

2021

Report

(pursuant to Article 92(4) of the 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 2021 financial year



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About this report:

The Single Resolution Mechanism is the EU's 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 obligation to report annually on any contingent liabilities arising.

So far, the SRF has not been called upon, but there is a considerable increase in the number of ongoing legal proceedings relating to a first resolution and other decisions, as well as *ex ante* contributions to the SRF. For the 2021 financial year, the Commission and the Council did not report any contingent liabilities. Following our recommendation from the previous year's report, the SRB developed a method for calculating contingent liabilities relating to legal challenges to *ex ante* contributions and reported a significantly lower amount compared to that disclosed in the 2020 accounts. The SRB did not report any contingent liabilities for a resolution decision. We found no evidence that would contradict the SRB's assessment in material terms. However, we note that some legal proceedings in relation to the *ex ante* contribution to the SRF target specific aspects of the SRB calculations and the risk of an outflow of economic resources was assessed as possible in certain cases.

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Executive summary

I We have a legal obligation to report annually on any contingent liabilities of the Single Resolution Board, the Commission, or the Council arising from the performance of their resolution tasks. We assessed whether the SRB, the Commission and the Council have disclosed their financial risks through appropriate contingent liabilities and provisions. At the time of the closure of their 2021 accounts in June 2022, there were various on-going legal proceedings against the Single Resolution Board and the Commission (but not the Council) concerning their resolution tasks before EU courts, as well as at the national level.

II In June 2022 there were 95 cases pending at EU level related to the resolution of Banco Popular Español S.A. that took place in 2017. Among those, the General Court had initially designated six pilot cases to be dealt with as a matter of priority. These have since been dismissed, as well as one related appeal. Furthermore, 919 administrative proceedings and court cases concerning the resolution of Banco Popular Español S.A. are still pending at national level. There were also two ongoing actions seeking the annulment of the SRB's non-resolution decisions before the General Court.

III The Single Resolution Board did not disclose contingent liabilities related to these 95 cases, as it considers the associated risk remote. For the related national cases, the SRB disclosed the nature of the contingent liabilities associated with these litigations, but it is not in a position to quantify the possible financial effect.

IV The Single Resolution Board collects *ex ante* contributions from banks to the Single Resolution Fund, which can be used to support the resolution of banks. In June 2021, there were 63 cases against decisions on *ex ante* contributions pending at EU level. Following the Court of Justice judgment of July 2022 and our recommendation from our report for 2020, the Single Resolution Board developed a new calculation method to better disclose the actual financial risk of these proceedings. As a result, it disclosed contingent liabilities of €5.5 million relating to possible reimbursements from the Single Resolution Fund. Moreover, the Single Resolution Board disclosed contingent liabilities of €2.55 million related to the possible compensation of legal costs. The Single Resolution Board did not disclose any contingent liabilities in relation to legal proceedings against *ex ante* contribution decisions pending at national level, as it considers the risk remote.

V 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 Single Resolution Board. The Commission did not disclose any contingent liabilities, since it had assessed the related likelihood of an outflow of economic resources as remote. We note that the General Court rejected all pending pilot cases on the 1 June 2022. The Council was not involved in any legal challenges related to its resolution tasks, and therefore did not disclose any contingent liabilities.

VI Based on the procedures performed, evidence obtained and information available at the closure of the 2021 accounts, nothing has come to our attention that causes us to believe that the contingent liabilities arising from the performance of their resolution tasks of the Single Resolution Board, the Commission and the Council had been materially misstated.

VII We recommend that the Single Resolution Board should:

- request directly from the national resolution authorities written representations on national proceedings;
- refine the method to quantify contingent liabilities related to the settlements of legal costs; and
- enhance the disclosures on the contingent liabilities for those cases where the risk of disbursement from the Single Resolution Fund is assessed as possible but the financial exposure cannot be reliably estimated.

Introduction

01 The Single Resolution Mechanism (SRM) was established by [Regulation \(EU\) No 806/2014 of the European Parliament and of the Council](#) (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, 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 area². The SRB became an independent body 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 European Central Bank (ECB), the SRB, the Commission and, potentially, the Council of the EU (the Council)³. Under certain conditions, the Single Resolution Fund (SRF, see paragraph [12](#)) 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.

¹ The term “bank” in this report refers to entities as defined under Article 2 of the [SRM Regulation](#).

² [List of banks](#) for which the SRB is the resolution authority.

³ Article 18 of the [SRM Regulation](#).

Audit scope and approach

Audit scope

04 This audit report assessed whether the SRB, the Commission and the Council have appropriately disclosed financial risks arising from their tasks under the SRM Regulation⁴, in particular contingent liabilities and provisions. In line with the Financial Regulation, we assessed all assertions of the relevant disclosures both in provisions and in contingent liabilities for the financial year 2021.

05 In addition to contingent liabilities arising during 2021, the accounting officer is obliged to take into account any relevant information obtained up to the date of presentation of the final accounts⁵. Thus, adjustments or additional disclosures may be required for a true and fair presentation of the accounts, and may include information obtained until the closure of the accounts in June 2022. The final accounts as at 31 December 2021 were presented:

- by the SRB on 15 June 2022;
- by the Commission on 17 June 2022;
- by the Council on 7 June 2022.

06 We have also audited the annual accounts of the SRB⁶, the Commission and the Council⁷ for the 2021 financial year. The results of these audits are presented in other reports.

07 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.

⁴ Article 92(4) of [SRM Regulation](#).

⁵ Article 98(4) of [Commission Delegated Regulation \(EU\) 2019/715](#).

⁶ [2021 annual report on EU agencies](#) (27.10.2022).

⁷ [2021 annual reports](#) (13.10.2022).

Box 1

Definition of a contingent liability

A contingent liability is:

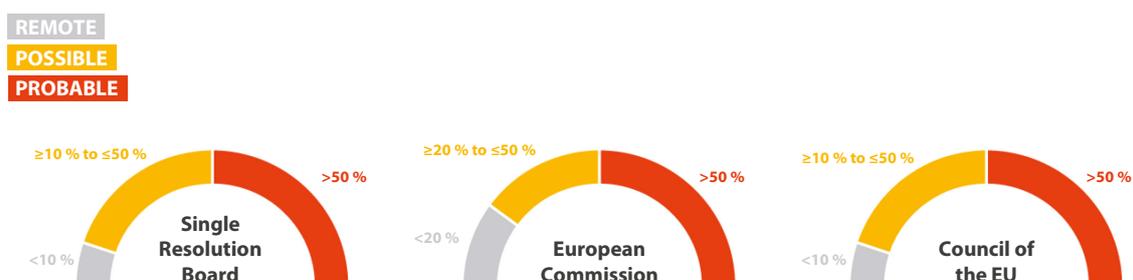
- a possible obligation that arises from past events and of which the existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the European Union,
- or a present obligation that arises from past events but is not recognised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

08 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.

09 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 – Probability thresholds for contingent liabilities and provisions



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

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 2021 financial year, the SRB disclosed contingent liabilities amounting to €5.5 million (2020: €5 561.1 million) for on-going legal proceedings for which it had assessed the risk of an outflow of economic resources due to recalculation of contributions as possible. The significant difference in comparison to the previous year is the result of new case law and the new method applied by the SRB (see paragraph [33](#)). The SRB also disclosed €2.55 million (2020: nil) on legal fees of the opposing party's legal representation in those cases with a probability of success assessed as possible for the applicants. The disclosed contingent liabilities are all related to *ex ante* contributions to the SRF. Like in previous years, the Commission did not disclose any contingent liabilities. For our audit, we selected a sample of 46 cases pending before EU courts and reviewed the relevant case files.

Table 1 – Pending judicial proceedings against the SRB and the Commission in relation to their tasks under the SRM Regulation on 15 June 2022

Cases related to	Before EU Courts	Before national courts or under administrative proceedings
Resolution of Banco Popular Español S.A. (BPE)	95	919
Decisions on non-resolution of ABLV and PNB Banka	2	Not applicable
No-creditor-worse-off decision for BPE	6	Not applicable
<i>Ex ante</i> contributions	63	711
Administrative contributions	0	Not applicable
TOTAL	166	1 630

Source: ECA, based on SRB and Commission data at the date of signature of accounts; excluding cases solely requesting access to documents, cases related to data protection or human resources that are not relevant to the SRB's tasks under the SRM Regulation.

11 In addition to the sample of court cases, our audit evidence included information gathered through interviews, documentation from the SRB, the Commission and the Council and representation letters from external lawyers. We assessed the new

method the SRB had developed for estimating contingent liabilities linked to *ex ante* contribution cases and the internal system the SRB had put in place to monitor proceedings at national level. We also analysed the evidence from national resolution authorities (NRA's), as well as publicly available data. In addition, we reviewed documentation from the SRB's private external auditor responsible for verifying the SRB's annual accounts.⁸

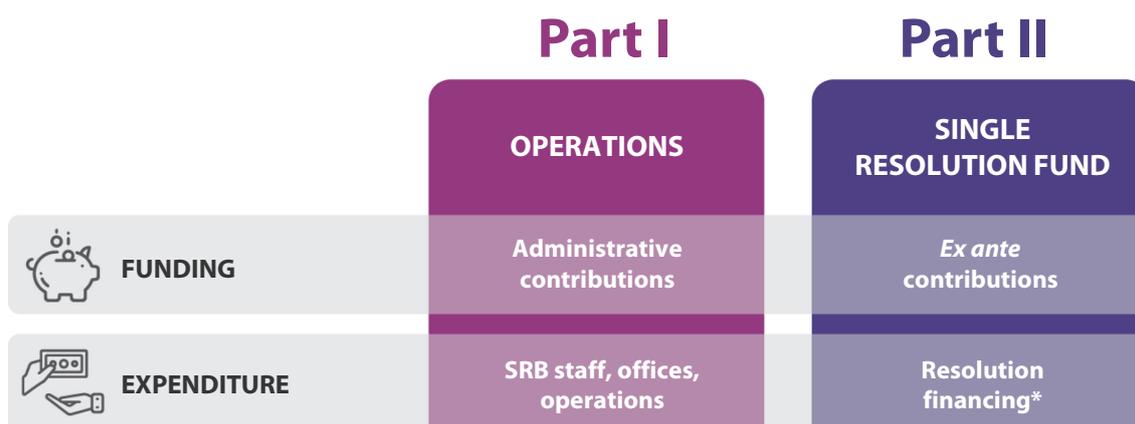
⁸ Article 104(1) of Commission Delegated Regulation (EU) 2019/715.

