Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

19 March 2015*

(Reference for a preliminary ruling — State aid — Article 107(1) TFEU — Concept of 'State aid' — Housing aid granted prior to the accession of Hungary to the European Union to certain categories of household — Payment of the aid by credit institutions in exchange for a State guarantee — Article 108(3) TFEU — Measure not previously notified to the European Commission — Unlawfulness)

In Case C-672/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Hungary), made by decision of 30 July 2013, received at the Court on 17 December 2013, in the proceedings

OTP Bank Nyrt

v

Magyar Állam,

Magyar Államkincstár,

THE COURT (Sixth Chamber),

composed of A. Borg Barthet, acting as President of the Sixth Chamber, E. Levits and F. Biltgen (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 13 November 2014,

after considering the observations submitted on behalf of:

— OTP Bank Nyrt, by P. Nagy, ügyvéd,

— the Hungarian Government, by M.Z. Fehér and G. Koós, acting as Agents,

— the European Commission, by K. Talabér-Ritz and L. Flynn, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Hungarian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 107 TFEU and 108 TFEU.

2 The request has been made in proceedings between OTP Bank Nyrt ('OTP Bank'), a Hungarian credit institution, and Magyar Állam ('the Hungarian State') and Magyar Államkincstár ('the Hungarian State Treasury') concerning a claim for reimbursement under a guarantee granted by the Hungarian State to OTP Bank.

Legal context

EU law

3 Under Article 2(2) thereof, the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (OJ 2003 L 236, p. 17, 'the Treaty of Accession') entered into force on 1 May 2004.

4 According to Article 1(2) of the Treaty of Accession, the conditions of admission and the adjustments to the Treaties on which the Union is founded are set out in the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33, 'the Act of Accession').

5 Article 22 of the Act of Accession, which, in the same way as its other provisions, is an integral part of the Treaty of Accession, provides that the acts listed in Annex IV are to be applied under the conditions laid down in that annex.

6 In paragraph 3, entitled 'Competition Policy', Annex IV to the Act of Accession states:

> '1. The following aid schemes and individual aid put into effect in a new Member State before the date of accession and still applicable after that date shall be regarded upon accession as existing aid within the meaning of Article [108(1) TFEU]:
>
> (a) aid measures put into effect before 10 December 1994;
>
> (b) aid measures listed in the Appendix to this Annex;
>
> (c) aid measures which prior to the date of accession were assessed by the State aid monitoring authority of the new Member State and found to be compatible with the *acquis* and to which the Commission did not raise an objection on the ground of serious doubts as to the compatibility of the measure with the common market pursuant to the procedure set out in paragraph 2.

All measures still applicable after the date of accession which constitute State aid and which do not fulfill the conditions set out above shall be considered as new aid upon accession for the purpose of the application of Article [108(3) TFEU].'

7 Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1) ('Regulation No 659/1999'), entitled 'Definitions', provides:

'For the purpose of this Regulation:

(a) "aid" shall mean any measure fulfilling all the criteria laid down in Article [107(1) TFEU];

(b) "existing aid" shall mean:

(i) without prejudice to … Annex IV, point 3 and the Appendix to said Annex of the Act of [Accession], …, all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;

(iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Regulation or prior to this Regulation but in accordance with this procedure;

(iv) aid which is deemed to be existing aid pursuant to Article 15;

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

(d) "aid scheme" shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

(e) "individual aid" shall mean aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme;

(f) "unlawful aid" shall mean new aid put into effect in contravention of Article 108(3) TFEU;

…'

Hungarian law

8 In the exercise of the powers granted by the Laws on the budget of the Republic of Hungary for 2000 to 2002, the Government of that Member State adopted Government Decree No 12/2001 of 31 January 2001, concerning aid intended to facilitate access to housing (*Magyar Kőzlőny* 2001/11, 'the Decree of 2001').

9 Paragraph 24(1) of that decree, set out in Chapter VII, provided that credit institutions were to be responsible for the grant and payment of loans under Chapters II to VI thereof, the determination of repayment methods, as well as subsidies and accounting for them for the purposes of the central budget, regardless of who the builder or seller was.

