAs to provide a detailed list of ongoing proceedings against ex-ante contributions, including applicants and amounts. 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. This information is provided to the SRB's accounting officer.

54 Based on the information received from NRAs, administrative and judicial proceedings have been brought against contribution decisions made by three NRAs. Two NRAs considered that for some of the pending administrative appeals and legal cases before the national courts, it is not possible to assess at this moment in time the probability of an outflow of economic resources, due to the complexity and novelty of the issues. In 2019, subject to the evolving case law, the ECA recommended to disclose

⁶⁴ The GC has suspended case T-336/20 until the judgments in cases T-411/17, T-414/17 and T-420/17 become final. Case T-339/20 has been suspended pending a judgment in cases T-420/17, T-413/18 and T-481/19.

contingent liabilities for all claims, which cannot be classified as “remote”⁶⁵. The SRB followed this recommendation and disclosed the total amount in dispute related to these appeals and legal cases, amounting to €1 861 million, as a contingent liability⁶⁶.

55 This system was established based on the SRB’s assumption that legal cases against ex-ante contributions at national level could lead to an outflow of resources. Going forward, the SRB’s financial reporting will have to take into account the CJ’s preliminary ruling on ex-ante contribution decisions for national proceedings (see paragraph 45 and *Box 11*). As only EU courts can rule on the legality of the SRB’s calculation of ex-ante contributions and related matters, national courts do not have competence to annul these decisions. It is therefore very unlikely that there will be an outflow of economic resources stemming from cases against ex-ante contributions at national level. Hence, it should not be necessary to disclose contingent liabilities in relation to such cases. Nevertheless, the SRB is well advised to continue to monitor and review national cases pertaining to ex-ante contributions to the SRF (see paragraphs 56-57 below), at least for a certain time period, given the possibility of requests for preliminary rulings by national courts.

Additional disclosure of ex-ante contributions challenged at EU and national level

56 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 for additional transparency. At 31 December 2019, these amount to around €4,9 billion, of which €2,5 billion were related to national cases and €2,4 billion to cases at the GC⁶⁷. Since then several further cases and appeals against ex-ante contribution decisions have been raised at national level (see *Table 4*). This disclosure provides useful background information for stakeholders.

⁶⁵ Report 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, Recommendation 2.

⁶⁶ Final annual accounts of the Single Resolution Board – Financial Year 2019, p. 35.

⁶⁷ Final annual accounts of the Single Resolution Board – Financial Year 2019, p. 36.

Table 4 – Evolution of disputed amounts at national level related to ex-ante contributions to the SRF

Contribution related to year	Number of cases May 2020	Challenged amounts May 2020 (in million EUR)	Number of cases May 2019	Challenged amounts May 2019 (in million EUR)
2020	31	669	n/a	n/a
2019	136	662	135	646
2018	114	587	114	587
2017	132	578	131	559
2016	240	563	240	563
2015	4	84	5	84
TOTAL	657	3 143	625	2 439

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

57 As stated in the SRB’s accounts, €315 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

58 Every year, the SRB collects administrative contributions to finance its operating costs (see [Picture 1](#)). 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 contributions⁶⁸. 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 being within their respective scope.

59 In February 2020, the SRB calculated the annual administrative contributions for the financial year 2020 based on ECB data collected in the previous financial year. Based on these calculations, it provided banks with the respective contribution

⁶⁸ EC Delegated Regulation No 2017/2361.

notices. Around 2 370 banks were notified about their 2020 administrative contributions (see Table 5). The amount to be raised by 26 March 2020 was €69,1 million. The deadline for payments expired on 26 March 2020. Significant institutions paid around 95 % of these contributions. Entities with smaller balance sheets benefitted from a reduction of parts of their fees⁶⁹. Overall the amount collected was lower than in 2019, as the SRB had accumulated a budget surplus in 2018 of €50,4 million. Where necessary, the 2020 contributions will be recalculated based on information on changes in scope or status of institutions during the next calculation cycle.

Table 5 – Administrative contributions invoiced by the SRB

	2020	2019	2018	2017	2016	2015
Number of banks notified	2 370	2 660	2 729*	2 819*	2 963*	3 060*
Total amount to be raised (in million EUR)	69,1	88,8	91,4	83,0	56,7	21,8

Source: SRB; amounts rounded to the nearest million; *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.

