EUROPEAN COMMISSION

Legal Service

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Fővárosi Törvényszék
Gazdasági Kollégiuma

Budapest, Varsányi Irén u. 44, 1027
Hungary
To the attention of:

Object: **Opinion of the European Commission in Case 7.G.40.788/2020/91 pending before the Fővárosi Törvényszék (our ref. SA.105501.NC)**

Dear Sir/Madam,

The European Commission (the 'Commission') has the honour to submit an opinion in response to the request submitted on 6 December 2022 by the Fővárosi Törvényszék (Budapest Municipal Court), on the basis of Article 29(1) of Council Regulation (EU) 2015/1589 (the 'Procedural Regulation')[1].

The Commission recalls that, in accordance with Article 29(1) of the Procedural Regulation and point 117 of the Commission's notice on the enforcement of State aid rules by national courts[2], opinions of the Commission are not binding on the national court. Only the Union Courts can give a binding interpretation of the Union's State aid rules. Therefore, the Commission's opinion is without prejudice to the possibility or obligation for the national court to ask the Court of Justice of the European Union for a preliminary ruling regarding the interpretation or the validity of Union law in accordance with Article 267 of the Treaty on the Functioning of the European Union ('TFEU').

1. RELEVANT FACTS AND PROCEDURE

(1) This opinion is based on the factual findings made by the Budapest Municipal Court in its request, which the Commission assumes to be accurate.

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1 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

2 Commission notice on the enforcement of State aid rules by national courts (OJ C 305, 30.7.2021, p. 1) (the 'Enforcement Notice').

1.1. Background of the case

(2) The case pending before the Budapest Municipal Court revolves around a rule which, according to that Court's request, has been part of Hungarian law since 1 January 1994. Under that rule, certain loans extended by credit institutions to certain categories of individuals for their housing needs would benefit from a State guarantee: the State would reimburse 80% of such loans in the event they were to become uncollectible[3] (the 'Guarantee'). As from 2001, the rule in question is laid down in paragraph 25 of Government Decree No 12/2001 of 31 January 2001 (the 'Decree').

(3) To the Commission's understanding, the Guarantee has been part of a broader national regime, first introduced by legislation going as far back as 1971, then, as from 2001, laid down in the Decree, which regulates aid intended to facilitate access to housing for certain categories of households.[4] According to the judgment attached as Annex II to the request for opinion, the objective of the Guarantee is '*to support married people, young families with multiple children and other people in need in order to meet their housing needs*', but the Commission understands that in fact this objective is pursued not only by the Guarantee but also by the entirety of the regulation at hand.[5] In order to achieve this objective, the above-mentioned legislation provided for several forms of support, including an '*additional interest rate subsidy*' with respect to loans granted by '*credit institutions*'.[6] To the Commission's understanding, the Guarantee was granted precisely with respect to housing loans '*taken out with additional interest rate subsidies*'.[7]

(4) The legislation concerning the Guarantee has been amended on a number of occasions. The exact scope of those changes has not been presented to the Commission. Among the amendments made to the rule in question over time are changes to the definition of a 'credit institution' applicable to the provision in question. Those amendments modified the circle of lenders whose loans could benefit from the Guarantee[8]: until 30 April 2004 that benefit was reserved for Hungarian credit institutions only, subsequently it was extended also to Union

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[3] The extent to which the Guarantee applied to the interest on the loans concerned appears to have changed over time, but – for the period concerned by the applicant's claim – it appears to have covered such interest at an 80% rate, but only up to 50% of the principal loan amount.

[4] Request for opinion, Annex I; see also the judgment in *OTP Bank* (referred to in footnote 14), paragraphs 8 and 46.

[5] Request for opinion, Annex II (judgment in case No 3.G.42.116/2017), page 21. The Commission's assumption that the stated objective may pertain to the entire regime is based on the subsequent sentence of that judgment: '*In order to achieve the desired objective, the Decree provides several types of support*.'

[6] Request for opinion, Annex II (judgment in case No 3.G.42.116/2017), pages 2 and 21.

[7] *Idem*, page 2. On that basis the Commission understands that in the Decree, that subsidy appears to be governed by paragraph 13(1), and indeed, paragraph 25(1) of the Decree establishes a Guarantee with respect to '*the loan referred to in paragraph 13(1), taken out from the credit institution*'.

[8] Source: request for opinion, Annex 2 (judgment of the Budapest Municipal Court in case No 3.G.42.116/2017/7), pages 2 and 21. Those modifications does not seem to be listed in the summary attached as Annex 1 to the request for opinion.

credit institutions[9]. From 7 September 2004 until 31 December 2015 the Guarantee was also made available to insurance undertakings; and since 1 February 2008 also to financial institutions that were subject to prudential rules equivalent to those applicable to credit institutions (that latter modification is referred to in this opinion as the '2008 amendment').

(5) The relevant legislation appears to have also been amended in other aspects, both regarding the Guarantee, the underlying loans and the underlying broader national regime. The Commission has no sufficient information on such changes but refers to paragraph (54) below for certain further details.

(6) On 1 May 2004, Hungary joined the European Union. The relevant Treaty of Accession[10] and Act of Accession[11] entered into force on the same date. The Guarantee is not listed among the existing aid measures identified in the Appendix to Annex IV to the Act of Accession, to which paragraph 1(b) of Chapter 3 of Annex IV to that Act refers.

