



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 2020 financial year**

Together with the replies of the SRB, the Commission and the Council

**About the report:**

The Single Resolution Mechanism is the EU system for managing the resolution of failing banks in the euro area, with the Single Resolution Board (SRB) having a central role, together with the Commission and the Council. The SRB oversees the Single Resolution Fund (SRF), which can be used in bank resolutions. We have an annual obligation to report on any contingent liabilities arising.

So far, the SRF has not been called upon, but there are a considerable number of ongoing legal proceedings relating to a first resolution and other decisions, as well as ex-ante contributions to the SRF. For the 2020 financial year, the SRB reported contingent liabilities relating to legal challenges to ex-ante contributions, but none relating to a resolution decision. We found no evidence that would contradict the SRB's assessment. We do, however, note that subsequent court judgments in 2021 may affect the amount of the contingent liabilities disclosures related to ex-ante contributions to the SRF.

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## Executive summary

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

**II** We have an obligation to report annually on any contingent liabilities of the SRB, the Commission, or the Council arising from the performance of their resolution tasks. Contingent liabilities and provisions reflect the financial risk to which these bodies are exposed. On 16 June 2021, 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.

**III** There are 100 cases at EU level related to the resolution of Banco Popular Español S.A. that took place 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 at EU courts. Given the number and complexity of cases in relation to this resolution and the similar pleas in law, the General Court had initially identified and selected six pilot cases to proceed to the second round of written procedure and oral hearing of which five are still pending. Furthermore, 1 451 administrative proceedings and court cases concerning the resolution of Banco Popular Español S.A. were brought at national level. There are also three actions seeking the annulment of the SRB's non-resolution decisions for two ABLV banks and PNB Banka before EU courts.

**IV** The SRB decided not to disclose contingent liabilities, in any of the above-mentioned cases, as it assessed the related risk as "remote". We note that it is difficult to predict the outcome of these legal proceedings at this stage, as the legal framework for resolution was applied for the first time at EU level in the Banco Popular Español S.A. case and as there is no related case law. We found no evidence that would contradict the SRB's assessment.

**V** Moreover, following the resolution of Banco Popular Español S.A., in March 2020, the SRB concluded that no shareholder or 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 the General Court. This court has declared one application inadmissible but the applicant has filed an appeal. In relation to this, the SRB did not disclose contingent liabilities as it considered the likelihood of a negative outcome as “remote”.

**VI** The SRB collects ex-ante contributions to the Single Resolution Fund. In June 2021, there were 44 cases against decisions on ex-ante contributions. The SRB has disclosed contingent liabilities of €5 561 million relating to 41 legal proceedings as it assessed the risk of an outflow of economic resources from those proceeding as “possible”. The SRB did not disclose any contingent liabilities in relation to legal proceedings against ex-ante contribution decisions pending at national level. It assessed the risk of an outflow of economic resources from such proceedings as “remote”. This was based on a Court of Justice judgment that ruled that national courts do not have competence to annul these decisions.

**VII** We note that the SRB followed a prudent approach in this case. However, we observe that a Court of Justice judgment of July 2021 (subsequent to the 2020 accounts) found the legal basis used for the calculation of the ex-ante contributions to be valid. It also stressed that the SRB could provide to the bank concerned a more detailed reasoning of its ex-ante contribution decisions, without infringing business secrets of other banks. This judgment may have an impact on the pending ex-ante contribution cases at the General Court, where the reasoning provided by the SRB does not meet the standards of the Court.

**VIII** The Commission is also subject to legal proceedings before EU courts relating to the resolution of Banco Popular Español S.A., 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 economic 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, based on the available information at the closure of the 2020 accounts. Considering subsequent events, such as the Court of Justice’s judgment on ex-ante contributions, we recommend that the SRB should reassess the amounts at risk based on a new method for all pending ex-ante contribution cases. Additionally, although in view of the case law, the risk of an economic outflow for the SRB stemming from national cases seems remote, we recommend that the SRB should re-introduce its process for monitoring national cases

by asking National Resolution Authorities to provide an annual assessment of the risk of outflow of economic resources for the SRB.

# Introduction

**01** The Single Resolution Mechanism (SRM) was established by Regulation (EU) No 806/2014 of the European Parliament and of the Council<sup>1</sup> (SRM Regulation); it is the second pillar of the EU's banking union. Its purpose is to manage the resolution of banks, which are failing or are likely to fail (FOLTF), with the aim of minimising the impact on the real economy and recourse to public funds. The Single Resolution Board, is the key player within this mechanism and is the resolution authority for all significant banks<sup>2</sup> and less significant cross-border banking groups established in the euro area<sup>3</sup>. The SRB became an independent body on 1 January 2015, and has full resolution powers since 1 January 2016.

**02** The process leading to the decision to place a bank under resolution involves the European Central Bank (ECB), the SRB, the European Commission and, potentially, the Council of the EU<sup>4</sup>. 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 us 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. We may request any information relevant for performing our task<sup>5</sup> from each of these bodies.

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<sup>1</sup> OJ L 225, 30.7.2014, p. 1.: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0806&from=EN>

<sup>2</sup> The term “bank” in this report refers to entities as defined under Article 2 of the SRM Regulation.

<sup>3</sup> A list of banks for which the SRB is the resolution authority can be found at: <https://www.srb.europa.eu/en/content/banks-under-srbs-remit>

<sup>4</sup> Article 18 of the SRM Regulation.

<sup>5</sup> 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 Regulation<sup>6</sup>. It covers the 2020 financial year. In addition to contingent liabilities arising during 2020, the accounting officer is obliged to take into account any relevant information obtained up to the date of presentation of the final accounts<sup>7</sup>. Thus, adjustments or additional disclosures may be required for a true and fair presentation of the accounts, and may include information obtained during 2021. The accounts as at 31 December 2020 were presented:

- by the Single Resolution Board on 16 June 2021;
- by the European Commission on 18 June 2021;
- by the Council of the European Union on 31 May 2021.

**05** We have also audited the annual accounts of the SRB<sup>8</sup>, the European Commission and the Council<sup>9</sup> for the 2020 financial year. The results of these audits are presented in other reports.

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

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<sup>6</sup> Article 92(4) SRM Regulation.

<sup>7</sup> Article 98(4) Commission Delegated Regulation (EU) 2019/715.

<sup>8</sup> Annual report on EU agencies for the 2020 financial year (29.10.2021).

<sup>9</sup> ECA Annual reports concerning the 2020 financial year (26.10.2021).

## 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 economic 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 economic resources (in general of cash) must be assessed. If a future outflow of resources is:

- 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 “possible” as one of between 10 % and 50 % (see [Figure 1](#)). The Commission defines “remote” as a probability of less than 20 % and “possible” as one of between 20 % and 50 %.

**Figure 1 – Probabilities defined by the relevant EU bodies**



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:

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

### **Audit approach**

**10** At the date of the published accounts, there were ongoing judicial proceedings against the SRB and the Commission in relation to their tasks under the SRM Regulation (see [Table 1](#)). There were no ongoing judicial proceedings against the Council. For the 2020 financial year, the SRB disclosed contingent liabilities amounting to €5 561 million, while the Commission did not disclose any contingent liabilities. The disclosed contingent liabilities are all related to ex-ante contributions to the SRF. For our audit, we selected a sample of 33 cases pending before the EU courts and reviewed the relevant case files.

**Table 1 – Judicial proceedings against the SRB and/or the Commission in relation to their tasks under the SRM Regulation**

Cases related to	Before EU Courts	Before national courts or administrative proceedings	Paragraphs in this report
Resolution of Banco Popular Español S.A. (BPE)	100	1 451	15-20; 22-30; 66-70; 75
Decisions on non-resolution of ABLV and PNB Banka	3	Not applicable	31-35
No-creditor-worse-off decision for BPE	6	Not applicable	36-39
Other cases related to BPE	4	0	21, 40
Ex-ante contributions	44	682	41-61; 71; 76-79
Administrative contributions	0	Not applicable	62-64
<b>TOTAL</b>	<b>157</b>	<b>2 133</b>	

*Source:* ECA, based on SRB and Commission data at the date of signature of accounts; For further details see the relevant paragraphs; The table does not include cases solely requesting access to documents or human resources cases that are not relevant to the SRB tasks under the SRM Regulation.

**11** In addition to the sample of court cases, our audit evidence included information gathered through interviews with staff, documentation from the SRB, the Commission and the Council and representation letters from external lawyers. We assessed the internal system the SRB has established to monitor proceedings at national level and analysed the evidence from some National Resolution Authorities (NRA's), as well as publicly available data. We also reviewed documentation from the SRB's private external auditor, which was tasked to verify the SRB's annual accounts<sup>10</sup>.

<sup>10</sup> Article of the 104(1) Commission Delegated Regulation (EU) 2019/715 stipulates that a private external auditor shall verify the SRB's annual accounts. We shall consider the audit work performed by the private external auditor for preparing our specific annual report on the SRB, as required by Article 287(1) Treaty on the functioning of the European Union (TFEU).

# Observations

## Part I: Contingent liabilities of the SRB

**12** The SRB's accounts consist of two parts (see *Figure 2*). Part I reflects the SRB's daily operations. It is funded through annual administrative contributions by 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 6*). In addition, under certain circumstances, the SRB can collect ex-post contributions. If necessary, the financial resources of the SRF can be used to support a resolution through specific tools, if a number of conditions are fulfilled<sup>11</sup>.

**Figure 2 – Budget of the Single Resolution Board**

	Part I	Part II
	<b>OPERATIONS</b>	<b>SINGLE RESOLUTION FUND</b>
 <b>FUNDING</b>	Administrative contributions	Ex-ante contributions
 <b>EXPENDITURE</b>	SRB staff, offices, operations	Resolution financing*

Source: ECA, based on Regulation (EU) 806/2014; \*subject to certain limitations.

**13** In a representation letter covering the annual accounts for the 2020 financial year, the SRB's accounting officer confirmed that all contingent liabilities have been disclosed.

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

<sup>11</sup> See Article 76 SRM Regulation.

## Contingent liabilities related to legal proceedings following resolution decisions

**15** On 7 June 2017 the first, and so far, only resolution at EU level took place for BPE. The SRB adopted the resolution scheme for BPE and the Commission endorsed it. 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 Banka under resolution have been brought against the SRB and the Commission (see [Table 2](#)).