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 3](#)). In addition, under certain circumstances, the SRB can collect extraordinary *ex post* contributions⁹. If necessary, the financial resources of the SRF can be used to support a resolution through specific tools, if certain conditions are fulfilled¹⁰.

Figure 2 – Budget of the Single Resolution Board



*Subject to certain limitations.

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

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

13 On 7 June 2017, the first resolution at EU level took place for BPE. The SRB adopted the resolution scheme for BPE and the Commission endorsed it. Since then, the SRB decided for a number of banks, whether they will be resolved or be subject to a national insolvency proceedings (see [Table 2](#)). [Annex I](#) provides a short summary of

⁹ See Article 71 of SRM Regulation.

¹⁰ See Article 76 of SRM Regulation.

the working arrangements at the Court of Justice of the European Union (CJEU) as well as available legal remedies against decisions of EU institutions, bodies, offices and agencies. *Annex II* illustrates the decision-making leading to the resolution of a bank or national insolvency proceedings.

Table 2 – Decisions taken by the SRB

Date	Bank	Decision	Reason
7 June 2017	Banco Popular Español S.A.	Resolution	Liquidity shortage and public interest
23 June 2017	Banca Popolare di Vicenza S.p.A.	National insolvency proceedings	Capital shortage but no public interest
	Veneto Banca S.p.A.	National insolvency proceedings	Capital shortage but no public interest
24 February 2018	ABLV Bank, AS	National insolvency proceedings	Anti-money-laundering issues but no public interest
15 August 2019	AS PNB Banka	National insolvency proceedings	Capital shortage but no public interest
1 March 2022	Sberbank Europe AG	National insolvency proceedings	Liquidity shortage but no public interest
	Sberbank d.d.	Resolution	Liquidity shortage and public interest
	Sberbank banka d.d	Resolution	Liquidity shortage and public interest

Source: ECA based on SRB and ECB.

Actions against the resolution decision of Banco Popular Español

14 In June 2017, the ECB assessed BPE 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.

15 Given the number and complexity of cases in relation to the resolution of BPE and similar pleas in law, the General Court had designated six pilot cases to be dealt with as

a matter of priority¹¹, while all other cases were suspended, until the pilot cases were settled. On 24 October 2019, the General Court rejected the first of the pilot cases as inadmissible¹². The applicants brought an appeal before the Court of Justice, which upheld the General Court's ruling in a judgment issued on 4 March 2021¹³.

16 On 1 June 2022, the General Court ruled on the five remaining pilot cases related to the BPE resolution scheme. In all five cases, the applicants had sought the annulment of the resolution decision, while in one¹⁴ of them the applicant was also claiming compensation for damages. The General Court dismissed the actions (see [Box 2](#)).

Box 2

The General Court dismissed all Banco Popular pilot cases

On 1 June 2022 the General Court has rejected all pleas in law raised by the applicants and the SRB prevailed in all cases.

The General Court confirmed the legality of the SRB's decision to resolve Banco Popular Español and the Commission's decision endorsing that resolution scheme. The action for damages was dismissed and the applicants were ordered to bear the legal costs of the SRB and the Commission.

The General Court found that a decision of the SRB on the resolution scheme is not a preparatory act but one which produces legally binding effects and which can be challenged before EU courts.

The General Court clarified that an action may be brought against a resolution scheme adopted by the SRB without lodging also an action against the Commission's decision endorsing that scheme.

The General Court considered its review to be limited given that a resolution scheme is based on highly complex economic and technical assessments.

¹¹ [SRB annual report 2020](#), section 5.4.1.

¹² [Case T-557/17](#).

¹³ [Case C-947/19 P](#).

¹⁴ [Case T-523/17](#).

As regards the claim that the valuation¹⁵ carried out by the independent valuer, was not 'fair, prudent and realistic', the General Court considered that given the time constraints and the information available, some uncertainties and approximations are inherent in any provisional valuation carried out. In view of the urgency of the situation, the Commission rightly considered that the SRB could rely on this valuation in order to adopt the resolution scheme.

As regards the actions for damages against the SRB and the Commission, the General Court considered that the applicants had not demonstrated that the SRB or the Commission had acted unlawfully. The applicants had not demonstrated that the SRB or the Commission disclosed confidential information and therefore they did not infringe their professional secrecy obligation.

17 The decisions of the General Court may be subject to an appeal before the Court of Justice, limited to points of law, within two months and ten days of notification of the decision. Five appeals have been lodged against the General Court rulings on four of the pilot cases¹⁶.

18 For its 2021 final accounts, the SRB did not disclose any contingent liabilities as a result of the pending BPE resolution cases. While it is difficult to predict the outcome of these legal proceedings due to the complexity of the applicable legal framework as well as the novelty of the issues raised and the scarcity of relevant case-law, we did not find any evidence contradicting the decision taken by the SRB not to disclose any contingent liabilities for its 2021 accounts.

Actions against the decision not to carry out an *ex post* definite valuation of Banco Popular Español

19 Three actions for annulment were initiated against the SRB for the absence of a definitive *ex post* valuation, all of which were dismissed as inadmissible by the General Court¹⁷. In judgments issued on 21 December 2021, the Court of Justice, ruling on appeal against two of these orders¹⁸ found that the General Court had been correct to conclude that, in any event, an *ex post* valuation would not have had any effect on the appellant's legal position in the circumstances of the present cases. It also found that the sale of business tool is not one of the situations provided for in Article 20(12) of

¹⁵ Article of 20 (10) of Regulation No 806/2014.

¹⁶ Case C-448/22 P, Case C-535/22 P, Case C-539/22 P, Case C-541/22 P, and Case C-551/22 P.

¹⁷ Cases T-2/19, T-599/18 and T-512/19.

¹⁸ Cases C-874/19 P and C-934/19 P.

the SRM Regulation in which compensation may be paid following a definite *ex post* valuation.

20 For its 2021 final accounts, the SRB has not disclosed any contingent liabilities linked to the *ex post* definite valuation cases. In the light of the Court of Justice judgments of 21 December 2021 and the General Court judgment of 1 June 2022 (see **Box 2**) reproducing the Court of Justice’s reasoning, we did not find any evidence contradicting the SRB decision not to disclose any contingent liabilities in this regard.

Actions against the national implementing decision for the resolution of Banco Popular Español

21 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 court¹⁹. It is therefore important that the SRB is aware of damage cases pending against NRAs in participating Member States.

22 Following the Commission’s endorsement of the BPE resolution scheme, the Spanish national resolution authority – Fondo de Reestructuración Ordenada Bancaria (FROB) issued an implementing decision in June 2017²⁰. 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 claims²¹.

23 Based on FROB’s report of June 2022, FROB had received 118 administrative appeals against the above-mentioned implementing decision and had dismissed all of them or declared them inadmissible. FROB had also received 1 073 requests for the initiation of administrative proceedings on the non-contractual liability of the state under Spanish national law. Out of those, FROB has dismissed 414 liability claims. Applicants had brought 260 court cases against FROB but these have all been suspended by the Administrative Chamber of the Spanish High Court.

¹⁹ Article 87(4) of [SRM Regulation](#).

²⁰ [Decision adopted by FROB’s Governing Committee](#) on 7 June 2017 concerning Banco Popular Español S.A.

²¹ Article 28(1)(b)(iii) of [SRM Regulation](#).

24 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. If there is a successful outcome for the appellants in the 260 court proceedings pending before the national courts, resulting in damages being payable by FROB, the SRB may have to return all or part of the corresponding amounts²². The SRB did not request a representation letter from FROB assessing the probability of an outflow of resources before finalising the annual accounts for 2021. Following our request, the SRB sought and obtained the representation letter. The SRB disclosed the nature of contingent liabilities associated with this litigation, but considers that it is not in a position to quantify the financial effect. We did not find any evidence contradicting the SRB decision not to disclose any contingent liabilities in this regard.

Actions against non-resolution decisions

25 In May 2018, two cases were brought before the General Court against the SRB’s decision not to take any resolution actions in relation to the ABLV Bank AS and its subsidiary ABLV Bank Luxembourg. For the purposes of the 2021 annual accounts, the SRB maintains its position that there is no risk of an outflow of economic resources²³ in relation to these cases; it therefore, did not disclose any contingent liabilities²⁴. Indeed, by 6 July 2022, the General Court had dismissed both cases, concluding²⁵ however, in line with previous case-law, that the decision not to adopt resolution tools in respect of a credit institution is a challengeable act. The General Court considered that, in the light of the discretion enjoyed by the SRB, it did not make a manifest error of assessment in finding that the applicant was failing or was likely to fail. In addition, it concluded that the SRB was allowed to rely on the ECB’s ‘failing or was likely to fail’ assessment in order to verify that there was no reasonable prospect that other alternative measures could prevent its failure within a reasonable timeframe. ABLV Bank AS was ordered to pay the SRB’s legal costs.

26 Furthermore, in August 2019, the SRB concluded that the resolution of AS PNB Banka was not necessary in the public interest, [following the ECB’s assessment](#) that the bank was "failing or likely to fail". The decision not to adopt a resolution scheme was

²² Article 87(4) of [SRM Regulation](#).

²³ [Final annual accounts of the Single Resolution Board – Financial Year 2021](#), p. 41.

²⁴ [Final annual accounts of the Single Resolution Board – Financial Year 2021](#), p. 41.

²⁵ Order of the General Court of 14 May 2020 in case [T-282/18 SRB v Ernestis Bernis and Others](#), and judgment of 6 July 2022 in case [T-280/18 SRB v ABLV Bank AS](#).

challenged by the bank and some of its shareholders before the General Court. In May 2022, the General Court decided to stay the proceedings until final decisions in related cases²⁶. The SRB continues to assess the likelihood of an outflow of economic resources as remote and, therefore, did not disclose any contingent liabilities in the 2021 accounts²⁷. We did not find any evidence contradicting the SRB's assessment.