10 Paragraph 24(15) of that decree provided:

'The credit institution shall conclude an agreement with the Minister and the State Treasury concerning the payment of aid and advances within the meaning of subparagraph 11 and the system for settling accounts and the provision of the data necessary for the purposes of financial supervision. The credit institution shall be authorised to pay the aid and subsidies following the conclusion of that agreement.'

11 Paragraph 25(1) and (2) of the Decree of 2001 states:

'(1) If the appellant has also, in order to obtain housing, made use of the construction allowance referred to in Paragraph 5(4) the State shall reimburse the credit institution 80% of the amount of the loan, as fixed in accordance with Paragraph 13(1), paid by the credit institution and which has become irrecoverable within the meaning of the Law on accounting together with interest and expenses on that loan, which may not exceed one half of its capital.

(2) The State shall reimburse the credit institution with the amount of the capital, interest and expenses paid in the form of advances by the credit institution pursuant to Paragraph 5/A and which has become irrecoverable in accordance with the provisions of the Law on accounting.'

12 Paragraph 25C of the Decree of 2001, inserted by Paragraph 10 of Government Decree No 257/2011 of 6 December 2011 ('the Decree of 2006'), provides:

'The obligations to reimburse the State referred to in Paragraph 25(1) and (2) of the Decree [of 2001] are not enforceable if they concern loan agreements concluded on or after 1 May 2004.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 On 15 September 2008, the Ministry of Local Government, the State Treasury and OTP Bank concluded an agency agreement on the basis of Paragraph 24(15) of the Decree of 2001.

14 In accordance with Chapter I(1) of that agreement, the Ministry of Local Government entrusted to OTP Bank, for the purpose of implementing that decree, the task of making the payments of State aid for housing. In that context, OTP Bank performed the following tasks: assessing the claims made by applicants for housing aid and subsidised mortgage loans, making aid payments under the conditions laid down by the Decree of 2001, ensuring registration in the Registry of Mortgages in favour of the State, prohibitions on sale and charges, recording in the budget the amounts granted as housing aid, and communicating data in accordance with the provisions of that decree.

15 As consideration for those tasks, OTP Bank received reimbursement of the expenses set out in Chapter II(5) of the agency agreement of 15 September 2008, that is to say 1.5% of the amounts granted as housing aid and 3% of the amounts fixed in loan agreements paid in the form of advances, housing aid for young people and the aid granted under the previous system of tax refunds.

16 Under Paragraph 25(1) of the Decree of 2001, in force when the agency agreement of 15 September 2008 was concluded, that is to say, before its amendment by the Decree of 2011, the Hungarian State was, under certain conditions, also required to reimburse the credit institution 80% of the amount of the loan paid by that institution and, which had become irrecoverable in accordance with the provisions of the Law on accounting, together with interest and expenses on that loan.

17 Paragraph 25(2) of the Decree of 2001 provided that the State also had to guarantee the repayment to the credit institution of the amount of the capital, the interest and the expenses of the loan paid in the form of advance by the credit institution under Paragraph 5/A and which had become irrecoverable.

18 On several occasions, OTP Bank unsuccessfully requested the Hungarian State to implement the agency agreement as regards the third quarter of 2009 and the quarters of the following years. The Hungarian State challenged that obligation, relying on the provisions of Paragraph 25/C of the Decree of 2001, inserted by the Decree of 2011. Following that legislative amendment, the Hungarian State considered that it was discharged from the obligations referred to in Paragraph 25(1) and (2) of the Decree of 2001, with regard to the loan agreements concluded from 1 May 2004.

19 In that context, OTP Bank brought an action before the Fővárosi Törvényszék (Budapest Municipal Court), seeking an order for the Hungarian State to pay HUF 1 261 506 204, together with interest and expenses, and for the judgment to be enforceable against the State Treasury. According to OTP Bank, following the adoption of Paragraph 25/C of the Decree of 2001, the Hungarian State also made the enforcement of the agency agreement of 15 September 2008 impossible and, as a result, unilaterally terminated it. For that reason, OTP Bank also requested a settlement of accounts between the parties in respect of the services provided under that contract, pursuant to Paragraph 479(3) of the Civil Code.

