Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 5 September 2018 [1]

**Case C-215/17**

**Nova Kreditna Banka Maribor d.d.**
**v**
**Republika Slovenija**

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

(Reference for a preliminary ruling — Reuse of public sector information — Prudential requirements for credit institutions and investment firms — Credit institutions under the dominant influence of the State — National rules granting unrestricted access to certain information on commercial contracts concluded by such institutions)

## I. Introduction

1. Nova Kreditna Banka Maribor d.d. ('NKBM') is a Slovenian bank. A journalist made a request to that bank for access to a list containing certain information on contracts concluded by NKBM with consultancy firms, law firms and companies providing services of an intellectual nature. That request was made under Slovenian rules on access to documents. At the time that the request was made, the Republic of Slovenia held a majority of the shares in NKBM. It had also recapitalised that bank. For those reasons, the national legislation on access to documents was applicable to the bank at that time, and it appears that information such as that requested by the journalist should have been granted under national law.

2. NKBM rejected the journalist's request. The journalist made a complaint to the administrative authority dealing with access to information in Slovenia, which ordered the bank to grant access to the requested information. NKBM challenged that decision before the national courts. The case is now being considered by the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia) on a point of law. That court refers two questions to this Court, enquiring about the compatibility of the Slovenian legislation on access to documents with both Directive 2003/98/EC [2] and Regulation (EU) No 575/2013. [3]

1 Original language: English.

2 Directive of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (OJ 2003 L 345, p. 90), as amended by Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98 (OJ 2013 L 175, p. 1).

3 Regulation 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. 1, and corrigenda OJ 2013 L 208, p. 68, and OJ 2013 L 321, p. 6).

## II. Legal framework

### *A. EU law*

#### *1. Directive 2003/98*

3. Directive 2003/98 seeks to establish, as stated in Article 1(1), 'a minimum set of rules governing the re-use and the practical means of facilitating re-use of existing documents held by public sector bodies of the Member States'.

4. Article 1(2) of this directive contains a list of exclusions from its scope of application. It provides in point (c), in particular, that the directive shall not apply to 'documents which are excluded from access by virtue of the access regimes in the Member States, including on the grounds of … commercial confidentiality (e.g. business, professional or company secrets)'.

5. The directive also states that it 'builds on and is without prejudice to access regimes in the Member States' in Article 1(3).

6. Article 2 of the directive provides inter alia the following definitions for the purposes of the directive:

'1. "public sector body" means the State, regional or local authorities, bodies governed by public law and associations formed by one or several such authorities or one or several such bodies governed by public law;

2. "body governed by public law" means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; and

(b) having legal personality; and

(c) financed, for the most part by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

…'

#### *2. Regulation No 575/2013*

7. The scope of application of Regulation No 575/2013 is defined in Article 1, which reads as follows:

'This Regulation lays down uniform rules concerning general prudential requirements that institutions supervised under Directive 2013/36/EU shall comply with in relation to the following items:

…

(e) public disclosure requirements.

…'

8. Part Eight of that regulation is entitled 'Disclosure by institutions' and is composed of Articles 431 to 455. Article 431 sets out the scope of disclosure requirements. Article 432(2) authorises, under certain conditions, the omission of proprietary or confidential information in the disclosures. Article 433 adds that the institutions shall publish the disclosures required by Part Eight at least on an annual basis.

### *B. Slovenian law*

#### *1. Law on access to public information*

9. Article 1a of the Zakon o dostopu do informacij javnega značaja ('Law on access to public information', or 'ZDIJZ') reads as follows:

'(1) The present law governs also the procedure enabling anyone to have free access to information of public importance held by commercial companies and other private law entities which are under the dominant influence, whether directly or indirectly, individually or jointly, of the Republic of Slovenia, autonomous local territorial entities or other public law entities ("undertakings under the dominant influence of public law entities").

(2) There shall be deemed to be dominant influence within the meaning of the preceding paragraph where the Republic of Slovenia, autonomous local territorial entities or other public law entities, individually or collectively:

– are able to exercise a dominant influence on the basis of a majority shareholding in the subscribed capital, or possess, in relation to a commercial company, the right to control the majority of or the power to appoint more than half of the members of the administrative organ or supervisory body, directly or indirectly through other commercial companies or other private law entities,

…

(3) A bank which benefits from measures taken pursuant to the law governing the measures taken by the Republic of Slovenia to strengthen the stability of banks shall also be deemed to be under a dominant influence within the meaning of paragraph 1 of this Article.