**Table 2 – Legal proceedings against the SRB and the Commission in relation to resolution decisions before the Court of Justice of the European Union at 16 June 2021**

Cases related to	Number of joint SRB and Commission cases	Number of SRB-only cases	Number of Commission-only cases	Total
Resolution decision on BPE	29	70	1	<b>100</b>
Decision on ABLV Bank AS and ABLV Bank Luxembourg	0	2	0	<b>2</b>
AS PNB Banka	0	1	0	<b>1</b>
<b>TOTAL</b>	<b>29</b>	<b>73</b>	<b>1</b>	<b>103</b>

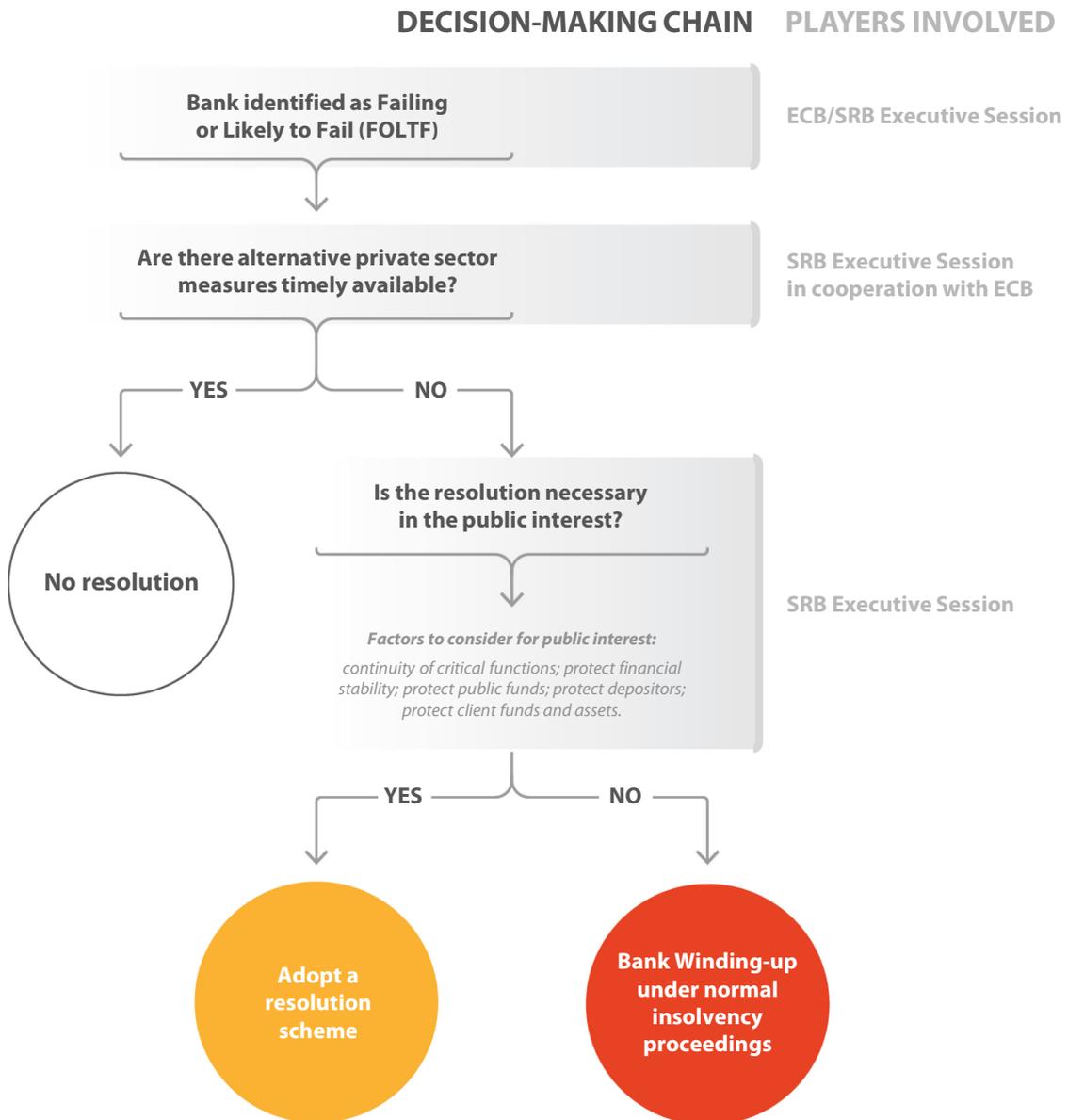
*Source:* ECA, based on SRB data; The table does not include cases solely requesting access to documents or cases related to the no creditor worse off process (Valuation 3 decision).

**16** 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](#)).

### Actions against a resolution decision

**17** In June 2017, BPE was 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 (see [Figure 3](#)). This saw the write-down and conversion of capital instruments and the sale of the bank for €1 (see [Box 2](#)).

**Figure 3 – The Single Resolution Mechanism (Resolving Failing Banks)**



Source: ECA and relevant legal framework (Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014).

## Box 2

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

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

*Source:* Decision of the Single Resolution Board of 7 June 2017 (SRB/EES/2017/08); Tier 1 instruments usually consists of shareholders' equity and retained earnings; Tier 2 instruments can include hybrid capital instruments, subordinated debt and reserves.

**18** When the SRB published its 2020 accounts, out of the open 100 cases related to decisions on whether to adopt a resolution scheme on BPE, 23 involved applicants seeking compensation for alleged damages in addition to their request for annulment of the resolution decision. Of the 100 cases, 12 involved applicants who had brought claims only for damages allegedly suffered.

**19** Given the number and complexity of cases in relation to the resolution of BPE and the similar pleas in law, the General Court (GC) identified and selected six pilot cases<sup>12</sup> to proceed to the second round of written procedure and oral hearing<sup>13</sup>. Of these six proceedings, the SRB is the sole defendant in two, the Commission in one, while the SRB and Commission are joint defendants in the remaining three. All other cases have been suspended by the GC, pending a final judgment in these six pilot cases. In October 2019, the GC ruled on the first of the pilot cases and declared it inadmissible<sup>14</sup>. The applicants have brought an appeal against this order before the

<sup>12</sup> Article 69(d) of the Rules of Procedure of the GC allows the latter to stay the proceedings in particular cases where the proper administration of justice so requires.

<sup>13</sup> SRB annual report 2020, section 5.4.1.

<sup>14</sup> Order of the General Court on 24 October 2019 in case T-557/17.

Court of Justice (CJ), which settled it by the judgment of 4 March 2021 (see [Box 3](#))<sup>15</sup>. The oral hearings concerning the remaining five pilot cases took place in June 2021.

### Box 3

#### First BPE pilot case dismissed

In first instance, the GC dismissed the action lodged by a bondholder, seeking the partial annulment of the BPE resolution decision, on the ground that the annulment of the conversion of certain Tier 2 instruments would alter the substance of the resolution decision.

In appeal, the CJ confirmed the decision of the GC and dismissed the appeal. The CJ held that the elements of the resolution decision relating to the writing down and conversion of capital instruments cannot be separated from the other elements of that decision and, in particular, from the decision to use the sale-of-business resolution tool.

Therefore, the CJ concluded that the GC correctly considered that Article 6(1)(d) of the resolution decision was intrinsically linked to the very substance of the resolution decision. Consequently, the partial annulment of that decision would have undermined the substance of that decision which presupposed that all the Tier 2 instruments of BPE were written down and then converted into newly issued shares of BPE.

**20** Resolution has to be based on the valuation of the bank, which is failing or likely to fail. As a resolution can become urgent within a short timeframe, the legal framework stipulates the use of a provisional valuation<sup>16</sup>. While the SRM regulation stipulates that an ex-post definitive valuation must be 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.

**21** Some applicants brought actions for annulment before the GC against the SRB. The GC already issued an order in two cases<sup>17</sup>, rejecting the actions as inadmissible. The GC's rulings have been appealed before CJ<sup>18</sup>. In both cases, the Advocate General

<sup>15</sup> Case C-947/19 P.

<sup>16</sup> Article 20(10) SRM Regulation.

<sup>17</sup> Cases T-2/19 and T-599/18.

<sup>18</sup> Cases C-874/19 P and C-934/19 P.

issued her opinion of 8 July 2021 supporting the SRB's position that the original applications were inadmissible.

**22** Some applicants claim that they are entitled to compensation if the SRB's or the Commission's decisions are annulled. However, based on EU case law, actions for annulment and actions for damages pursue different purposes. Therefore, even in the event that the appeals are upheld, the risk that these applications will lead to contingent liabilities other than legal costs is remote.

**23** For its 2020 final accounts, the SRB assessed the likelihood of an outflow of economic resources as a result of the pending BPE cases to be "remote"<sup>19</sup> and therefore it did not disclose any contingent liabilities. The SRB based its conclusion on its assessment of the submissions and evidence brought forward by the parties, whilst recognising the novelty and complexity of the relevant legal framework and the absence of relevant case law. In addition, the SRB pointed out that no fair estimate of the amounts under litigation can be established.