(7) With effect from 14 December 2011, the Decree was amended to clarify, in paragraph 25C that '*The State's obligations to reimburse 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*'. Hungary explains that it has not made any payments under the Guarantee with regard to loan agreements concluded as from 1 May 2004, whereas it still honours payments concerning earlier loans.

1.2. Procedure and the previous court case

(8) The proceedings pending before the Budapest Municipal Court concern a payment claim from OTP Bank Nyrt. ('OTP') against the Hungarian State ('Hungary') and its co-defendants: the Ministry of Finance and the Treasury. To the Commission's understanding, OTP's claim relies on several grounds (including damage compensation and unjust enrichment), but in any event its origin lies in the non-payment, by Hungary, of amounts under the Guarantee.

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[9] And possibly, until 6 September 2004, also to Union financial institutions.

[10] 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 L 236, 23.9.2003, p. 17, the 'Treaty of Accession').

[11] 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 L 236, 23.9.2003, p. 33, the 'Act of Accession').

(9) By virtue of an agency agreement of 15 September 2008 concluded between the Ministry of Local Government, the State Treasury and OTP, the latter was entrusted with certain tasks for the purpose of implementing the Decree.[12] As a result, OTP's claims deriving from loans granted in the implementation of that Decree were covered by the Guarantee.

(10) The claims in question relate to loans granted after Hungary's accession to the European Union. Based on that circumstance, Hungary contests those claims which, in its view, constitute State aid prohibited under Union law (as recognised by paragraph 25C of the Decree). Hence, as Hungary argues, in the interest of effectiveness of Union law, the applicant cannot obtain the amount corresponding to the Guarantee, under any legal basis.

(11) Importantly, the Budapest Municipal Court has already dismissed, in case No 3.G.42.116/2017[13], a previous action by OTP against Hungary. That case was based on the same factual and legal basis as the case at hand (i.e. also concerning OTP's claims deriving from the implementation of the agency agreement of 15 September 2018), but concerned claims for a different period. In the context of that case, the court requested a preliminary ruling from the Court of Justice of the European Union, which, in case C-672/13[14], held that:

'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.'

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12 See the judgment in *OTP Bank* (referred to in footnote 14), paragraphs 13 to 15, and the request for opinion, paragraph 9.

13 Request for opinion, paragraph 12 and Annex II; the judgment has become final.

14 Judgment of the Court of Justice of 19 March 2015, *OTP Bank,* C-672/13, EU:C:2015:185.

(12) In its judgment in that previous case, following the delivery of the preliminary ruling referred to above, the Budapest Municipal Court found that the Guarantee constituted State aid. Notably, the Budapest Municipal Court held that the Guarantee only benefitted credit institutions[15] and, as from 2008, also financial institutions that were required to comply with prudential rules equivalent to those applicable to credit institutions. Meanwhile, other undertakings engaged in the granting of loans for housing purposes were left outside of the scope of the Guarantee.[16] Such undertakings, despite any differences in size compared to the beneficiaries of the Guarantee, competed with those beneficiaries in lending, and were placed at a competitive disadvantage through the Guarantee.[17] The court thus concluded that the Guarantee was selective, both before and after the 2008 amendment. The Budapest Municipal Court also reached the conclusion that the Guarantee did not qualify as existing aid under paragraph 1 of Chapter 3 of Annex IV to the Act of Accession: the Guarantee was granted based on the Decree which entered into force after 10 December 1994, the Guarantee was not among the measures listed in the Appendix to Annex IV to the Act of Accession and it was not notified to the Commission under the 'interim procedure' laid down in paragraph 1(c) of that Annex IV. Neither was the Guarantee notified to the Commission under Article 108(3) TFEU. As a result, the Budapest Municipal Court concluded that the Guarantee constituted unlawful aid and that the applicant could not obtain the amount of the aid stemming from the Guarantee, in any way. On that basis, the Court dismissed the applicant's action.[18]

(13) In the present case, the Budapest Municipal Court observes that it is not bound by that earlier judgment as both cases cover different periods, but states that it will take into account the contents of that earlier judgment and the documents in the respective case file.[19] To the Commission understanding, the previous case concerned claims arising up to the first quarter of 2012, while the present case concerns those arising as from the fourth quarter of 2012. At the same time, the Commission is not aware of whether, apart from that difference in the periods concerned, there are other changes between the legal and factual circumstances underlying the two cases.

(14) Hungary stated during the proceedings at hand that it had not notified the Guarantee to the Commission under the Union's State aid rules[20]. The Commission is indeed not aware of any such notification.

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15 And, insurance undertakings, according to the table at page 2 of that judgment (Annex II to the request for opinion).

16 Request for opinion, Annex II (judgment in case No 3.G.42.116/2017), pages 21 and 23.

17 *Idem*, page 23.

18 *Idem*, pages 24 to 26.