(4) An undertaking shall also be considered subject to the obligation laid down in paragraph 1 of this Article for a period of five years after the dominant influence as referred to in paragraph 2 of this Article has come to an end, in the case of information of public importance that dates from the period during which that undertaking was under a dominant influence.

(5) An undertaking under the dominant influence of public law entities shall be subject to the obligation to provide access to information of public importance within the meaning of Article 4a of this Law.

(6) In addition to the objective set out in Article 2(1), the present Law shall have the objective of enhancing transparency, and the responsible management of public funds and the finances of undertakings under the dominant influence of public law entities.

…'

10. Article 4a(1) of the ZDIJZ states:

‘In the case of undertakings under the dominant influence of public law entities, information of public importance shall mean:

– information about a transaction involving the acquisition, disposal or management of the tangible assets of the undertaking or the undertaking’s expenditure in relation to the ordering of supplies, works, agency services, consultancy or other services, as well as financing, sponsoring, consultancy and copyright agreements, or other transactions that produce a similar outcome;

…’

11. Pursuant to Article 6a of the ZDIJZ:

‘(1) Notwithstanding the provisions of paragraph 1 of the preceding Article, access requested to information of public importance on undertakings under the dominant influence of public law entities shall be given in respect of the main data concerning completed transactions referred to in the first indent of Article 4a(1) of the present Law, that is:

– information about the type of transaction;

– the contractual partner, in the case of a legal person, the corporate or business name, registered office and business address; or, in the case of a natural person, the person’s name and place of residence;

– the value of the contract and the amounts of the various payments made;

– the date on which the contract was concluded and the duration of the transaction; and

– certain information contained in the annexes to such contracts.

…

(3) Notwithstanding the provisions of paragraph 1 of this Article, where the information of public importance is not accessible via the internet in accordance with paragraph 4 of Article 10a of this Law, a person required to provide access shall refuse access to the main data relating to a transaction referred to in paragraph 1 of this Article, if that person demonstrates that disclosure would seriously prejudice their competitive position on the market, unless those data concern transactions involving the provision of services by financiers, sponsors, consultants, authors or other transactions that produce a similar outcome.

…’

*2. Law on commercial companies*

12. Article 39 of the Zakon o gospodarskih družbah (‘Law on commercial companies’ or ‘ZGD-1’) states:

‘(1) Data described by a company in a written decision as a business secret shall be regarded as such. The decision must be made known to the members, employees, members of the company’s governing bodies and other persons bound by the business secret.

(2) Whether or not described as such by a decision within the meaning of paragraph 1, data in respect of which it is clear that their disclosure to an unauthorised person would cause serious harm shall also be considered a business secret. Members, employees, members of the company's governing bodies and other persons shall be responsible for the disclosure of a business secret if they were aware or should have been aware that the data were of that nature.

(3) Data which, by law, are public, or data relating to an infringement of a law or a breach of good commercial practice shall not be described as a business secret.'

## III. Facts, national proceedings and the questions referred

13. Nova Kreditna Banka Maribor d.d. is a Slovenian bank. A journalist made a request to that bank for access to a list with information including data about contracts that NKBM had concluded with consultancy firms, law firms and companies providing services of an intellectual nature in the period from 1 October 2012 to 17 April 2014. The requested data related specifically to: the type of transaction concluded; the contractual partner (in the case of a legal person, the corporate or business name, registered office and business address); the value of the contract; the amount of individual payments; the date on which the contract was concluded; the duration of the business relationship; and other such information contained in the annexes to the contract.

14. Under Article 6a(1) of the ZDIJZ, when the requested data relate to certain types of contractual transactions — including contracts such as the ones at stake — they are classified as 'main data'. Such data are considered to be 'information of public importance' when they concern companies under the dominant influence of a public law entity.

15. During the period for which the access to data was requested, NKBM was under the dominant influence of a public law entity, namely the Republic of Slovenia. This was because (i) directly or indirectly, Slovenia held the majority of NKBM's shares and, (ii) like a number of other banks, NKBM was substantially recapitalised due to State intervention.

16. According to Article 6a(3) of the ZDIJZ, access to the aforementioned 'main data' must in principle be granted. However, that access can be refused if the company proves that disclosure would seriously harm its competitive position on the market.