27 Following the Russian war of aggression against Ukraine, the EU and the US imposed sanctions on certain Russian banks. Sberbank d.d. in Croatia and Sberbank banka d.d. in Slovenia, were deemed to be "failing or likely to fail" owing to a deterioration of their liquidity situation.²⁸ Consequently, the SRB decided to adopt resolution schemes in respect of Sberbank d.d. and Sberbank banka d.d. Under the respective resolution scheme the SRB decided to transfer all the shares issued by Sberbank d.d. and Sberbank banka d.d. to Hrvatska Poštanska Banka d.d. and Nova ljubljanska banka d.d., respectively; the SRB also decided not to adopt a resolution scheme in respect of Sberbank Europe AG. Until the signature of the SRB's final accounts for 2021, there were no judicial proceeding launched against this resolution. Thus, the SRB did not disclose any contingent liabilities or provisions.²⁹ However, subsequent to the accounts, Sberbank Europe and Sberbank of Russia brought several cases against the SRB the Commission and the Council.³⁰ Consequently, these cases will only be considered for the 2022 accounts.

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

28 To safeguard fundamental property rights, 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" principle, any creditors who would have received better treatment under normal insolvency proceedings must be compensated by the SRF. To assess the treatment of creditors and shareholders, a valuation of difference in treatment must be conducted. There were no new developments in relation to six pending cases concerning the no-creditor-worse-off principle in 2021. See our [report](#) for 2020.

²⁶ T-275/19 PNB Banka v ECB, T-301/19 PBN Banka v ECB and T-330/19 PNB Banka v ECB.

²⁷ Final annual accounts of the Single Resolution Board – Financial Year 2021, p. 41.

²⁸ ECB's failing or likely to fail [assessment](#), 28 February 2022.

²⁹ Final annual accounts of the Single Resolution Board – Financial Year 2021, p. 47.

³⁰ Cases T-450/22, T-523/22, T-524/22, T-525/22, T-526/22, T-527/22, T-571/22, T-572/22.

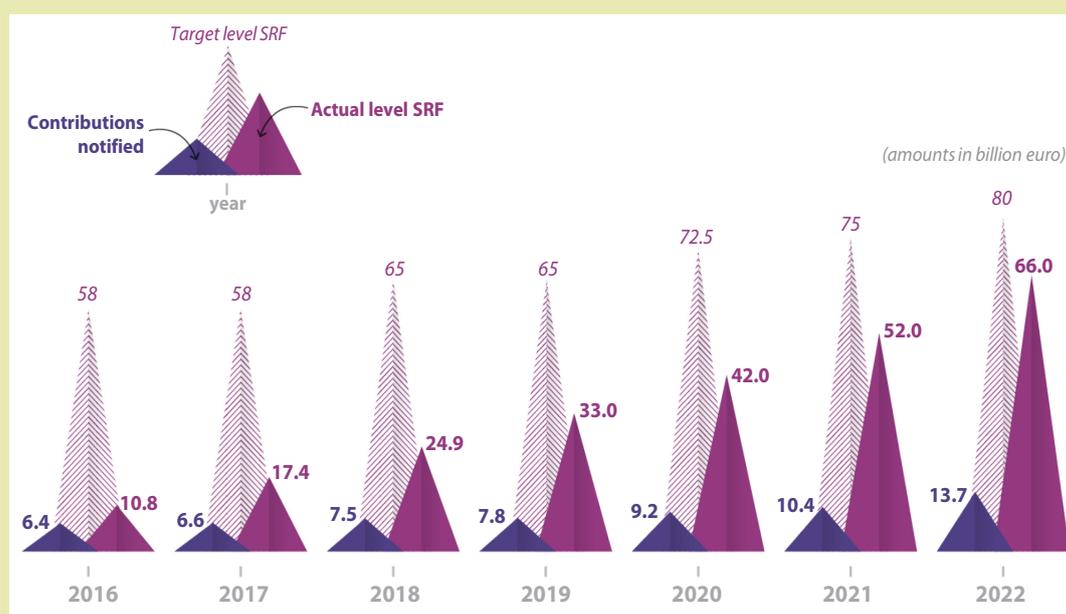
Contingent liabilities related to banks' contributions to the Single Resolution Fund

29 Banking Union banks are legally obliged to contribute to the SRF (see [Box 3](#) and [Annex III](#)) based on their individual risk profile as calculated by a method set out in [Commission Delegated Regulation \(EU\) 2015/63](#) and the target level as calculated by the SRB.

Box 3

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 €80 billion. Annual contributions notified to 2 896 banks in 2022, amounted to €13.67 billion. Including the ex-ante contributions of the 2022 cycle, the available financial means of the Fund will be around €66 billion.



Note: The difference is adjusted every year until 2023.

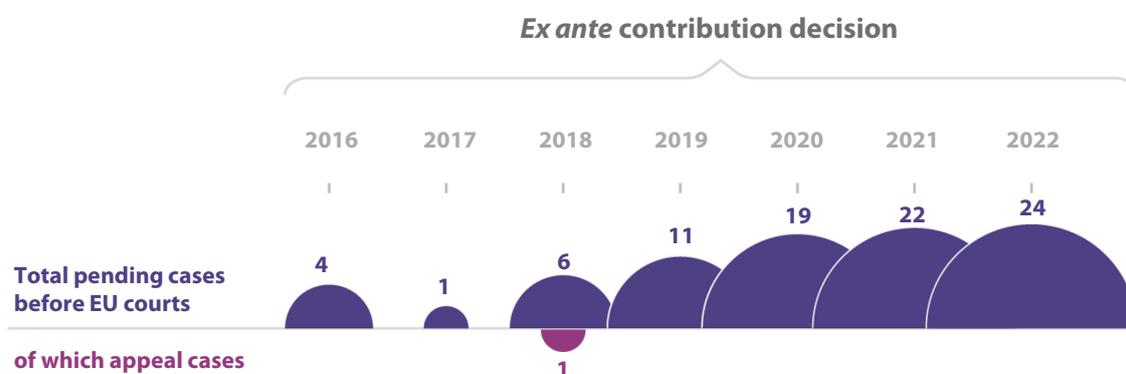
On 27 January and 8 February 2021, the Member States to the European Stability Mechanism signed the Agreement amending the European Stability Mechanism Treaty. The amendments include a backstop to the SRF, which – according to the draft decision of the Board of Governors – would provide a credit line up to a nominal cap of €68 billion³¹. The [reformed treaty](#) will come into force when ratified by the parliaments of all 19 European Stability Mechanism Members³².

Source: SRB, European Stability Mechanism.

Contingent liabilities arising from *ex ante* contributions cases at EU level

30 At the time the SRB's final accounts for 2021 were signed, 63 proceedings related to *ex ante* contributions (2020: 44 proceedings) were pending against the SRB before the General Court (62) and the Court of Justice (1). No applications against the 2022 *ex ante* contribution decisions of the SRB had been filed. After the accounts were signed, 24 applications against the 2022 *ex ante* contributions were lodged³³ (see [Figure 3](#)). Consequently, these cases will only be considered for the 2022 accounts.

Figure 3 – Break-down of *ex ante* contribution cases pending before EU courts on September 2022



Source: SRB.

31 In its final accounts for 2021 the SRB disclosed contingent liabilities related to *ex ante* contributions of €5.5 million (2020: €5 561 million) relating to eight (2020: 41) pending cases at the General Court³⁴ (see [Figure 4](#)) as the SRB assessed the risk of an

³¹ [European Stability Mechanism](#)

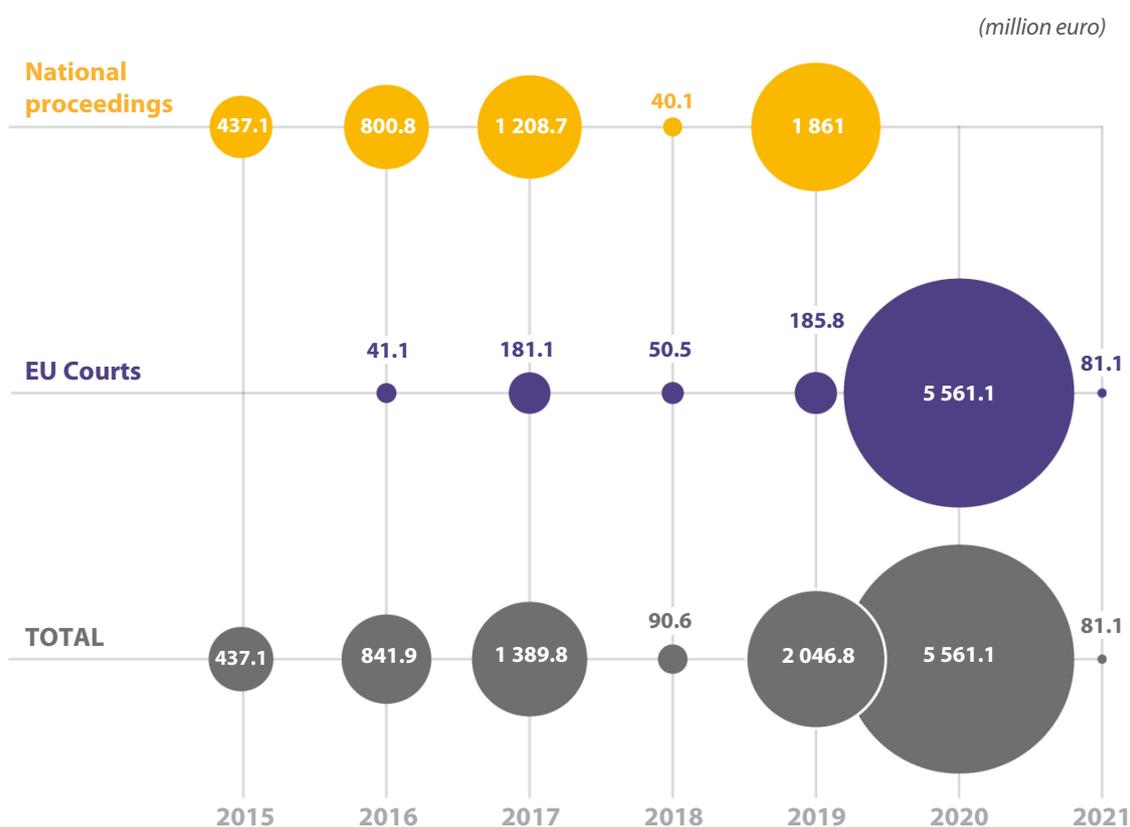
³² [Agreement Amending the Treaty Establishing the European Stability Mechanism](#).

³³ Case T-347/21, brought on 21 June 2021, was the first case lodged against the SRB's 2021 *ex ante* contributions decision.