60 Administrative contribution notices can be appealed at the SRB’s appeal panel within six weeks⁷⁰. Decisions of the appeal panel can be contested in the GC. Banks brought no appeals against administrative contribution notices in 2019 or 2020. Consequently, the SRB did not disclose any contingent liabilities for administrative contributions. The lack of appeals and litigation indicates the suitability of the calculations.

⁶⁹ Administrative contributions consist of a Minimum Contribution Component and a Variable Contribution Component. The SRB halved the MCC for Significant Institutions and cross-border banks with total assets of €10 billion or less and Less Significant Institutions with total assets of €1 billion or less.

⁷⁰ Article 85(3) SRM Regulation.

Other legal proceedings and additional information

61 In May 2020, the SRB was notified about two actions at the GC in relation to staff matters⁷¹. However, as the applications were only served on 10 July 2020, the SRB did not disclose related contingent liabilities or information in its 2019 accounts⁷².

62 Certain SRB decisions, such as on administrative contributions and access to documents, can be appealed at the SRB's appeal panel⁷³. In 2019 and 2020 several new cases were brought before the SRB's appeal panel. However, these cases only concerned access to documents, so no contingent liabilities should arise.

63 The SRB demonstrated that it put adequate internal controls in place, which ensure an overview of relevant litigations before EU courts as well as national bodies. However, due to the nature of proceedings at national level, the SRB depends largely on the cooperation of the relevant NRAs. Based on the available overview and our previous recommendation, an internal assessment of risks per litigation category at EU level is conducted by the SRB's legal team and provided to the accounting officer. Developments are regularly reported to the SRB's board.

64 All proceedings initiated against the SRB and NRAs have a cost in terms of required financial and human resources. The costs will be borne directly by these authorities and consequently by all banks via their administrative contributions. In 2019, the SRB paid €2,2 million to external legal services related to legal proceedings for the years to come, down from €5,9 million in 2018. At year-end 2019, five full-time equivalents (FTEs) in the SRB's legal service were dealing with litigation, down from seven FTEs in 2018. As of 24 September 2020, this number increased to nine FTEs and two interim staff. In addition, the Litigation Team is regularly supported by staff allocated to the Legal Advice Team within the SRB's Legal.

Part II: Contingent liabilities of the Commission

65 The European Commission confirmed that at 31 December 2019 there were no contingent liabilities arising based on its task under the SRM Regulation.

⁷¹ Cases T-270/20 and T-271/20.

⁷² Final annual accounts of the Single Resolution Board – Financial Year 2019, p. 37.

⁷³ Article 85 SRM Regulation.

66 EU case law⁷⁴ 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 Council⁷⁵.

67 On 7 June 2017, the Commission endorsed the first resolution scheme⁷⁶, adopted by the SRB. In relation to this scheme, 26 legal proceedings were pending before the GC against the Commission⁷⁷ in June 2020. While all 26 applicants brought actions for annulment of the Commission's decision, five applicants also brought actions for damages. These cases are still in progress and have not yet 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 paragraph **02**), the Commission did not conduct a State aid or Fund aid assessment.

68 As was the case for the 2018 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 **17**). Therefore, in the Commission's view, an outflow of resources relating to its endorsement decision is remote. Furthermore, the Commission stated that no applicants could have suffered damages, 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 would have been compensated by the SRF under the "no-creditor worse off" procedure (see paragraphs **37-40**). The Commission therefore stated that, based on its comprehensive

⁷⁴ 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].

⁷⁵ Article 18(7) SRM Regulation.

⁷⁶ Endorsement of the resolution scheme concerning Banco Popular Español S.A. (BPE).

⁷⁷ Only in one of these 26 cases is the Commission the sole defendant.

experience, the financial risk potentially arising from these cases for the Commission is remote.