17. There is nevertheless an exception to that exception: access must always be granted where those 'main data' concern 'transactions involving the provision of services by financiers, sponsors, consultants, authors or other transactions that produce a similar outcome'. According to the referring court, the list requested by the journalist concerns contracts falling under this category.

18. On 21 April 2016, NKBM became a private limited liability company and, as such, ceased to be under the dominant influence of the State. However, pursuant to Article 1a(4) of the ZDIJZ, it remained under an obligation to grant access to data for a further five years, provided that those data related to the period in which NKBM was under that dominant influence. In any event, the journalist made the request for access at a date which is not expressly indicated in the order for reference, but which clearly predated NKBM's becoming a private company: as the referring court notes, NKBM's (negative) response to that request was given on 19 May 2014.

19. NKBM refused the journalist's request for information. The journalist lodged a complaint against that refusal to the Informacijski pooblaščenec (Information Commissioner, Slovenia). The Information Commissioner upheld the complaint and ordered NKBM to provide the journalist with the requested data.

20. NKBM brought a claim against that decision, which was rejected by the court of first instance. NKBM then lodged an appeal on a point of law before the referring court, the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia). Before that court, NKBM alleged that the ZDIJZ infringed constitutional rights, and that it was incompatible with EU law. The allegations of incompatibility of the national legislation with the Slovenian Constitution were examined by the Ustavno sodišče Republike Slovenije (Constitutional Court of the Republic of Slovenia), seised of the question of constitutionality of the national law by the referring court. The Ustavno sodišče Republike Slovenije (Constitutional Court of the Republic of Slovenia) held that the national rules in question were not incompatible with the Slovenian Constitution. [4]

21. In those circumstances, the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) In the light of an approach based on minimum harmonisation, must Article 1(2)(c), third indent, of Directive 2003/98, as amended by Directive 2013/37 (consolidated version), be interpreted as meaning that national legislation may permit unrestricted (absolute) access to all information in copyright and consultancy contracts, even when those contracts are categorised as a business secret, and the legislation at issue stipulates this solely in relation to institutions under dominant State influence, but not also for other entities subject to the obligation; and is the interpretation also influenced by Regulation (EU) No 575/2013 in relation to the provisions on the disclosure of information, particularly in the sense that access to public sector information within the meaning of Directive 2003/98 may not be more extensive than is provided for by the uniform rules on the disclosure of information laid down by the regulation?

(2) Must Regulation No 575/2013, viewed in terms of the rules on disclosure of information on the commercial activity of banks, and more specifically Articles 446 and 432(2) in Part Eight thereof, be interpreted as meaning that the latter provisions preclude legislation of a Member State which compels a bank that is, or was, under the dominant influence of a public law entity, to disclose information on contracts provided for consultancy and legal services and services of an intellectual nature, and more specifically information concerning the type of transaction concluded, the contractual partner (in the case of a legal person: the corporate or business name, registered office and business address), the value of the contract, the amount of the individual payments for the abovementioned services, the date on which the contract was concluded, the duration of the business relationship and similar information contained in the annexes to the contract — all information that came into existence during the period of dominant influence — without providing for any exception to that requirement, and with no possibility of balancing the public interest in accessing the data against the bank's interest in safeguarding its business secrets, in circumstances in which there are no cross-border elements?'

22. Written submissions were lodged by NKBM, the Information Commissioner, the Hungarian and Slovenian Governments, and the European Commission. NKBM, the Slovenian Government and the Commission presented oral argument at the hearing held on 7 June 2018.

## IV. Assessment

23. I consider that neither Directive 2003/98 nor Regulation No 575/2013 preclude the legislation in question in the main proceedings. I will examine each of these EU instruments separately in the framework of the analysis of the first (A) and second (B) questions for a preliminary ruling.

4 Decision of the Ustavno sodišče Republike Slovenije (Constitutional Court of the Republic of Slovenia) of 12 January 2017 in Case U-I-52/16-17 (ECLI:SI:USRS:2017:U.I.52.16).

### *A. The first question: Directive 2003/98*

24. The first question has two prongs. The first prong concerns the issue of the compatibility, with Article 1(2)(c), third indent, of Directive 2003/98, of national rules that permit unrestricted (absolute) access to all information in copyright and consultancy contracts, even when those contracts are categorised as a business secret. The referring court notes that that legislation stipulates this solely in relation to institutions under the dominant influence of the State. In the second prong of the question, the issue is whether the interpretation of the directive is influenced by Regulation No 575/2013.