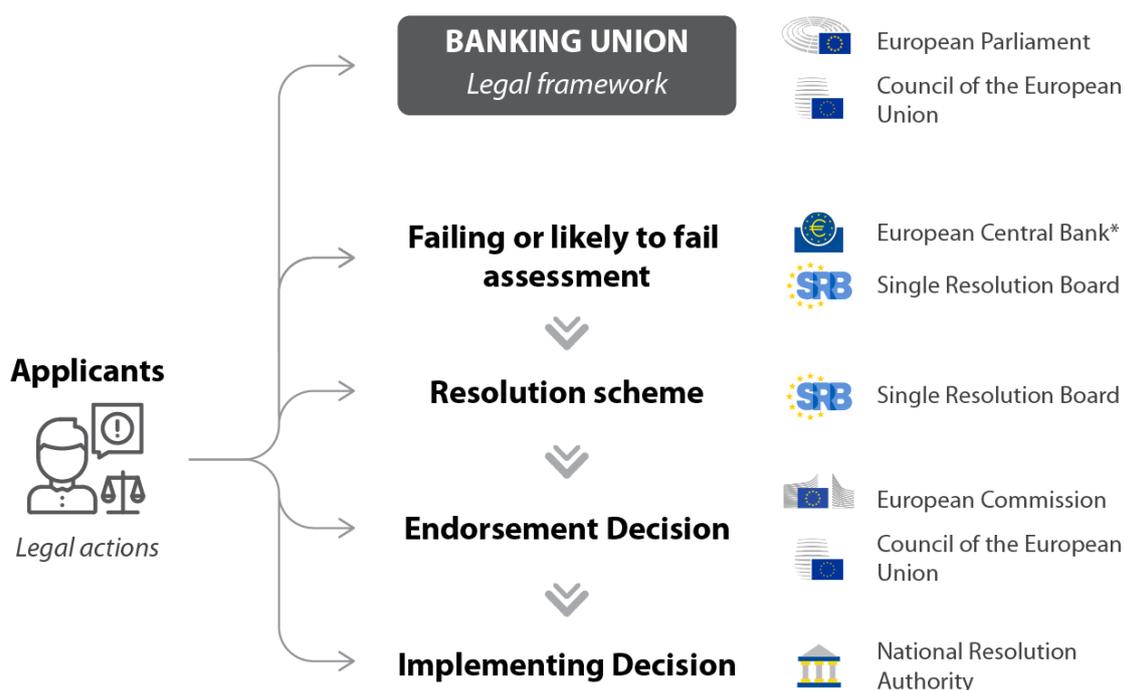
**24** We note that BPE was the SRB's first resolution case and that the assessment of legal cases is inherently subjective as it is based on expert judgement. While numerous cases have been filed, no judgments have so far been issued on material pleas in law and there is therefore no case law at EU level. Based on the reviewed audit evidence, we found that some applicants have claimed that the conditions for a non-contractual liability of the EU are fulfilled. While it is difficult to predict the outcome of these legal proceedings at this stage due to the complex, specific and unprecedented legal system of the legal framework for resolution, the audit evidence we examined does not contradict the conclusion reached by the SRB at its 2020 account that no contingent liabilities are needed.

**25** Within their actions for annulment and/or damages, some applicants have also brought pleas of illegality (see [Figure 4](#)). They claim that the legal framework underlying the resolution of BPE, such as provisions of the SRM Regulation, is not compliant with the TFEU and the Charter of Fundamental Rights of the European Union. If the EU courts agree, the disputed provision of the legal framework may hence be considered inapplicable.

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<sup>19</sup> Final annual accounts of the Single Resolution Board – Financial Year 2020, p. 36.

**Figure 4 – 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.

**26** Furthermore, annulment actions were brought against the ECB's failing or likely to fail decision (see [Box 4](#)), the Commission's endorsing decision (see [Table 2](#) and paragraph [68](#)) and the implementing decision (see paragraph [28](#)) by the NRA of Spain, Fondo de Reestructuración Ordenada Bancaria (FROB).

## Box 4

### Failing or likely to fail decisions by the ECB 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 decisions<sup>20</sup> 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”. Furthermore, the GC considered that the ECB “has no decision-making power within the framework for the adoption of a resolution scheme”<sup>21</sup>.

In an appeal case<sup>22</sup>, the CJ confirmed that while the ECB has a primary role in making the FOLTF assessment, given its expertise as supervisory authority, it however shares that power with the SRB. Therefore, the ECB’s FOLTF assessment is not binding on the SRB. Since this assessment is not a final act which definitively determines the institution’s position and which is intended to have legal effects capable of affecting the interests of a financial entity, the ECB’s FOLTF assessment is not an act that can be challenged before EU courts, under Article 263 TFEU.

Furthermore, a FOLTF assessment does not formally require a decision on whether the authorisation of a financial entity must be withdrawn.

## Actions against the implementing decision of a resolution scheme

**27** The SRM Regulation provides that following a resolution decision, under certain circumstances, the SRB may have to compensate NRAs for damages they have been ordered to pay by a national court<sup>23</sup>. It is therefore important that the SRB is aware of damage cases pending against NRAs in participating Member States.

**28** 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, FROB issued an implementing decision in June 2017<sup>24</sup>. A number of administrative appeals, liability claims and court proceedings

<sup>20</sup> Article 18(1) of Regulation (EU) No 806/2014.

<sup>21</sup> Order of the General Court in case T-281/18 on 6 May 2019, paragraphs 34 and 36.

<sup>22</sup> Judgment of 6 May 2021 in joined cases C-551/19 P and C-552/19 P, ABLV Bank v ECB and Bernis and Others v ECB.

<sup>23</sup> Article 87(4) of SRM Regulation.

<sup>24</sup> [Decision adopted by FROB’s Governing Committee on June 7, 2017 concerning Banco Popular Español S.A.](#)

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 claims<sup>25</sup>.

**29** Based on FROB's latest available report of September 2021, FROB had received 118 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 263 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 and related aspects such as the confidentiality of related administrative files. Six suspension decisions have been appealed before the Spanish Supreme Court, which declared inadmissible five appeals while one appellant eventually withdrew its appeal.

**30** We note that the national proceedings depend to a large extent on the validity of the resolution scheme and the Commission's endorsing decision. We found that FROB provided the SRB with regular information on national proceedings. In case of successful outcome for the appellants of the 263 court proceedings pending before the national courts resulting in damages to be repaid by the FROB, the SRB may have to return totally or partially the corresponding amounts<sup>26</sup>. In this context, FROB in its representation letter to the SRB assessed that it is difficult to reasonably predict the outcome of these litigations due to the complex, specific and unprecedented legal system created by the new resolution legal framework. Therefore, the SRB disclosed the nature of contingent liabilities associated with this litigation, but considers it is not in a position to quantify the financial effect. We acknowledge the SRB's approach.

### **Actions against non-resolution decisions**

**31** In addition to the first resolution decision, the SRB announced in 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 necessary in the public interest (see [Figure 3](#)). The SRB's decision followed the ECB's assessment that

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<sup>25</sup> Article 28(1)(b)(iii) SRM Regulation.

<sup>26</sup> Article 87(4) of SRM Regulation.

the banks were "failing or likely to fail" due to a significant deterioration of their liquidity situation<sup>27</sup>.

**32** In May 2018, the SRB was notified of two court cases brought before the GC against its decision 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"<sup>28</sup> 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 GC in 2020, on the grounds that the contested SRB decisions do not directly concern the applicants, within the meaning of the fourth paragraph of Article 263 TFEU<sup>29</sup>. However, the GC order was, at the time of this audit under appeal and the written procedure was closed<sup>30</sup>.

**33** In August 2019, the ECB declared that AS PNB Banka was 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 was not necessary 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 Commission for implementation in accordance with national law<sup>31</sup>.

**34** 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. The GC suspended the case until the CJ decided on the appeal brought in the ABLV and shareholders v. EBC case<sup>32</sup>. 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 liability<sup>33</sup>.

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<sup>27</sup> [ECB Failing or Likely to Fail assessments of ABLV Bank AS and ABLV Luxembourg adopted by the ECB on 23 February 2018.](#)

<sup>28</sup> Final annual accounts of the Single Resolution Board – Financial Year 2020, p. 37.

<sup>29</sup> Order in case T-282/18 on 14 May 2020, paragraph 46.

<sup>30</sup> Case C-364/20 P.

<sup>31</sup> SRB annual report 2019, section 3.1.

<sup>32</sup> Joint cases C-551/19 P and C-552/19 P.

<sup>33</sup> Final annual accounts of the Single Resolution Board – Financial Year 2020, p. 37.

**35** We consider that contingent liabilities other than legal costs were not necessary in the above cases, as the applicants were currently only asking the GC to annul the SRB's decision.

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

**36** To safeguard fundamental property rights<sup>34</sup>, the SRM Regulation provides that no creditor shall be left worse off under resolution than they would be under normal insolvency proceedings. Based on the "no creditor worse off" (NCWO) principle<sup>35</sup>, any creditors who would have received better treatment under normal insolvency proceedings must be compensated by the SRF<sup>36</sup>. To assess the treatment of creditors and shareholders, a valuation of difference in treatment has to be conducted (see [Box 5](#)).

#### Box 5

##### Valuation of difference in treatment

After a resolution, an independent valuer assesses whether shareholders and creditors affected by the resolution are entitled to compensation. The valuation process 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 procedure.

*Source:* ECA analysis of SRM Regulation.

**37** In June 2018, the SRB announced that Deloitte, the independent valuer, had released its report on valuation of difference in treatment for the BPE resolution. Based on the outcome of this valuation and the preliminary conclusion that no creditor would have been better off under national insolvency, the SRB published a notice in August 2018 regarding its preliminary decision not to pay compensation to the

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<sup>34</sup> Article 17(1) CFREU.

<sup>35</sup> Articles 15(1g) of SRM Regulation.

<sup>36</sup> Articles 20(16) and 76(1e) of SRM Regulation.

shareholders and creditors affected by the BPE resolution<sup>37</sup>. The SRB estimated that there are around 300 000 of them<sup>38</sup>.

**38** The SRB then began a “right to be heard” process<sup>39</sup> for affected creditors and shareholders (see *Figure 5*). This allowed registered parties to submit written comments on the preliminary decision not to grant them compensation. During this process, which was held in November 2018, the SRB received 2 856 submissions from eligible creditors and shareholders. In March 2020, the SRB published its final decision<sup>40</sup> stating that since insolvency would have been more costly than resolution, no compensation was due to BPE shareholders and creditors<sup>41</sup>.

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<sup>37</sup> Notice of the Single Resolution Board of 2 August 2018 regarding its preliminary decision on whether compensation needs to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular Español S.A. have been effected and the launching of the right to be heard process (SRB/EES/2018/132).

