



Consultation on the
Commission Notice on the
enforcement of State aid
rules by national courts

15.4.2021

Opinion by the
Municipal Guarantee Board



1. INTRODUCTION

The European Commission has launched an open consultation on its draft notice on the enforcement of State aid rules by national courts, ending on 16 April 2021.¹ Contributions are particularly sought from the national courts and authorities dealing with State aid, academics, and lawyers.

The Municipal Guarantee Board, as a public authority and as an interested party, wishes to use this opportunity and would draw attention to the following issues.

2. DESCRIPTION OF THE MUNICIPAL GUARANTEE BOARD

The Municipal Guarantee Board (MGB) is a public law body established in 1996 under the Act on MGB (487/1996), which has the purpose of safeguarding and developing the joint funding of municipalities in Finland.² MGB together with Municipality Finance Plc (MuniFin) comprise the joint funding system of Finnish municipalities.

MuniFin's funding originates from international capital markets and is guaranteed by MGB against sufficient security. The guarantee scheme is notified to and approved by the European Commission.³

The limits on the lending powers of MuniFin are defined in Section 1 a of the MGB Act, according to which the funding guaranteed by MGB and the lending operations of MuniFin are limited to municipalities or joint municipal authorities and, at preferential terms in accordance with the EU State aid rules, to entities under their control and to State-supported housing production on social grounds.

In accordance with Section 10 of the MGB Act, member entities are jointly responsible for the funding of such expenses and commitments which cannot be otherwise covered, in proportion to their population figures at the preceding year-end as referred to in Section 18 of the Population Data Act (507/93). The membership of MGB consists of all 293 Finnish municipalities (1 January 2021), representing 100 % of the population of mainland Finland.

In Finland, municipalities' debts are backed by an unlimited right of taxation equivalent to the tax-raising powers of the State. This ensures that municipal receivables are treated in the same way as government receivables and shall be assigned a 0 % risk weight in accordance with Article 115(2) of Capital Requirements Regulation (EU) 575/2013.⁴

MuniFin is under the direct supervision of the European Central Bank (ECB) and a Eurosystem counterparty with access to standing facilities. MGB is a public law body, and by virtue of Article 116(4) of the Capital Requirements Regulation (EU) 575/2013 (CRR), exposures to MGB may be treated as exposures to the central government.⁵

¹ [European Commission - Competition - Public consultations \(europa.eu\)](https://ec.europa.eu/competition/public_consultations/europa.eu)

² Act on the Municipal Guarantee Board (487/1996, as amended). In Finnish: Laki Kuntien takauskeskuksesta. Available at: <https://kuntientakauskeskus.fi/en/municipal-guarantee-board/mgb-act/>.

³ Commission decision C(2004)2034fin, 16.6.2004, State aid No N179/04 – Finland, Finnish municipal guarantees.

⁴ Capital Requirements Regulation (EU) 575/2013, OJ L 176, 27.6.2013, Article 115(2), p. 77.

⁵ Regulation (EU) No 575/2013 (Prudential 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 (Text

MuniFin can grant loans and leasing financing without a separate security to municipalities or joint municipal authorities. For other loans, only a guarantee as for one's own debt provided by a municipality or joint municipal authority or real estate collateral with the State's deficiency guarantee are accepted as collateral by the MGB. The guarantee, or state guarantee supplementing the real estate collateral, must be sufficient; the sufficiency is defined by the MGB.

In practice, MuniFin shall pledge all its loans, excluding interest-subsidised loans, to the MGB as counter security. In this connection, MGB verifies whether the conditions set out in law for undertaking measures are respected, especially as regards the requirements of EU competition law.

MGB has released part of the pledge under the framework agreement for safeguarding liquidity to be used as a collateral for the central bank funding. Along with the municipal loans, loans for joint municipal authorities are security material equivalent to government loans.⁶

At the end of 2020, the amount of funding guaranteed by MGB and related collateral was EUR 36,7 billion. MuniFin's long-term customer loans totalled EUR 26,9 billion, of which municipalities and joint municipal authorities had a share of approximately 41 %.⁷

3. NEED FOR A CLEAR DEFINITION OF THE TERM 'SUFFICIENT LEGAL REVIEW'

The Municipal Guarantee Board welcomes the on-going interest of the Commission to investigate and develop the State aid legislation, guidelines and notices.

It is commendable that the notices are updated with ever-evolving case law and practical information on questions that have caused uncertainty and inconsistency among national courts and other authorities.

As stated in the Commission draft notice, the role of national courts in ensuring compliance with State aid rules has become more prominent, which justifies the draft's aim to encourage closer cooperation between the Commission and national courts.