69 Based on the review of our 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.

70 In addition to cases relating to the resolution of BPE, the Commission was subject to two court cases⁷⁸ seeking the annulment of ex-ante contributions decisions and damages. In both cases, the Commission is the defendant, together with the SRB. While the SRB might have to reimburse applicants in case of an annulment of its ex-ante contributions decision, the Commission's risk would be limited to the reimbursement of applicant's legal costs. While the SRB has disclosed a contingent liability in relation to one of the two cases, the Commission is of the opinion that no illegal behaviour can be imputed to it and thus, did not disclose any contingent liabilities. Both cases have been stayed by the GC until the rulings of 23 September 2020 in the three 2017 ex-ante contribution cases (see **Box 13**) become final.

Part III: Contingent liabilities of the Council

71 We received a representation letter from the accounting officer of the Council stating that at 31 December 2019 the Council had no contingent liabilities arising due to the performance of its tasks under the SRM Regulation.

72 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 **66**).

73 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

⁷⁸ Cases T-386/18 and T-400/19.

ruled inadmissible insofar as it was directed at the Council⁷⁹ in 2018. Thus, no contingent liabilities arise for the Council.

⁷⁹ Order of the General Court (Eighth Chamber) of 14 June 2018 — Cambra Abaurrea v Parliament and Others (Case T-553/17).

Conclusions and recommendations

74 We note that any predictions at this stage concerning the outcome of the legal proceedings in relation to resolution and non-resolution decisions against the SRB and the Commission 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 and the Commission on any contingent liabilities arising as a result of the performance of their tasks under the SRM Regulation (see paragraphs [25](#) and [36](#)). Consequently, no contingent liabilities are disclosed in relation to these cases.

75 The SRB has continued to improve its accounting presentation of contingent liabilities related to ex-ante contributions to the SRF. For the 2019 accounts, the SRB disclosed contingent liabilities amounting to €186 million in relation to cases against the 2017 and 2018 contribution cycles pending at EU courts (see paragraph [45](#)). The disclosure was prudent, particularly as the GC annulled the SRB's decisions on 2017 ex-ante contributions for three banks in September 2020 due to lack of authentication and insufficient reasoning, in one case based on the partially illegal framework underpinning the decision (see [Box 13](#)). In absence of a successful appeal, the risk of annulment in all pending cases against ex-ante contribution decisions is high. Therefore, taking into account any developments, the SRB will have to reassess all pending cases related to ex-ante contributions for its 2020 accounts.

76 The SRB also improved its presentation of contingent liabilities related to national proceedings against ex-ante contributions. Two of three NRAs dealing with these proceedings stated that they were unable to assess the risk of on-going cases. In line with our recommendation in 2019, the SRB disclosed the corresponding amounts as contingent liabilities totalling €1 861 million, as an outflow of resources cannot be excluded beyond reasonable doubt (see paragraph [54](#)). However, given the CJ's recent preliminary ruling (see [Box 11](#)), national courts are not competent to review the SRB's decisions on ex-ante contributions to the SRF. Consequently, ex-ante contribution decisions disputed in national proceedings alone are very unlikely to lead to an outflow of economic resources for the SRB. Therefore, they should not require related disclosures of contingent liabilities.

77 The SRB has been notified of new legal cases before EU courts in relation to:

- its decision not to compensate shareholders and creditors of BPE under the NCWO principle (see paragraph [40](#));

- its new decision on 2016 ex-ante contributions to the SRF (see paragraph 50);
- its decision on 2020 ex-ante contributions to the SRF (see paragraph 44); as well as
- two cases related to staff matters (see paragraph 61).

However, as these cases were filed within weeks of the signature of the SRB's final accounts and require a thorough assessment of the application, the SRB's legal service stated that the assessment of the related risk was ongoing. Thus, the related risk was not assessed in time for the 2019 accounts. These cases will need to be considered in the SRB's 2020 accounts.

Recommendation 1 – Recent judgments and litigation

In light of the CJ's and the GC's recent judgments and any subsequent developments, the SRB should reassess the risk for all pending proceedings against its decisions on ex-ante contributions to the SRF and assess any new judicial proceedings.

Timeframe: Presentation of the SRB accounts for 2020

78 To ensure that the accounts provide a true and fair view, the accounting officer needs to obtain any relevant information. For the creation of the SRB's 2019 accounts, the SRB's accounting officer was provided with a risk assessment per category of ongoing litigations by the SRB's legal service (see paragraph 63). Unlike for the 2018 accounts, the risk assessment also included some underlying reasoning. Furthermore, the accounting officer received comprehensive information from NRAs on national proceedings in relation to ex-ante contributions (see paragraph 53), but not on national proceedings in relation to the resolution of BPE (see paragraph 31).

