JUDGMENT OF THE COURT (Second Chamber)

13 July 2023 (*)

(Reference for a preliminary ruling – Free movement of capital – Freedom of establishment – Regulation (EU) 2019/452 – Legislation of a Member State establishing a mechanism for filtering foreign investment in resident companies considered to be ‘strategic’ – Decision adopted on the basis of that legislation, prohibiting the acquisition by a resident company of all the shares of another resident company – Acquired company considered to be ‘strategic’ on the ground that its primary activity concerns the extraction of certain raw materials such as gravel, sand and clay – Acquiring company considered to be a ‘foreign investor’ on the ground that it forms part of a group of companies whose ultimate parent company is established in a third country – Harm or risk of harm to a national interest, public security or public order of the Member State – Objective intended to ensure the security of supply of raw materials to the construction sector, in particular at the local level)

In Case C-106/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Budapest High Court, Hungary), made by decision of 1 February 2022, received at the Court on 15 February 2022, in the proceedings

Xella Magyarország Építőanyagipari Kft.

v

Innovációs és Technológiai Miniszter,

intervening parties:

“JANES ÉS Társa” Szállítmányozó, Kereskedelmi és Vendéglátó Kft.,

THE COURT (Second Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, M.L. Arastey Sahún, F. Biltgen, N. Wahl and J. Passer, Judges,

Advocate General: T. Ćapeta,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 8 December 2022,

after considering the observations submitted on behalf of:

– Xella Magyarország Építőanyagipari Kft., by T. Kocsis, ügyvéd,

– the Hungarian Government, by M.Z. Fehér and K. Szíjjártó, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,

– the European Commission, by G. Conte, M. Mataija, G. von Rintelen and A. Tokár, acting as

Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 March 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 65(1)(b) TFEU, read in conjunction with recitals 4 and 6 of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investment in the Union (OJ 2019 L 79I, p. 1), and with Article 4(2) TEU.

2 The request has been made in proceedings between Xella Magyarország Építőanyagipari Kft. ('Xella Magyarország'), a Hungarian company, and the Innovációs és Technológiai Miniszter (Minister for Innovation and Technology, Hungary; 'the Minister'), concerning a decision by which the Minister prohibited the acquisition by Xella Magyarország of all the shares in "JANES ÉS TÁRSA" Szállítmányozó, Kereskedelmi és Vendéglátó Kft. ('Janes és Társa'), another Hungarian company, which is considered to be 'strategic', within the meaning of the national legislation establishing a foreign investment screening mechanism.

Legal context

European Union law

3 Recitals 4, 6, 10, 13 and 36 of Regulation 2019/452 state:

'(4) This Regulation is without prejudice to the right of Member States to derogate from the free movement of capital as provided for in point (b) of Article 65(1) TFEU. Several Member States have put in place measures according to which they may restrict such movement on grounds of public policy or public security. …

…

(6) Foreign direct investment falls within the field of the common commercial policy. In accordance with point (e) of Article 3(1) TFEU, the Union has exclusive competence with respect to the common commercial policy.

…

(10) Member States that have a screening mechanism in place should provide for the necessary measures, in compliance with Union law, to prevent circumvention of their screening mechanisms and screening decisions. This should cover investments from within the Union by means of artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country. This is without prejudice to the freedom of establishment and the free movement of capital enshrined in the TFEU.

…

(13) In determining whether a foreign direct investment may affect security or public order, it should be possible for Member States and the [European] Commission to consider all relevant factors, including the effects on critical infrastructure, technologies (including key enabling

technologies) and inputs which are essential for security or the maintenance of public order, the disruption, failure, loss or destruction of which would have a significant impact in a Member State or in the Union. In that regard, it should also be possible for Member States and the Commission to take into account the context and circumstances of the foreign direct investment, in particular whether a foreign investor is controlled directly or indirectly, for example through significant funding, including subsidies, by the government of a third country or is pursuing State-led outward projects or programmes.