While national courts and EU cooperation need to be deepened, MGB wishes to stress that at the same time, proactive action should be further developed to reduce the risk of irregularities. This concern relates especially to the definition of concepts of *legitimate expectations* and *legal certainty*, also referred to in paragraphs 67 and 98 of the draft notice, and their divergent interpretations and applications on various occasions. Amendments to the draft, which are intended to clarify the interpretation and application of these terms, would help to enforce such

with EEA relevance), OJ L 176, 27.6.2013, p. 1-337. The Municipal Guarantee Board shall be subject to the provisions of Article 116(4) of the said Regulation, p. 77, according to which "*In exceptional circumstances, exposures to public-sector entities may be treated as exposures to the central government, regional government or local authority in whose jurisdiction they are established where in the opinion of the competent authorities of this jurisdiction there is no difference in risk between such exposures because of the existence of an appropriate guarantee by the central government, regional government or local authority.*"

⁶ Guideline of the European Central Bank (EU) 2016/65, 18/11/2015, on the valuation haircuts applied in the implementation of the Eurosystem monetary policy framework.

⁷ Loans for housing companies owned by municipalities or joint municipal authorities are guaranteed by municipalities, or these loans can also at the same be categorised as state-subsidised housing loans. In such cases there is real estate collateral and a deficiency guarantee from the State of Finland.

development, and contribute to legal efficiency by allowing various actors to have sufficient knowledge of the law so as to be able to comply with it.

This is inextricably linked to a particular matter MGB wishes to strongly highlight in its opinion, i.e., to the specific context of State guarantees and the need for a clear and precise definition of the concept of *sufficient legal review*, established in the Article 213(3) of the Capital Requirements Regulation (EU) 575/2013 (CRR).

State guarantee differs from other forms of State aid as, inter alia, its formation is supervised by the European System of Financial Supervisors with a regulatory framework of CRR. Considering the EU law applicable to State aid, however, the wording of 'sufficient legal review' proves to be too general and open to interpretation, which is likely to create confusion. As legal instruments must not contradict one another or be mutually incompatible or difficult to understand, MGB points out that a definition of the concept should show greater consistency and accuracy in law and of interpretation, particularly in light of the Articles 107 and 108 TFEU.

To this end, taking into account the importance of the matter, MGB calls on the Commission to extend the cooperation and to pursue greater dialogue with European Supervisory Authorities in order to clarify the content of the term as well as to determine how to achieve sound and accurate interpretation of the concept, and in this respect effectively prevent or reduce the formation of problematic State guarantees.

4. ENSURING THE VALIDITY OF STATE GUARANTEES UNDER EU LAW

In principle, according to the well-established case-law of the EU Court of Justice, a State guarantee may be regarded as prohibited State aid.⁸ As the Commission points out in its Guarantee Notice (2008/C 155/02), the general criteria for State aid under Article 87 EC (currently 107 TFEU) also apply to guarantees, and guarantees granted directly by the State may constitute State aid.⁹ Therefore, the granting and payment of aid must be in line with the State aid rules laid down in the TFEU, which are part of the competition policy of the internal market within the meaning of Articles 107 and 108 TFEU.¹⁰

As stated in the paragraph 9 of the Commission draft notice under consultation, the general prohibition of State aid relies on a double system of *ex ante* and *ex post* control of interventions involving State aid. Member States are under an obligation, first, to notify the Commission of any measure intended to grant new aid or alter existing aid and, second, not to put into effect such planned measure until the Commission has assessed its compatibility with the internal market ('standstill obligation'). The standstill obligation stemming from Article 108(3) TFEU has direct effect: it confers rights on individuals, which they can rely on before national courts.

⁸ See i.e. C-275/10 *Residex Capital*, ECLI:EU:C:2011:814, the La Poste-case T-154/10 *France v Commission*, ECLI:EU:T:2012:452 as well as the appealed case C-559/12 P, *France v Commission*, ECLI:EU:C:2014:217 and C-672/13 *OTP Bank*, ECLI:EU:C:2015:185.

⁹ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (Guarantee Notice), OJ C 155, 20.6.2008, section 2.1, p. 12.

¹⁰ The Commission stated in its Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016) that State resources include all resources of the public sector (section 3.2.1, point 48) and that the transfer of State resources may take many forms, including guarantees (section 3.2.1., point 51).

While the Article 108(3) TFEU underlines the need for the proactive action, it is recalled herein that the EU Court of Justice has made the requirement even more restrictive by stating that ***the incompatibility of State aid, that has not been notified, shall not be rectified retrospectively***, even if the Commission states that the aid is compatible with the internal market.¹¹

As illustrated by the paragraph 47 of the present draft notice, the Commission has taken account of the recent judgements and is in line with the interpretation of the EU Court of Justice. The following paragraph reinforces the line of settled case-law which emphasises the effectiveness of recovery in all situations:

A final Commission decision recognising the compatibility of unlawful aid after it has been granted does not have the effect of regularising ex post facto the measures implementing the aid, which had been adopted in breach of the standstill obligation provided for by the TFEU.

As stated in the paragraph 48 of the draft notice, in this context, national courts must offer individuals the certain prospect that all appropriate conclusions will be drawn from the infringement of the standstill obligation. Such conclusions relate in particular to the ***validity*** of the acts giving effect to the aid and to the recovery of financial support granted in disregard of the standstill obligation, in accordance with their national law.