25. As a preliminary issue, it ought to be noted that the Slovenian Government maintained in its written submissions and confirmed during the hearing that the wording of this question is not entirely accurate.

26. First, this question states that the Slovenian legislation in question grants unrestricted access to *all information* concerning certain types of contracts. However, according to the Slovenian Government, the ZDIJZ would grant unrestricted access only to certain data, namely the 'main data' on those contracts. As further explained by the Slovenian Government at the hearing, that data would be presented in an aggregated form, which means that a person seeking access would obtain the information that, for example, bank X had concluded a contract with company Y, relating to matter Z, and the overall sum paid, but that person would receive no further details regarding the content of that contract. Thus, access to all the remaining elements of the contract (which are not 'main data') could be denied if the company were to categorise them as a business secret.

27. In any event, I wish to emphasise that it is clear from the order for reference that the journalist's request for access only covers such 'main data' on copyright and consultancy contracts, that is to say, information subject to unrestricted access under Article 6a(3) of the ZDIJZ *in fine*.

28. Second, the referring court states in the first question that the national legislation in question grants unrestricted access *even when those contracts are categorised as a business secret*. The Slovenian Government again suggests that the wording of the question is not consistent with its national legislation. More specifically, it maintains that the data sought by the journalist cannot be categorised as a business secret by NKBM, because Article 39(3) of the ZGD-1 does not allow data to be categorised as a business secret if those data are public under the law. The data sought by the journalist are public by virtue of Article 6a(3) of the ZDIJZ.

29. Again, in any case, even if in this regard the question may appear to have been drafted in overly broad terms, the referring court does not indicate in the order for reference that NKBM would have categorised or sought to categorise the data to which the journalist is seeking access as a business secret.

30. Leaving the details about facts and national law aside, what appears to be undisputed is that under Slovenian law NKBM must grant unrestricted access, in an aggregated form, to the list containing the data requested by the journalist. This list concerns contracts concluded by NKBM with consultancy firms, law firms and companies providing services of an intellectual nature. The data that the journalist must be granted access to only covers the 'main data'. It is also undisputed that such unrestricted access would not be possible if NKBM had not been, in the relevant period, under the dominant influence of the State. This appears to be the crux of the first prong of the first question posed by the referring court: is such unrestricted access compatible with Article 1(2)(c), third indent, of Directive 2003/98?

31. From my point of view it is, for a rather simple reason: it does not appear to me that Directive 2003/98, considering its applicability *ratione materiae*, aims at governing the situation in the main proceedings at all (2). However, in addition, the scope of application *ratione personae* of the directive is to be addressed, and should perhaps be properly addressed even before the issue of its applicability *ratione materiae* (1).

*1. Applicability* ratione personae

32. Directive 2003/98 states in Article 1(1) that it establishes rules 'governing the re-use and the practical means of facilitating re-use of existing documents *held by public sector bodies* of the Member States' (emphasis added). Article 2(1) of the directive provides that 'public sector body' means 'the State, regional or local authorities, bodies governed by public law…'. Article 2(2) further defines 'body governed by public law' as any body that meets three cumulative conditions. The first of these conditions is that such body be 'established for the specific purpose of meeting needs in the general interest, *not having an industrial or commercial character*' (emphasis added). [5]

33. It is naturally for the national court to ascertain the facts of a case. However, I must admit I have certain difficulties in imagining how an entity, which has been described as a (normal commercial) bank, and which was only temporarily controlled by the State for the purpose of recapitalisation and subsequently resold on the market, could be considered to be a 'public sector body' in the sense of the directive. Even if controlled for some time by the State, that would hardly turn that entity into a body 'governed by public law' in the sense of Article 2(1) of Directive 2003/98. Moreover, a commercial bank, as NKBM appears to be, is likely to fall short of the requirements of Article 2(2)(a) of the directive as well: the fact that such an entity is temporarily controlled by the State and recapitalised by it hardly turns that entity into a body 'established for the specific purpose of meeting needs in the general interest', depriving it of its 'industrial or commercial character'.

*2. Applicability* ratione materiae

34. However, irrespective of the conclusion of the referring court on whether NKBM qualified as a public sector body in the sense of Directive 2003/98 at the material time, I am of the view that the latter does not in any case govern *ratione materiae* the issues addressed by the Slovenian legislation applicable in the main proceedings.