19 Request for opinion, paragraph 12.

20 Request for opinion, paragraph 8.

2. QUESTIONS FROM THE NATIONAL COURT

(15) In its questions, the Budapest Municipal Court asks the Commission to provide its opinion on the following questions:

(a) How does the three-step analysis referred to in section 5.2.3 of the Commission's Notion of Aid Notice[21] apply to the Guarantee, taking into account the changes to the circle of beneficiaries of the Guarantee that took place over time?[22]

(b) How to calculate the '*premium that should be charged in an equivalent non-aid scheme set up in accordance with the conditions laid down in point 3.4 [of the Guarantee Notice[23]]*'[24] and, in this connection, what is the significance of the 80% guarantee coverage?[25]

(c) Is OTP considered a beneficiary of the Guarantee with respect to the entire advantage, or is it a beneficiary alongside the borrowers, and if it is the latter, what are the criteria to determine how much of the advantage benefits OTP and how much benefits those borrowers?[26]

(d) With regard to the nature of the Guarantee as new or existing aid: (i) on which basis can the different amendments to the rules governing the Guarantee be considered 'severable', (ii) what criteria can be used to assess whether a given amendment affects the 'substance' of the Guarantee or whether, by contrast, such amendment is purely formal or administrative in character, and (iii) if the initial Guarantee (according to the rules in force before 10 December 1994) were considered as existing aid, what is the significance of the present case, given notably that the rules governing the Guarantee have changed over time, but its basic nature (i.e. the State's obligation to reimburse financial institutions for uncollectible loans) did not change?[27]

(16) In addition, the Budapest Municipal Court asks the Commission for information on whether the Commission has examined the Guarantee in the framework of the so-called interim procedure for existing aid and, if so, it asks the Commission to provide the court with the related documentation.[28]

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21 Commission 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, p. 1).

22 Request for opinion, paragraph 15.

23 Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10).

24 As per section 4.4, first paragraph, of the Guarantee Notice.

25 Request for opinion, paragraph 17.

26 Request for opinion, paragraph 20.

27 Request for opinion, point 27.

28 *Idem*, point 30.

3. THE COMMISSION'S OPINION

3.1. On the selectivity of the Guarantee

(17) The first question raised by the Budapest Municipal Court revolves around the details of the application of the three-step test referred to in section 5.2.3 of the Notion of Aid Notice. That Court appears to be facing difficulties in applying that test, notably it seeks to understand how to determine the relevant reference system for the test, how to define both the objectives pursued by that system and the nature and the overall structure of that system, and how to determine the comparability of legal and factual situations of various operators, taking also into account the changes to the scope of institutions to whom the Guarantee applies. The essence of the question raised by the Court is whether the Guarantee, both before and after the 2008 amendment to the Decree, can be considered selective. In the paragraphs that follow, the Commission will provide its view to inform that analysis.

(18) Among of the criteria for a given measure to be classified as State aid within the meaning of Article 107(1) TFEU, one is that such measure is found to be '*favouring certain undertakings or the production of certain goods*', i.e. is selective.

(19) A textbook example, and indeed the archetypical form of a selective measure, is a grant. Generally, a grant is not awarded to all undertakings. On the contrary, normally undertakings operate in a market economy and hence must bear their own risks and costs. Where public support is awarded in the form of a grant, there is no difficulty in identifying a selective advantage, since the grant favours a given undertaking in relation to all other undertakings who must rely solely on market mechanisms to cover their risks and costs.

(20) It is with regard to other types of public support that the three-step test reveals its full usefulness. That test first appeared in the field of fiscal aid, to tackle the following difficulty: taxation is a charge and not a positive element for an undertaking; however, its modalities may have effects similar to those of a grant. Alleviating a burden that a taxpayer normally has to bear is tantamount to granting them a subsidy. Yet, such relief may be technically difficult to grasp because it involves first identifying the 'normal' charge to which an undertaking is subject and which is determined by the tax system of the Member State. Therefore, the three-step test was introduced to determine, so to speak, the grant equivalent of the fiscal measures in the absence of a clear positive benefit. As the Court of Justice has recently put it, '*the three-step method of analysing the selectivity of aid, invoked by the appellants, was designed in order to reveal the concealed selectivity of advantageous tax measures that are apparently available to any undertaking*.'[29]

(21) With that objective in mind, the following three-step test is carried out, as the Budapest Municipal Court rightly points out:

(a) in the first step, one must define the particular legal regime (reference system) that lays down the 'normal' situation;

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[29] Judgment of the Court of Justice of 2 February 2023, *Spain and Others v Commission*, Joined Cases C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60, paragraph 48.

(b) the second step involves a verification whether the measure in question favours certain undertakings or the production of certain goods over others which, in the light of the objective pursued by the reference system, are in a comparable legal and factual situation; if that is the case, then

(c) in a third step, such difference in treatment would not be found to be selective if it is justified by the nature or the general scheme of the reference system.

(22) That three-step test can also be relevant where undertakings are relieved of a regulatory burden that is not fiscal in nature.[30] In such cases it is indeed appropriate to determine the 'normal' level of charges (i.e. the burden that the beneficiary would normally have to incur under the system of charges) in order to establish the grant equivalent of a given measure.

(23) Importantly, in such types of cases there is a 'reference system' to be examined because, by definition, there is a system of charges. It is therefore generally possible to link the measure under examination to such wider system. One must then identify the scope of that reference system and its essential provisions. The Commission notes in this regard that section 5.2.3 of the Notion of Aid Notice talks precisely about '*broader measures applicable to all undertakings fulfilling certain criteria, which mitigate the charges that those undertakings would normally have to bear*' (see point 127 of that Notice).