20 The Hungarian State and the State Treasury, seeking to have OTP Bank's action set aside, argued that the amendment of the Decree of 2001 by the Decree of 2011 was necessary because the guarantee provided by the Hungarian State under Paragraph 25(1) and (2) of the Decree of 2001 ('the State guarantee') constitutes prohibited State aid under EU law. Thus, by adopting the Decree of 2011, the Hungarian State merely intended to render Hungarian law compatible with EU law.

21 OTP Bank's action was dismissed by the Fővárosi Törvényszék. The Fővárosi Ítélőtábla (Budapest Court of Appeal) set aside that judgment, holding that it might be appropriate to check the compatibility of the alleged State aid with the internal market, within the meaning of Article 107(2) and (3) TFEU, and referred the case back to the Fővárosi Törvényszék.

22 Before the Fővárosi Törvényszék, ruling afresh on the case, OTP Bank submits that, if that court were to consider that the State guarantee falls within Article 107(1) TFEU, it should ask the Court of Justice whether that guarantee is compatible with the internal market, in accordance with EU law, in particular taking account of the exception relating to aid having a social character referred to in Article 107(2)(a) TFEU, and the fact that the recipients of the type of aid at issue are individuals and not credit institutions.

23 According to the Fővárosi Törvényszék, the resolution of the dispute before it requires an interpretation of EU law. If that guarantee is not prohibited State aid or, in the alternative, constitutes aid comparable with the internal market within the meaning of Article 107(2) and (3) TFEU, it is possible that the Hungarian State has terminated the agency agreement without a proper basis in law.

24 In those circumstances, the Fővárosi Törvényszék decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does a State guarantee undertaken before the accession of Hungary to the European Union and granted under [the Decree of 2001] constitute State aid and, if so, is it compatible with the internal market?

(2) If the State guarantee granted by that Decree is incompatible with the internal market, what remedies are available under EU law for any damage to the interests of the persons concerned?’

Admissibility

25 The Hungarian Government and the Commission express doubts as to the admissibility of the request for a preliminary ruling or, at least, one or other of the questions referred.

26 In that respect, it should be noted, first of all, that in proceedings under Article 267 TFEU, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (see, inter alia, judgment in *Bruno and Others*, C-395/08 and C-396/08, EU:C:2010:329, paragraph 18 and the case-law cited).

27 According to the Court’s settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments in *van der Weerd and Others*, C-222/05 to C-225/05, EU:C:2007:318, paragraph 22, and *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 27).

28 Thus, in exceptional circumstances, the Court can examine the conditions in which the case was referred to it by the national court (see, to that effect, judgment in *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 39). The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (judgment in *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 32 and the case-law cited).

29 Next, it should be noted that, according to the case-law of the Court, although the Court may not, in proceedings under Article 267 TFEU, rule upon the compatibility of a provision of domestic law with EU law or interpret domestic legislation or regulations, it may nevertheless provide the national court with an interpretation of EU law on all such points as may enable that court to determine the issue of compatibility for the purposes of the case before it (see, inter alia, judgment in *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 34 and the case-law cited).

30 More specifically, it has already been held that the Commission’s powers for the purpose of determining whether aid is compatible with the internal market do not preclude a national court from referring to the Court of Justice a question on the interpretation of the concept of aid (judgment in *DM Transport*, C-256/97, EU:C:1999:332, paragraph 15). Accordingly, the Court has jurisdiction, inter

alia, to give the national court guidance on interpretation of EU law to enable it to determine whether a national measure may be classified as State aid under that law (see, to that effect, judgment in *Fallimento Traghetti del Mediterraneo*, C-140/09, EU:C:2010:335, paragraph 24 and the case-law cited).

31 Proceedings may be brought before the national courts requiring them to interpret and apply the concept of aid contained in Article 107(1) TFEU, in particular in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article 108(3) TFEU ought to have been subject to this procedure and, if appropriate, to verify whether the Member State concerned has complied with that obligation (see, to that effect, judgment in *P*, C-6/12, EU:C:2013:525, paragraph 38 and the case-law cited).

32 Finally, as is clear from paragraph 29 of the present judgment, since it is for the Court to give a useful answer to the referring court, the Court may have to reformulate the questions referred to it (see, inter alia, judgment in *Byankov*, C-249/11, EU:C:2012:608, paragraph 57 and the case-law cited).

