Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 31 March 2022 [1]

Case C-45/21

Banka Slovenije
Other party:
Državni zbor Republike Slovenije (National Assembly of the Republic of Slovenia)

(Request for a preliminary ruling
from the Ustavno sodišče Republike Slovenije (Constitutional Court of the Republic of Slovenia))

(Preliminary ruling procedure – Stability of the financial system – Reorganisation and resolution of credit institutions in the public interest – European System of Central Banks (ESCB) – National central bank (NCB) as resolution authority – Write-down and cancellation of capital instruments within the framework of the sovereign reorganisation or resolution of a credit institution – 'No creditor worse off' principle – Liability of the NCB – Compensation by the NCB to the shareholders and creditors concerned – Article 123 TFEU – Prohibition of monetary financing – Regulation (EC) No 3603/93 – Article 130 TFEU – Principle of independence of central banks – Publication of, and access to, documents relating to the resolution of a credit institution in 2013 and 2014 – Directives 2006/48/EC and 2013/36/EC – Applicability *ratione materiae*)

I. Introduction

1. The present request for a preliminary ruling arises at the interface between European monetary policy and bank resolution. In essence, the question at issue is whether the burdens of resolution financing – if they are to be borne by a national central bank (NCB) in its capacity as a resolution authority – may cause an infringement of the prohibition on monetary financing under Article 123 TFEU or impair the independence of central banks guaranteed by Article 130 TFEU.

2. The Court has hitherto addressed the prohibition on monetary financing primarily in connection with monetary policy measures of the European Central Bank (ECB). [2] However, Article 123 TFEU prohibits, in very general terms, Member States from having their obligations vis-à-vis third parties financed by the ECB or their respective NCBs. [3]

[1] Original language: German.

[2] In particular in judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400), and of 11 December 2018, *Weiss and Others* (C-493/17, EU:C:2018:1000).

[3] See Article 1(1)(b) of Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in [Articles 123 and 125 TFEU] (OJ 1993 L 332, p. 1).

3. The main proceedings concern the legal situation prior to the establishment of a single resolution mechanism at EU level in 2014 and the accompanying introduction of an EU wide resolution fund. [4] At that time, the Slovenian central bank, Banka Slovenije, was entrusted under national law with the task of reorganising and resolving banks in Slovenia whose insolvency might endanger the stability of the financial system. [5]

4. However, under the old Slovenian legal situation, there was no financing mechanism for the costs of bank resolution. Rather, a law that entered into force at the end of 2019 now retroactively obliges Banka Slovenije to compensate from its own resources, under certain circumstances, the shareholders and creditors of banks that were affected by a public reorganisation or resolution measure in 2013 and 2014.

5. Banka Slovenije considers this to be an infringement of the prohibition under Article 123 TFEU. Moreover, as the claims against it may be very substantial, it fears that its financial independence may be jeopardised.

II. Legal framework

A. European Union law

1. Treaty on the Functioning of the European Union (TFEU)

6. Article 123(1) contains what is referred to as the prohibition of monetary financing. It reads as follows:

'Overdraft facilities or any other type of credit facility with the [ECB] or with the [NCBs] in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the [ECB] or [NCBs] of debt instruments.'

7. Article 131 of the TFEU provides as follows:

'Each Member State shall ensure that its national legislation including the statutes of its [NCB] is compatible with the Treaties and the Statute of the ESCB and of the ECB.'

8. Article 127 TFEU reads as follows:

'1. The primary objective of the ESCB shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union …

[4] See Article 67 et seq. of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1; 'the SRM Regulation').

[5] The compatibility of the design of those powers with EU law, in particular the right to property under Article 17(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), has already been the subject of proceedings before the Court, which led to the judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570).

2. The basic tasks to be carried out through the ESCB shall be:

– to define and implement the monetary policy of the Union,

– to conduct foreign-exchange operations consistent with the provisions of Article 219,

– to hold and manage the official foreign reserves of the Member States,

– to promote the smooth operation of payment systems.

…

5. The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

6. The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the [ECB], confer specific tasks upon the [ECB] concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.'

9. Article 282(3) TFEU states:

'The [ECB] shall have legal personality. It alone may authorise the issue of the euro. It shall be independent in the exercise of its powers and in the management of its finances. Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence.'

2. Statute of the ESCB and of the ECB

10. Article 14.4 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank ('the Statute of the ESCB and the ECB') [6] states the following:

'National central banks may perform functions other than those specified in this Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB.'

11. Article 28 of that statute states:

'28.1. The capital of the ECB shall be euro 5 000 million. The capital may be increased by such amounts as may be decided by the Governing Council acting by the qualified majority provided for in Article 10.3, within the limits and under the conditions set by the Council under the procedure laid down in Article 41.

[6] OJ 2016 C 202, p. 230.

28.2. The national central banks shall be the sole subscribers to and holders of the capital of the ECB. The subscription of capital shall be according to the key established in accordance with Article 29.

…'

12. Article 32 of the Statute of the ESCB and of the ECB provides as follows:

'32.1. The income accruing to the national central banks in the performance of the ESCB's monetary policy function (hereinafter referred to as "monetary income") shall be allocated at the end of each financial year in accordance with the provisions of this Article.

32.2. The amount of each national central bank's monetary income shall be equal to its annual income derived from its assets held against notes in circulation and deposit liabilities to credit institutions. These assets shall be earmarked by national central banks in accordance with guidelines to be established by the Governing Council.

…'

13. In accordance with Article 33.1 of that statute, the ECB's net profit remaining after the transfer of a certain amount is to be distributed to the NCB in accordance with the capital key of its holding. Article 33.2 provides, for the event of a loss incurred by the ECB, that the shortfall may be offset against the general reserve fund of the ECB and, if necessary, following a decision by the Governing Council, against the monetary income of the relevant financial year in proportion and up to the amounts allocated to the national central banks in accordance with Article 32.5.

14. Article 35.3 of the Statute of the ESCB and of the ECB reads:

'The ECB shall be subject to the liability regime provided for in Article 340 of the Treaty on the Functioning of the European Union. The national central banks shall be liable according to their respective national laws.'

3. Regulation No 3603/93

15. Article 1(1)(b) of Regulation No 3603/93[7] defines the term 'other type of credit facility' contained in Article 123 TFEU as 'any financing of the public sector's obligations vis-à-vis third parties'.

4. Directive 2001/24

16. According to Article 1(1) of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions,[8] that directive 'shall apply to credit institutions and their branches set up in Member States other than those in

[7] See the reference in footnote 3.

[8] OJ 2001 L 125, p. 15.

which they have their head offices, as defined in points (1) and (3) of Article 1 of Directive 2000/12/EC, [9] subject to the conditions and exemptions laid down in Article 2(3) of that Directive'.

17. According to Article 2 of Directive 2001/24, 'competent authorities' for the purposes of that directive may be both authorities within the meaning of Article 4(1)(40) of Regulation No 575/2013 [10] and resolution authorities within the meaning of Article 2(1)(18) of the BRRD. [11]

18. Article 33 of Directive 2001/24 states:

'All persons required to receive or divulge information in connection with the information or consultation procedures laid down in Articles 4, 5, 8, 9, 11 and 19 shall be bound by professional secrecy, in accordance with the rules and conditions laid down in Article 30 of Directive 2000/12/EC [12], with the exception of any judicial authorities to which existing national provisions apply.'

19. The procedures laid down in Articles 4, 5, 8, 9, 11 and 19 concern information for, and consultation of, the authorities of other Member States or third countries in which the branch of a credit institution which is the subject of reorganisation or resolution measures in its Member State of establishment is located.

5. Directive 2006/48 (CRD III)

20. Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions [13] laid down, according to Article 1(1) thereof, 'rules concerning the taking up and pursuit of the business of credit institutions, and their prudential supervision.'

21. According to Article 4(4), for the purposes of that directive, 'competent authorities' means 'the national authorities which are empowered by law or regulation to supervise credit institutions'.

22. Article 44 of that directive provided, as the first provision in the section 'Exchange of information and professional secrecy', as follows:

'1. Member States shall provide that all persons working for or who have worked for the competent authorities, as well as auditors or experts acting on behalf of the competent authorities, shall be bound by the obligation of professional secrecy.

9 See, in relation to the references to Directive 2000/12, point 23 of this Opinion.

10 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 3). According to that regulation, 'competent authority means a public authority or body officially recognised by national law, which is empowered by national law to supervise institutions as part of the supervisory system in operation in the Member State concerned'.

11 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190; 'the BRRD').

12 Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ 2000 L 126, p. 1). See, regarding the meaning of the references to Directive 2000/12 after its repeal, point 23 of this Opinion.

13 OJ 2006 L 177, p. 1.

No confidential information which they may receive in the course of their duties may be divulged to any person or authority whatsoever, except in summary or collective form, such that individual credit institutions cannot be identified, without prejudice to cases covered by criminal law.

Nevertheless, where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be divulged in civil or commercial proceedings.

2. Paragraph 1 shall not prevent the competent authorities of the various Member States from exchanging information in accordance with this Directive and with other Directives applicable to credit institutions. That information shall be subject to the conditions of professional secrecy indicated in paragraph 1.'

23. Article 158 of Directive 2006/48 provided:

'1. [Directive 2000/12] as amended by the Directives set out in Annex XIII, Part A, is hereby repealed without prejudice to the obligations of the Member States concerning the deadlines for transposition of the said Directives listed in Annex XIII, Part B.

2. References to the repealed Directives shall be construed as being made to this Directive and should be read in accordance with the correlation table in Annex XIV.'

6. Directive 2013/36 (CRD IV)

24. Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC[14] governs, according to Article 1 thereof, access to the activity of credit institutions as well as supervisory powers and tools for the prudential supervision of institutions.