³⁴ [Final annual accounts of the Single Resolution Board – Financial Year 2021](#), pp. 39-40.

outflow of economic resources in these cases as possible. It also disclosed €2.55 million in relation to 51 cases corresponding to applicant's legal costs that the SRB would need to pay if the CJEU so decides.

Figure 4 – Historical evolution of the amount of contingent liabilities in the SRB's accounts in relation to *ex ante* contributions to the SRF



Source: SRB accounts; 2021: €5 509 446.47 contingent liabilities regarding legal cases on *ex ante* contributions at EU level and €2 550 000.00 legal costs for pending cases.

32 The significant change in the reported amount of contingent liabilities can be primarily attributed to two factors. The first factor is the Court of Justice annulment of the 2017 SRB *ex-ante* contribution decision and the resulting clarification on the validity of the legal framework on *ex-ante* contributions (see paragraph 42 and Box 5). This reduced the financial risk of a disbursement from the SRF significantly. Instead, the SRB disclosed contingent liabilities for legal costs related to procedural flaws. The second factor is the SRB's new method, based on our previous recommendation³⁵, to estimate contingent liabilities (see paragraph 35) for cases where the probability of the outflow of economic resources from the SRF is deemed to be possible and can be reliably quantified.

³⁵ 2020 annual report on contingent liabilities, recommendation 1, p. 43.

33 In its 2020 accounts, the SRB had reported the total value of *ex ante* contributions as contingent liabilities in disputed cases, due to uncertainties on the approach taken by the Court of Justice on the validity of the legal framework following the General Court judgment in 2020³⁶. In its 2021 accounts, using a new method, the SRB disclosed the estimated difference between the amounts received and the potential recalculation of the 2021 *ex ante* contribution amount on those legal cases where the risk of an outflow of economic resources was assessed as possible.

34 For the 2016, 2017, 2018, 2019 or 2020 *ex ante* contribution cycles the SRB did not disclose contingent liabilities other than legal costs, as it assessed the risk of an outflow of economic resources from the SRF as remote. These cases were resumed after the Court of Justice rulings in three cases related to the 2017 contribution cycle³⁷.

Method used by the SRB to calculate the difference between the original ex ante contribution decision and the potential revised decision for the 2021 ex ante contribution cases

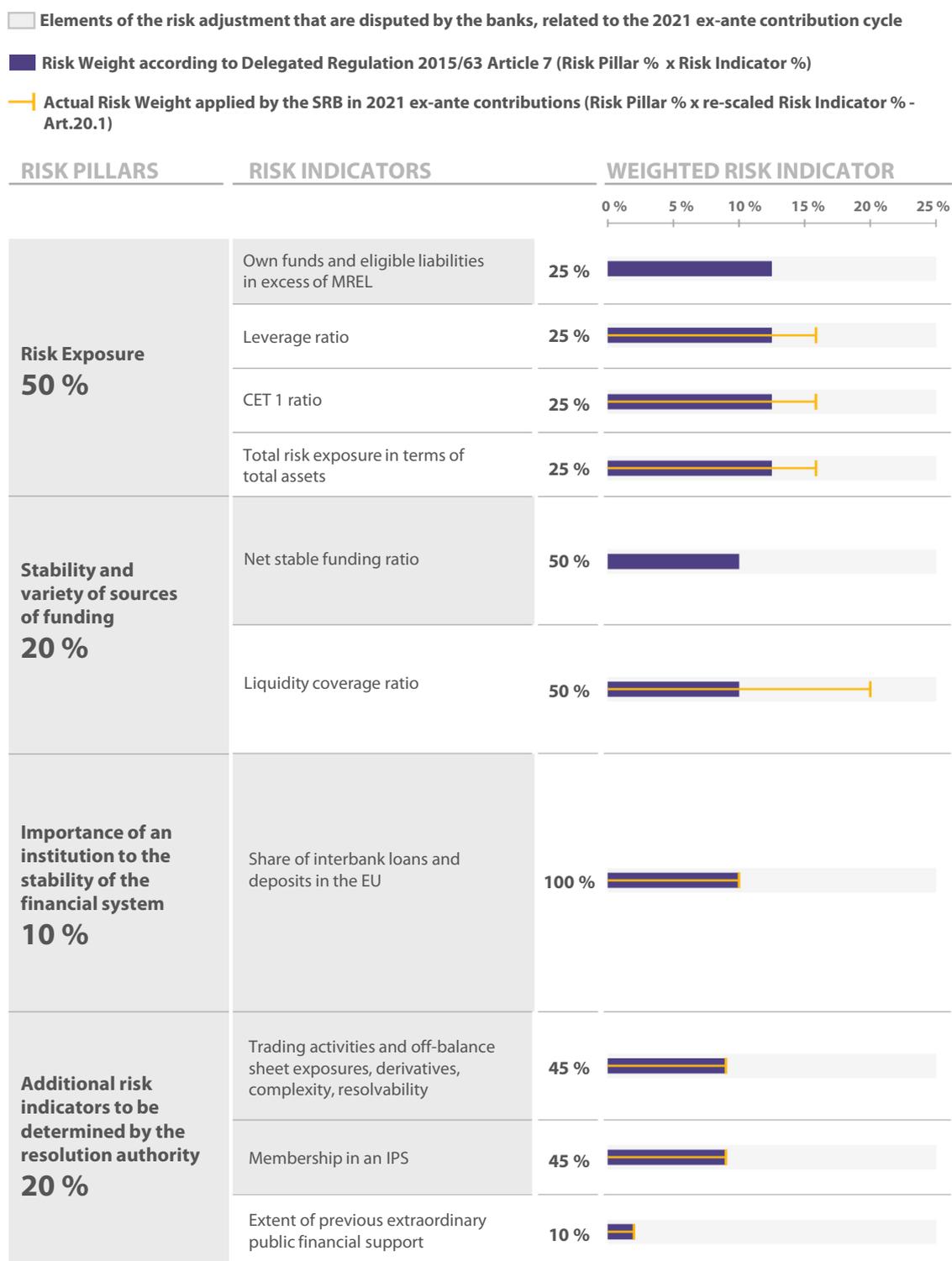
35 Implementing the ECA's recommendation³⁸, the SRB developed a new method for calculating the estimated difference in contributions between an original *ex ante* contribution decision and a potential revised decision based on a re-calculation affected by the challenged risk-indicators and risk adjustment process (see [Figure 5](#) and [Figure 6](#)). However, the new method has only been used for those 2021 *ex ante* contribution cases for which the risk has been assessed as possible, depending on the type of pleas raised in the respective applications. For the remaining pending cases, relating to the 2016-2021 *ex ante* contribution decisions, the SRB assessed the risk as remote. Therefore, it did not apply the new method and did not calculate any contingent liabilities.

³⁶ 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.

³⁷ Cases [C-584/20 P](#) and [C-621/20 P](#), [C-663/20 P](#) and [C-664/20 P](#).

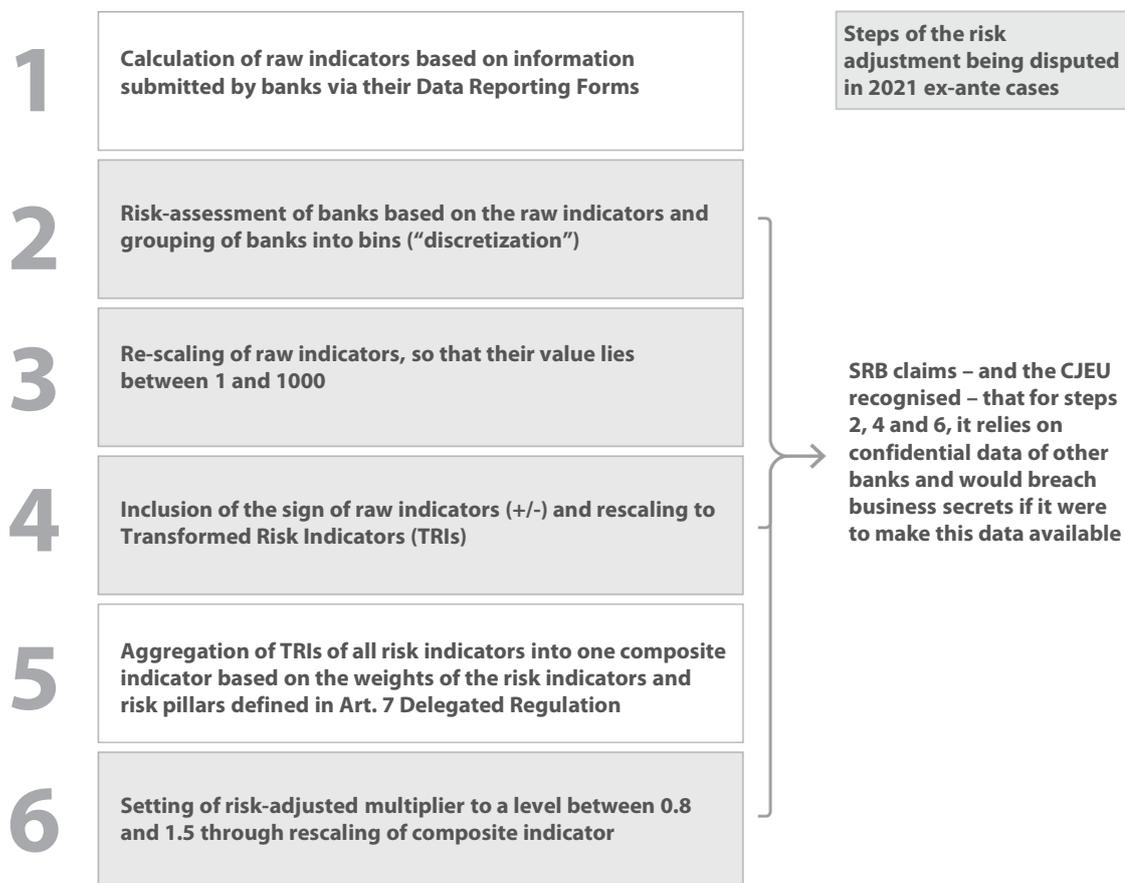
³⁸ [2020 annual report on contingent liabilities, recommendation 1](#), p. 43.

Figure 5 – Ex ante contribution calculation: determination of risk profile of institutions



Source: Commission Delegated Regulation (EU) 2015/63, table of the recital 136 of the Decision SRB/ES/2021/22 and legal cases related to the 2021 ex ante contribution cycle.