35. According to Article 1(3), the directive 'builds on and is without prejudice to access regimes in the Member States'. Similarly, recital 9 of Directive 2003/98 states that the directive 'builds on the existing access regimes in the Member States and does not change the national rules for access to documents'.

36. This is further clarified by recital 7 of Directive 2013/37, which amended Directive 2003/98. According to that recital, 'Directive 2003/98 does not contain an obligation concerning access to documents or an obligation to allow re-use of documents'. Moreover, according to recital 8 thereof, the amendments made by Directive 2013/37 'do not seek to define or to change access regimes in Member States, which remain their responsibility'.

5 Recital 10 of the directive clarifies that 'the definitions of "public sector body" and "body governed by public law" are taken from the public procurement Directives (92/50/EEC [of 18 June 1992 (OJ 1992 L 209, p. 1)], 93/36/EEC [of 14 June 1993 OJ 1993 L 199, p. 1)] and 93/37/EEC [of 14 June 1993 (OJ 1993 L 199, p. 54)] and 98/4/EC [of 16 February 1998 (OJ 1998 L 101, p. 1)]). Public undertakings are not covered by these definitions'.

37. Directive 2003/98 thus clearly distinguishes between *access to* documents and *reuse of* those documents. Without access there can be no reuse, but that does not imply that access and reuse can be considered as equivalent concepts.[6] The directive establishes obligations regarding the reuse of documents but does not touch upon (national) rules on access to documents. At the same time, the directive relies and depends on national rules on access to documents in order to be applicable. It is also true that, whenever access is granted by national law, reuse should in principle[7] automatically be allowed, subject to the conditions set out by the directive.[8] However, this does not change the fact that the directive is without prejudice to and does not intend to change rules on access to documents held by national public sector bodies, which remain a domain for which Member States are solely responsible.

38. As noted by the Slovenian Government in its written submissions, the Slovenian legislation in question in the main proceedings, namely the ZDIJZ, constitutes the national legislation on access to documents. It is true that the ZDIJZ is *also* the piece of legislation in which the national legislature decided to insert some provisions in order to transpose Directive 2003/98. However, having regard to the content of the specific provisions of the ZDIJZ applicable in the main proceedings, including Article 6a(3) thereof, it is, in my view, clear that these provisions are rules granting unrestricted access to certain information, and not rules on the reuse of documents.[9]

39. Thus, the situation in the main proceedings and the applicable national legislation clearly concern access, but not reuse in the sense of Directive 2003/98.[10] Since the issues of *initial* access are clearly ones for the Member States to decide, then by definition the *subsequently* potentially applicable 'add-on' in the form of Directive 2003/98 cannot be used for reasoning backwards and limiting the scope of that initial access. As a result, that directive cannot prevent national rules granting unrestricted access to certain documents, even if those documents were categorised as business secrets.

40. That conclusion is not affected by Article 1(2)(c), third indent of Directive 2003/98, referred to by the national court. According to this provision, the directive does not apply to documents which are excluded from access by virtue of national law. This is precisely because, as I have already noted, reuse (under the directive) is only possible where documents can be accessed (under national law). Hence, the fact that Article 1(2)(c), third indent, cites 'commercial confidentiality (e.g. business, professional or company secrets)' as one of the examples[11] of possible grounds of (national) exclusion from access to documents (which, if and where applicable, entail that those documents are not covered by the directive) can hardly be interpreted as imposing an obligation for Member States to provide limits to access on those grounds.

6 See judgment of 27 October 2011, *Commission* v *Poland* (C-362/10, not published, EU:C:2011:703, paragraph 54).

7 Indeed, as the Court has already noted, it follows from recital 9 and Article 3 that the directive does not contain an obligation to allow the reuse of documents held by public sector bodies: judgment of 27 October 2011, *Commission* v *Poland* (C-362/10, not published, EU:C:2011:703, paragraph 48); see also judgment of 12 July 2012, *Compass-Datenbank* (C-138/11, EU:C:2012:449, paragraph 50).

8 Recital 8 of Directive 2013/37, which amended Directive 2003/98, states clearly that the latter 'should … be amended to lay down a clear obligation for Member States to make all documents re-usable unless access is restricted or excluded under national rules on access to documents and subject to the other exceptions laid down in this Directive'.