25. For the purposes of the definition of 'competent authority', Article 3(1)(36) of Directive 2013/36 refers to Article 4(1)(40) of Regulation No 575/2013.[15]

26. Article 4(7) of Directive 2013/36 provides:

'Member States shall ensure that the functions of supervision pursuant to this Directive and to Regulation (EU) No 575/2013 and any other functions of the competent authorities are separate and independent from the functions relating to resolution. Member States shall inform the Commission and EBA thereof, indicating any division of duties.'

27. Article 53(1) of that directive contains a provision on professional secrecy which is, in essence, identical to Article 44(1) of Directive 2006/48. Paragraph 3 of that provision is worded as follows:

'Paragraph 1 shall not prevent the competent authorities from publishing the outcome of stress tests carried out in accordance with Article 100 of this Directive or Article 32 of Regulation (EU)

[14] OJ 2013 L 176, p. 338.

[15] See footnote 10 to this Opinion.

No 1093/2010 [16] or from transmitting the outcome of stress tests to EBA for the purpose of the publication by EBA of the results of Union-wide stress tests.'

28. Article 59(1) of Directive 2013/36 provides:

'Notwithstanding Article 53(1) and Article 54, Member States may, by virtue of provisions laid down in national law, authorise the disclosure of certain information to other departments of their central government administrations responsible for law on the supervision of institutions, financial institutions and insurance undertakings and to inspectors acting on behalf of those departments.

However, such disclosures may be made only where necessary for reasons of prudential supervision, and prevention and resolution of failing institutions. Without prejudice to paragraph 2 of this Article, persons having access to the information shall be subject to professional secrecy requirements at least equivalent to those referred to in Article 53(1).

…'

29. According to Article 163 of Directive 2013/36, that directive repeals Directives 2006/48 and 2006/49 with effect from 1 January 2014.

B. Slovenian law

1. ZBan-1

30. The Zakon o bančništvu (Law on the banking sector; 'the ZBan-1') provides, in Article 253a, that Banka Slovenjie, as the resolution authority, may order the write-down or cancellation of eligible liabilities of a credit institution in difficulty if this is necessary in the public interest to prevent the insolvency of that institution and thereby to ensure the stability of the financial system as a whole.

31. Article 261a(5) of the ZBan-1 lays down the 'no creditor worse off' principle ('the NCWO principle'), according to which a measure under Article 253a of the ZBan-1 may not place shareholders or creditors in a worse position than they would have been in the event of the insolvency of the institution concerned.

32. According to Article 350a(1) of the ZBan-1, the shareholders and creditors of a credit institution may, subject to the conditions of Article 223a of the ZBan-1, claim compensation for the damage they have suffered as a result of a resolution or reorganisation measure ordered by Banka Slovenije. Article 223a provides that Banka Slovenije must be presumed to have acted negligently if, at the time of the decision, it or the persons for whose actions it is accountable could not reasonably have presumed, on the basis of the facts and circumstances of which they were or should have been aware, that the decision was lawful.

16 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ 2010 L 331, p. 12).

2. ZPSVIKOB

(a) Rules on compensation for holders of cancelled or written-down capital instruments

33. The Zakon o postopku sodnega in izvensodnega varstva nekdanjih imetnikov kvalificiranih obveznosti bank (Law on the procedure applicable to the judicial and extra-judicial protection of former holders of eligible bank liabilities; 'the ZPSVIKOB') contains rules on the enforcement of compensation claims that investors of a credit institution may assert in accordance with Article 350a(1) of the ZBan-1 due to the reorganisation and resolution measures ordered by Banka Slovenije in 2013 and 2014.

34. According to Article 31 of the ZPSVIKOB, such a claim for compensation exists where Banka Slovenije cannot prove either that the measure was necessary in the public interest within the meaning of Article 253a of the ZBan-1 or that the NCWO principle laid down in Article 261a(5) of the ZBan-1 was not complied with.

35. In addition, the ZPSVIKOB provides, in Articles 4 to 7, for the possibility of a flat-rate sum of compensation exclusively for certain retail investors of a credit institution whose capital instruments have been cancelled or written down. According to these rules, investors whose annual gross income does not exceed a certain amount [17] may claim compensation in the amount of 80% of the nominal value of their capital instruments (up to a maximum amount of EUR 20 000) without having to prove that they would have received that sum in the event of the insolvency of the credit institution concerned. In addition, compensation in the amount of the insolvency value on the basis of Article 350a in conjunction with Article 261a of the ZBan-1 is excluded.

36. With regard to the financing of the two types of compensation, Article 40 of the ZPSVIKOB first provides that Banka Slovenije is to create special reserves for that purpose. Those reserves are financed by the profit (defined as the excess of income over expenditure) earned by Banka Slovenije as from 1 January 2019, 25% of which is normally allocated to the Republic of Slovenia budget in accordance with Article 50(1) of the Zakon o Banki Slovenije (Law on Banka Slovenije; 'the ZBS-1') and 75% of which is normally used to establish the general reserves.

37. If the amount of compensation payments exceeds the amount of the special reserves thus created, the ZPSVIKOB provides that the general reserves of Banka Slovenije that had been created by 1 January 2019 can then be used for the financing. However, those reserves may be drawn on only up to a limit of 50%.

38. In order to cover any remaining shortfall, the ZPSVIKOB provides, lastly, for the possibility for the Republic of Slovenia to grant a bridging loan to Banka Slovenije. That loan is, in turn, repaid using Banka Slovenije's future profits, such that, until the loan had been repaid in full, those profits cannot continue to be used to build up the general reserves, contrary to the provisions of the ZBS-1.

[17] EUR 18 278.16 in total.

(b) Rules on publication and access to documents

39. Articles 10 and 22 of the ZPSVIKOB require Banka Slovenije to publish certain documents in summarised form on its website and, respectively, to provide potential claimants in disputes concerning compensation or their legal counsel with access to those documents in a virtual data room. The documents are, in particular, the results of the stress tests carried out in respect of a credit institution under resolution, the asset quality review reports ('the AQR reports') of such an institution and the valuation of the assets that serve as the basis for the resolution decision.

III. Facts and main proceedings

40. In the main proceedings, the Ustavno sodišče (Constitutional Court, Slovenia) is required to conduct an abstract review of the constitutionality of certain provisions of the ZPSVIKOB and the ZBan-1 at the request of Banka Slovenije.

41. Those legal acts regulate the substantive conditions and judicial enforcement of liability and compensation claims to which shareholders and creditors of credit institutions whose capital instruments were written down or cancelled as part of the measures ordered by Banka Slovenije in 2013 and 2014 in its capacity as the resolution authority may be entitled. Provision is made for, on the one hand, compensation in the event that those measures infringe the NCWO principle and, on the other hand, a flat-rate sum of compensation for certain retail investors. Under the ZPSVIKOB, Banka Slovenije is the party obliged to meet those claims.

42. That law also contains rules on the publication of, or access to, documents – in particular the stress tests, AQR reports and valuations of the assets and liabilities of the credit institutions concerned – which are intended to make it easier to prove that the conditions for compensation are met.

43. The legislature adopted the ZPSVIKOB in late 2019 in response to a judgment that had been delivered by the Ustavno sodišče (Constitutional Court). In that judgment, the court had found that the possibilities for compensation and the procedural requirements for enforcing them under the old Slovenian legal situation were insufficient and therefore unconstitutional.

44. Banka Slovenije considers that the rules on its obligation to compensate holders of cancelled or written-down capital instruments constitute, inter alia, an infringement of the prohibition of monetary financing under Article 123 TFEU and of the principle of financial independence of central banks under Article 130 TFEU. This is because, according to Banka Slovenije, compensating creditors of failing credit institutions or shareholders who have been expropriated in the public interest or whose property rights have been restricted is objectively an obligation of the State. The latter cannot transfer the task of resolving of failing credit institutions, which necessarily entails such interventions, to an NCB without appropriate funding. Banka Slovenije takes the view that, as a result of the financing of the compensation payments which is provided for by the ZPSVIKOB, Banka Slovenije's general reserves are impacted in a way that jeopardises the performance of its tasks under EU law within the framework of the ESCB.

45. According to the Slovenian Government, there is no infringement of Article 123 TFEU, since the compensation is first paid from the profits earned by Banka Slovenije, part of which is in any event normally allocated to the State budget. In addition, submits the Slovenian Government, the fixed minimum level of the general reserves, which cannot be lowered as a result of the obligation

to compensate, constitutes a sufficient safeguard against the risk of Banka Slovenije's financial independence being jeopardised. In the event that it is lowered, the Republic of Slovenia can provide a bridging loan as a remedial measure.

46. As regards the publication of, or provision of access to, certain documents drawn up in connection with or serving as the basis for the resolution measures, Banka Slovenije takes the view that this infringes the obligations of professional secrecy under Directives 2006/48 and 2013/36. Moreover, the shareholders and creditors concerned do not require knowledge of the content of those documents in order to take effective legal action. By contrast, the Slovenian Government takes the view that the relevant provisions of those directives are not applicable in the main proceedings, either *ratione temporis* or *ratione materiae*.