(24) By contrast, a difficulty arises in applying the three-step test in cases where there is no system of charges and thus a link between a given benefit and a wider system appears problematic.

(25) There appear to be two ways of addressing that difficulty.

(26) The first manner would be to consider that in such cases the reference system only encompasses the measure itself. The selectivity of a public support measure would thus only be examined in light of the objectives, the nature and the general scheme of that specific measure. However, such an approach would mean that generally, grants or other positive benefits would not be selective, as long as they do not differentiate between their beneficiaries in the light of the objective pursued by the State intervention. As a result, large part of the State aid discipline would disappear. It is settled case-law that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects.[31] Thus, '*if it were to be considered that a specific measure could escape [Article 107(1) TFEU] if it pursued an economic or industrial policy objective, such as the promotion of investment, that provision would have no practical effect. In accordance with settled case-law, it must therefore be held that the objective pursued by the measure at issue cannot enable*

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[30] Judgment of the Court of Justice of 21 December 2016, *Commission v Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971.

[31] Judgment of the Court of Justice of 30 June 2016, *Belgium v Commission*, C-270/15 P, EU:C:2016:489, paragraph 40 and case-law cited.

it to escape being categorised as State aid'.[32] The objective pursued by State intervention can be relevant for the assessment of compatibility with the internal market, but cannot be relevant for the determination of whether such intervention constitutes State aid.[33] Hence, this first approach could not be justified in the light of Article 107(1) TFEU.

(27) The second solution would be to view, as the reference system, the normal regime prevailing in a market economy, in which undertakings bear the risks and costs related to their operations. Notably, in a market economy, lenders bear the risks related to their lending, or need to obtain additional guarantees if they wish to limit their risks. That is the 'normal' situation against which the treatment granted to lenders under the Guarantee should be assessed.

(28) It is in this context that the Court of Justice, in its judgment in OTP Bank, drew a distinction between *'credit institutions'* (explaining that '*the measure at issue appears to be exclusively for the benefit of the credit establishments'* in paragraph 48 of that judgment), and '*other economic operators'* (who were clearly left outside the scope of the Guarantee until 2008, while the situation as from 2008 was to be verified by the referring court, see paragraphs 51 and 58 of that judgment).

(29) In that judgment, the Court of Justice also referred to a narrower degree of selectivity, comparing the situation of the institutions benefitting from the Guarantee with that of other entities engaged in lending operations. As explained in paragraph 57 of the judgment in *OPT Bank*, '*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*.' By contrast, other operators active in the lending market do not enjoy such benefits and need to fully assume the risk of their borrowers' default or to procure a guarantee (at a fee), and as a result, their ability to compete with the beneficiaries of the Guarantee is impaired (see paragraph 58 of the judgment in *OTP Bank*). This difference in treatment has clear economic consequences for the beneficiaries of the Guarantee compared to other lenders, and so the Guarantee must be regarded as selective.

(30) The Commission wishes to add that there could be an additional element intensifying the degree of selectivity of the Guarantee, if it were to be established that the Guarantee only applied to those institutions that were entrusted by public authorities with the implementation of the legislation in question, with the effect that the circle of entities concerned would be further reduced. It is the Commission's understanding that OTP could only make claims under the Guarantee because it had entered into an agency agreement with the State for the

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[32] Judgment of the General Court of 4 March 2009, *Associazione italiana del risparmio gestito and Fineco Asset Management v Commission*, T-445/05, EU:T:2009:50, paragraph 170 and case-law cited.

[33] See e.g. the judgment of the Court of Justice of 22 December 2008, *British Aggregates Association v Commission*, C-487/06 P, EU:C:2008:757, paragraph 92.

purposes of implementing the Decree.[34] If so, it is unclear for the Commission if any '*credit institution*' (within the meaning of that legislation) was able to sign such an agency agreement or whether there were still additional criteria, or a degree of discretion on the part of the public authorities, that further restricted lenders' access to the Guarantee. This additional observation is without prejudice to the Commission's view that, already by restricting such access to '*credit institutions*', the Hungarian State rendered the Guarantee selective.

(31) The Commission, in line with the view taken by the Court of Justice in the judgment in *OTP Bank*, submits that the Guarantee had the effect of allowing the entities to whom it applied to pursue lending operations with a significantly reduced risk compared to the normal situation prevailing on the market, without any objective justification, consistent with the logic of a market-based economy, for such a difference in treatment.

(32) With regard to the period following the 2008 amendment, the Court of Justice noted that, to determine whether that amendment could call into question the selective nature of the Guarantee, one would need to verify whether and to which extent that amendment extended the Guarantee's benefit to '*economic operators other than credit institutions*'.[35] To the Commission's understanding, the extension in question has been quite limited in scope: only certain financial institutions, subject to prudential requirements equivalent to those of credit institutions, were included in the scope of the Guarantee.[36] It appears that other operators active in the market, notably those that offered similar loans and directly competed with the institutions to whom the Guarantee applied, were left outside the scope of the Guarantee also following that amendment.[37] The Commission sees no objective reason, consistent with the logic of a market-based economy, for such difference in treatment, and thus, on the basis of the facts as presented in the request for opinion, considers the Guarantee to be selective, also for the period following the 2008 amendment.