9 The Slovenian Government also highlighted at the oral hearing that the ZDIJZ does contain rules on the reuse of documents, but noted that these rules are to be found in other articles of that legislation. It also insisted on the fact that the requirements applicable to a request for access to documents and a request for reuse of documents differ substantially, and confirmed that the request in the main proceedings clearly fell in the former category.

10 I acknowledge that in view of the broad definition of 'reuse' in Article 2(4) of Directive 2003/98, it could be argued that a journalist asking for access to (aggregated/main) data on certain contracts is likely to 'reuse' that information 'for … non-commercial purposes other than the initial purpose within the public task for which the documents were produced', because if there were anything interesting in the data obtained, the journalist would be likely to 'reuse' that data for writing an article or even a series of articles on that topic. However, it is precisely for such reasons that the notion of 'reuse' must be read in the context of the logic and scheme of Directive 2003/98. Otherwise almost any activity would, at some stage or other, involve the 'reuse of public data'. Directive 2003/98 would then become almost universally applicable to any document or information processing, because there is always likely to be at least some input data in such processing that came from the public sector.

11 I note that Article 1(2)(c) uses the term 'including', which clearly points to an indicative list of grounds of exclusion from access.

41. Finally, by the second prong of the first question, the referring court essentially asks whether the interpretation of Directive 2003/98 is influenced by Regulation No 575/2013, particularly in the sense that access to public sector information may not be more extensive than what is provided for by the uniform rules on disclosure of information laid down by the regulation.

42. That element of the first question opens up the discussion of the second question referred by the national court: namely whether the regulation is exhaustive as to the *disclosure* obligations it imposes on credit institutions and, if this is the case, whether that implies a prohibition of national rules which would allow *access* to additional information not covered by those disclosure requirements. It is that question to which I now turn.

### *B. The second question: Regulation No 575/2013*

43. The second question concerns the rules on disclosure of information foreseen by Part Eight of Regulation No 575/2013, and more specifically Article 446 and Article 432(2). The referring court asks in essence whether those rules prevent national legislation which compels a bank under the dominant influence of a public law entity to disclose certain information (which corresponds to the 'main data' in the sense of the ZDIJZ) on contracts provided for consultancy and legal services and services of an intellectual nature, without providing for any exception to that requirement, and with no possibility of balancing the public interest in accessing the data against the bank's interest in safeguarding its business secrets. The referring court adds that it asks this question in circumstances in which there are no cross-border elements.

44. Regulation No 575/2013 is a detailed piece of legislation. It lays down uniform rules concerning general prudential requirements that institutions supervised under Directive 2013/36/EU,[12] that is to say credit institutions and investment firms, must comply with in relation to a number of items listed in Article 1 of the regulation. These relate principally to the risk profile of those entities. Recital 7 clarifies that 'this Regulation should, inter alia, contain the prudential requirements for institutions that relate strictly to the functioning of banking and financial services markets and are meant to ensure the financial stability of the operators on those markets as well as a high level of protection of investors and depositors'. The prudential requirements set out by the regulation seek to guarantee not only the financial soundness of credit institutions and investment firms, but also a sufficient level of information for investors and depositors, by means of a standardised system of disclosure of information on the risk profile of each institution.

45. The regulation imposes a number of substantive structural, economic, accounting and financial obligations relating to issues such as own funds (Part Two), capital requirements (Part Three), large exposures (Part Four), exposures to transferred credit risk (Part Five), liquidity (Part Six) and leverage (Part Seven). Moreover, Regulation No 575/2013 sets out in Part Eight an obligation of public disclosure of information in respect of some of those substantive obligations. Recital 68 states that 'the aim of the disclosure requirements should be to provide market participants with accurate and comprehensive information regarding the risk profile of individual institutions'.[13]

12 Directive 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 (OJ 2013 L 176, p. 338).

13 On the aim of disclosure, recital 76 also states that 'for the purposes of *strengthening market discipline* and *enhancing financial stability* it is necessary to introduce more detailed requirements for disclosure of the form and nature of regulatory capital and prudential adjustments made in order to *ensure that investors and depositors are sufficiently well informed about the solvency of institutions*' (emphasis added).

46. Credit institutions must, according to Article 431(3) of Regulation No 575/2013, adopt a formal policy to comply with these disclosure requirements. Pursuant to Article 433, the relevant information must be disclosed at least annually, although it can be published more frequently. Article 434 provides that credit institutions and investment firms are free to select the means of publication, although as far as possible all disclosures should be provided in one medium or location.