IV. The request for a preliminary ruling and the procedure before the Court

47. In those circumstances, the Ustavno sodišče (Constitutional Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU:

'(1) Are Article 123 TFEU and Article 21 of [the Statute of the ESCB and of the ECB] to be interpreted as prohibiting [an NCB] that is a member of the [ESCB] from incurring liability to pay compensation from its own resources to former holders of financial instruments that have been cancelled by decision of the central bank in the exercise of its own statutory power to adopt extraordinary measures in the public interest in order to avert threats to the stability of the financial system, in the event that it transpires in the course of subsequent legal proceedings that, in the context of the cancellation of financial instruments, there was a failure to observe the principle that no holder of a financial instrument should, as a result of an extraordinary measure, be placed in a worse position than he [or she] would have been in had the measure not been adopted, where, in that context, the national central bank is liable (i) for loss that was foreseeable from the facts and circumstances obtaining at the time of the central bank's decision and of which the bank was aware or ought to have been aware, and (ii) for loss resulting from the conduct of individuals who acted in the exercise of such powers of the central bank and on instructions from it where, in that context, having regard to the facts and circumstances of which they were aware or ought to have been aware in accordance with the powers conferred, those individuals did not act with the diligence of a prudent expert?

(2) Are Article 123 TFEU and Article 21 of [the Statute of the ESCB and of the ECB] to be interpreted as prohibiting [an NCB] that is a member of the ESCB from paying special monetary compensation from its own resources to some of the former holders of financial instruments that have been cancelled (in accordance with the criterion of the asset situation) on account of the cancellation of instruments decided upon by the bank in the exercise of its own statutory power to adopt extraordinary measures in the public interest in order to avert threats to the stability of the financial system, where, in that context, entitlement to receive compensation arises from the mere fact of cancellation of the financial instrument, regardless of whether or not there has been a breach of the principle that no holder of a financial instrument should, as a result of an extraordinary measure, be placed in a worse position than he [or she] would have been in had that measure not been adopted?

(3) Are Article 130 TFEU and Article 7 of [the Statute of the ESCB and of the ECB] to be interpreted as meaning that [an NCB] cannot be required to pay compensation for losses arising as a result of the exercise of its statutory powers in such sums as might impair the bank's ability to perform its own tasks effectively? In that context, are the legal conditions under which such liability is incurred relevant to establishing whether the principle of the financial independence of the national central bank has been infringed?

(4) Are Articles 53 to 62 of [Directive 2013/36] or Articles 44 to 52 of [Directive 2006/48], which protect the confidentiality of confidential information received or generated in the context of the prudential supervision of banks, to be interpreted in the sense that those two directives also protect the confidentiality of information received or generated in the context of the implementation of measures the purpose of which was to rescue banks in order to ensure the stability of the financial system, where the threats to the solvency and liquidity of the banks could not be eliminated by means of normal prudential supervision measures and where such measures were regarded as reorganisation measures within the meaning of [Directive 2001/24]?

(5) In the event that Question 4 is answered in the affirmative, are Articles 53 to 62 of [Directive 2013/36] or Articles 44 to 52 of [Directive 2006/48], which concern the protection of confidential information received or generated in the context of the prudential supervision of banks, to be interpreted as meaning that, for the purposes of the protection which they afford, the later directive, [Directive 2013/36], is relevant even with regard to information received or generated during the period when [Directive 2006/48] was applicable, where such information is to be disclosed during the period when [Directive 2013/36] is applicable?

(6) In the event that Question 4 is answered in the affirmative, is the first subparagraph of Article 53(1) of [Directive 2013/36] (or the first subparagraph of Article 44(1) of [Directive 2006/48], depending on the answer to the preceding question) to be interpreted as meaning that information held by [an NCB] in its capacity as supervisory body that has become public information subsequently to the time of its generation, or information which could constitute a professional secret but which is five or more years old and which, on account of the passage of time, is in principle regarded as historical information that is no longer confidential, is no longer confidential information to which the obligation of professional secrecy applies? In the case of historical information five or more years old, does the maintenance of confidentiality depend on whether confidentiality can be justified on grounds other than the commercial situation of the bank under supervision or that of other undertakings?

(7) In the event that Question 4 is answered in the affirmative, is the third subparagraph of Article 53(1) of [Directive 2013/36] [or the third subparagraph of Article 44(1) of [Directive 2006/48], depending on the answer to Question 5] to be interpreted as meaning that confidential documents which do not concern third parties involved in attempts to rescue a credit institution but which are legally relevant for the purposes of the court's decision in a civil damages action against the competent prudential supervisory body should automatically be disclosed, even prior to the commencement of legal proceedings, to all potential plaintiffs and their representatives, without there first being established a specific procedure for determining the lawfulness of the disclosure of each individual document to each individual or entity having standing, and without there first being any weighing of the interests at stake in each specific case? Does that apply even in the case of information concerning credit institutions which have not been declared bankrupt or are not being

compulsorily wound up but which have received assistance from the State in the procedure in which financial instruments held by shareholders or subordinated creditors of the credit institution were cancelled?

(8) In the event that Question 4 is answered in the affirmative, is the second subparagraph of Article 53(1) of [Directive 2013/36] (or the second subparagraph of Article 44(1) of [Directive 2006/48], depending on the answer to Question 5) to be interpreted as permitting the publication on the Internet, in a manner accessible to all, of confidential documents or summaries of confidential documents which do not concern third parties involved in attempts to rescue a credit institution but which are legally relevant for the purposes of the court's decision in a civil damages action against the competent prudential supervisory body, in the event that those documents contain information concerning credit institutions which have not been declared bankrupt or are not being compulsorily wound up but which have received help from the State in a procedure in which financial instruments held by shareholders or subordinated creditors of the credit institution were cancelled, where provision is made for the redacting of all confidential information prior to publication on the Internet?'

48. Banka Slovenije, the Slovenian Government, the ECB and the European Commission submitted written observations on those questions in the proceedings before the Court. Those parties were also represented at the hearing of 18 January 2022.

V. Legal assessment

49. By its first and second questions, the Ustavno sodišče (Constitutional Court) first wishes to ascertain whether the compensation regime provided for by the ZPSVIKOB and the ZBan-1 infringes the prohibition of monetary financing under Article 123 TFEU. The third question then concerns the permissibility of that regime in the light of the principle of independence of central banks under Article 130 TFEU and Article 7 of the Statute of the ESCB and of the ECB. Lastly, the fourth to eighth questions seek clarification as to whether the obligation to publish or provide access to certain documents specified in the ZPSVIKOB is compatible with Directives 2006/48 and 2013/36.

50. The first to third questions must be considered as being related in terms of substance. This is because the prohibition of monetary financing is closely linked to the principle of independence of central banks and underpins it in various ways.

51. Against that background, the first part of this Opinion examines the first to third questions together (in section A), addressing first the principle of independence and then the prohibition of monetary financing. In the second part, I then proceed to examine the fourth to eighth questions (in section B).

A. The first to third questions

1. Infringement of the principle of independence of the ESCB under Article 130 TFEU (third question)

52. By its third question, which is to be examined first, the Ustavno sodišče (Constitutional Court) seeks to ascertain, in essence, whether the financing mechanism for compensation payments which is provided for in Article 40 of the ZPSVIKOB might impair the independence of central banks.

53. Article 40 of the ZPSVIKOB provides that, first, all profits earned from 1 January 2019 until the judicial decision on the compensation payments are to be used to create the special reserves. Therefore, during that period, on the one hand, the Republic of Slovenia waives its share of the profits which is provided for in Article 50(1) of the ZBS-1 (namely up to 25%) and, on the other hand, the remaining profits as at that point in time are not used to establish general reserves. Second, if the special reserves set aside up until the time of the judicial decision are insufficient, the general reserves previously set aside up until 1 January 2019 are likewise used, up to a limit of 50%, to finance the compensation payments. Third, any remaining balance is financed by a bridging loan from the Republic of Slovenia. That loan, in turn, is repaid using the profits subsequently made by Banka Slovenije, which therefore also cannot be used to build up the general reserves until the loan has been repaid. [18]

54. The principle of independence, which is laid down in Article 130 TFEU and reiterated in Article 7 of the Statute of the ESCB and of the ECB, prohibits the ECB and the NCBs and the members of their decision-making bodies from seeking or taking instructions from, inter alia, the governments of the Member States, and expressly prohibits those governments from seeking to influence the members of the decision-making bodies of the NCBs in the performance of their tasks.

55. The Court has emphasised that the protection of the ECB from external influence in the implementation of its monetary policy, as postulated in Article 130 TFEU, is ensured, inter alia, by the fact that the ECB has its own resources and budget. [19] In that respect, it also follows from the legislative history of that provision that the ECB's independence has not only a functional, institutional and personal dimension, but also a financial one. [20]

56. That connection is apparent: if a central bank is dependent on the provision of financial resources by a government, there is naturally a risk that such support will be accompanied, explicitly or implicitly, by certain conditions on the monetary policy of that central bank, thereby affecting its independence. [21]

57. The authors of the Treaties had that risk in mind. Thus, it was laid down in Article 282(3) TFEU that the ECB is to have its own budget. The latter is not funded using EU resources. Rather, Articles 28 to 33 of the Statute of the ESCB and of the ECB contain rules on the ECB's capital, foreign reserve assets and profits, which ensure that the ECB can finance its tasks itself

[18] In that regard, see point 36 et seq. above.

[19] See judgment of 10 July 2003, *Commission* v *ECB* (C-11/00, EU:C:2003:395, paragraph 132).

[20] See the Report of the Monetary Committee of 23 July 1990 on economic and monetary union after the completion of the first stage (Krägenau, Europäische Wirtschafts- und Währungsunion, 1st Ed. 1993, Doc. 36, paragraph 36), and Opinion of Advocate General Jacobs in *Commission* v *ECB* (C-11/00, EU:C:2002:556, point 154).

[21] See Cukierman, K., *Central Bank Finances and Independence – How Much Capital Should a CB Have*?, Tel Aviv University, 2006, p. 3.

and is thus financially dependent on neither the EU institutions nor the governments of the Member States. In accordance with Article 28.2 of the Statute of the ESCB and of the ECB, its shareholders are not the Member States but the NCBs. The capital paid in by the NCBs may be increased by the ECB by its own decision (see Article 28.1. of that statute). Nor is it dependent on other public bodies in the event of losses (see, in particular, Article 33.2. of that statute).