…

(36) When a foreign direct investment constitutes a concentration falling within the scope of Council Regulation (EC) No 139/2004 [of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1)], the application of this Regulation should be without prejudice to the application of Article 21(4) of Regulation (EC) No 139/2004. …'

4 Article 1 of Regulation 2019/452, 'Subject matter and scope', provides in paragraph 1:

'This Regulation establishes a framework for the screening by Member States of foreign direct investments into the Union on the grounds of security or public order …'

5 Article 2 of that regulation, entitled 'Definitions', provides:

'For the purposes of this Regulation, the following definitions apply:

(1) "foreign direct investment" means an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity;

(2) "foreign investor" means a natural person of a third country or an undertaking of a third country, intending to make or having made a foreign direct investment;

…

(4) "screening mechanism" means an instrument of general application, such as a law or regulation, and accompanying administrative requirements, implementing rules or guidelines, setting out the terms, conditions and procedures to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments on grounds of security or public order;

…

(7) "undertaking of a third country" means an undertaking constituted or otherwise organised under the laws of a third country.'

6 Article 3 of that regulation, entitled 'Screening mechanisms of Member States', provides in paragraph 6:

'Member States which have a screening mechanism in place shall maintain, amend or adopt measures necessary to identify and prevent circumvention of the screening mechanisms and screening decisions.'

7 Article 4 of that regulation, entitled 'Factors that may be taken into consideration by Member States or the Commission', provides:

‘1. In determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may consider its potential effects on, inter alia:

…

(c) supply of critical inputs, including energy or raw materials, as well as food security;

…

2. In determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may also take into account, in particular:

(a) whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding;

…’

8 Article 6 of Regulation 2019/452, entitled ‘Cooperation mechanism in relation to foreign direct investments undergoing screening’, provides in paragraph 1:

‘Member States shall notify the Commission and the other Member States of any foreign direct investment in their territory that is undergoing screening by providing the information referred to in Article 9(2) of this Regulation as soon as possible. …’

9 Article 9 of that regulation provides:

‘1. Member States shall ensure that the information notified pursuant to Article 6(1) or requested by the Commission and other Member States pursuant to Articles 6(6) and 7(5) is made available to the Commission and the requesting Member States without undue delay.

2. The information referred to in paragraph 1 shall include:

(a) the ownership structure of the foreign investor and of the undertaking in which the foreign direct investment is planned or has been completed, including information on the ultimate investor and participation in the capital;

…’

Hungarian law

10 Paragraph 276 of the veszélyhelyzet megszűnésével összefüggő átmeneti szabályokról és a járványügyi készültségről szóló 2020. évi LVIII. törvény (Law No LVIII of 2020 on transitional provisions relating to the end of the state of emergency and to the pandemic crisis) of 17 June 2020 (*Magyar Közlöny* 2020/144), in the version applicable to the dispute in the main proceedings (‘the Vmtv’), provides:

‘For the purposes of this section:

1. “national interest” shall mean: the public interest, not governed by either EU or national sectoral regulations, in relation to the security and functioning of networks and installations and continuity of supply;

2. “Foreign investor” shall mean:

(a) any legal person or other entity registered in Hungary, in another Member State of the

European Union, in another Member State of the European Economic Area or in the Swiss Confederation which acquires a specific holding or influence in a commercial company established in Hungary and which carries on an activity referred to in Paragraph 277(2), where the person having "majority control", within the meaning of the *Polgári Törvénykönyvről szóló 2013. évi V. törvény* (Law No V of 2013 approving the Civil Code), of 26 February 2013 (*Magyar Közlöny* 2013/31), in the version applicable to the dispute in the main proceedings ("the Civil Code"), over that legal person or other entity is a national of a State other than a Member State of the European Union, a Member State of the European Economic Area or the Swiss Confederation, or a legal person or other entity registered in such a State;

(b) a national of a State other than a Member State of the European Union, a Member State of the European Economic Area or the Swiss Confederation, or a legal person or other entity registered in such a State;

3. "strategic company" shall mean: any limited liability company, private company limited by shares not listed on a stock exchange or public company limited by shares listed on a stock exchange, whose registered office is in Hungary and whose principal activity or one of whose activities, as defined by government decree, relates to the energy, transport or communications sector or to a strategically important sector – with the exception of financial infrastructure – for the purposes of Article 4(1)(a) to (e) of [Regulation 2019/452].'