Figure 6 – Steps in the calculation of the risk adjustment factors



Source: Delegated Regulation (EU) 2015/63 and legal cases related to the 2021 *ex ante* contribution cycle.

36 Some of the applicants argue that because they belong to institutional protection schemes (IPS), they should be granted equal protection, regardless of their size, business activity or risk profile. Moreover, they claim that the regulatory framework is unlawful, as it allows the SRB, in breach of the general principles of EU law, to set different IPS indicators and apply risk-adjustment multipliers to the IPS factor in a disproportionate manner. Due to the novelty and complexity of these issues raised, the SRB has assessed the risk of a negative outcome of the proceedings, which could lead to an outflow of economic resources as possible, and has calculated a contingent liability for the relevant cases.

37 There are also cases where the applicants put forward violations by the SRB of the [Commission Delegated Regulation \(EU\) 2015/63](#) as regards the consideration of the overall derivative risk position within the framework of the risk indicator “trading activities, off-balance sheet exposures, derivatives, complexity and resolvability” and

the application of the risk-adjustment multiplier. The SRB assessed the risk of an outflow of economic resources as possible and calculated a contingent liability.

38 Other cases challenge the interpretation by the SRB of Delegated Regulation (EU) 2015/63, on the grounds that it did not take into account certain risk indicators in its calculation, namely the “own funds and eligible liabilities held in excess of the minimum requirement for own funds and eligible liabilities”, the “net stable funding ratio” and the “complexity” and “resolvability” sub-indicators (see [Figure 5](#) and [Figure 4](#) and [Glossary](#)). Indeed, the SRB did not consider these risk indicators in its calculation, citing a lack of comparable data for all banks and the need for their equal treatment. For instance, the SRB could not calculate the excess “minimum requirements for own funds and eligible liabilities” available to all banks, as the SRB and the NRAs have not yet set binding “minimum requirements for own funds and eligible liabilities” targets for all banks under their respective remits. We raised this issue in previous reports.³⁹ Even though the SRB assessed the overall risk of an outflow of economic resources as possible for some of these cases, it did not disclose any contingent liabilities for the particular substantive pleas, due to the unavailability of relevant data (see [Box 4](#)). In addition, it did not include in the accounts the reason for non-disclosure of any related contingent liabilities.

Box 4

Risk indicators challenged by banks, for which the SRB did not calculate a financial exposure

The “net stable funding ratio” standard reporting became applicable as a substantive prudential requirement in June 2021⁴⁰. [Regulation \(EU\) 2019/876](#) introduced a 100 % net stable funding ratio supervisory requirement applicable from 28 June 2021 onwards⁴¹. Before that date, no binding harmonised net stable funding ratio standard had been available. Therefore, the SRB decided not to use it for the 2021 *ex ante* cycle. The SRB will apply the net stable funding ratio indicator starting with the 2023 *ex ante* contributions cycle.

³⁹ [Special Report 23/2017](#), recommendation 2a and [special report 01/2021](#), paragraph 73.

⁴⁰ [EBA/ITS/2020/05 Final Draft implementing technical standards on supervisory reporting requirements for institutions under Regulation \(EU\) No 575/2013](#).

⁴¹ Recitals 45-48, Articles 2(4) and 3(2) of [Regulation \(EU\) 2019/876](#).

For all the cases that include pleas in relation to the risk indicator “**liabilities held in excess of minimum requirements for own funds and eligible liabilities**”, it was not possible for the SRB to calculate the difference in contributions between original *ex ante* contribution decisions and a potential revised decision. Thus, the SRB did not quantify any contingent liabilities for these cases in respect to the pleas concerned.

The SRB stated that applying the “own funds and eligible liabilities held in excess of the minimum requirements for own funds and eligible liabilities” risk indicator only for those institutions, for which minimum requirements for own funds and eligible liabilities targets have already been set, would violate the principle of equal treatment.

Similarly, for the “**complexity**” and “**resolvability**” sub-indicators, data is not available in a harmonised form for all institutions in the participating Member States for the reference year 2019 (*ex ante* contribution cycle 2021). Therefore, the SRB assessed that it cannot apply these sub-indicators for the 2021 *ex ante* cycle.

39 Taking into account the high level of uncertainty and the complex regulatory framework, we conclude that the application of the new method to estimate contingent liabilities on the *ex-ante* contribution cases improved the accuracy of the disclosure amount.

Developments in cases concerning the SRB’s 2016 *ex ante* contributions decisions

40 In September 2019, NRW Bank lodged an appeal⁴² against the General Court judgment of June 2019 in Case T-466/16 dismissing the action as inadmissible. In October 2021, the Court of Justice set aside the General Court judgment and referred the case back to the General Court to rule on the substance. The SRB assessed the risk for this case as remote and did not disclose any contingent liabilities. We did not find any evidence that would contradict the SRB assessment.

Developments in cases concerning the SRB’s revised 2016 *ex ante* contributions decisions

41 On 28 November 2019, the General Court annulled the SRB’s 2016 *ex ante* contribution decisions for three banks on procedural grounds⁴³. As the calculation remained valid, the SRB issued a new decision on the disputed 2016 *ex ante*

⁴² Case C-662/19 P.

⁴³ Case T-365/16, joined cases T-377/16, T-645/16 and T-809/16 as well as case T-323/16.

contributions following a revised procedural approach. In May, June and August 2020 the three banks filed applications at the General Court for the annulment of the SRB's new 2016 *ex ante* contribution decision. The General Court resumed the proceedings in the three cases⁴⁴ after the Court of Justice issued its rulings in three pending 2017 *ex ante* contribution cases⁴⁵. The SRB assessed the risk for these cases as remote and did not disclose any contingent liabilities. We did not find any evidence that would contradict the SRB assessment.

Developments in cases related to the 2017 ex ante contributions decisions

42 On 15 July 2021, the Grand Chamber of the Court of Justice set aside the ruling of the General Court for one case⁴⁶. The Court of Justice annulled the *ex ante* contribution decision of the SRB for insufficient reasoning and upheld the validity of the contested provisions of [Commission Delegated Regulation \(EU\) 2015/63](#)⁴⁷. Following this judgment, the SRB issued a new ex-ante contributions decision on 15 December 2021. The bank requested the annulment of this new decision on 15 March 2022⁴⁸. The SRB also brought appeals against the other two General Court judgments of 23 September 2020 and the Court of Justice issued its ruling on 3 March 2022⁴⁹ (see [Box 5](#)).

⁴⁴ Cases [T-336/20](#), [T-339/20](#) and [T-499/20](#).

⁴⁵ Cases [C-584/20 P](#) and [C-621/20 P](#), [C-663/20 P](#) and [C-664/20 P](#).

⁴⁶ Judgment of 23 September 2020, [Case T-411/17](#), [Landesbank Baden-Württemberg v SRB](#).

⁴⁷ Cases [C-584/20 P](#) and [C-621/20 P](#) [Commission v Landesbank Baden-Württemberg and SRB v Landesbank Baden-Württemberg](#).

⁴⁸ [Case T-142/22](#), [Landesbank Baden-Württemberg v SRB](#).

⁴⁹ Cases [C-663/20 P](#), [SRB v Hypo Vorarlberg Bank and C-664/20 P](#), [SRB v Portigon and Commission](#).

Box 5**General implications of the Court of Justice ruling of 3 March 2022 on the SRB's 2017 *ex ante* contributions decision**

The Court of Justice annulled the SRB's 2017 *ex ante* contribution decision with regard to two banks⁵⁰, following the line taken by the Court of Justice in its previous judgment of 15 July 2021. In particular, the Court of Justice clarified the following:

- (1) The SRB's 2017 *ex ante* contributions decision and its annex, were properly authenticated.
- (2) 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. As regards the scope of the SRB's obligation to state reasons, we refer to the relevant judgment and orders of the Court of Justice.⁵¹

The Court of Justice maintained the effects of the SRB's annulled 2017 *ex ante* contribution decision with respect to the two banks for maximum 6 months until the entry into force of a new SRB decision concerning the 2017 *ex ante* contribution cycle.

Developments in cases relating to the ex ante contributions cycles 2018-2020

43 In one of the cases relating to the 2018 contribution cycles lodged before the General Court (T-758/18, ABLV Bank v SRB), the SRB had assessed the risk of annulment as remote and did not disclose any contingent liabilities. This is consistent with the General Court's judgment dismissing the action in January 2021, against which the bank appealed in March 2021⁵². In September 2022, the Court of Justice dismissed the appeal.

44 However, the SRB considered that it was possible that all other cases related to its *ex ante* contribution decisions pertaining to the 2018, 2019 and 2020 contribution cycles would be annulled on procedural grounds for insufficient motivation, since they did not fully comply with the reasoning standards established by the Court of Justice in

⁵⁰ Cases T-414/17, Hypo Vorarlberg Bank v SRB and T-420/17 Portigon AG v SRB and Commission.

⁵¹ Cases C-584/20 P and C-621/20 P, paragraph 137, C-663/20 P, paragraph 102 and C-664/20 P, paragraph 105.

⁵² Case C-202/21 P, ABLV Bank v SRB.

three appeal cases (see paragraph 42). For these cases, the SRB considers that even in the event that *ex ante* contribution decisions were re-adopted following a judgment, this would not affect the calculation of the *ex ante* contributions, despite any existing substantive pleas, as the decisions would only rectify the motivation. In that scenario, calculation of *ex ante* contributions might still be affected in the future but only if the banks concerned decided to appeal and raise substantive pleas against the re-issued decisions. Therefore, for the 2018, 2019 and 2020 cases, the SRB assessed the risk of an outflow of economic resources from the SRF resulting from those cases as remote except for legal costs and did not apply the new method. In comparison, in the 2021 cases assessed as possible the SRB applied the new method as it considered reasonably to assume that the EU courts would rule on their merits relating to the calculation of the *ex ante* contributions.

45 In summary, we did not find any evidence that would contradict the conclusions made by the SRB on its contingent liabilities based on available information at the time of the closure of the accounts 2021.

Developments in cases relating to the *ex ante* contributions cycle 2021

46 Twenty-two actions were lodged for the annulment of the 2021 *ex ante* contribution decision and are still pending before the General Court. For those cases where the risk of an outflow of economic resources has been assessed as possible the SRB applied the new method and calculated a contingent liability (see paragraphs 35-39).

47 We did not find any evidence that would contradict the assessment of the SRB on the probability of an outflow of economic resources for the 2021 cases.