33 In the light of the foregoing, and in order to provide the referring court with a useful answer, the two questions, which must be examined together, must be reformulated to the effect that the referring court asks essentially whether the State guarantee may be classified as 'State aid' within the meaning of Article 107(1) TFEU and, if so, whether it was subject to the obligation of notification laid down in Article 108(3) TFEU and, if appropriate, what are the consequences arising from the failure to fulfil that obligation.

Consideration of the questions referred

Preliminary observations

34 With regard to monitoring compliance by the Member States with the obligations imposed on them by Articles 107 TFEU and 108 TFEU, it is necessary, as preliminary point, to set out the way in which the provisions of Article 108 TFEU work together and the powers and responsibilities that those provisions grant to the Commission, on one hand, and the Member States, on the other.

35 Article 108 TFEU establishes different procedures according to whether the aid is existing or new. Whilst under Article 108(3) TFEU new aid must be notified to the Commission and may not be implemented until that procedure has led to a final decision, under Article 108(1) TFEU existing aid may be lawfully implemented so long as the Commission has made no finding of incompatibility (judgment in *P*, EU:C:2013:525, paragraph 36 and the case-law cited).

36 Under that system of supervision, the Commission and the national courts have different powers and responsibilities (judgment in *Namur-Les assurances du crédit*, C-44/93, EU:C:1994:311, paragraph 14).

37 In accordance with the case-law cited in paragraph 31 of the present judgment, proceedings may be commenced before national courts requiring those courts to interpret and apply the concept of aid contained in Article 107(1) TFEU, in particular in order to determine whether State aid should or should not have been made subject to the preliminary examination procedure provided for in Article 108(3) TFEU. If those courts reach the conclusion that the measure concerned should in fact have been previously notified to the Commission, they must declare it to be unlawful. On the other hand, national courts do not have jurisdiction to give a decision on whether State aid is compatible with the internal market, that assessment falling within the exclusive competence of the Commission (see to that effect, judgment in *P*, EU:C:2013:525, paragraph 38 and the case-law cited).

Substance

38 Taking account of those factors, and for the purpose of giving a useful answer to the referring court, it must be determined, first of all, whether the measure at issue in the main proceedings constitutes State aid within the meaning of Article 107 TFEU. In that regard, the national court must be provided with the criteria necessary for interpreting the conditions laid down by Article 107(1) TFEU for categorising a national measure as State aid, namely, the financing of that measure by the State or through State resources, the selectivity of that measure, and its effect on trade between Member States and the distortion of competition resulting therefrom. It is therefore appropriate to examine those three conditions one by one.

The condition relating to the financing of the measure by the State or through State resources

39 Article 107(1) TFEU covers 'any aid granted by a Member State or through State resources in any form whatsoever'.

40 According to the settled case-law of the Court, the definition of aid is more general than that of a subsidy because it includes not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see, inter alia, judgment in *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 131 and the case-law cited).

41 As regards the case in the main proceedings, it is apparent from the documents submitted to the Court that, first, the State guarantee was provided in the agency agreement concluded on 15 September 2008 between the Ministry for Local Government, the State Treasury and OTP Bank on the basis of Paragraph 24(15) of the Decree of 2001.

42 Second, when the quarterly calls on the State guarantee were made, the credit institutions sent their claims to the Ministry of Local Government or the Ministry of the Economy, which granted them the aid and advances requested by attributing them to the credit line in the general budget allocated for 'Other housing aid' managed by the State Treasury.

43 It follows that the State guarantee constitutes aid granted by the State or through State resources within the meaning of Article 107(1) TFEU.

The condition relating to the selectivity of the measure

44 Article 107(1) TFEU prohibits aid 'favouring certain undertakings or the production of certain goods', that is to say selective aid.

45 Therefore, it must be determined whether the State guarantee is such as to favour certain undertakings or the production of certain goods in relation to other undertakings which, in light of the objective of the measure at issue, are in a comparable factual and legal situation.

46 As a preliminary point, it should be noted that the Decree of 2001, on the basis of which that guarantee was granted, regulates aid intended to facilitate access to housing for certain categories of household. Thus, Paragraph 24(1) of that decree provides that it is for the credit institutions to grant and pay the loans and to determine the methods of repayment and the aid. As consideration, Paragraph 25(1) and (2) of that decree gives that guarantee to the credit institutions concerned.