Recommendation 2 – Information to be provided to the accounting officer

The SRB should consider all legal cases for its final accounts to ensure that they provide a true and fair view. This includes any information that could lead to an outflow of economic resources, such as national proceedings against implementing decisions of endorsed resolution schemes.

Timeframe: Presentation of the SRB accounts for 2020

This Report was adopted by Chamber IV, headed by Mr Alex Brenninkmeijer, Member of the Court of Auditors, in Luxembourg on 10 November 2020.

For the Court of Auditors

A handwritten signature in black ink, appearing to read 'K-H Lehne', written in a cursive style.

Klaus-Heiner Lehne

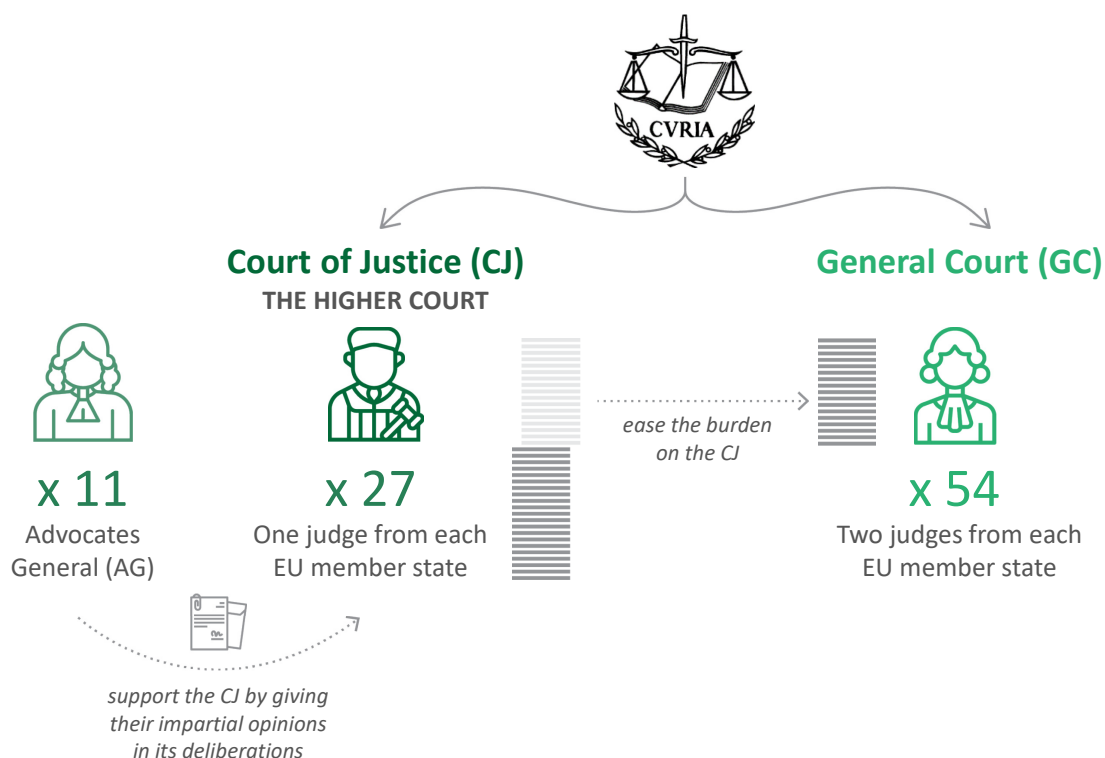
President

Annexes

Annex I – The Court of Justice of the European Union and available legal remedies against decisions of EU institutions, bodies, offices and agencies

01 The CJEU (see [Picture 1](#)) 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. 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.