3.2. On the quantification of the advantage stemming from the Guarantee

(33) By its second and third questions, the Budapest Municipal Court in essence seeks the Commission's view on how to quantify the advantage that the Guarantee procured to OTP, taking into account that the Guarantee also benefitted consumers and that the coverage of the Guarantee was in principle limited to 80 % of the underlying claim.

(34) As a preliminary remark, while the Budapest Municipal Court's question refers directly to section 3.4 of the Guarantee Notice, the Commission wishes to clarify that the Notice only applies to guarantees whose principal beneficiary (i.e. in case

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[34] See paragraph **Error! Reference source not found.** above.

[35] *Idem*, paragraphs 51 and 59.

[36] See paragraph (4) above.

[37] See request for opinion, Annex II (judgment in case No 3.G.42.116/2017), page 23, as recorded in paragraph (12) above.

of loans, borrower) is an undertaking.[38] Therefore, the guidance on the assessment of guarantee schemes set out in sections 3.4 and 4.4 of the Guarantee Notice is not applicable to schemes where borrowers are not undertakings.

(35) Instead, it is the general rule spelled out in point 111 of the Notion of Aid Notice that the Commission considers relevant to quantify the advantage that OTP enjoys over its competitors who do not benefit from the Guarantee. That rule requires, in essence, a benchmarking of the financial transaction in question against comparable transactions that can be found on the financial markets. Comparability should be established taking into account the key characteristics of the financial transaction, including the amount and duration, the expected loss given default and the creditworthiness of the borrower. If no corresponding guarantee premium benchmark can be found on the financial markets, the total financial cost of the guaranteed loan (including the interest rate of the loan and the guarantee premium, if any) should be compared to the market price of a similar non-guaranteed loan. Given that in the present case the borrowers belong, to the Commission's understanding, to a group which is financially vulnerable, it needs to be assessed if, in the absence of the Guarantee, those borrowers would have been able to take out the loan at all, i.e. whether there is a market rate at all for similar but non-guaranteed loans. If there is no such rate, the aid element of the Guarantee may be as high as the amount effectively covered by that Guarantee. In such situations, for the purposes of quantification of the advantage in a recovery procedure it would be irrelevant if in the absence of the Guarantee the lender would have chosen to extend a given loan or not. Recovery of unlawful aid does not imply reconstructing past events differently on the basis of hypothetical elements such as the choices, often numerous, which could have been made by the operators concerned, since the choices actually made with the aid might prove to be irreversible[39].

(36) Importantly, the advantage in question is established as between OTP and its non-aided competitors, and consequently the entirety of that advantage accrues to OTP. Indeed, the Court of Justice has stressed, in paragraph 48 of the judgment in *OTP Bank*, that '*the measure at issue appears to be exclusively for the benefit of the credit establishments*'. Indeed, the Guarantee has conferred an advantage on the institutions that benefitted from it, who were able to offer loans to a vulnerable public without assuming the related financial risk. The quantification of that

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[38] In this context, see the numerous references, in the Guarantee Notice, that link the borrower with the operation of an economic activity, such as the definitions of a '*guarantee scheme*' and '*individual guarantee*' laid down in section 1.3 of that Notice (referring to guarantees '*provided to an undertaking*'); the reference in section 3.1 of that Notice, to '*the effective possibilities for a beneficiary undertaking to obtain equivalent financial resources by having recourse to the capital market*'; the references, in section 2.2 of that Notice, to effects of State guarantees on borrowers, whereby '*State guarantees may thus facilitate the creation of new business and enable certain undertakings to raise money in order to pursue new activities. Likewise, a State guarantee may help a failing firm remain active instead of being eliminated or restructured*'; the reference to '*all economic sectors, including the agriculture, fisheries and transport sectors*' in section 1.3; reference to guarantee premiums '*prices paid by similarly rated undertakings on the market*' in section 3.2(d); specific considerations concerning borrowers who are small or medium-sized undertakings, in sections 3.3 and 3.5; the determination of whether the borrower is in financial difficulty by reference to standards applicable to undertakings, in section 3.2(a) and 3.4(a); reference to the '*undertaking guaranteed*' in section 4.2 (emphasis added).

[39] See judgment of the Court of Justice of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraphs 117 to 119.

advantage should be carried out in comparison with the situation of unaided lenders rather than by reference to the situation of the borrowers. Certainly, the Guarantee has benefitted not only OTP and other credit institutions who entered into the relevant agency agreements with the State: that Guarantee has sought to improve access to housing and hence favours certain households whose income does not enable them, by themselves, to envisage purchasing a property (see the judgment in *OTP Bank*, paragraph 50). The Guarantee thus creates a benefit for those households, as compared to other individuals not engaged in economic activities. However, that benefit falls outside the State aid analysis, as the latter analysis revolves, in the present case, around the advantage that OTP has enjoyed over its competitors on the lending market, and which has enabled OTP to offer loans that its unaided competitors could not offer, at least not on comparable terms.