47. Article 432(2) of Regulation No 575/2013, which is referred to in the second question, provides that credit institutions and investment firms have the possibility not to disclose some of this information [14] if it is regarded as 'proprietary or confidential'. [15]

48. Article 6a(3) of the ZDIJZ, as already noted, [16] allows for refusal of access to information of public importance where that disclosure would seriously prejudice the competitive position on the market of the person or company concerned. This exception to the obligation of disclosure is worded in somewhat similar terms to the exception to the obligation of disclosure of proprietary information provided for by Article 432(2) of Regulation No 575/2013. Nevertheless, unlike the ZDIJZ, the regulation does not allow this exception to be set aside on grounds of public interest. This is precisely the reason why the referring court seems to have doubts as to the compatibility of the national rule with EU law.

49. I have outlined the provisions of EU and national law in question in quite some detail in order to emphasise that despite both provisions containing similar 'keywords' ('disclosure', 'banks', and 'confidential information'), they concern and are supposed to regulate very different subject matters. This is further underlined by three points relating to the overall structure and logic of both measures.

50. First, the ZDIJZ allows for the *possibility* of *individual access* to *specific documents*, on the basis of an *individual request on a case-by-case basis*. Regulation No 575/2013, by contrast, establishes an *obligation* of *general disclosure* of an *important number of information items predetermined by the regulation*, which it is obligatory to disclose *unilaterally* (that is to say, without the need for any request from any interested party), *systematically*, *annually* (or, as the case may be, more frequently) and, in principle, in a *consolidated form* by way of a unitary publication on the internet or in print.

51. Second, as regards the entities subject to the disclosure obligations, the ZDIJZ applies generally to *all public law entities* as well as *private entities under the dominant influence of public law entities*, whereas the regulation only applies to *credit institutions and investment firms*.

52. Third, concerning the objective of the disclosure obligations, Article 1a(6) of the ZDIJZ states that 'the present Law shall have the objective of *enhancing transparency*, and the *responsible management of public funds* and the finances of undertakings under the dominant influence of public law entities' (emphasis added). By contrast, recital 68 of the regulation notes that 'the aim of the disclosure requirements should be to *provide market participants* with accurate and comprehensive information regarding the *risk profile of individual institutions*' (emphasis added).

53. In my view, the type of *disclosure* set out in Regulation No 575/2013 and the unrestricted right of *access* granted by the ZDIJZ have different rationales and objectives, are drafted in a different way and impose rights and obligations on different persons. They concern very different matters.

14 The only exception to the exception, namely information that must *always* be disclosed, is information on own funds and remuneration policy.

15 Article 432(2) of Regulation No 575/2013 defines both notions as follows: Information is 'proprietary' if disclosing it publicly would undermine the competitive position of the institution; this notion may include information on products or systems which, if shared with competitors, would render an institution's investments therein less valuable. Information is 'confidential' if there are obligations to customers or other counterparty relationships binding an institution to confidentiality.

16 Above points 11 and 16.

54. Therefore, I do not think that the uniform rules on exceptions to disclosure allowed by Article 432(2) of the regulation, drafted and formulated in their specific context and for their specific purpose, can be plugged into the national legislation on access to documents, namely the ZDIJZ. There is simply no material or systemic relationship between the regulation and the ZDIJZ to justify any such limitation.

55. An example might help to demonstrate the true (and problematic) nature of the argument underlying the second question of the referring court. Imagine a piece of legislation setting up a national public authority. In that measure, setting out the competences and governance of that institution, it is also stated that the institution in question shall publish an annual report, containing such and such kind of information, available to everybody on its website. Could such a measure then be invoked by that public institution to refuse access to an individual piece of information requested by an individual under the generally applicable access to documents legislation, with the argument that because the legislature did not include that type of information in the list of information to be published automatically on an annual basis, it thereby precluded that information from ever being individually disclosed?

56. The answer is, naturally, no. The fact that two ships pass each other in the night, and even signal to each other in passing, certainly does not mean (without further, rather explicit action) that one controls the other.

57. Three closing remarks are called for in order to fully reflect all the arguments made by the referring court and to fully assist the Court, should any such assistance be needed in the context of the second question beyond what has already been suggested.