58. The independence of the ECB and the NCBs is not an end in itself, but is intended to ensure that they can perform their tasks properly and effectively and, consequently, to safeguard the functioning of the ESCB. [22]

59. Therefore, in the view taken by the ECB, Article 130 TFEU implies that, in terms of their financial resources also, the NCBs must be able to perform in full independence the tasks and obligations within the framework of the ESCB that are conferred on them by EU law.

(a) The need for the NCBs to have sufficient financial resources to fulfil certain obligations within the framework of the ESCB

60. In this connection, the ECB emphasises in particular the obligation of the NCBs to contribute to any increase in the capital of the ECB in accordance with Article 28.2 of the Statute of the ESCB and of the ECB. The referring court also appears to proceed on the assumption that the use of all of Banka Slovenije's future profits and 50% of its general reserves to finance the compensation payments might result in it no longer having the resources required to comply with that obligation.

61. However, in practice, capital increases are effected via TARGET transfers and not by means of capital raised from the NCBs' actual own funds. [23] TARGET (which stands for Trans-European Automated Real-time Gross settlement Express Transfer system) is the cashless payment settlement system between the central banks (and commercial banks) of the Eurosystem. Put simply, the system is based on accounts which the Eurosystem NCBs hold with the ECB. With each cross-border transfer, the account balance of the NCB of that Member State with the ECB increases or decreases depending on whether a commercial bank of a Member State is the recipient or initiator of that transfer. However, unlike in the case of commercial banks, the accounts of the Eurosystem NCBs do not have to be settled at the end of a business day. Accordingly, an NCB may have a liability towards the ECB at the end of a given day.

62. In the event of a capital increase, this means that, even if the TARGET system already shows that an NCB has a debit position vis-à-vis the ECB, the amount concerned is merely increased by the transfer effected for the purpose of that capital increase. However, the NCB is not required actually to raise or settle that amount using its own resources, such as its profits. Consequently, the use of an NCB's profits for purposes such as those at issue in the main proceedings does not, in practice, impair its ability to fulfil its obligation to increase the capital of the ECB under Article 28.2 of the Statute of the ESCB and of the ECB. [24] Rather, the amount required for the capital increase is in fact created by money creation.

[22] See, to that effect, judgments of 10 July 2003, *Commission* v *ECB* (C-11/00, EU:C:2003:395, paragraphs 130 and 134); of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 40); and of 26 February 2019, *Rimšēvičs and ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2019:139, paragraph 46).

[23] See, for example, Article 1(3) of the Decision of the ECB of 13 December 2010 on the paying-up of the increase of the European Central Bank's capital by the national central banks of Member States whose currency is the euro (ECB/2010/27) (OJ 2011 L 11, p. 54).

[24] Langer, *EWU-Kommentar, Vorbemerkungen zu Art. 28-33 der Satzung des ESZB und der EZB*, in: Siekmann (ed.), paragraph 9.

63. It is true that the TARGET liability that may thus arise appears on the liabilities side of the balance sheet of the NCB concerned. At the same time, however, an increase in the value of that NCB's participating interest in the ECB, increased by the same amount, is recorded on the assets side. [25] There is therefore only a balance sheet extension. If the NCB concerned has a positive TARGET balance, then, for that bank, the capital increase is merely an accounting exchange on the asset side (positive TARGET balance against participating interest in the ECB).

64. Nor is the fulfilment of the other financial obligations of NCBs mentioned by the ECB – namely the obligation to pay in further foreign reserve assets upon request in accordance with Article 30.4 of the Statute of the ESCB and of the ECB or to offset the ECB's losses in accordance with Article 33.2 thereof – dependent, on closer examination, on an NCB having sufficient own funds.

65. On the one hand, it cannot be inferred from the order for reference that Banka Slovenije's foreign reserve assets could be used to finance the compensation payments. [26] The Slovenian Government also confirmed that this is not the case at the hearing.

66. On the other hand, the obligation to offset losses under Article 33.2 of the Statute of the ESCB and of the ECB exists only up to the amounts of monetary income to be allocated. [27] The monetary income of all the NCBs is pooled at the end of the year in a first step in accordance with Article 32.1 of that statute and then allocated to the NCBs in a second step according to a certain key reflecting their participating interests in the ECB (see Article 32.5 of that statute). In accordance with Article 32.5 of the Statute, in conjunction with Article 33.2 thereof, in the event that the ECB has incurred losses, they are to be deducted in advance from the monetary income to be allocated. However, there is no further obligation for NCBs to offset losses – for example using their own funds. [28]

(b) Need for sufficient financial resources to maintain the credibility of, and confidence in, the ESCB

67. In my view, the decisive point with regard to the independence of the NCBs is, rather, the following: the financing mechanism provided for in Article 40 of the ZPSVIKOB fully deprives Banka Slovenije, for a period of several years, of its power to decide on the use of its resources and therefore of the possibility to hold reserves in the amount that it deems appropriate.

68. Therefore, on the one hand, the government has plainly and simply claimed for itself a decision-making right formerly exercised by the NCB in full independence.

69. On the other hand, however, there are good reasons justifying why an NCB must be able to decide, on its own responsibility, the level of reserves that it holds. This is because that decision expresses the NCB's risk assessment with regard to its monetary policy operations.

[25] Langer, *EWU-Kommentar, Vorbemerkungen zu Art. 28-33 der Satzung des ESZB und der EZB*, in: Siekmann (ed.), paragraph 10.

[26] It likewise does not appear possible that Banka Slovenije could be led by the financing mechanism under the ZPSVIKOB to sell foreign reserve assets for purposes other than monetary policy purposes and that it might therefore no longer be able to fulfil its obligations under Article 30.4. This is because the ECB must approve such transactions in advance in accordance with Article 31 of the Statute of the ESCB and of the ECB.

[27] That is to say, the income from notes in circulation and the interest income from the main refinancing operations with the commercial banks.

[28] Siekmann, H., *Die Einstandspflicht der Bundesrepublik Deutschland für die Deutsche Bundesbank und die Europäische Zentralbank*, Institute for Monetary and Financial Stability Working Paper Series No 120 (2017), p. 10, Langer, *EWU-Kommentar, Art. 33 der Satzung des ESZB und der EZB*, in: Siekmann (ed.), paragraph 9.

70. The general reserves represent reserves for the financial risks inevitably associated with such operations.[29] If a central bank considers that it is necessary to sell, for instance, securities for monetary policy purposes, for example to withdraw liquidity from the market, it will do so even if it may entail losses. The same applies to foreign exchange asset sales, which may be necessary to regulate the exchange rate under certain circumstances but might bring about losses in a situation where the bank's own currency appreciates. At the same time, however, in such cases an NCB will seek to establish greater reserves in advance in order to absorb such losses.

71. Consequently, an adequate level of reserves to absorb any losses arising from monetary policy operations reflects the fact that the NCB concerned has foreseen and is in control of the impact of its measures.

72. However, Article 40 of the ZPSVIKOB prevents Banka Slovenije, for a period of several years, from establishing new reserves and even provides that the existing stock can be drawn on up to a limit of 50%. Therefore, in the event that losses are incurred in connection with monetary policy operations, there is a risk that its net equity will be less than its share capital or even negative.

73. That situation is problematic, for at least three reasons.

74. First, it is harmful in view of the fact that a central bank sets an example for the banking sector, which in turn must comply with ever stricter rules on capital requirements.

75. Second, it may give the markets the impression that the NCB is misjudging or no longer in control of the impact of its monetary policy measures. In any event, the provision of Article 40 of the ZPSVIKOB actually deprives Banka Slovenije of its control over the adequate absorption of any losses that it may incur.

76. Against this background, the ECB rightly emphasises that the reporting of low or even negative capital over a prolonged period of time may damage the credibility of, and confidence in, the NCB and thus the ESCB as a whole. However, in modern fiat money systems – that is to say, in money systems in which the currency is not backed by the value of certain commodities such as gold – confidence in the ability of central banks to maintain price stability through the use of controlled and effective monetary policy measures is essential.

77. Therefore, the ECB specifically addresses the link that can be established between a central bank's weak equity situation and its ability to pursue the objective of maintaining price stability effectively and in complete independence, that is to say, taking account solely of monetary policy considerations.[30]

78. The reason for this is that, if a central bank is placed in a situation where it has very low or negative capital for a prolonged period of time due to a legal restriction on its ability to build up sufficient reserves, it may be incentivised to use monetary policy operations for the purpose of generating revenue to counter the perception of instability and to maintain market confidence.

[29] See, in respect of the ECB, Article 33.2 of the Statute of the ESCB and of the ECB. See also, in that regard, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 125).

[30] Since a central bank can normally produce legal tender itself, negative capital does not equate to insolvency. The question as to whether, in general, central banks need capital at all is therefore a controversial one; see, in that regard, Adler, G., Castro, P., Tovar, C.E., *Does Central Bank Capital Matter for Monetary Policy?*, IMF Working Paper, Issue 60 (2012), p. 3 et seq.; *Siekmann, Die Einstandspflicht der Bundesrepublik Deutschland für die Deutsche Bundesbank und die Europäische Zentralbank*, Institute for Monetary and Financial Stability Working Paper Series No 120 (2017), p. 34. However, the NCBs of the Eurosystem have that power only to a limited extent; see, in that regard, point 81 of this Opinion.

Such measures often tend to have inflationary effects. [31] In very vivid terms, an increase in inflation would increase the demand for cash among the population, thereby also increasing the income that the central bank generates from issuing the cash. However, this would clearly run counter to the primary objective of maintaining price stability.