Picture 1 – Composition of the Court of Justice of the European Union

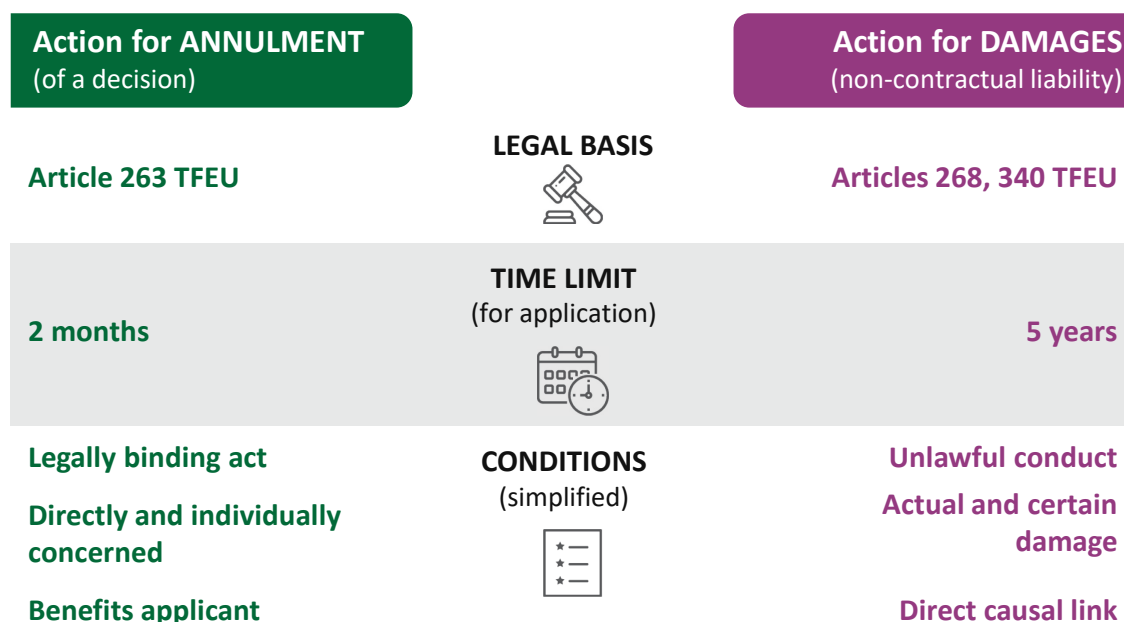


Source: ECA.

02 There are different judicial remedies, which natural and legal persons may use against decisions of EU institutions, bodies, offices, and agencies (see [Picture 2](#)). 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 decision⁸⁰.

Picture 2 – Available judicial remedies against decisions of EU institutions, bodies, offices and agencies



Source: ECA based on the TFEU and case law.

03 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 liabilities⁸¹ 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.

04 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

⁸⁰ 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.

⁸¹ Article 268 TFEU, Article 87(5) of SRM Regulation and Article 46 of the Statue of the Court of Justice.

sought. Within two months⁸², 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 3](#)). Judgments can be appealed within two months and ten days after the notification of the decision to the parties.⁸³ If they are not appealed, they become final after this period.

Picture 3 – Typical process of cases at the CJEU



Source: ECA.

⁸² 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.

⁸³ Article 56 of the Statute of the Court of Justice.

Annex II – Follow-up of previous year's recommendations

Year of issuance	Recommendation	Status	Detail
2019	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.	Completed	The SRB has assessed the risks per category of cases, including certain reasons for its conclusions.
2019	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.	Completed	The SRB has disclosed collected ex-ante contributions under dispute at national level as contingent liabilities in cases which could not be assessed by the respective NRA.

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
FTEs	Full-time equivalents
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

The SRB's reply

The SRB takes note of this report and would like to thank the ECA for the good cooperation during the audit.

Recommendation 1. The SRB accepts ECA's recommendation 1.

Recommendation 2. The SRB accepts ECA's recommendation 2.

Reply of the Commission

to the report of the European Court of Auditors 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 and the Commission of their tasks under this Regulation for the financial year 2019

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

The Council's reply

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

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 Rimantas Šadžius, supported by Mindaugas Pakstys, Head of Private Office; Joanna Metaxopoulou, Director; Paul Stafford, Principal Manager; Matthias Blaas, Head of Task; Carlos Soler Ruiz, Nadiya Sultan, Auditors; Andreea-Maria Feipel-Cosciug, Legal Advisor.



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