Case related to the irrevocable payment commitments

48 There is another case⁵³ pending before the General Court relating to the interpretation of Article 7(3) of [Council Implementing Regulation \(EU\) 2015/81](#) in the context of agreements on irrevocable payment commitments concluded with the SRB. The applicant, which has ceased operating as a credit institution, considers that the SRB's refusal to return the sums paid as cash guarantees for irrevocable payment commitments for 2015-2021 amounts to a breach of its contractual obligations. The SRB considers that the risk of an outflow of economic resources from the SRF is remote. We did not find any evidence contradicting the conclusions of the SRB.

⁵³ Case [T-688/21](#), BNP Paribas Public Sector v SRB.

Estimate of contingent liabilities for opposing party's legal costs

49 In its final accounts for 2021, the SRB, for the first time, disclosed separate contingent liabilities related to the settlement of legal costs of the opposing party's legal representation for those cases where it considers the probability of success to be possible for the applicant (without necessarily resulting in a disbursement from the SRF). The SRB estimated the total legal costs for all those pending cases at €2.55 million. The SRB based its estimation on the latest settlement for a case of similar nature⁵⁴. However, the SRB analysis did not sufficiently address differences in the complexity and the length of the cases concerned, which have an impact on the legal costs incurred.

50 For five cases, for which the SRB assessed the likelihood of an outflow of economic resources as probable, it recognised provisions amounting to €242 750 for the cost of the opposing party's legal representation. In this context, we note that the SRB has directly expensed the payment of legal costs for one case that was settled in January 2021, without using the relevant provision for this case in the 2020 accounts.

Contingent liabilities arising from *ex ante* contribution cases at national level

51 In addition to the above cases, a number of banks in four Member States (Austria, Italy, Finland and Germany) have brought administrative or judicial proceedings against the decisions on their *ex ante* contributions. The challenged amount of €4 712 million (see [Table 3](#)) relates to *ex ante* contribution decisions pending an appeal at national level (702 administrative appeals and 9 appeals at national court in the four countries concerned). Most of the cases were launched in Germany. We note that the overall challenged amount under dispute has increased in relation to 2020.

52 Despite a judgment of December 2019, in which the Court of Justice determined that only the CJEU could review the legality of SRB decisions concerning *ex ante* contributions to the SRF⁵⁵, there are still new cases at national level. The SRB considers that the risk of outflow of economic resources stemming from cases against *ex ante* contributions at national level is remote. Therefore, the SRB did not disclose any contingent liabilities in relation to such cases⁵⁶.

⁵⁴ Final annual accounts of the Single Resolution Board – Financial Year 2021, p. 41.

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

⁵⁶ Final annual accounts of the Single Resolution Board – Financial Year 2021, p. 40.

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

Contribution related to year	Number of cases 2022	Challenged amounts 2022 (in million euros)	Number of cases 2021	Challenged amounts 2021 (in million euros)
2022	3	232	n/a	n/a
2021	57	1 402	28	632
2020	30	679	30	679
2019	135	646	136	662
2018	113	566	113	566
2017	131	559	132	578
2016	238	544	239	545
2015	4	84	4	84
Total	711	4 712	682	3 746

Source: ECA, based on SRB data; all amounts as at May of the respective year; amounts rounded to the nearest million.

53 While the SRB did not disclose national cases and disputed amounts in its 2021 accounts, it continued monitoring cases lodged at the national level concerning the SRB's *ex ante* contribution decisions. Furthermore, in line with our previous [recommendation](#)⁵⁷, the SRB requested and received written representations from NRAs on behalf of its private external auditor.

54 The level of information provided by NRAs varies significantly. As part of its written assurance, one NRA stated that for all but the 2016 cases, which were assessed as remote, they were not in a position to assess the likelihood of an annulment in the *ex ante* decisions subject to national administrative proceedings or judicial proceedings. Another NRA stated that it is not possible to assess their related cases. Finally, a third NRA assessed their cases as remote.

⁵⁷ 2020 annual report on contingent liabilities, recommendation 2, p. 44.

Contingent liabilities related to administrative contributions

55 Appeals against administrative contribution notices can be filed with the SRB's appeal panel within six weeks of the date the notice was issued⁵⁸. Decisions of the appeal panel can be contested in the General Court. In 2021, banks brought no appeals against administrative contribution notices. Consequently, the SRB did not disclose any contingent liabilities for administrative contributions.

Additional information

56 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. We found that the SRB's legal team conducted an internal assessment of risks with an underlying reasoning in each litigation category and provided it to the accounting officer. Developments are regularly reported to the SRB's board.

Part II: Contingent liabilities of the Commission

57 In its accounts as of 31 December 2021, the Commission has not disclosed any contingent liabilities arising based on its task under the SRM Regulation.

58 Following the Commission's endorsement of the BPE resolution scheme⁵⁹, adopted by the SRB, 26 legal cases were pending before the General Court against the Commission in June 2022. In four additional cases in which the Commission was a defendant, the General Court issued rulings on 1 June 2022 dismissing the cases in their entirety (see [Box 2](#)). Therefore, there was no outflow of economic resources regarding these cases.

59 The Commission is also a defendant in two *ex ante* contribution cases and intervener in other *ex ante* contribution files. However, as the Commission is not involved in the decision-making process of the *ex ante* contributions, it did not disclose any contingent liabilities.

⁵⁸ Article 85(3) of [SRM Regulation](#).

⁵⁹ Endorsement of the resolution scheme concerning Banco Popular Español S.A. (BPE).

60 We did not find any evidence that would contradict the Commission's assessment on the ongoing litigation in relation to the Commission's task concerning the SRM.

Part III: Contingent liabilities of the Council

61 The Council has confirmed that, at 31 December 2021 had no contingent liabilities arising due to the performance of its tasks under the SRM Regulation.

62 Up to June 2022, the Council had not been involved in any resolution decisions.

Conclusions and recommendations

63 In relation to cases related to resolution and non-resolution decisions at EU level, the SRB and the Commission assessed the risk of outflow of economic resources as remote and consequently did not disclose any contingent liabilities (see paragraphs [18](#), [20](#), [25](#), [26](#) and [57](#)).

64 In its 2021 accounts, the SRB disclosed contingent liabilities for potential disbursement from the SRF in relation to pending cases against the SRB's *ex ante* contribution decisions taken in 2021, amounting to €5.5 million. The SRB also disclosed a contingent liability of €2.55 million for the legal costs of the opposing party's legal representation. This concerns most of the pending cases for the *ex ante* contribution decisions for the years 2016-2021 (see paragraph [31](#) and [Figure 4](#)). The SRB analysis did not sufficiently address differences in their complexity and the length of the proceedings, which impact the accumulated legal costs (see paragraph [49](#)).

65 For those 2021 cases for which the SRB assessed the risk of outflow of economic resources from the SRF as possible, it applied a method to calculate the estimated difference between the amount of the original *ex ante* contribution decision and the potential recalculation. This better reflects the actual financial risk of these cases. However, the method took into account only the cases that could be reliably quantified by the SRB. For those cases for which the risk was assessed as possible but the SRB felt unable to quantify the potential financial exposure, it did not disclose the nature and the reason of the uncertainties (see paragraph [38](#)).

66 The SRB did not apply the new method to the pre-2021 cases as it has assessed the risk of an outflow of economic resources as remote. The SRB considered that it was possible that all other cases related to its *ex ante* contribution decisions pertaining to the 2018, 2019 and 2020 contribution cycles would be annulled on procedural grounds for insufficient motivation, since they do not fully comply with the reasoning standards established by the Court of Justice. In SRB's assessment, such annulment would not affect the calculation of the amount of the *ex ante* contributions but could have consequences for the duty to reimburse legal costs (see paragraph [44](#)).

67 Similar to the accounts of the 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 preliminary ruling, which states that national courts are not competent to review the SRB's decisions on *ex ante* contributions to the SRF (see paragraph [52](#)).

68 Based on the procedures performed and evidence obtained, nothing has come to our attention that causes us to believe that the contingent liabilities arising from the performance of their resolution tasks of the SRB, the Commission and the Council are materially misstated, based on the available information at the closure of the 2021 accounts. We note however, that all assessments concerning the outcome of the legal proceedings in cases related 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 situation (see paragraph 18). We also note that the legal proceedings in relation to the *ex ante* contribution to the SRF target specific aspects of the SRB calculations and the risk of an outflow of economic resources cannot be entirely excluded (see paragraphs 36 and 37).

69 To ensure that the accounts provide a true and fair view, the accounting officer needs to obtain all relevant information. For the preparation of the SRB's 2021 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 and a detailed analysis of the new method for calculating contingent liabilities. The risk assessment also included some underlying reasoning (see paragraph 56). However, the accounting officer did not receive written representations from FROB on national proceedings in relation to the resolution of Banco Popular Español (see paragraph 24). This was done subsequent to the final accounts. Following our recommendation No 2 from 2020, the SRB received written representation on behalf of its private external auditor, from the relevant national resolution authorities on national proceedings in relation to *ex ante* contributions (see paragraph 53).

Recommendation 1 – Direct request for written representation related to national proceedings

The SRB should request written representations assessing the probability of an outflow of economic resources because of national proceedings related to resolution or *ex ante* contributions to the SRF directly from national resolution authorities, before finalising its annual accounts.

Timeframe: Presentation of the SRB's accounts for 2022

Recommendation 2 – Further improvement of the method for calculating the possible compensation of legal costs

When quantifying the contingent liabilities related to the settlement of legal costs of the opposing party's legal representation, the SRB should refine its analysis of the relevant cases, taking into account their complexity, including the potential length of the proceedings.

Timeframe: Presentation of the SRB's accounts for 2022

Recommendation 3 – Disclosure of possible reimbursements from the Single Resolution Fund

For *ex ante* contribution cases for which the SRB assesses the outflow of economic resources as possible but cannot reliably quantify the contingent liability, the SRB should disclose in its accounts the nature of the uncertainty and the reasons behind it.

Timeframe: Presentation of the SRB's accounts for 2022

This Report was adopted by Chamber IV, headed by Mr Mihails Kozlovs, Member of the Court of Auditors, in Luxembourg at its meeting of 8 November 2022.