79. It is true that the NCBs of the Eurosystem have less leeway of their own in the use of their monetary policy instruments, since the essential decisions are prescribed by the ECB. However, at the latest in the event that several Member States were to jeopardise the financial soundness of their NCBs via such statutory provisions, the ECB could, in turn, find itself in the above-described conflict of objectives between maintaining price stability and increasing revenues for the ESCB. In any case, the impression could be created that the ECB's room for manoeuvre in monetary policy is determined or restricted by national legislation such as Article 40 of the ZPSVIKOB. In that regard, there is empirical evidence that the degree of public trust in a central bank's ability to maintain price stability is highly dependent on the perceived independence of the central bank. [32]

80. Otherwise, the alternative would be to ask the government of the Member State concerned to take recapitalisation measures. It is obvious that such aid could be attached to conditions and therefore entail the risk of political interference in monetary policy. [33]

81. Third, if a Eurosystem NCB has insufficient funds of its own, this could even lead to a liquidity problem, in the most extreme case. This is because, in comparison with other central banks, the NCBs of the Eurosystem have the special feature that their ability to create money is limited under Article 128(1) TFEU, since any issue of euro is subject to the approval of the ECB. It is true that, in respect of the financing of compensation payments, Article 40 of the ZPSVIKOB provides only for the use of the revenue surplus remaining after all expenses have been deducted. However, if revenue were to be lower than expenditure for a prolonged period of time and the remaining reserves were already depleted, Banka Slovenije would not be able to create money automatically, for example to cover its operating and administrative costs, owing to Article 128(1) TFEU. If the ECB were to step in or authorise additional money creation for that purpose in such a case, this would once again be problematic from a reputational point of view.

82. Legislation such as Article 40 of the ZPSVIKOB is therefore liable to impair the independence and thus the functioning of the NCB.

(c) Conclusion

83. Article 130 TFEU and Article 7 of the Statute of the ESCB and of the ECB must therefore be interpreted as precluding national legislation on the use of an NCB's profits under which the NCB is fully prevented, for a period of several years, from building up its general reserves and, moreover, that NCB's existing reserves may be used, up to a certain amount, to finance public

[31] See Bindseil, U., Manzanares, A. and Weller, B., *The Role of Central Bank Capital Revisited*, ECB Working Paper Series No 392, September 2004, p. 27; Cukiermann, K., *Central Bank Finances and Independence – How Much Capital Should a CB Have*?, Tel Aviv University, 2006, p. 7; Johnson, G., Zelmer, M., *Implications of New Accounting Standards for the Bank of Canada's Balance Sheet*, Bank of Canada Discussion Paper 2007-2, p. 16.

[32] Bindseil, U., Manzanares, A. and Weller,B., The Role of Central Bank Capital Revisited, ECB Working Paper Series No 392, September 2004, p. 24.

[33] See also, in that regard, Cukierman, K., *Central Bank Finances and Independence – How Much Capital Should a CB Have*?, Tel Aviv University, 2006, pp. 3 and 4.

tasks. This is because such legislation entails the risk that, in the event that losses are incurred in connection with monetary policy operations, the net equity of that NCB will be less than the amount of its share capital or even negative for a prolonged period of time.

2. Prohibition of monetary financing under Article 123 TFEU (first and second questions referred)

84. In light of the foregoing statements, it must now be examined whether Banka Slovenije's obligation to compensate, by means of its own resources, investors of banks that have been resolved or restructured by public authorities also constitutes an infringement of the prohibition of monetary financing.

85. Under Article 123 TFEU, 'overdrafts or any other type of credit facility' with the ECB or with the NCBs in favour of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States are prohibited. Article 1(1)(b)(ii) of Regulation No 3603/93 defines the term 'other type of credit facility' as 'any financing of the public sector's obligations vis-à-vis third parties'.

86. In view of that definition of monetary financing, it must first be examined whether the compensation that Banka Slovenije may be required to pay to shareholders and creditors of failing credit institutions under the ZBan-1 and the ZPSVIKOB constitutes 'public sector's obligations vis-à-vis third parties' (see section (a)).

87. Second, in view of the fact that the financing take place by means of Banka Slovenije's profits, part of which would normally be channelled into the State budget in any event, it must be examined whether this constitutes prohibited 'financing' by an NCB within the meaning of Article 1(1)(b)(ii) of Regulation No 3603/93 (see section (b)).

(a) Concept of 'public sector's obligations vis-à-vis third parties'

88. The ZBan-1 and the ZPSVIKOB provide for two types of compensation payment: first, the compensation of the investors of a bank in the amount of the insolvency value of their capital instruments where it is subsequently found that the NCWO principle had not been complied with when they were written down or cancelled, due to Banka Slovenije's failure to exercise due care (first question). [34] It is recalled that, according to that principle, no investor may be placed in a worse position as a result of State intervention in the form of resolution than he or she would have been in had normal insolvency proceedings been conducted. In other words, the claimant investors in the compensation disputes currently pending before the Slovenian courts claim that they would have received more in the event of insolvency of the resolved banks than what they received in the course of the resolution/reorganisation by Banka Slovenije.

89. Second, that legislation provides for flat-rate compensation for lower-income investors which amounts to 80% of the nominal value of the capital instruments, with a maximum compensation amount of EUR 20 000, irrespective of whether or not that value could have been obtained in the insolvency (second question). [35]

[34] Regarding the conditions for such liability, see points 31, 32 and 34 of this Opinion.

[35] See, in that regard, point 35 of this Opinion.

90. With regard to the question as to whether those payment obligations are 'public sector's obligations vis-à-vis third parties' within the meaning of Article 1(1)(b)(ii) of Regulation No 3603/93, all parties to the proceedings took the view – albeit with different results – that the decisive factor is whether the liability is fault-based. They claim that this is because, in so far as the liability is attached to fault on the part of Banka Slovenije, the resulting claims are its 'own' obligations and not 'public sector's obligations vis-à-vis third parties'.

91. The Slovenian Government takes the view that liability for breaches of duty by an NCB is governed exclusively by the respective national laws in accordance with Article 35.3 of the Statute of the ESCB and of the ECB. Moreover, according to the Slovenian Government, that provision and the third paragraph of Article 340 TFEU also provide, with regard to the ECB, that the latter is liable to third parties for damage caused by it or its servants in the performance of their duties.

92. The Commission takes the view that this also applies if fault-based liability is triggered in the exercise of national public tasks, since, under Article 14.4 of the Statute of the ESCB and of the ECB, an NCB performs such tasks on its own 'responsibility and liability'.

93. Banka Slovenije and the ECB have not expressly objected to that argument. However, they took the view that, in any event, the payment obligations at issue do not constitute fault-based liability but rather objective liability.

94. That appears to be undisputed as far as the flat-rate compensation is concerned. At the same time, however, it is likewise undisputed that the obligation to compensate under the NCWO principle is attached *de lege lata* to negligence on the part of Banka Slovenije and therefore to an element of fault. That said, Banka Slovenije and the ECB argue, in essence, that the obligation to compensate under the NCWO principle follows directly from the fundamental right to property under Article 17(1) of the Charter and therefore may not be made dependent on an element of fault, even *de lege feranda*. They submit that, consequently, the obligation at issue is a 'public sector obligation vis-à-vis third parties' within the meaning of Article 1(1)(b)(ii) of Regulation No 3603/93.

(1) Irrelevance of the fault-based nature of the liability

95. However, as I will explain below, whether or not the NCB's payment obligation is to be attributed to its own breach of duty is not decisive for the question as to an infringement of Article 123 TFEU.

96. Rather, qualification as the NCB 'own' obligation or as a 'public sector obligation' within the meaning of Article 1(1)(b)(ii) of Regulation No 3603/93 can depend solely on whether the liability is attached to the exercise of *an NCB's tasks within the framework of the ESCB* or to the exercise of *other public tasks* within the meaning of Article 14.4 of the Statute of the ESCB and of the ECB. [36]

[36] The established practice of the ECB also follows that line; see, inter alia, Convergence Report June 2016, p. 30; Convergence Report June 2020, p. 31; and Opinion CON/2015/22, paragraph 2.3.1. et seq.

97. Otherwise, a Member State could evade its financial obligations by transferring to its NCB tasks that are urgently needed in the public interest but are particularly intrusive and costly.[37] This is particularly true of tasks entailing liability risks, and especially where liability is triggered already by a breach of the duty to exercise due care or even on a no-fault basis.

98. If such tasks were transferred to any other public body, the State would ultimately have to pay for any damage caused; however, in the case of transfer to an NCB, any obligations arising therefrom would in principle remain neutral for the State treasury due to the strict separation of the State budget and the central bank budget.[38] As explained above, separate budgets are an essential element in ensuring the independence of central banks.[39] Consequently, a burden on the budget of the central bank cannot be equated with a burden on the State treasury.

99. However, such a burden on a State's own NCB is not compatible with the spirit and purpose of Article 123 TFEU. That provision is intended to prevent the ESCB from providing any financial assistance whatever to the Member States.[40] Therefore, the transfer of other public tasks to an NCB without corresponding financing must, in principle, be regarded as financial assistance to the Member State concerned if those tasks typically entail costs which, as a result of the transfer, must now be borne by the NCB instead of the Member State.

100. No other conclusion can be drawn from Article 14.4 of the Statute of the ESCB and of the ECB, in accordance with which the NCBs perform national tasks on their own 'responsibility and liability'. That provision does not state who must be financially responsible for an activity, but merely specifies who is to be accountable for it. Accordingly, Article 14.4 expressly adds that the functions which an NCB performs on its own responsibility and liability are not to be regarded as being 'part of the functions of the ESCB'.