47 According to the case-law of the Court, where aid is granted in the form of a guarantee it is essential that the national courts identify the beneficiaries of the aid, those beneficiaries being either the borrower or the lender or, in certain cases, both of them together (see, to that effect, judgment *in Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 37).

48 In the present case, as is clear from paragraph 46 of the present judgment, the Decree of 2001 provides that it is for the credit institutions to implement that decree and thereby to benefit from the State guarantee. Thus, the measure at issue appears to be exclusively for the benefit of the credit establishments.

49 According to the case-law of the Court, an aid may be selective with regard to Article 107(1) TFEU even where it concerns a whole economic sector (see, in particular, to that effect, judgments in *Belgium* v *Commission*, C-75/97, EU:C:1999:311, paragraph 33 and *Paint Graphos and Others*, EU:C:2011:550, paragraph 53).

50 Therefore, the State guarantee may be regarded as selective. The fact that, in certain circumstances, it also favours recipients who are not credit institutions, such as, in the present case, certain households whose income does not enable them, by themselves, to envisage purchasing a property, does not call that finding into question, which is sufficient for the application of Article 107(1) TFEU.

51 However, it must be observed that during the debates during the hearing before the Court, an amendment to the Decree of 2001 was mentioned, which was made in 2008 and which extended the possibility of implementing that decree to other economic operators.

52 As regards a question of fact, it is ultimately for the referring court to establish the veracity of the evidence relating to and to determine whether it is capable of calling into question the selective nature of the State guarantee.

The conditions relating to effect of the measure on trade between Member States and the distortion of competition which may result from it

53 Article 107(1) TFEU prohibits aid which affects trade between Member States and distorts or threatens to distort competition.

54 For the purpose of categorising a national measure as State aid, it is not necessary to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, it being necessary only to examine whether that aid is liable to affect such trade and distort competition (judgments in *Italy* v *Commission*, C-372/97, EU:C:2004:234, paragraph 44, and *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 54).

55 In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, those undertakings must be regarded as affected by that aid (see judgment in *Unicredito Italiano*, EU:C:2005:774, paragraph 56 and the case-law cited).

56 In that connection, it is not necessary that the beneficiary undertaking should itself participate in the intra-Community trade. Aid granted by a Member State to an undertaking may help to maintain or increase domestic activity, with the result that undertakings established in other Member States have less chance of penetrating the market of the Member State concerned. Furthermore, the strengthening of an undertaking which, until then, was not involved in intra-Community trade may place that undertaking in a position which enables it to penetrate the market of another Member State (judgment in *Unicredito Italiano*, EU:C:2005:774, paragraph 58).

57 As regards the case in the main proceedings, it should be noted that the State guarantee enables the credit institutions to conclude loan agreements without having to assume the financial risk. Thus, credit institutions which have concluded an agency agreement, such as that at issue in the main proceedings, do not necessarily have to examine the solvency of the borrowers or provide for a guarantee fee. Furthermore, borrowers will usually request additional services from those institutions, such as opening a current account. Therefore, the State guarantee confers an advantage on those institutions as it increases the number of their clients and their revenue.

58 It follows that the State guarantee has the effect to strengthening the position of the credit institutions as compared with that of other operators in the market and makes it more difficult for operators established in other Member States to penetrate the Hungarian market. Therefore, that guarantee is liable to affect trade between Member States and distort competition within the meaning of Article 107(1) TFEU.

59 Having regard to the foregoing considerations, it must be held that the State guarantee granted exclusively to credit institutions constitutes, prime facie, 'State aid' within the meaning of Article 107(1) TFEU. However, it is for the referring court to ascertain more specifically the selective nature of such a guarantee by determining, in particular, whether, following the amendment of the Decree of 2001 which is supposed to have taken place in 2008, that guarantee may be granted to economic operators other than credit institutions and, in the affirmative, whether that fact may call into question the selective nature of that guarantee.

60 In the second place, and assuming that the referring court classifies the State guarantee as 'State aid' within the meaning of Article 107(1) TFEU, in order to enable it to ascertain the lawfulness of the guarantee, it must be determined whether the guarantee was subject to the notification procedure laid down in Article 108(3) TFEU. In order to do so it must be established whether that guarantee constitutes existing or new aid.