For the Court of Auditors



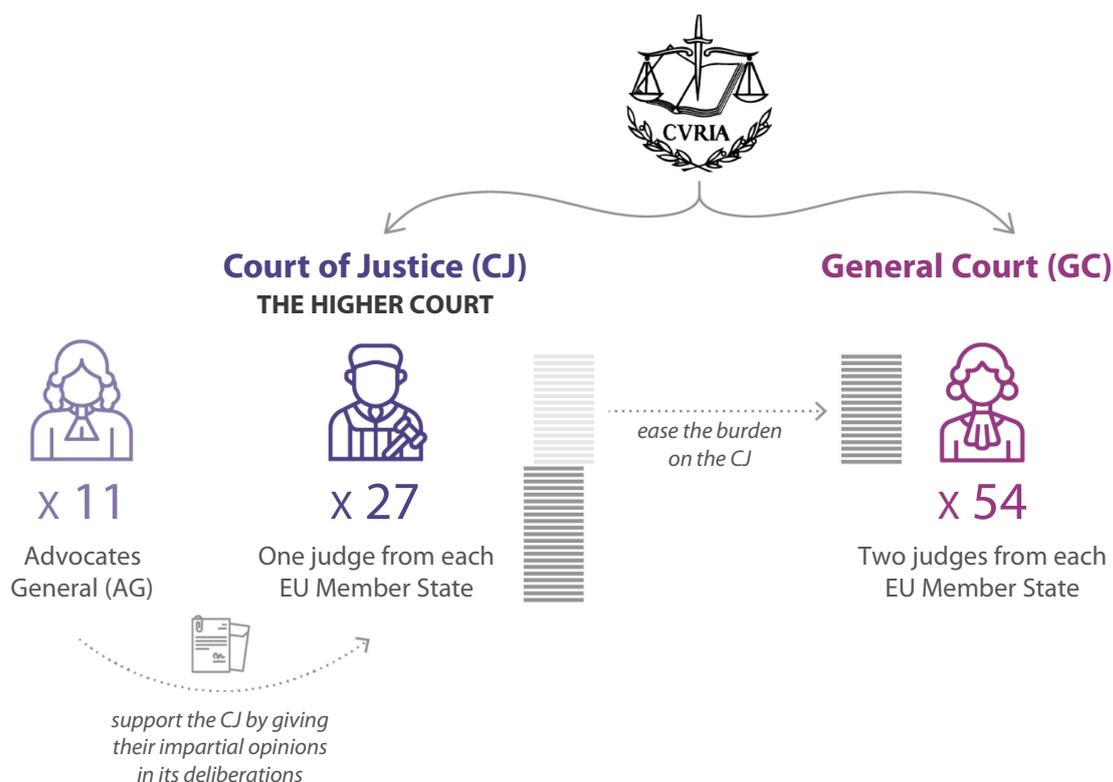
Tony Murphy
President

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 7](#)) consists of two courts: the Court of Justice and the General Court. Within the Court of Justice, Advocates-General provide their opinions on cases in order to support the Court of Justice in its deliberations. The General Court was established to ease the burden on the Court of Justice; 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 General Court can be appealed before the Court of Justice within two months, but such appeals are limited to points of law.

Figure 7 – 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 8](#)). 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 decision⁶⁰.

Figure 8 – Judicial remedies available against decisions of EU institutions, bodies, offices and agencies

ACTION FOR ANNULMENT (of a decision)	ACTION FOR DAMAGES (non-contractual liability)
Article 263 TFEU	Articles 268, 340 TFEU
LEGAL BASIS 	
2 months	5 years
TIME LIMIT (for application) 	
Legally binding act Directly and individually concerned Benefits applicant	Unlawful conduct Actual and certain damage Direct causal link
CONDITIONS (simplified) 	

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 claims⁶¹ 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.

⁶⁰ 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.

⁶¹ Article 268 TFEU, Article 87(5) of [SRM Regulation](#) and Article 46 of the [Statute of the Court of Justice](#).

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 months⁶², 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 [Figure 9](#)). Judgments of the General Court can be appealed before the Court of Justice within two months and ten days after the parties are notified of the decision⁶³. If they are not appealed, they become final after this period.

Figure 9 – Typical process of cases at the CJEU



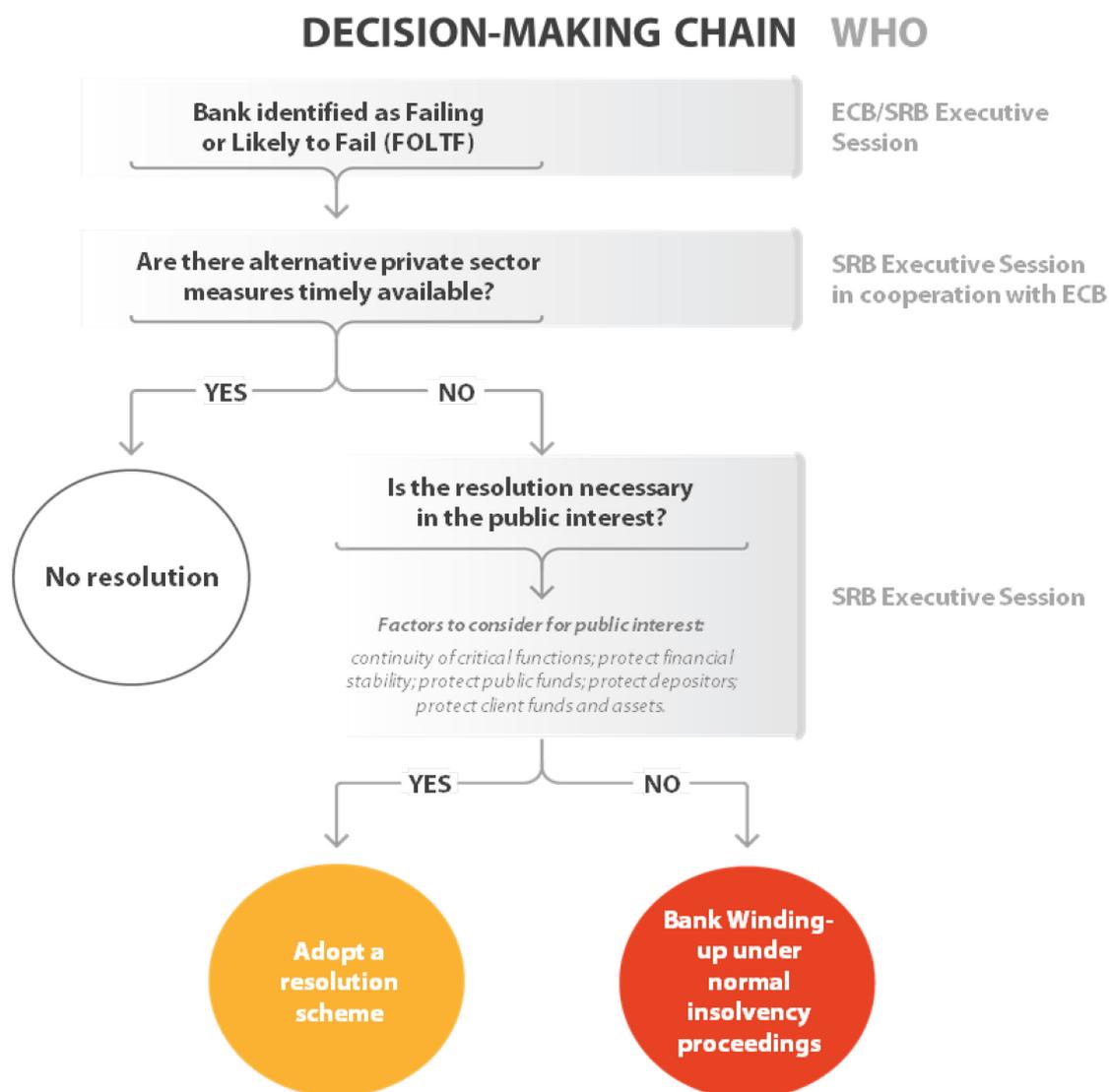
Source: ECA.

⁶² 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.

⁶³ Article 56 of [Statute of the Court of Justice](#).

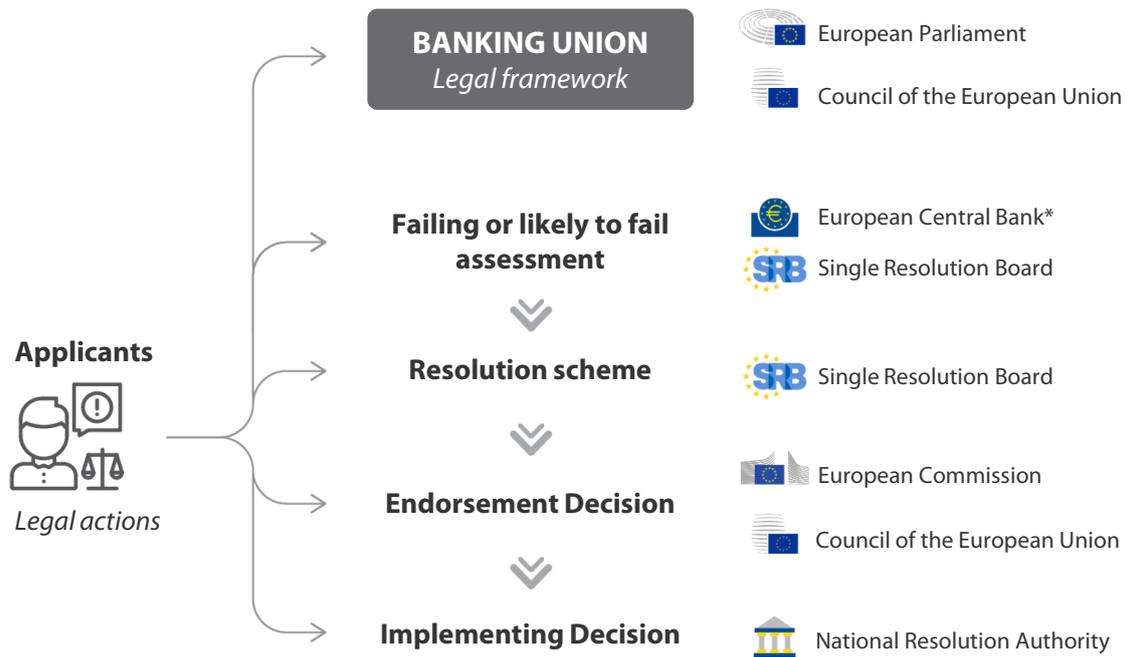
Annex II – Resolution Process and Decision

Figure 10 – 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).