11 Paragraph 277 of the Vmtv provides as follows:

'1. In the case of strategic companies, where the conclusion of a contract or a unilateral declaration of intent or decision made by the company … has the effects defined in subparagraphs 2 to 4, they must be notified to [the Minister] and acknowledgement of receipt must be obtained … in respect of the following legal transactions:

(a) the transfer, for consideration or free of charge, of some or all of the holdings in a strategic company by any form of transfer of ownership, including contributions,

…

2. In the sectors referred to in Paragraph 276(3), the notification must indicate whether the total value of the investment is equal to or greater than 350 million Hungarian forint (HUF) (approximately EUR 935 720):

(a) any "foreign investor" within the meaning of Paragraph 276(2)(a) … if, as a result of:

(aa) the acquisition, directly or indirectly, of a … holding in the strategic company concerned following a legal transaction referred to in points (a) to (c) of subparagraph 1,

…

it acquires, directly or indirectly, "majority control" over that strategic company, within the meaning of the Civil Code,

…'

12 Under Paragraph 283 of the Vmtv:

'1. Immediately after receiving the notification, the Minister shall examine:

…

(b) whether, where the person submitting the notification acquires ownership, a right of

ownership over bonds, a right of usufruct or an operating right, the Hungarian national interest, public security or public policy are harmed or threatened or may be harmed or threatened, having regard in particular to the security of supply as regards basic social needs in accordance with Article 36, Article 52(1) and Article 65(1) TFEU;

…

2. The Minister shall, at the latest within 30 working days of receipt of the notification …:

(a) if the conditions specified in points (b) to (e) of subparagraph 1 are not met, acknowledge receipt in writing of the notification;

(b) if the conditions specified in points (b) to (e) of subparagraph 1 are met, prohibit the acquisition of ownership, the right of ownership of bonds, a right of usufruct or an operating right …

…'

13 Annex 1 to the magyarországi székhelyű gazdasági társaságok gazdasági célú védelméhez szükséges tevékenységi körök meghatározásáról szóló 289/2020. (VI. 17.) Korm. rendelet (Government Decree No 289/2020 (VI. 17.) relating to the definition of categories of activities necessary for the protection of the economic interests of commercial companies established in Hungary) of 17 June 2020 (*Magyar Közlöny* 2020/145), in the version applicable to the dispute in the main proceedings, sets out the categories of activities by virtue of which a commercial company having its registered office in Hungary is to be considered to belong to a strategic sector for the purposes of the Vmtv. Category 22 in that annex refers to 'critically important raw materials' and subcategory 8 of that category relates to 'other types of mining and quarrying'.

14 Under Section 8:2 of the Civil Code, entitled 'Influence':

'(1) "Majority control" means any link by which a natural or legal person ("influential entity") holds more than 50% of the voting rights or exercises decisive influence over a legal person.

(2) A controlling entity exercises decisive influence over a legal person where, depending on the case, it is a member or shareholder of that legal person, and

(a) has the right to elect or remove a majority of the senior management or members of the supervisory board of that legal person, or

(b) the other members or shareholders of that legal person vote, pursuant to an agreement with the influential entity, in the same way as the latter, or exercise their voting rights through it, provided that they hold, together, more than half of the votes.

(3) Decisive influence shall also be presumed in cases where indirect influence confers on the influential entity the rights set out in paragraphs 1 and 2.'

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

15 Xella Magyarország, a Hungarian company, operates on the Hungarian construction materials market and is primarily engaged in the manufacture of concrete construction products. It is 100% owned by Xella Baustoffe GmbH, a German company, which is in turn 100% owned by Xella International SA, a Luxembourg company. The latter company is in turn indirectly owned by LSF10 XL Investments Ltd, the ultimate parent company of the Lone Star group registered in Bermuda, the latter group belonging, ultimately, to J.P.G., an Irish national.

16 In a decision of 29 March 2017, the Commission did not object, in the context of a merger control procedure under Regulation No 139/2004, to the takeover of Xella International by LSF10 XL Bidco SCA, established in Luxembourg, a subsidiary of Lone Star Fund X, established in the United States, and of Lone Star Fund X, established in Bermuda, and declared the transaction compatible with the internal market.