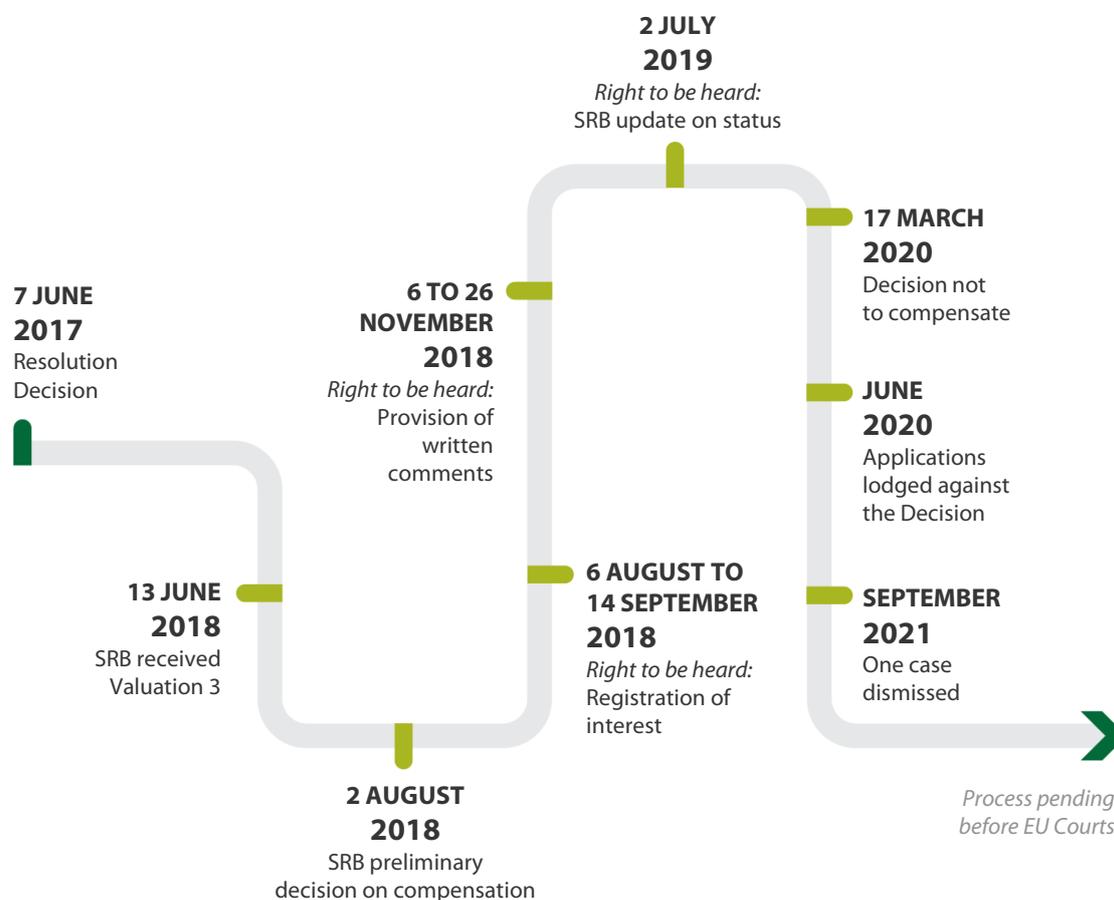
<sup>38</sup> SRB annual report 2018, footnote 16, p. 32.

<sup>39</sup> Based on Article 41(2a) Charter of Fundamental Rights of the European Union.

<sup>40</sup> 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.

<sup>41</sup> SRB annual report 2019, p. 32.

**Figure 5 – No creditor worse off process timeline for Banco Popular Español S.A.**



Source: ECA.

**39** A number of shareholders and creditors decided to request the annulment of the SRB's final decision before the GC. They filed seven applications by June 2020. In addition to annulment, one applicant also claimed 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 economic resources, as a new SRB decision would be required. The GC has declared one of these seven applications inadmissible<sup>42</sup>, which was confirmed in September 2021 by the CJ in the appeal<sup>43</sup>. The GC joined three of these seven applications<sup>44</sup>. In its 2020 accounts, the SRB did not disclose contingent liabilities related to the NCWO principle as it considers that for

<sup>42</sup> Application in case T-257/20.

<sup>43</sup> Case C-27/21 P, Order of the Court of 30 September 2021.

<sup>44</sup> Cases T-302/20, T-303/20 and T-307/20.

these cases the likelihood of a negative outcome can be considered as “remote”. We did not find any evidence that would contradict the SRB’s assessment.

### Litigation against a decision of the European Data Protection Supervisor

**40** SRB lodged an application before the GC<sup>45</sup> for annulment of a Decision of the European Data Protection Supervisor (EDPS) of 24 June 2020, which held that the SRB infringed Article 15 of Regulation (EU) 2018/1725<sup>46</sup>. The SRB considers the likelihood of a negative outcome of this application as “remote” and, thus, it has not disclosed any contingent liability. We did not find any evidence that contradicts this assessment.

### 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 6](#)).

#### Box 6

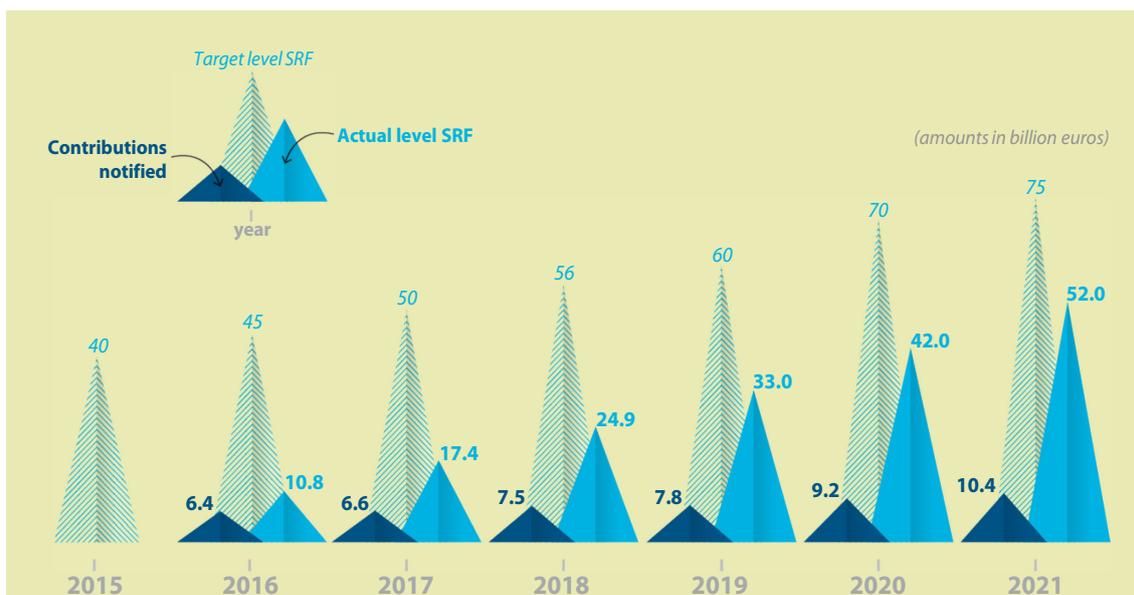
##### The Single Resolution Fund (SRF)

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 around €75 billion. Annual contributions were collected from 3 018 banks in 2021, amounting to €10.4 billion. As of July 2021, around €52 billion had been collected in total.

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<sup>45</sup> Case T-557/20.

<sup>46</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ 2018 L 295, p. 39).



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

Source: SRB, ESM.

On 27 January and 8 February 2021, the Member States to the European Stability Mechanism signed the Agreement amending the ESM Treaty. The amendments include a backstop to the SRF, which according to the draft decision of the Board of Governors, would provide a credit line and its size will be aligned to the size of SRF up to a nominal cap of €68 billion<sup>47</sup>. The [reformed treaty](#) will come into force when ratified by the parliaments of all 19 ESM Members<sup>48</sup>.

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

**42** Since 2016, the SRB has been responsible for calculating the contributions to the SRF<sup>49</sup> in close cooperation with NRAs. The contribution per bank is calculated based on a flat-rate contribution for small or non-risky banks and a risk-adjusted contribution for larger or risky banks<sup>50</sup> (see [Figure 6](#)).

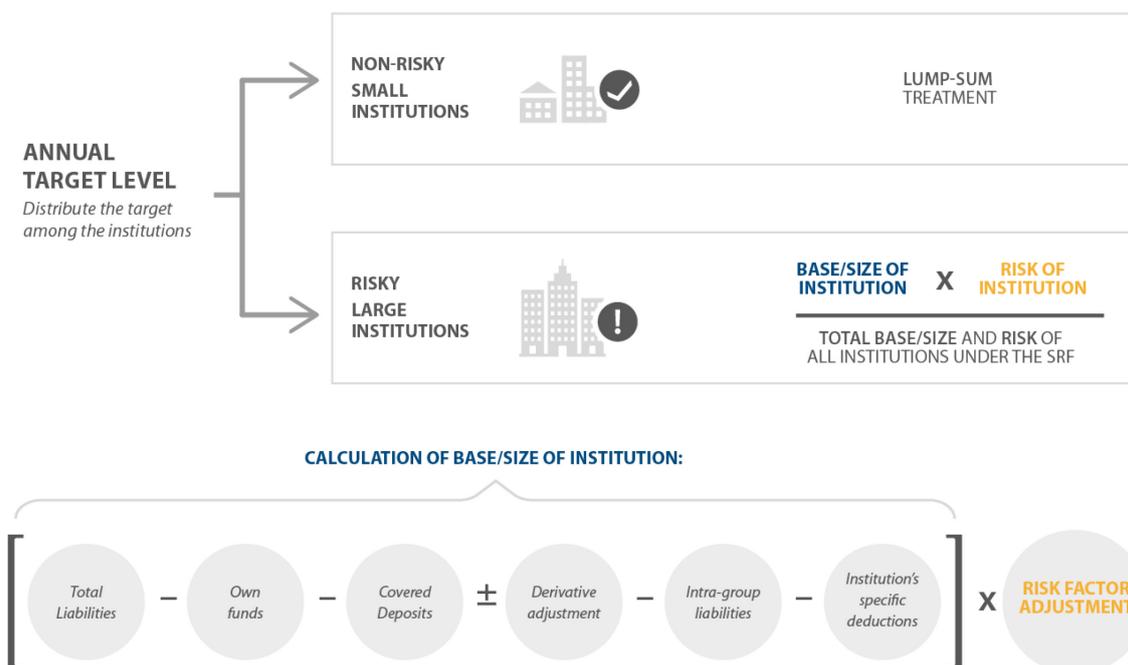
<sup>47</sup> European Stability Mechanism.

<sup>48</sup> Agreement Amending the Treaty Establishing the European Stability Mechanism.

<sup>49</sup> Article 4 Council Implementing Regulation (EU) 2015/81.

<sup>50</sup> Article 4(1) Commission Delegated Regulation (EU) 2015/63.