Figure 11 – Decision process leading to a resolution and current disputes



* The ECB is not within the scope of this audit.

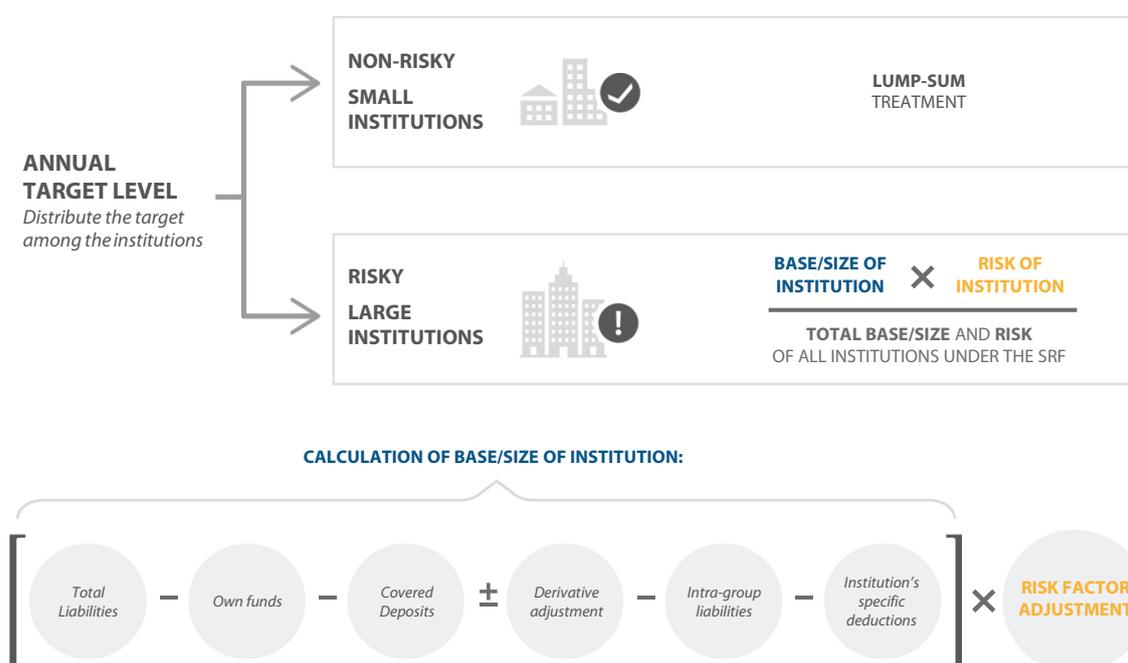
Source: ECA, based on the legal framework.

Annex III – Ex ante contribution calculation and collection process

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

Since 2016, the SRB has been responsible for calculating the contributions to the SRF⁶⁴ in close cooperation with NRAs. The contribution per bank is calculated based on a flat-rate contribution for small (non-risky) banks and a pro-rata (risk-adjusted, where applicable) contribution for larger or risky banks⁶⁵ (see [Figure 12](#)).

Figure 12 – Ex ante contributions calculation method



Source: SRB.

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 (the Harmonised Annex). Based on the calculation provided by the SRB, the NRAs collect the contributions and transfer the amounts to the SRF⁶⁶, which is managed by the SRB (see [Figure 13](#)).

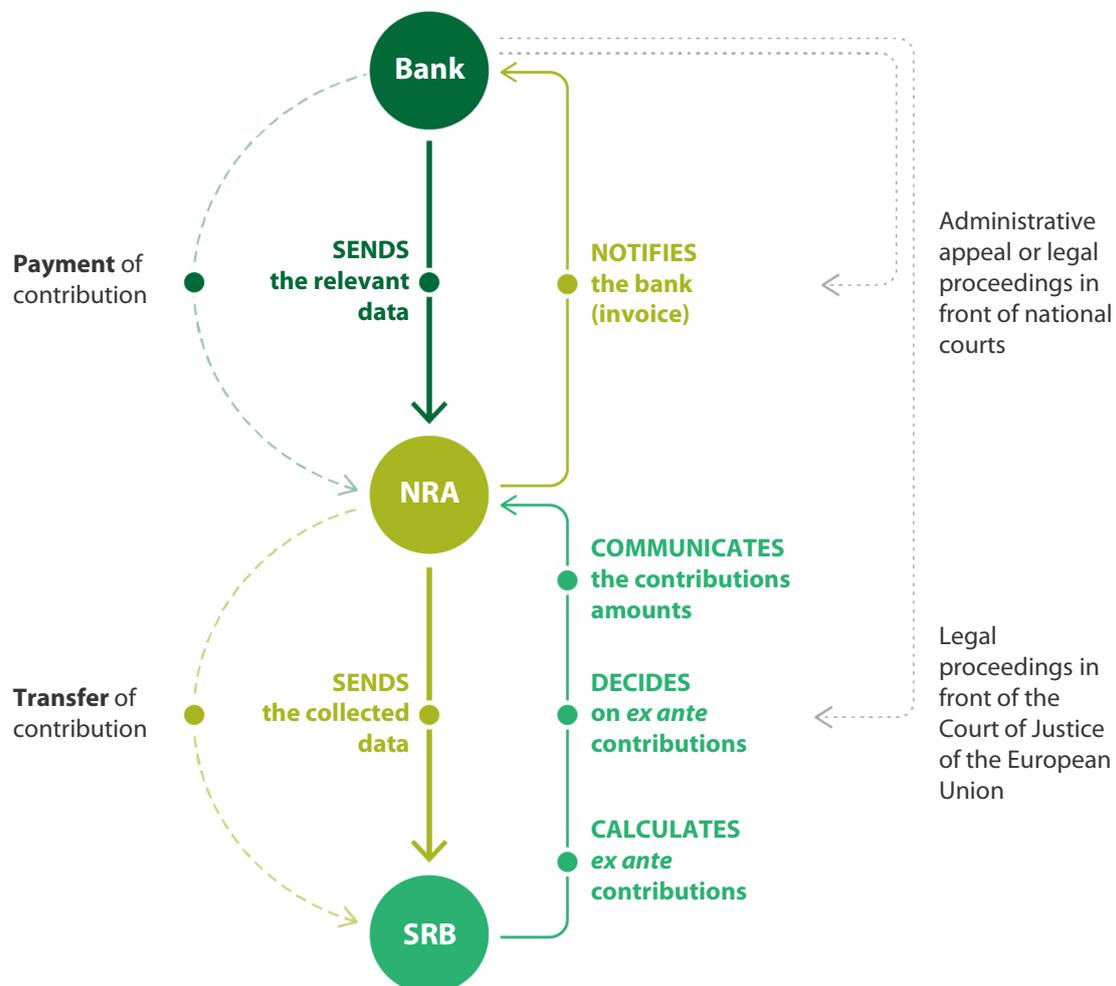
⁶⁴ Article 4 of [Council Implementing Regulation \(EU\) 2015/81](#).

⁶⁵ Article 4(1) of [Commission Delegated Regulation \(EU\) 2015/63](#).

⁶⁶ [Council agreement](#) on the transfer and mutualisation of contributions to the Single Resolution Fund, 14 May 2014.

During this calculation and notification process, a number of formal procedural requirements must be met.

Figure 13 – Ex ante contribution collection process with legal remedies



Source: ECA based on the legal framework.

Annex IV – Follow-up of previous year’s recommendations

Year of issuance	Recommendation	Status	Detail
2021	The SRB should assess and develop a method for calculating the estimated difference in contributions between the original <i>ex ante</i> contribution decisions and a potential revised decision, where applicable.	Completed	The SRB developed a method to estimate the amounts that it would be liable for in disputed cases to contributing institutions where it considers a successful outcome for the applicant as possible; in the 2021 accounts only the difference between the amounts received and potential revised decisions is recognised as contingent liability for those cases.
2021	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 <i>ex ante</i> contribution.	Completed	For the 2021 accounts, the SRB asked national resolution authorities in January 2022 to provide to its external auditor – with the SRB in copy – an assessment of the likely outcome of these pending administrative appeals and national court cases related to <i>ex ante</i> contributions and estimate of the liability, which might arise from those appeals.

Abbreviations

Acronym or abbreviation	Explanation
BPE	Banco Popular Español S.A.
CJEU	Court of Justice of the European Union
ECA	European Court of Auditors
ECB	European Central Bank
FROB	Fondo de Reestructuración Ordenada Bancaria (Spanish National Resolution Authority)
IPS	Institutional Protection Schemes
NRA	National Resolution Authority
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

Glossary

Common Equity Tier1 capital: Capital of the highest quality which financial institutions must have available for unrestricted and immediate use to cover risks or losses as soon as they occur.

Harmonised annex: Annex to the Single Resolution Board's Decision on financial institutions' annual contributions to the Single Resolution Fund, which financial institutions can use check the calculation of their contributions.

Minimum requirement for own funds and eligible liabilities: Requirement for financial institutions to hold sufficient instruments to allow them cover losses and recapitalise themselves if they get into financial difficulty and are placed in resolution.

Net Stable Funding Ratio: Liquidity standard requiring financial institutions to hold enough stable funding to cover the duration of their long-term assets.

Resolution plan: Description of a financial institution's characteristics and resolution strategy how it will address any impediments to resolution and how it meets the minimum requirements for own funds and eligible liabilities requirement.

Resolution scheme: Decision containing a specification of the tools to apply when winding up a failing financial institution.

Resolution: Orderly winding-up of a failing or likely to fail financial institution to ensure the continuity of its essential functions, preserve financial stability, and protect public funds by minimising the need for public financial support.

The Single Resolution Board's reply

SRB reply to Box 4

The SRB would like to highlight that due to the unavailability of harmonised data, in accordance with Article 20(1) of the Commission Delegated Regulation (EU) 2015/63, the Board did not apply the Net Stable Funding Ratio risk indicator within the “Stability and variety of sources of funding” pillar.

The SRB accepts recommendations 1, 2 and 3.

The Commission's reply

"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 Pakstys, Head of Private Office; Matthias Blaas, Attaché of Private Office; Ioanna Metaxopoulou, Director; Michal Machowski, Principal Manager; Leonidas Tsonakas, Head of Task; Carlos Soler Ruiz, Armin Hosp, Nadiya Sultan, Ioannis Sterpis Auditors; Andreea-Maria Feipel-Cosciug, Klotildi Kantza; Legal Advisors, Giuliana Lucchese; Graphic designer.



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