17 Janes és Társa, a company incorporated under Hungarian law, is owned by 'PAN3' Építőipari és Kereskedelmi Kft., another company incorporated under Hungarian law. Its main activity is the extraction of gravel, sand and clay in its quarry situated in Lázi (Győr-Moson-Sopron County, Pannonhalma District, Hungary), an activity referred to in subcategory 8 of Category 22 in Annex I to Government Decree No 289/2020, from which it follows that it is classified as a 'strategic company', within the meaning of Paragraph 276(3) of the Vmtv. Its market share on the Hungarian market for the production of the raw materials concerned is 0.52%.

18 Xella Magyarország purchases about 90% of the annual production of Janes és Társa with a view to the processing of those raw materials into sand-lime bricks in its factory near the quarry, with the remaining 10% of that production being purchased by local construction companies.

19 On 29 October 2020, Xella Magyarország concluded a sale agreement for the purpose of acquiring 100% of the shares in Janes és Társa and sent the Minister a notification under Paragraph 277(1)(a) of the Vmtv, requesting it to take note of the transaction concerned in accordance with Paragraph 283(2)(a) of the Vmtv or to confirm that that formality was not necessary in view of its ownership structure.

20 By decision of 30 December 2020, the Minister prohibited the execution of the legal transaction notified pursuant to Paragraph 283(1)(b) and (2)(b) of the Vmtv, relying on the ground of 'national interest' referred to in Paragraph 276(1) of the Vmtv.

21 The Fővárosi Törvényszék (Budapest High Court, Hungary), the referring court, annulled that decision on the ground that the Minister had not complied with the procedural rules and had failed to fulfil his obligation to state reasons, and ordered him to conduct a new procedure.

22 In a decision of 20 July 2021 ('the decision at issue in the main proceedings'), delivered at the end of that new procedure, the Minister again prohibited the execution of the notified legal transaction, on the basis of Paragraph 283(2)(b) of the Vmtv, having regard to Paragraph 276(1) and (2), Paragraph 277(2)(a)(aa) and Paragraph 283(1)(b) thereof.

23 In the grounds of that decision, the Minister classified Xella Magyarország as a 'foreign investor', within the meaning of Paragraph 276(2) of the Vmtv, because it is indirectly owned by LSF10 XL Investments, a company registered in Bermuda. In addition, it maintained that the security and foreseeability of the extraction and supply of raw materials were of strategic importance. According to the Minister, the COVID-19 pandemic clearly showed that serious disruption to the functioning of global supply chains could occur in a short period of time, with negative repercussions that could harm the national economy. The Minister highlighted that the production of aggregates, such as sand, gravel and crushed stone, for the construction sector was already dominated by foreign-owned Hungarian producers.

24 The Minister took the view that if Janes és Társa were to be indirectly owned by a company registered in Bermuda, this would pose a longer-term risk to the security of supply of raw materials to the construction sector, particularly in the region where Janes és Társa is established, given that its market share in that region would be 20.77%. Moreover, the acquisition by a foreign owner of a strategic company would reduce the proportion of domestic-owned companies, which could harm the 'national interest', in the broad sense.

25 Xella Magyarország challenged the decision at issue in the main proceedings before the referring

court, arguing that that decision constituted arbitrary discrimination or a disguised restriction on the free movement of capital in the light, inter alia, of Articles 54 and 55 TFEU, which afford, in parallel, the benefit of freedom of establishment to companies established in the European Union. It pointed out that, ultimately, it is owned by a person who is a national of an EU Member State. The only reason why the acquisition was prohibited was the 'non-national' nature of its ownership structure. It also argued that the lack of clarity of the concept of 'national interest', within the meaning of the Vmtv, was capable of breaching the fundamental principle of the rule of law.

26 In those circumstances, the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice:

'(1) Must Article 65(1)(b) TFEU be interpreted as meaning – having also regard to recitals 4 and 6 of Regulation 2019/452 and to Article 4(2) TEU – that it permits the laying down of rules such as those in Section 85 of the Vmtv, and in particular those in Paragraph 276(1) and (2)(a), and Paragraph 283(1)(b) of that law?