**Figure 6 – Ex-ante contributions calculation method**

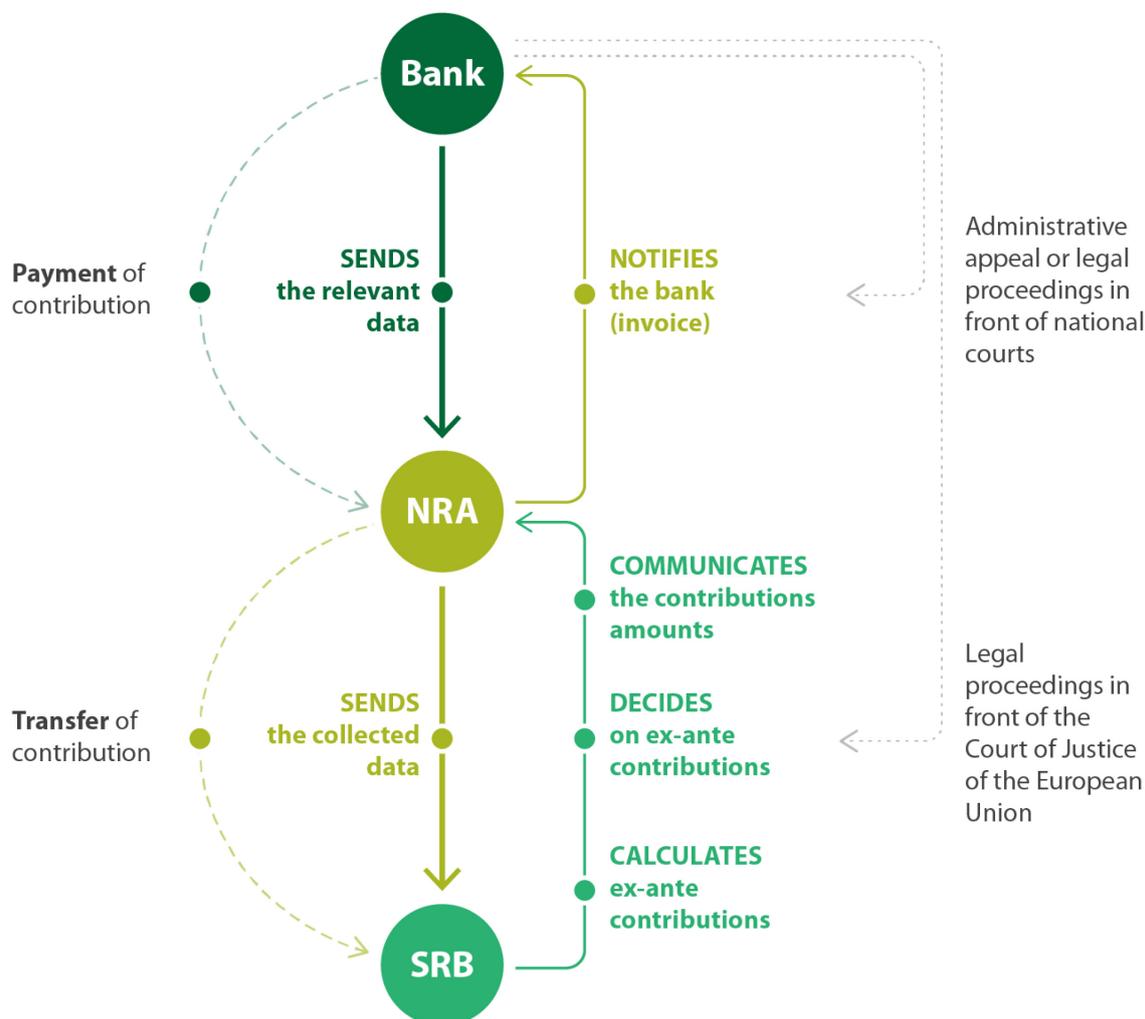


Source: SRB.

**43** The information required for the calculation is provided to the SRB by the NRAs, which gather data from the banks. The SRB then communicates its decision to every NRA. It sends them its decision with its reasoning, a standard form with individual 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 (so called the Harmonised Annex). Based on the calculation provided by the SRB, the NRAs collect the contributions and transfer the amounts to the SRF<sup>51</sup>, which is managed by the SRB (see [Figure 7](#)). During this calculation and notification process, a number of formal procedural requirements must be met.

<sup>51</sup> Council agreement on the transfer and mutualisation of contributions to the Single Resolution Fund, 14 May 2014.

**Figure 7 – Ex-ante contribution collection process with legal remedies**



Source: ECA based on the legal framework.

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

**44** As ex-ante contributions to the SRF are calculated and decided on by the SRB, applicants initiated proceedings at the EU Courts against the SRB's decisions on ex-ante contributions for the years 2016 to 2020. At the time of signature of the SRB's accounts for 2020 (16 June 2021), 44 proceedings (in 2019 accounts: 22 proceedings) were pending. While 38 of them were pending at the GC, six cases are appeals to rulings of the GC pending at the CJ<sup>52</sup>. Moreover, at that same time, no applications against the 2021 ex-ante contribution decisions of the SRB had been filed.

<sup>52</sup> Including the joined cases C-584/20 P and C-621/20 P.

Subsequently, 22 applications against the 2021 ex-ante contributions were lodged<sup>53</sup> (see [Figure 8](#)). Nevertheless, these cases need to be considered for the 2021 accounts.

### Figure 8 – Break-down of ex-ante contribution pending before EU courts as of September 2021



Source: SRB.

**45** In addition to the above cases, a number of banks in three<sup>54</sup> Member States have brought administrative or judicial proceedings against the decisions on their ex-ante contributions in national courts. On 31 May 2021, 682 pending cases were subject to an appeal in national courts. The number of cases relating to the ex-ante contribution decisions in 2020 (30 cases) and 2021 (28 cases) was significantly lower than the number of court cases relating to previous contribution cycles. Based on the information available, the majority of these cases are related to ex-ante contributions cases pending before EU Courts. This declining trend may partly reflect a recent judgment of December 2019, whereby the CJ determined that only the CJEU can review the legality of SRB decisions concerning ex-ante contributions to the SRF)<sup>55</sup>. Hence, in the future national court cases disputing the SRB's ex-ante contributions calculation or other related issues are unlikely to cause an outflow of economic resources for the SRB.

<sup>53</sup> Case T-347/21, brought on 21 June 2021, was the first case lodged against the SRB's 2021 ex-ante contributions decision.

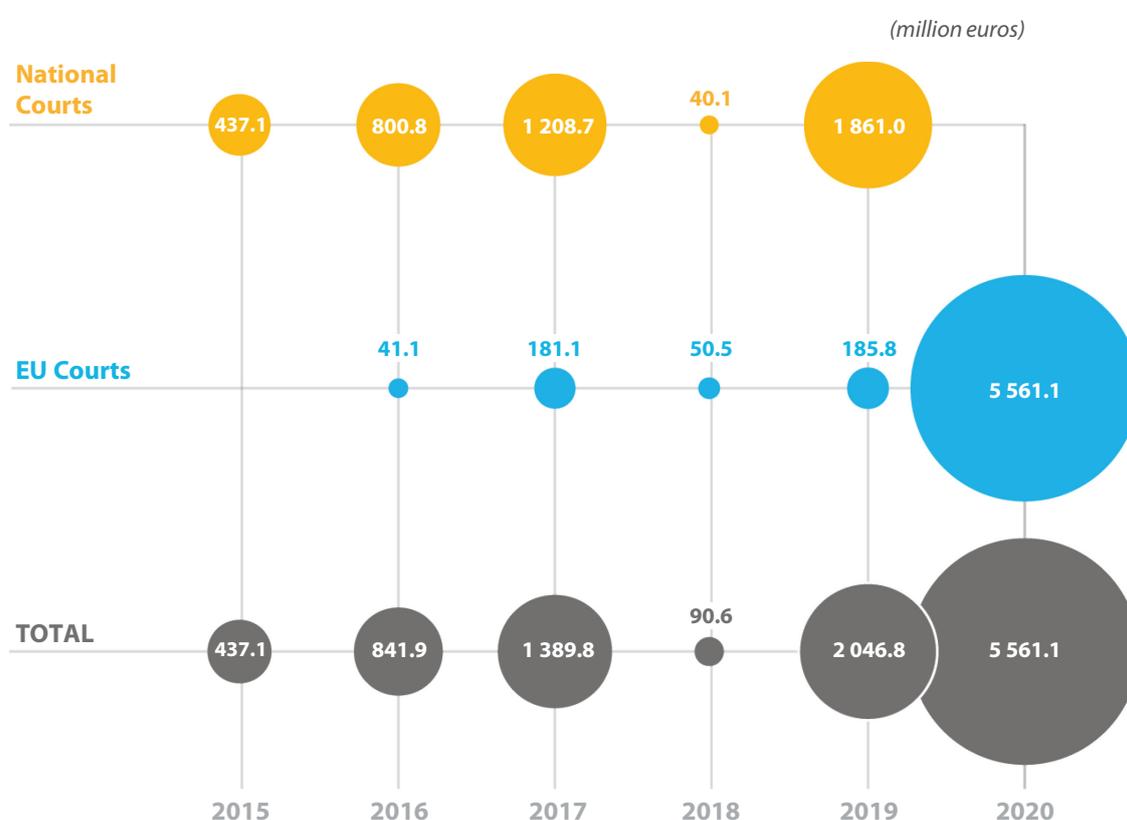
<sup>54</sup> Austria, Italy and Germany.

<sup>55</sup> Judgment of the Court in case C-414/18 on 3 December 2019.

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

**46** In its final annual accounts for 2020 the SRB disclosed contingent liabilities of €5 561 million (2019: €186 million) related to 41 (2019: 9) pending cases at the GC<sup>56</sup> (See [Figure 9](#)) as the SRB assessed the risk of an outflow of economic resources as “possible”. In these 41 cases, the plaintiffs sought an annulment of the SRB’s ex-ante decisions pertaining to the 2016, 2017, 2018, 2019 or 2020 contribution cycles. As the GC has suspended most of the cases pending a final ruling in all three cases related to the 2017 contribution cycle, these cases will be considered first.

**Figure 9 – Historical evolution of the amount of the contingent liabilities in the SRB’s accounts in relation to the ex-ante contributions**



Source: SRB accounts.

<sup>56</sup> SRB Annual Accounts 2020, p. 35-36.

Cases related to the 2017 ex-ante contributions decisions

**47** In September 2020<sup>57</sup>, the GC annulled the SRB’s 2017 ex-ante contributions decision for three banks due to infringements of essential procedural requirements: lack of authentication of the decision and insufficient reasoning. The GC considered that the statement of reasons provided by the SRB does not enable the applicants to verify whether their contribution has been calculated correctly or to decide whether they should dispute that amount in court. The GC noted that, as the calculation of the applicants’ contributions depends on data from the other (approximately) 3 500 banks, that calculation is inherently opaque. In one case<sup>58</sup>, the GC found that the SRB’s failure to reason how it has risk-adjusted the ex-ante contribution, derives from the methodology set out in Delegated Regulation 2015/63, which the GC considered to be unlawful in part.