58. First, in its question, the referring court cites not only Article 432(2), but also Article 446 of Regulation No 575/2013. This provision, entitled 'Operational risk', essentially establishes an obligation to disclose the approaches and methodology that each institution uses for the assessment of own funds requirements for operational risk that it qualifies for. [17]

59. However, apart from quoting that provision, the referring court does not explain why it considers that the Slovenian law could be incompatible with this provision. I do not think that that provision would alter anything in the general conclusion already reached for the second question. In any case, it might be recalled that Article 94 of the Rules of Procedure of the Court of Justice, which determines the content of requests for a preliminary ruling, states in point (c) that the latter must inter alia contain 'a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings'. Since the referring court has failed to abide by this obligation, I consider this part of the second question to be inadmissible. [18]

60. Second, the referring court mentions Article 450 of Regulation No 575/2013 as another source of potential incompatibility of the ZDIJZ with EU law. This provision, entitled 'Remuneration policy', sets out an obligation to disclose certain information regarding the remuneration policy and practices of each institution for those categories of staff whose professional activities have a material impact on its risk profile.

17 This article reads as follows: 'Institutions shall disclose the approaches for the assessment of own funds requirements for operational risk that the institution qualifies for; a description of the methodology set out in Article 312(2), if used by the institution, including a discussion of relevant internal and external factors considered in the institution's measurement approach, and in the case of partial use, the scope and coverage of the different methodologies used.'

18 Recently, see, for example, judgment of 2 July 2015, *Gullotta and Farmacia di Gullotta Davide & C.* (C-497/12, EU:C:2015:436, paragraphs 17 to 21).

61. In this regard, I wish to state that the Slovenian Government confirmed at the oral hearing that the list of data requested by the journalist would not contain information on the remuneration policy of NKBM, but only on contracts it concluded with third parties and which do not concern the remuneration policy of NKBM. In the absence of any further explanation from the referring court, it would appear that the mention of Article 450 of the regulation is therefore not relevant for the case in the main proceedings.

62. Third and finally, the referring court expressly states at the end of the second question that the latter is raised 'in circumstances in which there are no cross-border elements'. This contrasts with the fact that the order for reference states, in the context of the arguments invoked by NKBM, that 'the cross-border element arises because [NKBM] has a subsidiary with its registered office in Vienna [Austria] (Adria Bank AG)'. The order for reference also notes that NKBM is currently owned by an undertaking from another Member State, which is, however, not identified. This could be relevant, in the referring court's view, to assess the Slovenian rules in the light of the rules on the right of establishment (Article 49 TFEU), on freedom to provide services (Article 56 TFEU), or on the free movement of capital (Article 63 TFEU), as well as on freedom to conduct a business (Article 16 of the Charter of Fundamental Rights of the European Union).

63. However, the referring court immediately notes that the question on the fundamental freedoms 'is set out solely hypothetically', since at the material time NKBM was not owned by an undertaking from another Member State. Nevertheless, the referring court insists that that question be answered 'as it is not a separate question, but is closely connected to the effects of the minimum harmonisation permitted by Directive 2003/98'.

64. In view of the facts presented by the referring court and also of the acknowledgement that that part of the question is hypothetical, I am of the view that there is no need to address the issue of potential restrictions to the fundamental freedoms.[19] Perhaps more importantly, there is no specific question on this issue, and thus no need to provide an answer.

## V. Conclusion

65. In the light of the foregoing, I propose that the Court reply to the questions raised by the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia) as follows:

– Article 1(2)(c), third indent, of Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, as amended by Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98, does not preclude national legislation, such as that in question in the main proceedings, which permits unrestricted (absolute) access to certain information concerning copyright and consultancy contracts solely in relation to institutions under the dominant influence of the State.

– 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, and in particular Article 432(2) thereof, does not preclude national legislation, such as that in question in the main proceedings, which compels a bank under the dominant influence of a public law entity to disclose certain information on contracts provided for consultancy and legal services and services of an intellectual nature, without providing for any exception to that requirement.

19 The Court has already declared as inadmissible (on the basis of established case-law according to which the justification for a request for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute concerning EU law) questions which a referring court qualifies as purely hypothetical in so far as the main proceedings pending before it are concerned: see, for example, judgment of 10 November 2016, *Private Equity Insurance Group* (C-156/15, EU:C:2016:851, paragraphs 56 to 59).