(2) If the answer to the first question is in the affirmative, does the mere fact that the Commission has conducted a merger control procedure, exercised its powers and authorised a concentration affecting the chain of ownership of a foreign indirect investor preclude the exercise of the decision-making power under the applicable law of the Member State?'

Consideration of the questions referred

The first question

27 By its first question, the referring court asks, in essence, whether Article 65(1)(b) TFEU, read in conjunction with recitals 4 and 6 of Regulation 2019/452 and Article 4(2) TEU, must be interpreted as precluding a foreign investment filtering mechanism, provided for by the legislation of a Member State, by means of which a resident company which is a member of a group of companies established in several Member States, over which an undertaking of a third country has decisive influence, may be prohibited from acquiring ownership of another resident company regarded as strategic, on the ground that that acquisition harms or risks harming the national interest in ensuring the security of supply to the construction sector, in particular at the local level, with respect to basic raw materials such as gravel, sand and clay.

28 That question is raised in the context of the acquisition by Xella Magyarország – a Hungarian company which is part of a group of companies whose ultimate parent company is established in Bermuda and ultimately belongs to an Irish national – of a 100% holding in Janes és Társa, a Hungarian company whose main activity concerns the extraction of certain basic raw materials, in particular gravel, sand and clay, which is considered, on account of that extractive activity, to be a 'strategic' company. That acquisition was notified to the competent Hungarian Minister, who prohibited it by the decision at issue in the main proceedings, essentially on the ground that it would risk undermining the national interest in ensuring the continuity of supply of those basic raw materials to the construction sector, in particular at the regional level.

Identification of the applicable EU law

29 As regards, in the first place, the reference, in the first question, to Regulation 2019/452, it should be noted, as the Commission also observed, in essence, that the acquisition at issue in the main proceedings does not fall within the scope of that regulation.

30 That scope is defined in Article 1(1) of Regulation 2019/452, which provides that that regulation establishes a framework for the screening by Member States of 'foreign direct investments' into the European Union on grounds of security or public order.

31 It follows from Article 2 of Regulation 2019/452, in particular from the definitions set out in points 1, 2 and 7 of that article, that the concept of 'foreign direct investment' covers certain investments aimed at a lasting and direct holding by a 'foreign investor', a concept which encompasses that of an 'undertaking of a third country', which refers to 'an undertaking constituted or otherwise organised under the laws of a third country'.

32 It follows that, as regards investments made by undertakings, the scope of Regulation 2019/452 is limited to investments in the European Union made by undertakings constituted or otherwise organised under the laws of a third country.

33 By contrast, the foreign investment filtering mechanism provided for by the national legislation at issue in the main proceedings applies not only in such a case of investments made by undertakings of a third country, but also in the situation, specifically at issue in the main proceedings, where investments are made by undertakings registered in Hungary or in another Member State over which an undertaking registered in a third country has 'majority control' within the meaning of Section 8:2 of the Civil Code.

34 Consequently, since that second situation is not covered by Article 1 of Regulation 2019/452, that national legislation, to that extent, falls outside the scope of that regulation, with the result that the acquisition at issue in the main proceedings, which concerns the second situation, also does not fall within the scope of that regulation.

35 That cannot be called into question by the fact that it follows from Article 4(2)(a) and Article 9(2)(a) of Regulation 2019/452 that the ownership structure of the foreign investor may be taken into account as a factor in the assessment of a potential risk to security or public order posed by the investment concerned.

36 That assessment factor specifically refers to 'whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding'.

37 Since that assessment factor expressly relates only to the ownership structure of the 'foreign investor', a concept defined in Article 2(2) of Regulation 2019/452 and which is limited to undertakings of a third country, that factor does not mean that the scope of that regulation, as defined in Article 1(1) thereof, is extended to include investments made by undertakings organised in accordance with the laws of a Member State over which an undertaking of a third country has majority control.

38 Moreover, it is not apparent from the file before the Court that the decision at issue in the main proceedings was taken in order to counter an attempt to circumvent the filtering mechanism, within the meaning of Article 3(6) of Regulation 2019/452.

39 There is nothing in that file to suggest that the situation in the present case is one referred to in recital 10 of that regulation, which clarifies the scope of Article 3(6), namely that of 'investments from within the Union by means of artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country'.