**48** In November 2020, the SRB and the Commission appealed the GC decision in case T-411/17 (Landesbank Baden-Württemberg). In its judgment of 15 July 2021, the Grand Chamber of the CJ set aside the ruling of the first instance. Nevertheless, the CJ annulled the ex-ante contribution decision of the SRB for insufficient reasoning and upheld the validity of the contested provisions of Delegated Regulation 2015/63 (see [Box 7](#))<sup>59</sup>. The SRB also brought appeals against the other two GC judgments of 23 September 2020, which are still pending<sup>60</sup>.

**49** The CJ’s ruling confirms the interdependency of data of the various financial institutions concerned, which is used in the calculation of their ex-ante contributions. It also considers that the SRB properly authenticated its 2017 ex-ante contribution decision. Finally, the CJ provides clarity on the concrete information the SRB may further provide to the banks without infringing business secrets pertaining to other banks. In doing so, the CJ acknowledges that this information will not allow the banks to verify fully the accuracy of the value of the so called “risk adjusting multiplier” attributed to them for the purposes of calculating their ex ante contribution to the SRF (see [Figure 6](#)).

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<sup>57</sup> Judgments of 23 September 2020 in cases T-411/17, Landesbank Baden-Württemberg v SRB, T-414/17, Hypo Vorarlberg Bank v SRB and T-420/17, Portigon AG v SRB.

<sup>58</sup> T-411/17, Landesbank Baden-Württemberg v SRB.

<sup>59</sup> Judgment of 15 July 2021 in cases C-584/20 P and C-621/20 P Commission v Landesbank Baden-Württemberg and SRB v Landesbank Baden-Württemberg.

<sup>60</sup> Cases C-663/20 P, SRB v Hypo Vorarlberg Bank and C-664/20 P, SRB v Portigon and Commission.

## Box 7

### General implications of the CJ judgment of 15 July 2021 on the SRB's 2017 ex-ante contributions decision

The CJ annulled the SRB's 2017 ex-ante contribution decision with regard to one bank<sup>61</sup>. However, the CJ accepted that the need to uphold business secrets limits the extent to which the SRB must reason its decision to the bank. In particular, the CJ clarified the following issues:

- (1) The SRB's 2017 ex ante contributions decisions and its annex, were properly authenticated, since the Chair of the SRB had hand-signed the body of the decision as well as the routing slip accompanying the decision. The GC erred by not giving the SRB the opportunity to respond and submit evidence relating to the authentication of its decision.
- (2) The risk-adjustment of a bank's ex-ante contribution to the SRF is based on a comparison of that bank's exposure to relevant risk factors with that of other banks concerned.
- (3) Articles 4 to 7 and 9 and Annex I of Delegated Regulation 2015/63 are valid, to the extent that they do not prevent the SRB to disclose in collective and anonymised form, sufficient information to enable an institution to understand how its individual situation was taken into account in the calculation of its *ex ante* contribution to the SRF compared to the situation of the other banks and whether to challenge that decision before EU courts.
- (4) The SRB's 2017 ex-ante contribution decision was insufficiently motivated, but its duty to state reasons needs to be balanced against its obligation to protect confidential data of other banks. In this respect, the SRB can disclose to the banks the limit values of each 'bin' and the related indicators, in order to allow the respective bank to understand that the risk profile attributed to it is appropriate.

**50** Because the CJ judgment in the appeal cases relating to the 2017 contribution cycle was rendered after the signature of the 2020 final accounts, the SRB correctly based its disclosure of contingent liabilities on the prior GC judgment (see paragraph 47). SRB assessed its risk of an outflow of economic resources as "possible" and followed a prudent approach disclosing the full amount of the disputed ex-ante contributions as a contingent liability. Since the SRB has a legal obligation to collect ex-ante contributions, we expect that in the event that the Court should in a future judgment oblige the SRB to recalculate the ex-ante contributions the SRB might need

<sup>61</sup> T-411/17, Landesbank Baden-Württemberg v SRB.

to return or claim any potential difference between the originally collected amounts and the new ex-ante contribution decision's amount. Therefore, an outflow of the full amount of ex-ante contribution is unlikely.

Case concerning the SRB's 2016 ex-ante contributions decisions

**51** In September 2019, NRW Bank lodged an appeal<sup>62</sup> against the GC judgment of June 2019 in Case T-466/16. In this earlier ruling, the GC had dismissed the bank's pleas in law as inadmissible due to being out of time and off-subject. In October 2021, the CJ set aside the GC judgment and referred the case back to the GC for judgment on the substance. It considered that the amendment of one of the elements of the calculation of the ex-ante contribution to the SRF, such as the Institutional Protection Scheme<sup>63</sup> indicator, gives rise to a new time limit for bringing proceedings. This allows the applicant to challenge not only the amended element of the calculation of that contribution, but also the other elements of that calculation.

**52** Based on the original GC ruling of 2019, the SRB assessed the probability of an annulment in this case as "remote" and did not disclose a contingent liability. In its views, the Delegated Regulation 2015/63 does not permit it to exclude such activities from the calculation of the ex-ante contribution. In the context of this audit, we note that the SRB's external lawyers could not exclude that the risk of annulment in the case is more than "remote", but that it deemed an annulment on substance unlikely. We consider that an annulment on procedural grounds is unlikely to lead to an outflow of economic resources for the SRB, as it could take a new ex-ante contribution decision with the same amount, following a revised procedural approach.

Cases concerning the SRB's revised 2016 ex-ante contributions decisions

**53** On 28 November 2019 the GC annulled the SRB's 2016 ex-ante contribution decisions for three banks on procedural grounds<sup>64</sup>. As the calculation remained valid, the SRB proceeded by issuing a new decision on the disputed 2016 ex-ante contributions following a revised procedural approach. In May, June and August 2020 the three banks filed applications at the GC for annulment of the SRB's new 2016 ex-ante contribution decision. The GC suspended the proceedings in two of the cases until

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<sup>62</sup> C-662/19 P.

<sup>63</sup> "Institutional Protection Scheme" or "IPS" means an arrangement that meets the requirements laid down in Article 113(7) of Regulation (EU) No 575/2013.

<sup>64</sup> T-365/16, joined cases T-377/16, T-645/16 and T-809/16 as well as case T-323/16.

the GC issues a ruling in several relevant pending 2017 ex-ante contribution cases<sup>65</sup>. SRB assessed its risk of an outflow of economic resources as “possible” and followed consistently the approach to disclose as contingent liability the full amount of the 2016 ex-ante contributions paid by the three banks (See paragraph 50).

#### Cases relating to the ex-ante contributions cycles 2018-2020

**54** In one of the cases relating to the 2018 contribution cycles pending before the Courts, T-758/18 ABLV Bank v SRB, the SRB deemed the risk of annulment as “remote” and did not disclose a contingent liability. This is consistent with the GC’s dismissal of the action for annulment in January 2021, which the bank has appealed in March 2021.

**55** However, the SRB deemed it possible that all other cases related to its ex-ante contribution decisions pertaining to the 2018, 2019 and 2020 contribution cycles would be annulled. The Court had largely suspended these cases pending final rulings in the 2017 ex-ante contribution cases (See **Box 7**). The SRB assessed these cases as “possible” taking account of past GC’s rulings which found that the ex-ante contributions decisions related to the 2016 contribution cycle (see paragraph 53) and the 2017 contribution cycle (see paragraph 47) were not properly authenticated. Another aspect was the reasoning of the decisions, which both the GC and later the CJ had found to be insufficient in relation to the 2017 contribution cycle.

**56** During the audit the SRB explained that both of the aforementioned risks have diminished in more recent contribution cycles. For instance, the SRB stated with respect to the 2020 contribution cycle, that decisions taken via written procedure were electronically signed by the Chair and make reference to annexes containing the calculation of the individual ex-ante contributions to the SRF. Further, the reasons for the decisions were given to the banks concerned.

**57** The SRB is in the process of assessing how the CJ’s ruling in the 2017 appeal cases affects the risk of the pending cases pertaining to contribution cycles 2018-2020. We note that the risk of an annulment and outflow of economic resources in these cases depends largely on the approach that the EU Courts and the SRB will take to the disputes going forward.

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<sup>65</sup> 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.

**58** In summary, we did not find any evidence that would contradict the conclusions made by the SRB on their contingent liabilities based on available information at the time of the closing of the accounts in mid-June 2021. We also note that the SRB followed a prudent approach in disclosing as contingent liabilities the full amount of the disputed ex-ante contributions, when it assessed the risk of an outflow of economic resources as “possible”. However, as the SRB has a legal duty to collect every year ex-ante contributions from banks, it is unlikely to have to compensate banks for their full contribution, even in those cases where the Court rules on substance. Instead, the SRB might need to return or claim any potential difference in amounts between the original and the revised ex-ante contribution decision. However, the CJ’s recent judgment in the appeal cases related to the 2017 ex-ante contribution decision for one bank (see [Box 7](#)), has an impact on the amount at risk for the pending cases against the SRB’s ex-ante contributions decisions.

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

**59** In its final accounts for the year 2020, the SRB did not disclose any contingent liabilities arising from ex-ante contribution cases at national level (2019: €1.861 million). This is consistent with the CJ’s preliminary ruling on ex-ante contribution decisions for national proceedings (see paragraph [45](#)).

**60** Unlike for the 2019 accounts, the SRB did not disclose the total amount of ex-ante contributions, which are subject to administrative or judicial proceedings at national level. Overall, the challenged amounts related to ex-ante contribution decisions pending an appeal at national courts was €3 746 million in May 2021 (see [Table 3](#)). While significantly fewer cases relating to the contribution cycles 2020 and 2021 were pending before national courts compared to previous contribution cycles (see paragraph [45](#) and [Table 3](#)), the challenged amounts in 2020 (€679 million) and 2021 (€632 million) were at similar levels as in previous years. Most of the cases filed in 2021 refer to pending lawsuits at the EU Courts.