(37) In the quantification of the advantage conferred to OTP by virtue of the Guarantee, the guarantee coverage of 80% mentioned in the Budapest Municipal Court's request for opinion can be taken into account. Where the relevant benchmark is also a guarantee transaction with a different coverage, the premium payments under the benchmark guarantee may need to be adjusted to take account of that difference in coverage. In the same vein, where the relevant benchmark is the total financial cost of a loan (or the total amount of the loan, in case where a market for the loans in questions would not exist), it may be appropriate to only take into account the proportion of that cost corresponding to the coverage of the Guarantee (i.e. 80%).

(38) The Commission draws the attention of the Budapest Municipal Court to the fact that, when quantifying the aid element embedded in the Guarantee, the relevant amounts should be discounted to their present value at the moment of granting of the guarantee, and then added up to obtain the total grant equivalent of the aid. In its practice, the Commission has accepted the use of a discounting rate equal to the reference rate laid down in its Communication on the revision of the method for setting the reference and discount rates.[40] That rate is made up of (a) the base rate, as applicable at the relevant time, increased by (b) a fixed margin of 100 basis points.

(39) As a final remark, the Commission wishes to underline, as Hungary has done in the case at hand, that to the extent the Guarantee would be considered to procure a selective advantage to OTP and constitute new and unlawful State aid subject to the recovery obligation, OTP could not rely on any alternative legal bases to support its claim (such as damage compensation or unjust enrichment). As clarified in the Enforcement Notice, '*individuals who might be entitled under national law to receive aid which has not been notified to and approved by the Commission, but who have not received such aid, cannot claim as compensation for damages the equivalent of the sum of the non-received aid, since this would constitute an indirect grant of unlawful aid*' and '*[b]eneficiaries of unlawful aid sometimes try to claim damages from the State after having been ordered to reimburse the amount. Usually, these beneficiaries put forward arguments concerning the alleged breach of their legitimate expectations. Nevertheless, the Court of Justice held that an*

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[40] Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6). Updated base rates are available at: https://ec.europa.eu/competition-policy/state-aid/legislation/reference-discount-rates-and-recovery-interest-rates/reference-and-discount-rates_en

unlawfully granted measure could not generate any legitimate expectation for the beneficiary, which should be able to determine whether the correct procedure for the granting of the aid has been followed'.[41]

3.3. On the nature of the Guarantee as existing or new aid

(40) The Budapest Municipal Court's last question aims at determining if the Guarantee, insofar it constitutes State aid, can be, with regard to OTP, considered existing aid, or whether it qualifies as new aid.

(41) In this context, Articles 1(b) and (c) of the Procedural Regulation define 'existing aid' and 'new aid' as follows[42]:

'(b) 'existing aid' means:

(i) […], all aid which existed prior to the entry into force of the TFEU 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 TFEU in the respective Member States;

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

[…];

(c) 'new aid' means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.

(42) Article 4 of Commission Regulation (EC) No 794/2004[43] reads as follows:

'*1. For the purposes of Article 1(c) of Regulation (EC) No 659/1999, an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market. However an increase in the original budget of an existing aid scheme by up to 20 % shall not be considered an alteration to existing aid.*

2. The following alterations to existing aid shall be notified on the simplified notification form set out in Annex II:

(a) increases in the budget of an authorised aid scheme exceeding 20 %;

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41 Points 97 and 98 of the Enforcement Notice and the case-law cited therein.

42 Those provisions are aligned with the definitions of 'existing aid' and 'new aid' in Articles 1(b) and (c) of the earlier Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

43 Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

(b) *prolongation of an existing authorised aid scheme by up to six years, with or without an increase in the budget;*

(c) *tightening of the criteria for the application of an authorised aid scheme, a reduction of aid intensity or a reduction of eligible expenses; […]*'.

(43) Paragraph 1 of Chapter 3 of Annex IV of the Act of Accession reads:

'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 88(1) of the EC Treaty:

(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 fulfil the conditions set out above shall be considered as new aid upon accession for the purpose of the application of Article 88(3) of the EC Treaty. […].'

(44) In that context, the Court notably points out that before the adoption of the Decree in 2001, Hungarian law had already contained similar provisions on the Guarantee since 1 January 1994; this circumstance had not been examined either in the previous national court case or in the proceedings before the Court of Justice in *OTP Bank*. Since 1 January 1994, the provisions concerning the Guarantee have, however, been modified on a number of occasions.[44]

(45) According to paragraph 1(a) of Chapter 3 of Annex IV to the Act of Accession, '*[t]he 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.*'

(46) The Budapest Municipal Court thus concludes that the Guarantee had been first put into effect before 10 December 1994, contrary to what the Court of Justice established in *OTP Bank*.[45] If so, and without prejudice to any subsequent alterations, at least the initial Guarantee would qualify as existing aid in accordance with paragraph 1(a) of Chapter 3 of Annex IV to the Act of Accession. The

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[44] Request for opinion, paragraphs 21 and 22.

[45] See the judgment in *OTP Bank*, paragraph 63.

Commission is not in a position to form an opinion on the factual finding concerning the moment when the Guarantee was first put into effect.

(47) Nonetheless, as the Budapest Municipal Court rightly submits, given that the relevant legislation at hand has undergone modifications since the Guarantee had been first put into effect, it is relevant to establish if those alterations gave rise to new aid, within the meaning of Article 1(c) of the Procedural Regulation and Article 4(1) of Commission Regulation (EC) No 794/2004) and whether such new aid was severable from the possible existing aid.