40 In the second place, as regards the reference, in the first question, to Article 4(2) TEU, the referring court does not explain the relevance of that provision for the purposes of the answer to be given to that question, with the result that there is no need to examine it in the light of that provision.

41 In the third and last place, as regards the identification of the fundamental freedom that may be applicable in the case at issue in the main proceedings, although the referring court asks the Court to examine the national legislation concerned in the light of the rules of the TFEU on the free

movement of capital and, in particular, Article 65(1)(b) TFEU, it must be held that that legislation, and in particular the provisions of that legislation which relate to the acquisition by a 'foreign investor' of a shareholding conferring on him or her 'majority control' over a strategic company as applied in the decision at issue in the main proceedings and to which the first question referred for a preliminary ruling expressly relates, concern another fundamental freedom, namely the freedom of establishment.

42 In accordance with settled case-law, national legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the scope of the rules on the freedom of establishment and not the rules on the free movement of capital (see, to that effect, judgment of 27 February 2019, *Associação Peço a Palavra and Others*, C-563/17, EU:C:2019:144, paragraph 43 and the case-law cited).

43 In the present case, the acquisition of all the shares in a company is undoubtedly sufficient to allow the acquiring company involved to exert a definite influence on the management and control of the acquired company (see, by analogy, judgment of 27 February 2019, *Associação Peço a Palavra and Others*, C-563/17, EU:C:2019:144, paragraph 44).

44 In that context, it must be pointed out that, in accordance with Article 54 TFEU, freedom of establishment is enjoyed, inter alia, by companies or firms constituted under civil or commercial law, provided that they are formed in accordance with the law of a Member State and have their registered office, central administration or principal place of business within the European Union, that is to say, companies or firms which have the nationality of a Member State.

45 In that regard, it should be borne in mind, first, that the location of the registered office, central administration or principal place of business of the companies or firms referred to in Article 54 TFEU serves as the connecting factor with the legal system of a particular Member State in the same way as does nationality in the case of a natural person (judgment of 30 September 2003, *Inspire Art*, C-167/01, EU:C:2003:512, paragraph 97).

46 Secondly, it does not follow from any provision of EU law that the origin of the shareholders, whether natural or legal persons, of companies resident in the European Union affects the right of those companies to rely on freedom of establishment, since the status of an EU company is based, under Article 54 TFEU, on the location of the registered office and the legal order of which the company is incorporated, and not on the nationality of its shareholders (judgment of 1 April 2014, *Felixstowe Dock and Railway Company and Others*, C-80/12, EU:C:2014:200, paragraph 40).

47 It follows that a company such as Xella Magyarország, even though it is part of a group of companies whose ultimate parent company is established in a third country, has the right to rely on the freedom of establishment guaranteed by the TFEU since it is connected to the legal system of a Member State and is therefore an EU company.

48 Accordingly, the origin of Xella Magyarország's shareholders cannot in any event be relied on to deny that company the benefit of the freedom of establishment, particularly since it is common ground that the ultimate owner of the group of which it forms part is an Irish national.

49 Thus, the first question referred for a preliminary ruling must be examined solely in the light of the provisions of the TFEU on freedom of establishment.

Admissibility of the first question

50 As regards the admissibility of the first question referred for a preliminary ruling, since it has been concluded in the previous paragraph that it is appropriate to answer that question solely in the light of the provisions of the TFEU on freedom of establishment, it must be borne in mind that those

provisions are not applicable to a situation which is confined in all respects within a single Member State (judgment of 7 September 2022, *Cilevičs and Others*, C-391/20, EU:C:2022:638, paragraph 31 and the case-law cited).

51 In that regard, all the factors characterising the situation at issue in the main proceedings appear, prima facie, to be confined within a single Member State since, first, both Xella Magyarország, the acquiring company, and Janes és Társa, the acquired company, are companies resident in the Member State concerned and, secondly, that question concerns the compatibility with the provisions of the TFEU on freedom of establishment of national legislation allowing that Member State to prohibit investments in resident companies regarded as strategic companies.

52 However, the fact that the acquiring company forms part of a group of companies established, inter alia, in different Member States, even if those companies do not appear to play any direct role in the acquisition concerned, constitutes a relevant foreign element for the purposes of answering the first question referred for a preliminary ruling.