**Table 3 – Evolution of disputed amounts at national level related to ex-ante contributions to the SRF**

Contribution related to year	Number of cases May 2021	Challenged amounts May 2021 (in million euros)	Number of cases May 2020	Challenged amounts May 2020 (in million euros)
2021	28	632	n/a	n/a
2020	30	679	31	669
2019	136	662	136	662
2018	113	566	114	587
2017	132	578	132	578
2016	239	545	240	563
2015	4	84	4	84
<b>Total</b>	<b>682</b>	<b>3 746</b>	<b>657</b>	<b>3 143</b>

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

**61** While the SRB is not disclosing national cases and disputed amounts in its 2020 accounts, it continued as in the previous year and in line with our suggestion to monitor cases lodged before national courts concerning the SRB's ex-ante contribution decisions<sup>66</sup>. However, unlike 2019, in 2020 the SRB did not request from NRAs written assurance on the information they provided and an assessment of the likelihood of the success of the proceedings against ex-ante contributions at national level. This would allow the SRB an enhanced monitoring of national proceedings challenging ex-ante contributions.

### Contingent liabilities related to administrative contributions

**62** Every year, the SRB collects administrative contributions to finance its operating costs (see [Figure 2](#)). 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

<sup>66</sup> ECA, 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 2019, para 55.

expenditure of the Single Resolution Board came into force, creating a permanent system for administrative contributions<sup>67</sup>. Unlike ex-ante contributions to the SRF, administrative contributions are not collected via the NRAs but directly by the SRB. They are collected for each banking group, while ex-ante contributions are collected for each single entity. As a result, different numbers of banks are liable to pay administrative contributions and ex-ante contributions.

**63** Following the entry into force of Commission Delegated Regulation (EU) 2021/517<sup>68</sup>, the SRB applied the transitional arrangements and calculated the annual administrative contributions for the 2021 financial year based on ECB data collected in 2019 including all subsequent amendments to the data for that year. Based on these calculations, it provided banks with the contribution notices. For 2021 the total amount to be collected by the SRB amounts to €60 million from 2 316 institutions (see *Figure 10*). The overall amount collected was lower than in 2020, as the SRB had accumulated a budget surplus of €59.4 million in 2019. The 2021 contributions will be recalculated during the next calculation cycle (transitional arrangement). Where necessary, the 2020 and 2019 contributions will be recalculated during the next calculation cycle, based on information on changes in the scope, status or fee factors of institution.

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<sup>67</sup> EC Delegated Regulation No 2017/2361.

<sup>68</sup> Commission Delegated Regulation (EU) 2021/517 of 11 February 2021 amending Delegated Regulation (EU) 2017/2361 as regards the arrangements for the payment of contributions to the administrative expenditures of the Single Resolution Board, (OJ L 104, 25.3.2021, p. 30 33).

**Figure 10 – Administrative contributions invoiced by the SRB**



Source: SRB; amounts rounded to the nearest million.

**64** Appeals against administrative contribution notices can be filed with the SRB’s appeal panel within six weeks of the date the notice was issued<sup>69</sup>. Decisions of the appeal panel can be contested in the GC. In 2020 and 2021, banks brought no appeals against administrative contribution notices. Consequently, the SRB did not disclose any contingent liabilities for administrative contributions.

### Additional information

**65** The SRB demonstrated that it had put adequate internal controls in place, giving an overview of relevant litigation before EU and national courts. 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

<sup>69</sup> Article 85(3) SRM Regulation.

(see [Annex II](#)), an internal assessment of risks in each litigation category is conducted by the SRB's legal team and provided to the accounting officer. Developments are regularly reported to the SRB's board.

## Part II: Contingent liabilities of the Commission

**66** The European Commission has confirmed that, at 31 December 2020, there were no contingent liabilities arising based on its task under the SRM Regulation.

**67** EU case law<sup>70</sup> limits the delegation of power to EU agencies such as the SRB to executive powers. The implications of this for resolution schemes is that they can only take effect if the Commission endorses them. The Commission may object to any discretionary aspect of a resolution scheme. If the Commission objects to the resolution scheme due to the public interest criterion, it must propose any necessary changes to the Council. The same applies if it requests a material change to the use of the SRF<sup>71</sup>.

**68** On 7 June 2017, the Commission endorsed the first resolution scheme<sup>72</sup>, adopted by the SRB. In relation to this scheme, 30 legal proceedings were pending before the GC against the Commission<sup>73</sup> in June 2021. While all 30 applicants brought actions to annul the Commission's decision, eight of the applicants also brought actions for damages. These cases are still in progress. As the resolution of BPE did not involve any public financial support or any use of the SRF (see paragraph 17), the Commission did not conduct a state aid or fund aid assessment.

**69** As was the case for the 2019 accounts, the Commission has decided not to disclose also in 2020 any contingent liabilities for these cases based on its accounting assessment. According to the Commission, no applicant has sufficiently demonstrated a non-contractual liability on its part. In particular, the Commission stated that there was no sufficiently serious breach of any provision intended to confer rights on individuals. Therefore, in the Commission's view, the risk of an outflow of economic

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<sup>70</sup> Meroni doctrine as established in cases 9/56 and 10/56, *Meroni & Co, Industrie Metallurgiche v. High Authority*, [1957-1958] ECR 133 and case C-270/12, *United Kingdom v. European Parliament and Council of the European Union*, [ECLI:EU:C:2014:18].

<sup>71</sup> Article 18(7) SRM Regulation.

<sup>72</sup> Endorsement of the resolution scheme concerning Banco Popular Español S.A. (BPE).

<sup>73</sup> Only in one of these 30 cases is the Commission the sole defendant.

resources relating to its endorsement decision is “remote”. Moreover, the Commission stated that no applicants could have suffered damages, given that the alternative to the resolution procedure would have been an insolvency procedure 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 36-39). The Commission has therefore stated that, based on its comprehensive experience, the financial risk potentially arising from these cases for the Commission is “remote”.

**70** From the analysis of our sample, we found no evidence that would contradict the Commission’s assessment.

**71** In addition to the cases relating to the resolution of BPE, the Commission also filed one appeal in case C-584/20 P, whereby it sought to set aside the GC’s earlier ruling in one ex-ante case pertaining to the 2017 contribution cycle. On 15 July 2021, the CJ set aside the original GC judgment but upheld the annulment of the SRB’s ex-ante contribution decision, on grounds of insufficient reasoning (see paragraph 48). The Commission did not have this judgment in time for the annual accounts 2020 and therefore had to base its disclosures on the prior GC judgment in the three 2017 ex-ante contribution cases. As the Commission is not involved in the decision-making process of the ex-ante contributions, it did not disclose any contingent liabilities. We did not find any evidence that would contradict the Commission’s assessment.

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

**72** The Council has confirmed that, at 31 December 2020 had no contingent liabilities arising due to the performance of its tasks under the SRM Regulation.

**73** The Commission may object to a resolution scheme proposed by the SRB. If the objection is related to the public interest criterion, it must propose any necessary changes to the Council. The same applies if it requests a material change to the use of the SRF (see paragraph 67).

**74** To date, the Council has not been involved in any resolution decisions. However, it was the subject of one legal case relating to BPE at the end of 2017. The case was ruled inadmissible insofar as it was directed at the Council<sup>74</sup> in 2018. Thus, no contingent liabilities arise for the Council.

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<sup>74</sup> Order of the General Court (Eighth Chamber) of 14 June 2018 — Cambra Abaurrea v Parliament and Others (Case T-553/17).

## Conclusions and recommendations

**75** We note that at this stage, any assessment concerning the outcome of the legal proceedings in relation to resolution and non-resolution decisions against the SRB and the Commission are highly complicated by the fact that the legal framework for resolution 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 Single Resolution Mechanism Regulation (see paragraphs [23](#), [34](#), [39](#) and [69](#)). Consequently, no contingent liabilities are necessary in connection with these cases.

**76** In its 2020 accounts, the SRB disclosed contingent liabilities amounting to €5 561 million in relation to pending cases against the SRB's ex-ante contribution decisions taken in 2016-2020 (see paragraph [46](#)). The disclosure was based on the General Court's decisions to annul the SRB's 2017 ex-ante contribution decision for three banks in September 2020. While the ruling has since been set aside by the Grand Chamber of the Court of Justice in one case, the ruling came after the SRB issued its final accounts in mid-June 2021, and could therefore not be considered.

**77** In its 2020 accounts, the SRB disclosed the full ex-ante contributions subject to litigation as contingent liabilities. This approach was motivated by prudence based on the available information and relevant case-law of EU courts at the time of the closure of SRB accounts. We note that the SRB has a legal obligation to collect ex-ante contributions, and is therefore unlikely to have to compensate banks' for their contributions in full. In the event of a recalculation of the ex-ante contributions, it might need to return or claim any potential difference in amounts between the original and the revised ex-ante contributions decision.

**78** Unlike in the accounts of previous financial years, the SRB did not disclose contingent liabilities related to national proceedings against ex-ante contributions. This is consistent with the Court of Justice's recent preliminary ruling (see [Box 7](#)), which states that national courts are not competent to review the SRB's decisions on ex-ante contributions to the SRF. We acknowledge that in line with our previous recommendations, the SRB is continuing to monitor ex-ante cases before national courts.

**79** The SRB has been notified of new legal cases before EU courts in relation to its decision on 2021 ex-ante contributions to the Single Resolution Fund (see paragraph 44). However, as these cases were filed after the SRB's final accounts were signed, and since they require a thorough assessment of the application, the SRB was not able to assess them for the 2020 accounts. These cases will need to be considered for the SRB's 2021 accounts.

**80** To ensure that the accounts provide a true and fair view, the accounting officer needs to obtain any relevant information. For the preparation of the SRB's 2020 accounts, the SRB's accounting officer was provided with a risk assessment for each category of on-going litigation by the SRB's legal service (see paragraph 65). The risk assessment also included some underlying reasoning. Furthermore, unlike for the 2019 accounts, the accounting officer received written representations from Fondo de Reestructuración Ordenada Bancaria on national proceedings in relation to the resolution of Banco Popular Español (see paragraph 30), but not from the relevant National Resolution Authorities on national proceedings in relation to ex-ante contributions (see paragraph 61).

### **Recommendation 1 – Development of a method for calculating the potential financial exposure from ex-ante contributions**

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The SRB should continue assessing the risk for all pending proceedings against its decisions on ex-ante contributions to the Single Resolution Fund and assess any new judicial proceedings up to the closure of the SRB accounts.

Depending on the risk assessment, SRB should disclose as contingent liabilities the amount that it expects to be liable for towards contributing banks. Instead of disclosing as contingent liabilities the full amounts of the ex-ante contributions subject to litigation, it should assess and develop a method for calculating the estimated difference in contributions between the original ex-ante contribution decisions and a potential revised decision, where applicable.