(48) In this regard, according to settled case-law, an analysis of the changes made to an existing aid scheme needs to be carried out '*to examine whether those changes affected the constituent elements of that system of financing, such as the class of beneficiaries, the objective of the financial support, the public service task assigned to the beneficiaries and the source and amount of that support*.'[46]

(49) In this context, examples of alterations giving rise to new aid include:

(d) changes to the circle of beneficiaries of a measure: extending[47] but also restricting that circle[48];

(e) increases in the budget of an authorised aid scheme exceeding 20%[49];

(f) prolongation of an aid scheme[50];

(g) reduction of aid intensity or of eligible expenses;[51]

(h) exclusion of certain activities from the scope of application of a scheme.[52]

(50) More broadly, while not all modifications to an existing aid measure will give rise to new aid, any alteration that is capable of influencing the compatibility of the aid with the internal market will lead to a finding of new aid. Notably, changes to parameters of an aid measure such as its objectives, its structure, the budget and amount, the duration, the circle of beneficiaries or the conditions based on which aid can be accessed, do play a role in this regard. It is important to note that a

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[46] Judgment of the General Court of 14 April 2021, *Verband Deutscher Alten- und Behindertenhilfe et CarePool Hannover v Commission*, T-69/18, EU:T:2021:189, paragraph 191 and case-law cited.

[47] Judgment of the General Court of 11 July 2014, *Telefónica de España and Telefónica Móviles España v Commission*, T-151/11, EU:T:2014:631, paragraph 64.

[48] Judgment of the Court of Justice of 14 November 2019, *Dilly's Wellnesshotel*, C-585/17, EU:C:2019:969, paragraph 63.

[49] Article 4(2) of Commission Regulation (EC) No 794/2004.

[50] *Ibidem*.; see also e.g. judgment of the Court of Justice of 26 October 2016, *DEI and Commission v Alouminion tis Ellados*, C-590/14 P, EU:C:2016:797, paragraph 50,

[51] *Ibidem*.

[52] See judgment of the General Court of 21 September 2022, *Portugal v Commission*, T-95/21, EU:T:2022:567, paragraphs 82 and 84 (under appeal).

modification does not need to affect the outcome of the compatibility assessment of a given measure; rather, it qualifies as new aid already when it concerns elements that are relevant for that compatibility assessment.

(51) Where a given modification is found to constitute an alteration to an existing aid measure, then (a) if that alteration affects the actual substance of the original measure, it transforms that entire measure into new aid, or (b) if, by contrast, the new element is clearly severable from the original measure, then it is only the alteration itself that constitutes new aid.[53]

(52) In the case at hand, the Commission emphasises that the analysis in question should not be limited only to the provisions governing the Guarantee as such, but should also take account of changes made to the framework in the context of which the Guarantee operated. Importantly, the Guarantee could not be viewed in isolation from the objectives that it sought to achieve, or from the scope of lending operations which it supported, as well as from other essential elements that defined the nature and the scope of the State intervention in question.

(53) In this context, given that – in the Commission's understanding – the Guarantee has been part of a broader regime regulating aid intended to facilitate access to housing for certain categories of households (see paragraph (3) above), the compatibility of the Guarantee with the internal market could not be dissociated from the aim that it intended to achieve, nor from the constituent elements of the relevant support framework, including but not limited to how housing needs were defined, whose needs were addressed and how, what the amount of the support was, what the scope of the supported lending operations was, and what the conditions were for supporting the housing needs under the relevant legislation.

(54) From that perspective, the summary of changes provided in Annex I to the request for opinion and the information concerning the circle of lending institutions to whom the Guarantee applies (in Annex II), do not appear sufficient for the purposes of the analysis in question. However, it appears already from that summary that, after 10 December 1994, changes have been made to certain central parameters of the Guarantee, of the underlying loans and of the interest rate support for those loans, such as the amount of the interest rate subsidy[54], the types of eligible loans[55], the guarantee coverage of claims for interest[56], the link between the Guarantee and the various housing subsidies[57], the lender's obligation to grant the

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53 Judgment in *Telefónica de España and Telefónica Móviles España v Commission*, paragraph 63.

54 E.g. as from 1 January 1999 it doubled for families without children (Annex I to the request for opinion, p. 3).

55 E.g. as from 1 January 1997, housing loans disbursed on the basis of a housing savings contract concluded under Act CXIII of 1996 were excluded (Annex I, p. 2); as from 6 August 1997, only loans with interest rates not exceeding a rate determined by the Minister of Finance were supported (Annex I, p. 3).

56 The ceiling of half of the principal amount appears to only have been added in paragraph 25(1) of the Decree of 2001 (Annex I, p. 4).

57 E.g. as from 16 June 2003, the Guarantee was made conditional on the borrower having also applied for the housing construction subsidy under paragraph 5(4) of the Decree (Annex I, p. 5).

loans concerned[58], the temporary scope of the Guarantee[59] and the collateral for the Guarantee.[60] To the Commission's understanding those amendments have gone significantly beyond purely formal or administrative adjustments, and they are not severable from the pre-existing measure as they concern the actual substance of the housing support that the Guarantee has been part of. On the basis of those elements, the Commission's view is that we are no longer in the presence of the same Guarantee and the same underlying housing support, and that at least some changes to the relevant legal framework cannot be severed from the measure as it existed before those changes were made. In light of the foregoing, the Guarantee on the basis of which OTP has put forward its claims in the present case cannot be considered as existing aid.