53 The first question raised by the referring court expressly concerns the compatibility with EU law of Paragraph 276(2)(a) of the Vmtv, a provision which that court cites and which is applied in the decision at issue in the main proceedings.

54 According to the very wording of that national provision, the national legislation at issue in the main proceedings applies to resident companies and to companies registered in other Member States acquiring a shareholding in a strategic company, where the person exercising majority control over those companies is a natural or legal person originating in a third country.

55 Thus, in the decision at issue in the main proceedings, that national provision was applied in the light of the fact that the group of companies, namely the Xella group, which includes, in addition to the acquiring company, inter alia, the parent German company and its 'grandparent' Luxembourg company, is in turn controlled by another group of companies, namely the Lone Star group, the ultimate parent company of which is registered in a third country, that is to say, in Bermuda.

56 Consequently, the cross-border ownership structure of the resident acquiring company within the European Union which characterises the situation at issue in the main proceedings is a relevant foreign element for the purposes of answering the first question referred for a preliminary ruling.

57 That question is therefore admissible.

Whether there is a restriction on the freedom of establishment

58 According to the Court's settled case-law, all measures which prohibit, impede or render less attractive the exercise of freedom of establishment must be considered to be restrictions on that freedom within the meaning of Article 49 TFEU (judgment of 27 February 2019, *Associação Peço a Palavra and Others*, C-563/17, EU:C:2019:144, paragraph 54 and the case-law cited).

59 The national legislation concerned, as applied in the decision at issue in the main proceedings, in so far as it allows the authorities of a Member State to prohibit an EU company, on grounds of security and public policy, from acquiring a shareholding in a 'strategic' resident company allowing it to exert a definite influence on the management and control of that company, clearly constitutes a restriction on the freedom of establishment of that EU company, in this case a particularly serious restriction.

As to whether the restriction on the freedom of establishment is justified

60 It follows from settled case-law of the Court that a restriction on a fundamental freedom guaranteed by the TFEU may be permitted only if the national measure in question meets an overriding reason

relating to the public interest, that it is appropriate to ensure that the objective it pursues is achieved and that it does not go beyond what is necessary to achieve it (judgment of 3 February 2021, *Fussl Modestraße Mayr*, C-555/19, EU:C:2021:89, paragraph 52 and the case-law cited).

61 As regards the existence of an overriding reason relating to the public interest capable of justifying the restriction on the freedom of establishment entailed by the national legislation at issue in the main proceedings, it is apparent from the order for reference that, in so far as it allows, inter alia, the acquisition of ownership of strategic resident companies to be prohibited if that acquisition harms or threatens to harm a national interest, that legislation is intended, inter alia, to ensure the security and the continuity of supply 'as regards basic social needs', in accordance, in particular, with Article 52(1) TFEU.

62 In the present case, as is apparent from the decision at issue in the main proceedings, as summarised in the order for reference, what is at issue is the specific national interest in ensuring the security and the continuity of supply to the construction sector, in particular at the local level, as regards certain basic raw materials, namely gravel, sand and clay, resulting from extractive activities in the national territory.

63 In that regard, Article 52(1) TFEU provides that a restriction on the freedom of establishment may be justified on grounds of public policy, public security or public health.

64 It is settled case-law that purely economic grounds, such as, in particular, promotion of the national economy or its proper functioning, cannot serve as justification for an obstacle to one of the fundamental freedoms enshrined in the Treaties (judgment of 27 February 2019, *Associação Peço a Palavra and Others*, C-563/17, EU:C:2019:144, paragraph 70 and the case-law cited).

65 However, the Court has acknowledged that reasons of an economic nature in the pursuit of an objective in the public interest or the guarantee of a service of general interest may constitute an overriding reason in the public interest capable of justifying an obstacle to one of the fundamental freedoms enshrined in the Treaties (see, to that effect, judgments of 22 October 2013, *Essent and Others*, C-105/12 to C-107/12, EU:C:2013:677, paragraph 53, and of 27 February 2019, *Associação Peço a Palavra and Others*, C-563/17, EU:C:2019:144, paragraph 72 and the case-law cited).