**Timeframe: Presentation of the SRB accounts for 2021**

## Recommendation 2 – Information to be provided to the accounting officer in relation to national cases

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Given that the overall number of national proceedings on ex-ante contributions is high and continues to increase, the SRB should re-introduce the process for monitoring these cases by asking the National Resolution Authorities to provide written assurance each year on the information provided, and an assessment of the likelihood of the success of the proceedings against ex-ante contribution. This information should be provided to the SRB's accounting officer to help in drawing up the SRB's accounts.

**Timeframe: Presentation of the SRB accounts for 2021**

This Report was adopted by Chamber IV, headed by Mr Mihails KOZLOVS, Member of the Court of Auditors, in Luxembourg on 9 November 2021.

*For the Court of Auditors*



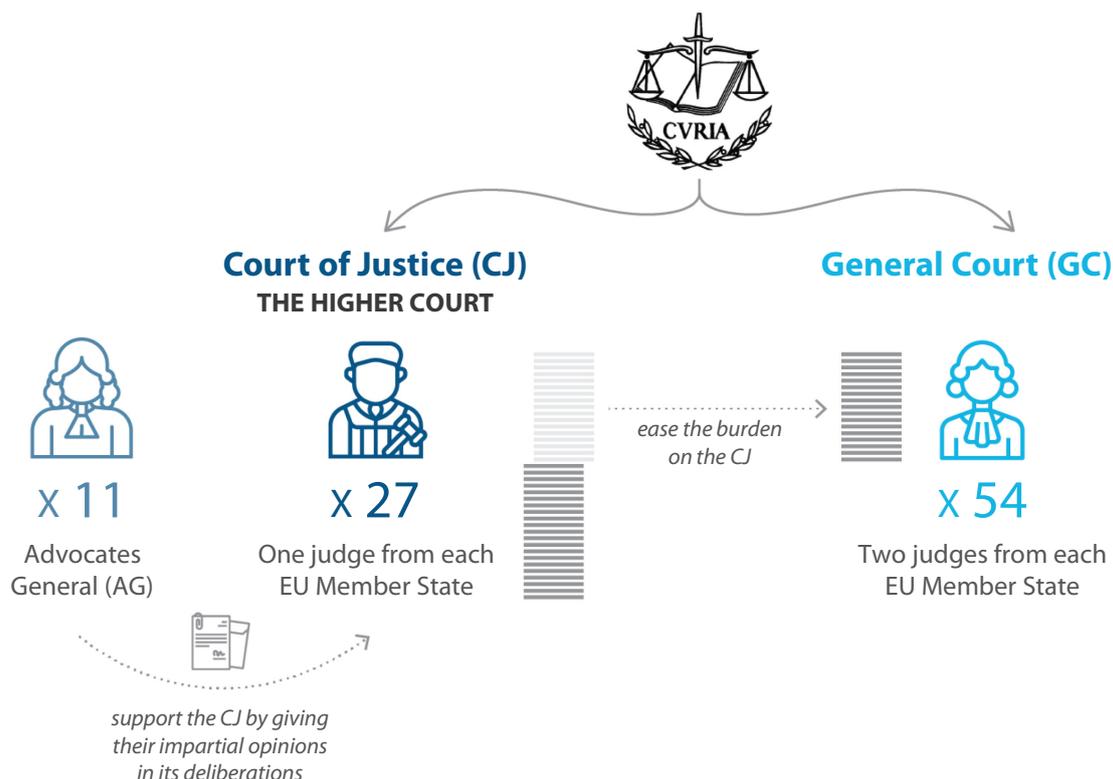
Klaus-Heiner LEHNE  
*President*

## Annexes

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

The CJEU (see [Figure 11](#)) consists of two courts: the Court of Justice (CJ) and the General Court (GC). Within the CJ, Advocates-General provide their opinions on cases in order to support the CJ in its deliberations. The GC was established to ease the burden on the CJ; it 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.

**Figure 11 – Composition of the Court of Justice of the European Union**

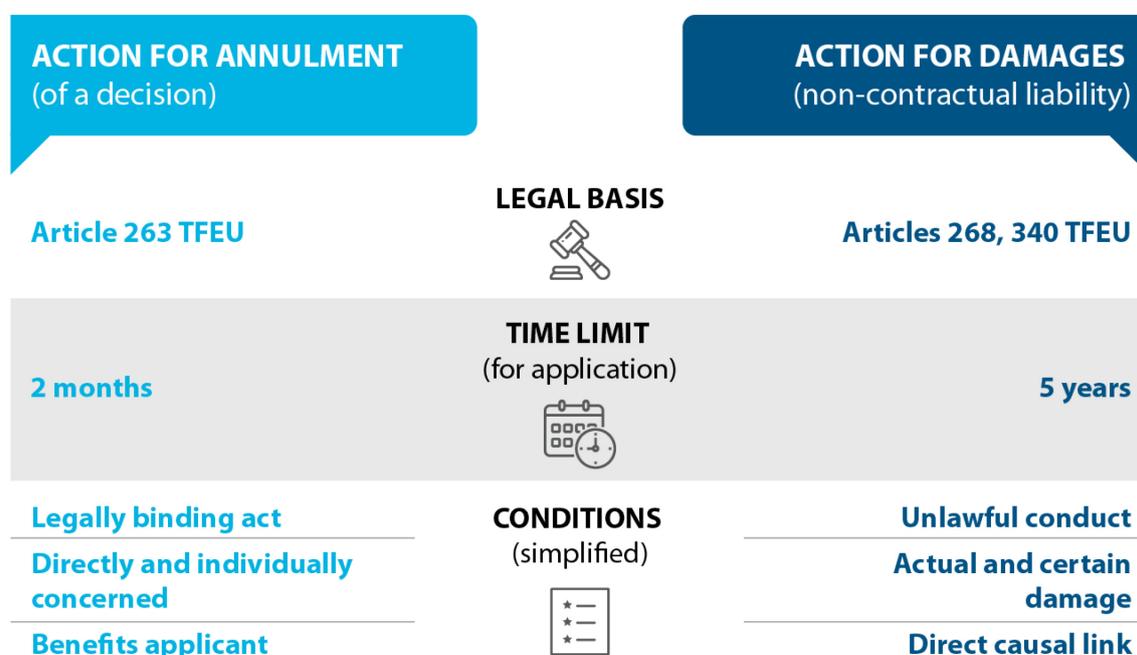


Source: ECA.

Different judicial remedies are available to natural and legal persons who wish to contest decisions of EU institutions, bodies, offices, and agencies (see [Figure 12](#)). One type of remedy is an annulment action against a legally binding decision which has either been addressed to the person or is of direct and individual concern. To annul a

decision taken by the EU or one of its bodies, applicants must present their applications within two months of publication of the relevant decision<sup>75</sup>.

## Figure 12 – Judicial remedies available against decisions of EU institutions, bodies, offices and agencies



Source: ECA based on the TFEU and case law.

Another type of remedy is an action for damages on the basis of the EU being non-contractually liable to pay them. Such claims<sup>76</sup> can only be brought within five years. For a successful action for damages, applicants must demonstrate a sufficiently serious breach by the institution of a rule of law intended to confer rights on individuals, actual damage suffered by the applicant, and a direct causal link between the unlawful act and the damage.

Each judicial proceeding starts with the filing of an application by the applicant, specifying the pleas in law and arguments relied upon, as well as the form of order sought. Within two months<sup>77</sup>, the defendant is obliged to provide a written defence.

<sup>75</sup> Article 263 of TFEU defines the timeframe as within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter.

<sup>76</sup> Article 268 TFEU, Article 87(5) of SRM Regulation and Article 46 of the Statue of the Court of Justice.

<sup>77</sup> In exceptional circumstances, this time limit may be extended upon a reasoned request of the defendant, based on Article 81 Rules of Procedure of the General Court (OJ 2015 L 105, p.1). This happened in most cases concerning the resolution of BPE.

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 [Figure 13](#)). Judgments can be appealed within two months and ten days after the parties are notified of the decision<sup>78</sup>. If they are not appealed, they become final after this period.

**Figure 13 – Typical process of cases at the CJEU**



Source: ECA.

<sup>78</sup> 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
2020	In light of the CJ’s and the GC’s recent judgments 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.	<b>Completed</b>	Taking into account all the existing CG’s and CJ’s judgments at the time of the preparation of the 2020 accounts, the SRB re-assessed the level of risk and disclosed as contingent liabilities the full amount of the ex-ante contributions in the cases where it assessed the risk as “possible”.
2020	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.	<b>Completed</b>	For the 2020 accounts, the SRB requested written representation from FROB on BPE’s administrative appeals and court proceedings at national level and made additional disclosures based on the analysis of the information provided.

## Acronyms and abbreviations

Acronym or abbreviation	Explanation
BPE	Banco Popular Espanol S.A.
CJ	Court of Justice (Part of the Court of Justice of the European Union)
CJEU	Court of Justice of the European Union
ECA	European Court of Auditors
ECB	European Central Bank
FOLTF	Banks that are failing or likely to fail
FROB	Fondo de Reestructuración Ordenada Bancaria (Spanish National Resolution Authority)
GC	General Court (Part of the Court of Justice of the European Union)
NRA	National Resolution Authority
NCWO	No creditor worse off
SRB	Single Resolution Board
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SRM Regulation	Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules 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 the recommendation 1.

The SRB will of course continue to comply with the applicable accounting rules and in the context of contingent liabilities will provide a best estimate based on a true and fair view.

As regards the recommendation to “assess and develop a method for calculating the estimated difference”, the SRB at the current stage sees the risk that:

- due to the complexity and interrelatedness of the contribution calculation; and,
- due to the current uncertainty as to the approach that might be taken by the GC and CJ as regards ex-ante litigation that would warrant a recalculation,

the enhancement of the SRB's current (prudent) approach might lead to a very approximate estimation of such a difference in contributions.

### **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 2020**

"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 Mihails Kozlovs. The audit was led by ECA Member Rimantas Šadžius, supported by Mindaugas Pakštys, Head of Private Office; Matthias Blaas, Attaché of Private Office; Ioanna Metaxopoulou, Director; Valeria Rota, Principal Manager; Leonidas Tsonakas, Head of Task; Carlos Soler Ruiz, Nadiya Sultan, Auditors; Andreea-Maria Feipel-Cosciug, Legal Advisor.



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