61 It is clear from Article 1(b)(i) of Regulation (EC) No 659/1999 that, without prejudice to Annex IV(3) to the Act of Accession, existing aid means all aid which existed prior to the entry into force of the FEU Treaty in the Member State concerned, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of that Treaty.

62 Annex IV(3) to the Act of Accession provides that all measures still applicable after the date of accession which constitute State aid and which do not fulfill the three conditions set out in paragraph 3(1) of that annex are to be regarded as new aid upon accession.

63 In the present case, it should be noted that the Decree of 2001, on the basis of which the State guarantee was granted, entered into force after 10 December 1994, is not mentioned in the list of aid set out in the appendix to Annex IV to the Act of Accession and was not notified to the Commission under the transitional measures referred to in Annex IV(3)(1)(c) to that act.

64 Therefore, the State guarantee does not fulfil the three conditions set out in Annex IV(3)(1) to the Act of Accession and must, accordingly, in that case, be regarded as new aid.

65 Under Article 108(3) TFEU, new aid must be notified in advance to the Commission and may not be put into effect until the procedure has resulted in a final decision.

66 According to the settled case-law of the Court, an aid measure which is put into effect in infringement of the obligations arising from Article 108(3) TFEU is unlawful (judgment in *Distribution Casino France and Others*, C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, EU:C:2005:657, paragraph 30 and the case-law cited).

67 As regards the case in the main proceedings, it appears that Hungary did not notify the Commission of the State guarantee.

68 It follows from the foregoing that even if the referring court classifies the State guarantee as 'State aid' within the meaning of Article 107(1) TFEU, such a guarantee must be regarded as new aid and is, on that ground, subject to the obligation of prior notification to the Commission in accordance with Article 108(3) TFEU. It is for the referring court to verify whether the Member State concerned has complied with that obligation and, if that is not the case, to declare that guarantee unlawful.

69 In the third place, as regards the consequences arising from such unlawfulness and, more specifically, as far as concerns the beneficiaries of the unlawful aid, it must be recalled, first of all, that the Court has repeatedly stated that it is for the national courts to draw the necessary conclusions with respect to the infringement of Article 108(3) TFEU, in accordance with their national law, with regard to both the validity of the acts giving effect to the aid and the recovery of financial support granted in disregard of that provision (see, to that effect, judgments in *van Calster and Others*, C-261/01 and C-262/01, EU:C:2003:571, paragraph 64; *Xunta de Galicia*, C-71/04, EU:C:2005:493, paragraph 49; and *CELF and Ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraph 41).

70 The logical consequence of the finding that aid is unlawful is its removal by means of recovery in order to restore the previous situation (see, inter alia, judgments in *Italy and SIM — 2 Multimedia* v *Commission*, C-328/99 and C-399/00, EU:C:2003:252, paragraph 66, and *Mediaset* v *Commission*, C-403/10 P, EU:C:2011:533, paragraph 122).

71 Accordingly, the main objective pursued in recovering unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage which such aid affords (see, to that effect, judgments in *Germany* v *Commission*, C-277/00, EU:C:2004:238 paragraph 76, and *Commission* v *MTU Friedrichshafen*, C-520/07 P, EU:C:2009:557, paragraph 57). By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (judgment in *Commission* v *Italy*, C-350/93, EU:C:1995:96, paragraph 22).

72 It is only in exceptional circumstances, should the case arise, that it would be inappropriate to order repayment of the aid (see judgment in *Residex Captial IV*, EU:C:2011:814, paragraph 35 and the case-law cited).

73 In the case in the main proceedings, there is nothing in the documents submitted to the Court to suggest that the existence of such exceptional circumstances was relied upon before the referring court. Accordingly, the national court is, in principle, bound to order the repayment of the aid at issue in that case in accordance with its national law.

74 Next, it should be noted that the Commission alone is competent to determine the compatibility of aid with the internal market, in such a situation, undertaking that examination even where the Member State fails to have regard to the prohibition, referred to in the final sentence of Article 108(3) TFEU, on the putting into effect of the aid measures. The national courts do no more than preserve, until the final decision of the Commission, the rights of individuals faced with a possible breach by State authorities of that prohibition (see, to that effect, judgment in *CELF and Ministre de la Culture et de la Communication*, EU:C:2008:79, paragraph 38 and the case-law cited).