(2) Financing of resolution as another public task within the meaning of Article 14.4 of the Statute of the ESCB and of the ECB

101. The sovereign reorganisation and orderly resolution of banks is not a task of an NCB within the framework of the ESCB but rather another public task.[41] The tasks of the ESCB are exhaustively laid down in Article 127 TFEU and consist, in essence, in conducting the monetary policy of the Union.[42]

102. The resolution and reorganisation measures ordered by Banka Slovenije in 2013 and 2014 still had to be regarded as purely national tasks at that time, as they were carried out before the harmonisation of bank resolution rules at Union level by the SRM Regulation and the BRRD.

37 One need only consider the – admittedly unlikely – case of a Member State entrusting its NCB with the construction and operation of infrastructure such as roads, railways or airports.

38 Although in the present case the Republic of Slovenia has temporarily waived its share of Banka Slovenije's profits and has thus waived budgetary resources, this is only one component of the financing mechanism. See, in that regard, point 122 et seq. of this Opinion.

39 See, in particular, points 55 to 57 of this Opinion.

40 Judgments of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 132); of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 95); and of 11 December 2018, *Weiss and Others* (C-493/17, EU:C:2018:1000, paragraph 103).

41 The orderly resolution or sovereign reorganisation of banks is in the public interest, since bank insolvencies can have serious consequences for both the financial system and the real economy due to the systemic functions of banks and should therefore be avoided wherever possible; see, for example, recitals 1 and 2 of the BRRD, as well as my Opinion in *Banco de Portugal and Others* (C-504/19, EU:C:2020:943, point 1).

42 See judgment of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 94).

103. However, even after the establishment of the banking union, bank resolution would not be categorised as a task of the ESCB. It is true that, according to Article 127(5) TFEU, the ESCB must also contribute to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system.

104. However, it cannot be concluded from this that bank resolution is a task of the ESCB. This already follows from the wording in Article 127(5) TFEU, in accordance with which the ESCB is to assist the 'competent authorities' in the conduct of those policies and is not itself responsible for them. In that respect, it is true that Article 3(3) of the BRRD allows Member States to designate their NCB as the resolution authority under the current legal situation. [43] However, that provision makes clear that, in such cases, the NCB is entrusted with public administrative powers.

105. Therefore, the provisions in Article 127(5) TFEU and Article 3(3) of the BRRD merely show that the transfer of such tasks to an NCB is not in principle incompatible with the objectives and tasks of the ESCB (see the second sentence of Article 14.4 of the Statute of the ESCB and of the ECB). However, the transfer of the task of bank resolution to an NCB does not make it a task of the ESCB. Moreover, it is not the ECB that is responsible for bank resolution at Union level but rather an agency created specifically for that purpose, the Single Resolution Board ('the SRB'). [44]

106. Consequently, Banka Slovenije, as the resolution authority, performed another public task within the meaning of Article 14.4 of the Statute of the ESCB and of the ECB in 2013 and 2014. Such a task does not constitute a task of the ESCB and therefore must, in principle, be financed by the Member States.

107. The requirement of sufficient financing is particularly important against the background that the reorganisation or resolution of a bank inevitably involves far-reaching interference with the property rights of its shareholders and creditors. Thus, the old Slovenian law also made the write-down and conversion of relevant capital instruments a prerequisite for a reorganisation measure taken using public funds. [45]

108. At the same time, the law of 2019 now provides, on the one hand, for the obligation to pay flat-rate compensation to certain investors in accordance with Article 4 to 7 of the ZPSVIKOB. On the other hand, Banka Slovenije is liable under the ZBan-1 and the ZPSVIKOB for infringements of the NCWO principle, whereby a breach of the duty to exercise due care under Article 223a of the ZBan-1 is sufficient to trigger that liability. According to that provision, such a breach exists if the harm (that is to say, the infringement of the NCWO principle in this case) is the result of a failure to take into account facts and circumstances which Banka Slovenije was aware of or could have been aware of when taking its decision.

109. However, a thus defined breach of the duty to exercise due care can occur relatively quickly if an infringement of the NCWO principle is established.

[43] The NCB (also) performs the tasks of the national resolution authority in 15 Member States at present; see https://www.eba.europa.eu/about-us/organisation/resolution-committee/resolution-authorities.

[44] Nor, moreover, is banking supervision to be regarded as a task of the ESCB following the establishment of the banking union, even though the ECB partly performs that task within the Single Supervisory Mechanism. This is because supervisory tasks must be strictly separated from monetary policy tasks; see, for example, recitals 65 and 66 of Regulation (EU) No 1024/2013 of the Council of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63; 'the SSM Regulation'). Banking supervision and bank resolution must likewise be strictly separated; see Article 3(3) of the BRRD.

[45] See, in that regard, judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 26).

110. The extent of the required write-down and conversion of capital instruments is determined prior to the decision to resolve a bank on the basis of a valuation of its assets and liabilities. That valuation also seeks to determine what the value of the assets and liabilities would be in an insolvency scenario. In most cases, however, that valuation has to be carried out under extremely time pressure – there is usually only one weekend available for the resolution itself – and must be confined to the bank's most important assets and liabilities. It is therefore plausible that a post-resolution valuation, taking into account all available data, might conclude that certain capital instruments would have been ascribed a higher value in the insolvency scenario. The NCWO principle applies in such a case. [46]

111. Therefore, the Member State must certainly expect the incurrence of such liability. In the event of a transfer to any other Member State body, such payments would ultimately be charged to the State budget. It is only by virtue of its designation as resolution authority that Banka Slovenije is placed in the situation of having to pay the compensation from its own resources. That circumstance is even more obvious in the case of the obligation to pay flat-rate compensation in accordance with Articles 4 to 7 of the ZPSVIKOB.

(3) Interim conclusion

112. Consequently, both types of compensation payments must be regarded as 'public sector's obligations vis-à-vis third parties' within the meaning of Article 1(1)(b)(ii) of Regulation No 3603/93.

(4) In the alternative: an objective obligation of the Member State to compensate under the NCWO principle using public funds does not follow from Article 17(1) of the Charter

113. If, however, the Court were to conclude that the question of whether there is 'public sector obligation vis-à-vis third parties' in fact depends on whether the liability of the NCB is fault-based or is based on an objective obligation, the following should be stated: Contrary to what the ECB claims, the Court has hitherto not expressly ruled that Article 17(1) of the Charter requires mandatory compliance with the NCWO principle.

114. The idea behind the NCWO principle is that, in the event a bank will (probably) fail without State intervention, the insolvency of that bank is the only alternative. In other words, the capital instruments of its shareholders and creditors in that situation no longer have a higher market value than the insolvency value. [47] Accordingly, the Court has ruled that the write-down or cancellation of capital instruments of a bank that is failing or is likely to fail does not constitute an unjustified interference in the rights to property of the investors concerned if the NCWO principle is observed. [48]

115. However, it cannot be concluded from this that an unjustified interference necessarily exists if that principle is not respected.

[46] Regarding the significance and functioning of the various valuations, see, in detail, my Opinion in *Aeris Invest* v *SRB and Algebris (UK) and Anchorage Capital Group* v *SRB* (C-874/19 P and C-934/19 P, EU:C:2021:563, points 57 to 68, and 74 to 78).

[47] See in that regard, in detail, my Opinion in *Aeris Invest* v *SRB* and *Algebris (UK) and Anchorage Capital Group* v *SRB* (C-874/19 P and C-934/19 P, EU:C:2021:563, points 112 to 118).

[48] Judgments of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraphs 78 and 79), and of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB* (C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 73 and 74).

116. It is true that such a serious interference in the right to property generally requires that fair compensation is paid.[49] However, in accordance with the case-law of the European Court of Human Rights ('the ECtHR'),[50] reasons of public interest may call for compensation below the market value in individual cases.[51] Such public interest considerations may well play a role in the context of bank resolution in certain cases. This is all the more true given that, otherwise, the general public would have to bear those burdens instead of the bank's investors, even though only the latter benefited from its profits during the times when it was economically successful. In addition, the ability of State authorities to act could be unduly restricted if they were compulsorily required in every case to compensate, at the insolvency value, investors in a bank whose collapse could have serious consequences for the national economy.

117. Accordingly, EU law now – that is to say, under the new legal situation following the establishment of the banking union – certainly provides that investors in a resolved bank may claim compensation under the NCWO principle. However, that compensation is not financed by public funds, but from the resources of the Single Resolution Fund, which are built up by contributions from the commercial banks themselves.[52]

118. In conclusion, an objective obligation – that is to say, existing always and independently of any breach of duty – of the Member State to compensate under the NCWO principle using public funds does not follow from Article 17(1) of the Charter. Consequently, it is not for that reason that such compensation is a 'public sector obligation vis-à-vis third parties'.

119. Rather, the qualification of the compensation owed under Slovenian law as 'public sector's obligations vis-à-vis third parties' is due to the fact that those obligations follow solely from the transfer of another public task – namely bank resolution – to the NCB without corresponding funding.[53]

(b) Source of the financing

120. As a following step, however, the question arises as to whether any financing of such an obligation from the resources of an NCB leads to an infringement of Article 123 TFEU.

121. In that connection, the Slovenian Government appears to take the position that only direct financing by means of money creation infringes the prohibition of monetary financing under Article 123 TFEU. However, according to Article 40 of the ZPSVIKOB, the compensation payments are financed from Banka Slovenije's profits (defined as the excess of income over expenditure).[54]

122. The profits of a central bank derive from its monetary policy operations. In accordance with Article 18.1 of the Statute of the ESCB and of the ECB, those operations are carried out exclusively to achieve the objectives set out in Article 127 TFEU, that is to say, primarily to maintain price stability. In that context, profit can result in particular from the issue of cash and from interest

[49] Judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraph 87).