In the event of non-notification, the Member state authority shall be responsible for the correct interpretation of the nature of State aid. In principle, the aid measure cannot be presumed to be authorised unless the aid has been notified in accordance with Article 108(3) TFEU. According to the settled case-law, to protect ***legitimate expectations*** in recovery of unlawful State aid, ***the beneficiary must ensure*** that the aid was granted within the meaning of Article 108(3) TFEU.¹²

This is an essential point in terms of the ***legal certainty*** involved in the guarantee operations. In principle, the protection of legitimation cannot be successfully invoked in case of an unlawful matter.¹³

Although the Capital Requirements Regulation is not directed at the MGB, the issue of legal certainty is crucial for MGB in ensuring the validity of the State guarantees and the enforceability of the credit protection. Therefore, MGB could not emphasise enough the importance of the matter.

¹¹ See e.g., C-672/13 *OTP Bank Nyrt*, ECLI:EU:C:2015:185, Section 76 (in the line of cases).

¹² The EU Court of Justice ruled in its judgement in case C-672 of *OTP Bank Nyrt* (ECLI:EU:C:2015:185, Section 77) that [-] 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 the Article 108 TFEU. Secondly, it held that a diligent economic operator should normally be able to determine whether that procedure has been followed. According to this judgement, unnotified state aid arrangements are not subject to the protection of legitimate expectations. The judgement is consistent with Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraphs 98–104, and Judgment of the Court of Justice of 15 December 2005, *Unicredito Italiano*, C-148/04, ECLI:EU:C:2005:774, paragraph 104.

¹³ Important views of MGB in relation to State guarantees, prudent trader and sufficient legal review are described in detail in the paper by professor Juha Raitio presented at the MGB Council webinar on 18 March 2021. Available at: <https://kuntientakauskeskus.fi/wp-content/uploads/raitio-ktk-esitelma-18-03-2021-EN.pdf>.

The Court of Justice has ruled that the failure of national authorities to comply with Article 108(3) TFEU affects **the validity of measures** giving effect to aid¹⁴ and that guarantees granted contrary to the State aid rules **may be incompatible with EU law** and therefore **unenforceable**.¹⁵

According to Article 213(1) (d) of EU Capital Requirements Regulation 575/2013 (CRR), which mainly covers capital requirements for credit institutions,

*a credit protection contract must be legally effective and enforceable in all jurisdictions which are relevant at the time of conclusion of the credit agreement.*¹⁶

Pursuant to the Article 213(3) of the CRR, **an institution must** fulfil any contractual and statutory requirements in respect of, and **take all steps necessary to ensure, the enforceability of its unfunded credit protection** under the law applicable to its interest in the credit protection.¹⁷

This implies that only activities in line with the Article 108(3) TFEU together with the requirements of the Procedural Regulation (EU) 2015/1589 ensure the validity of State guarantees and the indisputability and enforceability of the credit protection contract in the various jurisdictions.

It is a duty of the European Financial Supervisory System and any competent authority for supervising credit institutions to ensure, on their side, that the credit institution has complied with its obligations and ensured the enforceability of guarantees under EU internal market law.

In order to facilitate this process, a considerable simplification could be achieved if the Commission and the European Financial Supervisory System cooperated to provide an unambiguous interpretation of the term of ‘sufficient legal review’ referred to in Article 213(3) of the CRR.¹⁸

5. MGB’S OPINION

The Municipal Guarantee Board accordingly notes that:

The formation of such State guarantees which prove to be invalid under EU internal market law could be prevented in advance by specifying the content of the ‘sufficient legal review’ set out in the Article 213(3) of the CRR (EU) 575/2013 and by increasing cooperation between the European Commission and the European System of Financial Supervisory to control the compliance of the said Article.

¹⁴ C-354/90 case *FNCE*, Judgment of 21 November 1991 ECLI:EU:C:1991:440, paragraph 12 and paragraph 17, according to which “the last sentence of Article 93(3) of the Treaty (currently 108(3) TFEU) is to be interpreted as imposing on authorities of Member States an obligation whose infringement will affect the validity of measures giving effect to aid, and that the subsequent adoption by the Commission of a final decision declaring the measures compatible with the common market does not have the effect of regularising the invalid measures ex post facto”.

¹⁵ See e.g., C-275/10 *Residex Capital IV*, Judgment of 8 December 2011 ECLI:EU:C:2011:814, paragraphs 28–31.

¹⁶ Capital Requirements Regulation (EU) 575/2013, OJ L 176, 27.6.2013, Article 213(1)(d), p. 133.

¹⁷ Capital Requirements Regulation (EU) 575/2013, OJ L 176, 27.6.2013, Article 213(3), p. 134.

¹⁸ An illustrative example can be the MGB’s decision, according to which any guarantee involved in the joint funding system of Finnish municipalities must indicate the decision of the competent EU authority verifying that the guarantee is compatible with the EU internal market. What is noteworthy here is that it is exclusively for the Commission to assess whether an aid measure is compatible with the internal market; national courts cannot evaluate it.