75 Therefore, it is for the Commission to examine the compatibility of the State guarantee with the internal market, in particular, in order to determine whether that aid is likely to benefit from the exemption on aid having a social character laid down in Article 107(2)(a) TFEU.

76 However, even if the Commission were to declare, in a future final decision, that the State guarantee is compatible with the internal market, the national court is still required to order the recovery of that State aid, in accordance with its national law. If the direct effect of the last sentence of Article 108(3) TFEU is not to be compromised or the interests of individuals, which are to be protected by national courts, are not to be disregarded, the Commission's final decision does not have the effect of regularising *ex post facto* the implementing measures which were unlawful by reason of their having been adopted in continuation of the prohibition laid down by that article. Any other interpretation would encourage the Member States to disregard the prohibition laid down in the last sentence of Article 108(3) TFEU and would deprive it of its effectiveness (see, to that effect, judgments in *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon*, C-354/90, EU:C:1991:440, paragraph 16, and *SFEI and Others*, C-39/94, EU:C:1996:285, paragraphs 67 to 69).

77 Finally, and as regards in particular the beneficiaries of the State guarantee, it must be stated that, taking account of the mandatory nature of the review of State aid by the Commission pursuant to Article 108 TFEU, first, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article and, second, a diligent economic operator should normally be able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification to the Commission, so that it is unlawful under Article 108(3) TFEU, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful (judgment in *Unicredito Italiano*, EU:C:2005:774, paragraph 104 and the case-law cited).

78 It follows from the foregoing considerations that the beneficiaries of a State guarantee, such as that at issue in the main proceedings, granted without regard for Article 108(3) TFEU and, therefore, unlawful, do not have any remedies available in accordance with EU law.

79 In the light of all of the above, the answer to the questions referred is that:

— the State guarantee granted exclusively to credit institutions prima facie constitutes 'State aid' within the meaning of Article 107(1) TFEU. However, it is for the referring court to ascertain more specifically the selective nature of such a guarantee by determining, in particular, whether, following the amendment of the Decree of 2001 which is supposed to have taken place in 2008, that guarantee may be granted to economic operators other than credit institutions and, in the affirmative, whether that fact may call into question the selective nature of that guarantee;

— if the referring court classifies the State guarantee at issue in the main proceedings as 'State aid' within the meaning of Article 107(1) TFEU, such a guarantee must be regarded as new aid and is, on that ground, subject to the obligation of prior notification to the European Commission in accordance with Article 108(3) TFEU. It is for the referring court to verify whether the Member State concerned has complied with that obligation and, if that is not the case, to declare that guarantee unlawful;

— the beneficiaries of a State guarantee, such as that at issue in the main proceedings, granted without regard for Article 108(3) TFEU and, therefore, unlawful, do not have any remedies available in accordance with EU law.

Costs

80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

The guarantee provided by the Hungarian State under Paragraph 25(1) and (2) of Government Decree No 12/2001 of 31 January 2001 concerning aid intended to facilitate access to housing, granted exclusively to credit institutions prima facie constitutes 'State aid' within the meaning of Article 107(1) TFEU. However, it is for the referring court to ascertain more specifically the selective nature of such a guarantee by determining, in particular, whether, following the amendment of the Decree of 2001 which is supposed to have taken place in 2008, that guarantee may be granted to economic operators other than credit institutions and, in the affirmative, whether that fact may call into question the selective nature of that guarantee.

If the referring court classifies the State guarantee at issue in the main proceedings as 'State aid' within the meaning of Article 107(1) TFEU, such a guarantee must be regarded as new aid and is, on that ground, subject to the obligation of prior notification to the European Commission in accordance with Article 108(3) TFEU. It is for the referring court to verify whether the Member State concerned has complied with that obligation and, if that is not the case, to declare that guarantee unlawful.

The beneficiaries of a State guarantee, such as that at issue in the main proceedings, granted without regard for Article 108(3) TFEU and, therefore, unlawful, do not have any remedies available in accordance with EU law.

[Signatures]