[50] Since Article 17 of the Charter corresponds to Article 1 of Protocol No 1 to the ECHR, the latter provision must be taken into account as the minimum threshold of protection in accordance with Article 52(3) of the Charter; see judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraph 72).

[51] See, in that regard, ECtHR, judgment of 25 March 1999, *Papachelas v. Greece* (CE:ECHR:1999:0325JUD003142396, § 48).

[52] See Article 76(1)(e) of the SRM Regulation.

[53] See point 96 et seq. and the conclusion in point 112 of this Opinion.

[54] In that regard, see, in detail, point 53 of this Opinion.

income from refinancing operations,[55] but also from income from securities transactions or foreign exchange trading. Neither Article 123 TFEU nor Regulation No 3603/93 expressly regulates whether or not the use of those funds for budgetary purposes is to be regarded as prohibited monetary financing.

123. In that connection, however, the Commission also emphasised the fact that part of Banka Slovenije's profit, which the latter uses to build up the special reserves, would normally be channelled into the State budget. This raises the legitimate question as to whether the permissibility of the compensation mechanism can depend on whether the relevant share of the profits of the NCB is used to pay the compensation in question immediately, or only after it has been allocated to the State budget.

124. The use of part of the profits of the NCB to finance general public expenditure is common practice in almost all Member States of the EU.[56] It is comparable to surpluses from fines or penalties being used for budgetary purposes. In principle, this is not regarded as an infringement of the prohibition of monetary financing, since the profits are merely a 'by-product' of the monetary policy measures of an NCB and are not the result of an economic activity aimed at generating revenue for the State.[57]

125. However, the possibility of those profits being used by the State must not be deflected from its intended purpose. Otherwise, it could ultimately lead to a circumvention of the prohibition of monetary financing.[58]

126. Deflection from the intended purpose is to be assumed if monetary policy purposes recede into the background in order to achieve financing objectives. However, that is the precise result of the provision in Article 40 of the ZPSVIKOB.

127. This is because, under that provision, not only the share of profit that is normally allocated to the State budget, but in particular also the part that is intended to establish the general reserves is used for financing purposes – and thus for purposes other than monetary policy purposes. Indeed, as has already been shown, the establishment of sufficient reserves ultimately also serves to preserve the capacity to act in monetary policy and thus the functioning of a central bank.[59] That applies in particular in a situation such as the present one, in which up to 50% of the reserves already established can also be used for financing purposes and, consequently, can no longer be used for the purpose of absorbing losses.[60]

128. Generally speaking, monetary policy operations must not serve to raise revenue, but should contribute to the achievement of the objectives under Article 127 TFEU. In the present case, however, the provision in Article 40 of the ZPSVIKOB could create an incentive or, in the extreme case, even political pressure to act with the intention of making a profit when using monetary policy instruments and to allow monetary policy objectives to recede into the background. This is

55 This is referred to as monetary income; see Article 32.2 of the Statute of the ESCB and of the ECB.

56 In the case of the ECB, Article 33.1(b) of the Statute of the ESCB and of the ECB provides that the net profit remaining after the establishment of reserves is to be distributed to the NCB in proportion to its capital share.

57 Siekmann, H., *Die Verwendung des Gewinns der EZB und der Bundesbank*, Institute for Monetary and Financial Stability, Working Paper No 3 (2006), pp. 13 and 14.

58 See, regarding the prohibition of circumvention, recital 7 of Regulation No 3603/93 and the judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 101).

59 In that regard, see, in detail, point 77 et seq. of this Opinion.

60 In that regard, see point 70 et seq. of this Opinion.

because, for the reasons already set out above, the NCB has an interest in restoring as soon as possible its decision-making freedom as regards the use of its profits for the purpose of establishing reserves. [61]

129. The prohibition of monetary financing also safeguards the independence of the ESCB in this way. [62] That prohibition is not only intended to ensure a certain degree of budgetary discipline in the Member States. [63] Rather, its purpose is, on the one hand, to prevent the governments of the Member States from increasing the monetary base through their fiscal policy decisions and thereby possibly influencing the monetary policy of the ESCB. [64] On the other hand, however, by precluding national governments from having extensive access to the resources of the NCBs, that prohibition is also intended to prevent governments from undermining the financial independence of their central bank in that way.

130. In conclusion, the use of the profits of an NCB is therefore deflected from its intended purpose by legislation such as Article 40 of the ZPSVIKOB. [65] This constitutes a circumvention of the prohibition under Article 123 TFEU.

(c) Conclusion

131. Article 123 TFEU must therefore be interpreted as precluding national legislation under which an NCB, as the resolution authority, must pay compensation to the investors of a credit institution whose capital instruments have been written down or cancelled as a result of a reorganisation or resolution measure ordered by it, whereby that compensation is financed as follows: first, all profits earned by that NCB from a certain point in time, as well as part of the existing reserves, are used and, if those are insufficient, a loan is granted by the Member State concerned, for the repayment of which all future profits of the NCB are also used until the principal has been paid.

This applies both where the obligation to compensate under national law is triggered by an infringement of the 'no creditor worse off' principle, which is attributable to a breach by the NCB of the duty to exercise due care, and where that obligation objectively exists vis-à-vis a specific group of investors without the need to prove an infringement of that principle or a breach by the NCB of the duty to exercise due care.

B. The fourth to eighth questions

132. By its fourth to eighth questions, the Ustavno sodišče (Constitutional Court) seeks to ascertain, in essence, whether, in particular, Article 44(1) of Directive 2006/48, or its essentially identical successor provision in Article 53(1) of Directive 2013/36, precludes the provisions of Articles 10 to 22 of the ZPSVIKOB.

[61] In that regard, see in particular points 78 and 79 of this Opinion.

[62] In that regard, see, by way of introduction, point 50 of this Opinion.

[63] Regarding that aspect, see judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 100), and of 11 December 2018, *Weiss and Others* (C-493/17, EU:C:2018:1000, paragraph 107).

[64] This is the case even though – contrary to widespread belief – the monetary policy of the ESCB is not aimed primarily at controlling the monetary base or the money supply, but rather at ensuring price stability; see, for example, *Deutsche Bundesbank*, Die Rolle von Banken, Nichtbanken und Zentralbank im Geldschöpfungsprozess, Monatsbericht April 2017, p. 28.

[65] In its annual convergence reports, with regard to the prohibition of monetary financing, the ECB regularly regards it as critical if fixed amounts or profits not yet realised are already planned in advance for certain budgetary purposes; see Convergence Report June 2016, p. 31; and Convergence Report June 2020, p. 33.

133. The latter provisions require Banka Slovenije to publish on its website, in whole or in part, certain information and documents that served as the basis for its decision to write down or cancel capital instruments under the resolution and reorganisation measures ordered in 2013 and 2014, and to provide potential claimants in compensation disputes with access to them available in a virtual data room. Specifically, the information and documents consist of the results of the stress tests and the reports on the Asset Quality Reviews (AQRs) conducted prior to the resolution or reorganisation of the credit institutions, as well as the valuations of their assets and liabilities, on the basis of which Banka Slovenije decided on the specific extent to which capital instruments were cancelled or written down.

134. According to the referring court, the information concerning the bank in question is published on the website in aggregate form, with all personal data, confidential information and professional secrets removed, but with the credit institution named, and the information is accessible to everyone. Access to the virtual data room is granted to all potential claimants in compensation disputes, specifically the (former) holders of written-down or cancelled capital instruments, and to their legal counsel. Personal data are redacted, and confidential information and professional secrets are marked as such.

1. Applicability ratione materiae of Directives 2006/48 and 2013/36

135. Directive 2006/48, also referred to as 'CRD III' (Capital Requirements Directive), contained harmonised rules on access to, and supervision of, the business of credit institutions. It was replaced by Directive 2013/36, or 'CRD IV', with effect from 1 January 2014.

136. Article 44 of Directive 2006/48 and Article 53 of Directive 2013/36 apply to the activities of the authorities entrusted by national law with the task of banking supervision [66] and prescribe the confidentiality of certain information received by those authorities in the exercise of their supervisory activities.

(a) No direct applicability to reorganisation and winding-up measures within the meaning of Directive 2001/24.

137. According to the order for reference, Banka Slovenije already carried out the task of banking supervision during the period of application of Directive 2006/48. However, the extraordinary measures ordered in 2013 and 2014, in the context of which the information and documents at issue in the present case were used, are not supervisory measures. Rather, in the view of the referring court and all the parties to the proceedings, the measures in question must be regarded as reorganisation or winding-up measures within the meaning of Directive 2001/24 in so far as they were ordered by Banka Slovenije in its function (exercised in parallel) as resolution authority within the meaning of Article 2 of Directive 2001/24. Accordingly, the abovementioned players also all agree that the provisions of Directives 2006/48 and 2013/36 are not directly applicable to that activity of Banka Slovenije.

138. However, both Banka Slovenije and the Commission emphasise that at least part of the information, the publication of which or provision of access to which is provided for in Articles 10 to 22 of the ZPSVIKOB, has a factual connection to banking supervision.

[66] See Article 3(4) of Directive 2006/48 and Article 1(1)(36) of Directive 2013/36, respectively.

139. In that respect, it follows from point (a) of the first subparagraph of Article 48(1) of Directive 2006/48 in conjunction with the second subparagraph of that provision and the second subparagraph of Article 59(1) of Directive 2013/36 that information which is protected in a prudential context does not lose that protection as a result of its disclosure or use in a resolution context. This is because the first-mentioned provisions provide that disclosure to resolution authorities is permitted, whereby it must be ensured that, in that case also, that information must be protected in a manner which is at least equivalent to that provided for in Article 44 of Directive 2006/48 or Article 63 of Directive 2013/36.