(55) The Commission adds, in this regard, that Union law does not impose any specific conclusion that the national courts must necessarily draw with regard to the validity of the acts relating to implementation of unlawful aid. It is for the national court to consider the most effective means of restoring the competitive situation existing prior to the payment of the aid.[61] Whether such means will entail the annulment of the act adopted in the implementation of unlawful aid or the repayment of the amount equal to the advantage granted to the beneficiary together with the illegality interest is a matter for the national court to consider in light of the foregoing.

3.4. On the court's request for information and documents

(56) At paragraph 30 of its request for opinion, the Budapest Municipal Court inquires whether the Commission has examined the Guarantee in the framework of the mechanism referred to in paragraphs 1(c) and 2 of Chapter 3 of Annex IV to the Act of Accession and if so, whether it could provide that Court with the documents based on which it can determine the outcome of that procedure.

(57) The so-called interim procedure to which the Court refers concerns State aid measures that were not automatically considered existing aid, i.e. had not been put into effect before 10 December 1994 and were not listed in the Appendix to Annex IV to the Act of Accession (as per paragraphs 1(a) and (b) of Chapter 3 of Annex IV). Under that procedure, Member States could submit, for the Commission's assessment, measures that had been approved by their national State aid monitoring authorities. The Commission could then raise an objection to those measures on grounds of serious doubts as to their compatibility with the internal market.

(58) The Commission services have, further to the Budapest Municipal Court's request, proceeded to a verification of their administrative file in this regard and have not identified any submission from Hungary concerning the Guarantee in the framework of the abovementioned procedure.

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[58] As from 1 February 2001 (as per paragraph 25(4) of the Decree) and furthermore as from 11 February 2006 (see paragraph 25B of the Decree) (Annex I, pp. 4 and 8).

[59] As from 14 December 2011, paragraph 25C of the Decree restricted the benefit of the Guarantee to loans concluded before 1 May 2004 (Annex I, p. 10).

[60] As from 1 January 2015, paragraph 25(2a) and (2b) were added to the Decree (Annex I, p. 11).

[61] See judgment of the Court of Justice of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraphs 44 to 49.

3.5. Conclusion

(59) In conclusion, the answers to the questions from the Budapest Municipal Court, on the basis of the factual elements provided to the Commission by that Court, are as follows:

(a) the Guarantee must be regarded as selective, also following the extension of the scope of its beneficiaries in 2008;

(b) the advantage procured by the Guarantee should be quantified on the basis of a comparison of the remuneration that OTP paid for the Guarantee (if any) against the market price of comparable guarantees, or – in their absence – against the market terms of a comparable loan; if in the absence of the Guarantee the borrowers would not have been able to take out the loan at all (i.e. if there is no market rate for such loan), the aid element of the Guarantee may be as high as the amount effectively covered by the Guarantee; the Guarantee coverage of 80 % may be taken into account when quantifying the advantage procured by the Guarantee;

(c) the entire advantage, as quantified taking into account the foregoing, accrues to the lender and is separate from the benefit enjoyed by the borrower households;

(d) in light of the changes made to the legislative framework governing the Guarantee and the underlying loans, the Guarantee that OTP relies on in the present case cannot be considered as existing aid;

(e) the Commission has not identified in its administrative file any submission from the Hungarian State concerning the Guarantee in the framework of the procedure referred to in paragraphs 1(c) and 2 of Chapter 3 of Annex IV to the Act of Accession.

Finally, pursuant to point 129 of the Enforcement Notice, the Commission may also make its opinions publicly available on its website.

For this reason, the Budapest Municipal Court is requested to give its consent to the publication of the opinion at hand. Should the opinion contain information which is considered confidential including professional secrecy and data protected by Regulation (EU) 2018/1725 [62] ('confidential information'), the Budapest Municipal Court is asked to provide the Commission services with a non-confidential version thereof or indicate which parts of the opinion would contain confidential information. The Commission would be grateful if the Budapest Municipal Court could reply at its earliest convenience at the following mail address: COMP-AMICUS-STATE-AID@ec.europa.eu, preferably within 2 months after the date of this opinion, mentioning the reference number **SA.105501.NC**. In case of objections, the Court is kindly asked to give the reasons for its refusal.

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[62] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (OJ L 295, 21.11.2018, p. 39).

To complement the envisaged publication of the opinion, the Commission also intends to publish the full judgment of the Budapest Municipal Court when it is given, cleared from confidential information, on the Commission's website, or to provide a link to the national website where that judgment is published, in order to give broader knowledge to the public and to share good practices with other jurisdictions. To this end, the Commission asks the Budapest Municipal Court to provide it with the judgement or with the link to the judgment if it has been published on a national website, at the following mail address: COMP-AMICUS-STATE-AID@ec.europa.eu. If national law does not foresee such publication, however, the Budapest Municipal Court is kindly requested to inform the Commission services thereof, in which case Commission will only publish the opinion at hand.

I trust that the clarifications provided above will be helpful in the resolution of the case at hand.

With kind regards,