COURT OF JUSTICE
OF THE EUROPEAN UNION

PRESS RELEASE No 57/23
Luxembourg, 30 March 2023

Advocate General's Opinion in Case C-106/22 | Xella Magyarország

Advocate General Ćapeta: EU law does not, in principle, preclude national legislation which allows for the screening of foreign direct investment of third country provenance even if implemented via an EU-based company

Such national legislation falls within the scope of the FDI Screening Regulation[1] and thus must ensure that individual screening decisions are justified and comply with requirements of proportionality as required by the Treaty rules on the free movement of capital and the freedom of establishment

In 2021, the Hungarian Minister for Innovation and Technology blocked the acquisition of a Hungarian company by another Hungarian company. The former company owns a quarry from which sand, clay and gravel are extracted. In its decision, the Minister explained that it would be contrary to Hungarian national interests, including the security of supply of those raw materials, to allow a company with indirect third country (Bermudan) ownership to take control of such a 'strategic' company.

In deciding on the validity of the Minister's decision to prevent the acquisition, the Fővárosi Törvényszék (Budapest High Court, Hungary) has, in essence, asked whether EU law permits Hungary to put in place legislation which restricts foreign direct investment in EU-based companies if such investments are implemented via another EU-based company.

In today's Opinion, Advocate General Tamara Ćapeta considers first, that **foreign direct investments of third country provenance fall within the scope of the FDI Screening Regulation.** That regulation **covers investments of any type by which the third-country investor gains effective participation or control over an EU company**. That also **includes investment whereby a third-country investor *indirectly* gains control over an EU company, through acquisition of an EU company by another EU company, which is owned by that third country company**.

Such investment falls within the scope of Article 207 TFEU and thus within the scope of the **EU's exclusive competence** in the field of common commercial policy. Therefore, **the FDI Screening Regulation, which enables Member States' to enact screening mechanisms, should be understood as 'delegating' competences back to the Member States** in an area in which they had previously lost them with the entry into force of the Lisbon Treaty.

Second, **national screening mechanisms**, enabled by the FDI Screening Regulation, **must also comply with the rules of the internal market**. National legislation has, therefore, to oblige those bodies that are responsible in adopting individual screening decisions to offer **legitimate justifications** for restricting capital flows. It flows from the FDI Screening Regulation that **restrictions on capital movements may only be justified on grounds of**

[1] 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 investments into the Union (OJ 2019 L 79I, p. 1).

security or public order. Such justifications can be relied upon **only if there is a genuine and sufficiently serious threat to a fundamental interest to society**. Further, any measure restricting capital flows has to be **proportionate** to the aim it pursues.

Looking at the justification for the Minister's veto at issue in the present case, the Advocate General recognises that **securing the supply of certain raw materials may, in times of crisis, be capable of justifying a restriction on foreign direct investment** on grounds of public policy (or public security). **These reasons may even justify restrictions of capital movement from third countries that otherwise cannot be accepted within the internal market**.

In order to decide on the validity of the decision prohibiting the transaction at issue in this case, the national court has to assess whether the Hungarian Minister for Innovation and Technology has sufficiently explained why the indirect foreign ownership in the quarry at issue represents a genuine and serious threat to the security of supply of gravel, sand and clay in Hungary and whether the security of such supply could not have been achieved by a less restrictive measure.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

The full text of the Opinion is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ✆ (+352) 4303 3355.