66 It is nevertheless clear from the case-law of the Court that, while Member States are still, in principle, free to determine the requirements of public policy and public security in the light of their national needs, those grounds must, in the EU context and, in particular, as derogations from a fundamental freedom enshrined in the TFEU, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the EU institutions. Thus, public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. Moreover, those derogations must not be misapplied so as, in fact, to serve purely economic ends (see, to that effect, judgment of 14 March 2000, *Église de scientologie*, C-54/99, EU:C:2000:124, paragraph 17 and the case-law cited).

67 As regards specifically an objective linked to security of supply, the Court has held that such an objective may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (judgment of 8 November 2012, *Commission* v *Greece*, C-244/11, EU:C:2012:694, paragraph 67 and the case-law cited).

68 In the case of undertakings carrying out activities and supplying public services in the petroleum, telecommunications and energy sectors, the Court has held that the objective of guaranteeing the security of supply of such products or the supply of such services in the event of a crisis, on the territory of the Member State concerned, may constitute a public security reason and, therefore, possibly justify an obstacle to a fundamental freedom (see, to that effect, judgment of 8 November 2012, *Commission* v *Greece*, C-244/11, EU:C:2012:694, paragraph 65 and the case-law cited).

69 However, it cannot be held that the objective at issue in the main proceedings, in so far as it seeks to ensure the security of supply to the construction sector, in particular at the local level, as regards certain basic raw materials, namely gravel, sand and clay, resulting from extractive activities, concerns, like the objective of ensuring security of supply in the petroleum, telecommunications and energy sectors, a 'fundamental interest of society', within the meaning of the case-law referred to in paragraphs 66 and 67 above, with the result that it is not appropriate to apply the case-law referred to in paragraph 68 above to that objective.

70 It must also be noted that, in the present case, that objective is relied on to justify a restriction on the freedom of establishment which, as mentioned in paragraph 59 above, must be regarded as particularly serious, since the decision at issue in the main proceedings excludes the exercise of that fundamental freedom by an EU company.

71 Furthermore, it does not appear, in the light of the documents before the Court and subject to verification by the referring court, that, as regards the supply of basic raw materials to the local construction sector, the acquisition prohibited by the decision at issue in the main proceedings is actually capable of giving rise to a 'genuine and sufficiently serious threat', within the meaning of the case-law referred to in paragraphs 66 and 67 above.

72 In that regard, it appears to be common ground, first, that, prior to that acquisition, the acquiring company had already purchased approximately 90% of the production of the basic raw materials concerned from the quarry of the acquired company in order to process them in its factory near that quarry and that the remaining 10% of that production were purchased by local undertakings in the construction sector.

73 Secondly, it is well known that, since those raw materials have, by their very nature, a relatively low market value compared, above all, with their transport cost, the risk that a significant part of the basic raw materials extracted from that quarry would be exported rather than sold on the local market appears unlikely or even non-existent in practice.

74 In the light of all the foregoing considerations, the answer to the first question is that the provisions of the TFEU on freedom of establishment must be interpreted as precluding a foreign investment filtering mechanism provided for by the legislation of a Member State by means of which a resident company which is a member of a group of companies established in several Member States, over which an undertaking from a third country has decisive influence, may be prohibited from acquiring ownership of another resident company regarded as strategic, on the ground that the acquisition harms or risks harming the national interest in ensuring the security of supply to the construction sector, in particular at the local level, with respect to basic raw materials such as gravel, sand and clay.

The second question

75 Since the referring court has asked its second question only in the event that the first question is answered in the affirmative and the first question has been answered in the negative, there is no need to answer the second question.

Costs

76 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 (Second Chamber) hereby rules:

The provisions of the TFEU on freedom of establishment

must be interpreted as precluding a foreign investment filtering mechanism provided for by the legislation of a Member State by means of which a resident company which is a member of a group of companies established in several Member States, over which an undertaking of a third country has decisive influence, may be prohibited from acquiring ownership of another resident company regarded as strategic, on the ground that the acquisition harms or risks harming the national interest in ensuring the security of supply to the construction sector, in particular at the local level, with respect to basic raw materials such as gravel, sand and clay.

[Signatures]

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* Language of the case: Hungarian.