140. In that respect, a distinction must be drawn in the present case between, on the one hand, the valuation of assets and liabilities to determine the extent to which capital instruments must be written down and cancelled, and, on the other hand, stress tests and AQRs.

141. Valuation is an essential and typical procedural step in the ordering of a sovereign reorganisation or resolution measure.[67] As has already been stated, those measures are not covered *ratione materiae* by Directives 2006/48 and 2013/36.[68]

142. By contrast, it is true that regular stress tests and AQRs are supervisory tools.[69] Taken together, they are referred to as a comprehensive assessment, the result of which is normally intended to create transparency about the resilience of a bank and thus to strengthen confidence in the financial sector. Therefore, the obligation of professional secrecy under Article 53(1) of Directive 2013/36 does not preclude the publication of stress tests in accordance with paragraph 3 thereof.

143. It is also apparent from the Commission's State aid decision concerning the extraordinary measures of 2013 and 2014 that Slovenia carried out the stress tests in question, as well as the AQRs, at the request of the Commission specifically in preparation for the reorganisation measures (which consisted, in essence, of a State recapitalisation) and their approval under State aid law.[70] Therefore, there does not in any event appear to be a situation in which information compiled in a supervisory context was disclosed to the resolution authority within the meaning of Article 48(1)(a) of Directive 2006/48 or the second subparagraph of Article 59(1) of Directive 2013/36.

(b) Applicability of Directives 2006/48 and 2013/36 by reference?

144. However, Article 33 of Directive 2001/24 on the reorganisation and winding up of credit institutions contains a reference to professional secrecy 'in accordance with the rules and conditions laid down in Article 30 of [Directive 2000/12]', which, in accordance with the transitional provision in Article 158(2) of Directive 2006/48, which replaced Directive 2000/12, is to be construed as a reference to Article 44 et seq. of Directive 2006/48. Since Directive 2006/48 was in turn repealed by Directive 2013/36, that reference must be construed, following the entry into force of that directive, as a reference to Article 53 et seq. of Directive 2013/36 (see Article 163 of Directive 2013/36).

67 See, under the current legal situation, Article 20 of the SRM Regulation and Article 36 of the BRRD. Regarding the significance of that valuation in the context of resolution, see point 110 of this Opinion and the references in footnote 46.

68 See points 135 and 137 of this Opinion.

69 See, for example, Article 100 of Directive 2013/36.

70 See recital 9 of the Commission Decision of 18 December 2013 on State aid SA.33229 (2012/C) – (ex 2011/N) – Restructuring of NLB – Slovenia which Slovenia is planning to implement for Nova Ljubljanska banka d.d. (OJ 2014 L 246, p. 28). See also, in that regard, ECtHR, judgment of 14 September 2021, *Pintar and Others v. Slovenia* (CE:ECHR:2021:0914JUD004996914, §§ 7 and 9).

145. Banka Slovenije concludes from this that, in particular, Article 53 of Directive 2013/36 is also applicable to reorganisation and winding-up measures within the meaning of Directive 2001/24.

146. However, as the Court has already held, Directive 2001/24 was not intended to harmonise the laws of the Member States in the field of the reorganisation and winding-up of credit institutions.[71] Rather, that directive was intended to regulate only the mutual recognition of such measures in the Member States.[72] Accordingly, Article 33 of that directive, according to its very wording, refers only to information exchanged within the framework of information or consultation procedures between the authorities of different Member States, which serve precisely the mutual recognition of those measures. As far as can be seen from the order for reference, however, the information at issue in the main proceedings has no connection with such cross-border procedures.

147. In contrast to banking supervision, for which uniform legal provisions were established as early as 2000,[73] it was not until 2014 that bank resolution was harmonised by the BRRD and then subsequently by SRM Regulation – that is to say, after the adoption of the measures at issue in the present case.

148. Consequently, the reference contained in Article 33 of Directive 2001/24 cannot be understood as prescribing the confidentiality of all information related to a reorganisation or resolution measure formerly governed exclusively by national law. This is because harmonisation of the conditions for those measures was precisely not provided for during the period of application of Directive 2001/24.

(c) Applicability of Directive 2006/48 where supervisory and resolution activities are carried out by the same authority?

149. Against that background, the Commission's arguments regarding the applicability of Directive 2006/48 must ultimately also be rejected. In the procedure before the Court, the Commission had taken the view that it follows from the mere fact that, during the period of application of Directive 2006/48, Slovenia had entrusted the task of bank resolution – which is not covered by that directive – to the same authority that carried out the task of banking supervision – which is governed by Directive 2006/48 – that that directive also applies to the activity of bank resolution.

150. However, Directive 2006/48 does not make such provision. It is true that, unlike the successor directives,[74] it does not prescribe a strict institutional separation of banking supervision and bank resolution. However, it does not follow from this that the same rules apply to banking supervision and bank resolution, in particular against the background that bank resolution was not harmonised at all under EU law when Directive 2006/48 was in force.[75]

[71] Judgments of 24 October 2013, *LBI* (C-85/12, EU:C:2013:697, paragraph 39), and of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 104).

[72] Judgments of 24 October 2013, *LBI* (C-85/12, EU:C:2013:697, paragraph 39), and of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 104).

[73] In particular by the abovementioned Directives 2000/21, 2006/48 and 2013/36.

[74] See Article 4(1) and (7) of Directive 2013/36, and Article 3(3) of the BRRD.

[75] This is, moreover, in my view, the reason why Directive 2006/48 does not mention bank resolution and therefore also does not prescribe its institutional separation from supervisory activity.

151. Furthermore, it cannot be concluded from the mere transfer of resolution tasks to the supervisory authority that the Member State concerned intended, with regard to the resolution of credit institutions, to subject itself to the harmonised legal regime applicable to supervisory authorities. Rather, such a presumption would require a finding by the national courts of that Member State that the Member State in question intends to be bound by the provisions of the directive even in an area not covered by it.[76] The opposite is true in the present case, since the Ustavno sodišče (Constitutional Court) is asking the Court whether the directives on banking supervision were also applicable to the activities of the resolution authorities of the Member States in the period prior to the establishment of the banking union and the associated harmonisation of bank resolution.

(d) Conclusion

152. Consequently, Article 44 of Directive 2006/48 and Article 53 of Directive 2013/36 are not applicable either to the results of stress tests and AQR reports of a credit institution carried out for the purpose of implementing a reorganisation or winding-up measure within the meaning of Directive 2001/24 and during the period of application of only that directive, or to the valuation of the assets and liabilities of such a credit institution carried out in that context.

153. In view of that conclusion, it is not necessary to answer the fifth to eighth questions referred.

2. Importance of publication or provision of access to the relevant documents for the effective enforcement of the rights of (former) holders of written-down or cancelled capital instruments

154. That outcome is in line with the requirements established by the ECtHR in relation to the protection of property. In its decision in *Pintar and Others* v. *Slovenia*, it held that, with regard to the rights of (former) holders of written-down or cancelled capital instruments, the Slovenian legal situation prior to the adoption or application of the ZPSVIKOB constituted an infringement of the procedural aspect of the fundamental right to property under Article 1 of the Protocol No 1 to the ECHR.

155. The ECtHR took the view that the confidential nature of the information and documents on the basis of which the decision to write down and cancel the capital instruments in question was taken prevented those persons from understanding the circumstances in which the interference with their property rights had taken place and the grounds on which it was based.[77]

156. However, according to the ECtHR, knowledge of those circumstances and reasons is necessary in order to appeal, if necessary, against the interference with the fundamental right to property. The ECtHR emphasises that, in particular, the results of the stress tests and the AQR reports are crucial information in that respect.[78]

[76] See, to that effect, judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraphs 53 and 56).

[77] ECtHR, judgment of 14 September 2021, *Pintar and Others v. Slovenia* (CE:ECHR:2021:0914JUD004996914, § 107).

[78] ECtHR, judgment of 14 September 2021, *Pintar and Others v. Slovenia* (CE:ECHR:2021:0914JUD004996914, §§ 99 and 100).

VI. Conclusion

157. In the light of the above considerations, I propose that the Court answer the questions referred by the Ustavno sodišče (Constitutional Court, Slovenia) as follows:

(1) Article 130 TFEU and Article 7 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank must be interpreted as precluding national legislation on the use of an NCB's profits under which the NCB is fully prevented, for a period of several years, from building up its general reserves and, moreover, that NCB's existing reserves may be used, up to a certain amount, to finance public tasks. This is because such legislation entails the risk that, in the event that losses are incurred in connection with monetary policy operations, the net equity of that NCB will be less than the amount of its share capital or even negative for a prolonged period of time.

(2) Article 123 TFEU must therefore be interpreted as precluding national legislation under which an NCB, as the resolution authority, must pay compensation to the investors of a credit institution whose capital instruments have been written down or cancelled as a result of a reorganisation or resolution measure ordered by it, whereby that compensation is financed as follows: first, all profits earned by that NCB from a certain point in time, as well as part of the existing reserves, are used and, if those are insufficient, a loan is granted by the Member State concerned, for the repayment of which all future profits of the NCB are also used until the principal has been paid.

    This applies both where the obligation to compensate under national law is triggered by an infringement of the 'no creditor worse off' principle, which is attributable to a breach by the NCB of the duty to exercise due care, and where that obligation objectively exists vis-à-vis a specific group of investors without the need to prove an infringement of that principle or a breach by the NCB of the duty to exercise due care.

(3) Article 44 of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions and Article 53 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC must be interpreted as not being applicable either to the results of stress tests and asset quality review reports of a credit institution carried out for the purpose of implementing a reorganisation or winding-up measure within the meaning of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions and during the period of application of only that directive, or to the valuation of the assets and liabilities of such a credit institution carried out in that context.