



Reports of Cases

Case C-672/13

OTP Bank Nyrt

v

Magyar Állam

and

Magyar Államkincstár

(Request for a preliminary ruling from the Fővárosi Törvényszék)

(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 — Illegality)

Summary — Judgment of the Court (Sixth Chamber), 19 March 2015

1. *Questions referred for a preliminary ruling — Jurisdiction of the Court — Limits — Interpretation of the concept of aid — Included*

(Arts 108 TFEU and 267 TFEU)

2. *State aid — Existing aid and new aid — Examination by the Commission — Exclusive competence — Jurisdiction of the national courts — Limits*

(Arts 107 TFEU and 108 TFEU; Council Regulation No 659/1999, Art. 1(b)(i))

3. *State aid — Concept — Aid from State resources — Guarantee to reimburse house purchase loans requiring the imputation of payments to the general budget — Included*

(Art. 107(1) TFEU)

4. *State aid — Concept — Selective nature of the measure — Guarantee of reimbursement of house purchase loans benefitting a whole economic sector — Included*

(Art. 107(1) TFEU)

5. *State aid — Effect on trade between Member States — Adverse effect on competition — Guarantee of reimbursement by the State of house purchase loans — Grant of an advantage to the sector concerned — Unlawful*

(Art. 107(1) TFEU)

6. *State aid — Existing aid and new aid — Measure which cannot be classified as State aid according to the Act of Accession of the Member State concerned — Classification as new aid — Prohibition on implementation before the Commission's final decision — Scope — Obligations of national courts — Obligation to order recovery of the unlaw aid*

(Arts 107(1) TFEU and 108(3) TFEU)

7. *State aid — Aid granted without regard for the procedural rules in Article 108(3) TFEU — Obligations of national courts — Obligation to order the recovery of the unlaw aid — No remedies available to beneficiaries*

(Art. 108(3) TFEU)

1. See the text of the decision.

(see paras 26-32)

2. See the text of the decision.

(see paras 35-37)

3. A State guarantee, consisting in an obligation for the public authorities to reimburse, under certain conditions, a credit institution 80% of the cumulated amount of capital and interest on subsidised loans contracted with that institution which have become irrecoverable, granted as housing aid for young people and as aid granted under the previous system of tax refunds, *prima facie* constitutes State aid within the meaning of Article 107(1) TFEU, since the amounts claimed when the calls on guarantees are made are imputed to the general budget and are granted through State resources.

(see paras 42, 43, operative part)

4. Aid may be selective for the purposes of Article 107(1) TFEU even if it concerns a whole economic sector. In that connection, a State guarantee, consisting in an obligation to reimburse, under certain conditions, a credit institution 80% of the cumulated capital and interest on subsidised loans concluded by that established which have become unrecoverable, granted as housing aid for young people and the aid granted under the previous system of tax refunds may be regarded as selective, since that measure is exclusively for the benefit of the credit establishment sector.

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 a national decree which served as the basis for the introduction of that guarantee, the latter 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.

(see paras 49-52, operative part)

5. A State guarantee, consisting in an obligation to reimburse a credit institution 80% of the cumulated capital and interest on subsidised loans concluded by that established which have become unrecoverable, granted as housing aid for young people and the aid granted under the previous system of tax refunds, enables the credit institutions to conclude loan agreements without having to assume the financial risk. Thus, credit institutions which have concluded an agency agreement 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.

It follows that the State guarantee has the effect of 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 national market concerned. Therefore, that guarantee is liable to affect trade between Member States and distort competition within the meaning of Article 107(1) TFEU.

(see paras 57-59, operative part)

6. Where a measure, still applicable after the date of accession of a Member State to the European Union, which constitutes State aid and which does not fulfil the conditions set out in the Act of Accession of that Member State to the European Union or those laid down by Article 1(b) of Council Regulation No 659/1999 laying down detailed rules for the application of Article 93 EC, applicable to Article 108 TFEU, in order to be classified as existing aid, it must be regarded as new aid. Such a measure must, therefore be notified to the Commission in advance and cannot be implemented before a final decision has been reached.

In those circumstances, if the referring court classifies a State guarantee as State aid within the meaning of Article 107(1) TFEU, such a guarantee must be regarded as new aid and is, therefore, 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.

The consequences arising from such illegality are, inter alia, its removal by means of recovery in order to restore the previous situation. 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. Since only exceptional circumstances justify non-reimbursement of the aid, the national court is, in principle, bound to order the repayment in accordance with its national law.

(see paras 62, 66-73, operative part)

7. In the area of State aid, even if the Commission were to declare, in a future final decision, that a guarantee to reimburse house purchase loans granted by a Member State before its accession to the European Union, which was the subject of an investigation as new aid, was compatible with the internal market, the national court would still be 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.

As regards, specifically, the beneficiaries of the State guarantee, in view of the mandatory nature of the supervision of State aid by the Commission pursuant to Article 108 TFEU, 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 a diligent businessman should normally be able to determine whether that procedure has been followed.' In particular, where aid is paid 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.

It follows that the beneficiaries of such a State guarantee, granted without regard for Article 108(3) TFEU and, therefore, unlawfully, do not have any remedies available in accordance with EU law.

(see paras 76-79, operative part)