

Case C-106/22

Summary of the request for a preliminary ruling made under Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

15 February 2022

Referring court:

Fővárosi Törvényszék (Budapest High Court, Hungary)

Date of the decision to refer:

1 February 2022

Applicant:

Xella Magyarország Építőanyagipari Kft.

Competent authority to which the application was made:

Innovációs és Technológiai Miniszter (Hungarian Minister for Innovation and Technology)

Subject matter of the main proceedings

Application for annulment of a ministerial resolution prohibiting a foreign investor from acquiring shares in a strategic company.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of Article 65(1)(b) TFEU.

Legal basis: Article 267 TFEU.

Questions referred

(1) Having regard to recitals 4 and 6 of Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union and to Article 4(2) TEU, must Article 65(1)(b) TFEU be interpreted as meaning that it permits the laying down of rules such as those in Paragraph 85 of veszélyhelyzet

megszűnésével összefüggő átmeneti szabályokról és a járványügyi készségről szóló 2020. évi LVIII. törvény (Law LVIII of 2020 on transitional provisions relating to the end of the state of emergency and to the pandemic crisis), 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?

Provisions of EU law relied upon

- Article 4(2) TEU.
- Article 63(1) and Article 65(1)(b) TFEU.
- 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 79 I, p. 1), recitals 4 and 6 and Article 4(2).
- Communication from the Commission entitled ‘Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452’ (OJ 2020 C 99 I, p. 1).

Provisions of national law relied upon

- Provisions of the veszélyhelyzet megszűnésével összefüggő átmeneti szabályokról és a járványügyi készségről szóló 2020. évi LVIII. törvény (Law LVIII of 2020 on transitional provisions relating to the end of the state of emergency and to the pandemic crisis) (‘Law LVIII of 2020’) that were in force at the time of the facts in the main proceedings:

‘Paragraph 276

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, another EU Member State of the European Union or a third country belonging to the European Economic Area or in the Swiss Confederation which acquires a specific holding or influence in a commercial company whose registered office is in Hungary and which carries on a specific activity in accordance with Paragraph 277(2), wherever the person having a decisive influence, in accordance with the Law approving the Hungarian Civil Code, over that legal person or other entity is either a natural person who is a national of a country that does not belong to the European Union or to the European Economic Area and is not the Swiss Confederation, or a legal person or other entity registered in a country that does not belong to the European Union or to the European Economic Area and is not the Swiss Confederation;
 - b) any natural person who is a national of a country that does not belong to the European Union or to the European Economic Area and is not the Swiss Confederation, or any legal person or other entity registered in a country that does not belong to the European Union or to the European Economic Area and is not the Swiss Confederation;
3. “strategic company” shall mean: any limited liability company (*korlátolt felelősségű társaság*), private company limited by shares not listed on a stock exchange (*zártkörűen működő részvénytársaság*) or public company limited by shares listed on a stock exchange (*nyilvánosan működő részvénytársaság*), whose registered office is in Hungary and whose principal activity or one of whose activities, as defined by government decree, belongs 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 (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.

Paragraph 277

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 (collectively, “legal transaction”) has the effects defined in paragraphs 2 to 4, it must be notified to the minister for the national economy (for the purposes of this section, “the Minister”), and acknowledgement of receipt of that notification must be obtained, by 31 December 2020 in respect of the following legal transactions:

- a) the transfer of some or all of the holdings in a strategic company by any form of transfer of ownership, including contributions, whether for valuable consideration or otherwise;

...

Paragraph 283

- 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 damaged or threatened or may be damaged or threatened, having regard in particular to the guarantee of the coverage of basic social needs in accordance with Article 36 and Articles 52(1) and 65(1) TFEU;

...

- 2. The Minister shall, within 30 days from receiving the notification – or, in the situation under paragraph 3, within the period indicated in that paragraph –, if the circumstances defined in subparagraphs 1(b) to (e)

...

- b) are satisfied, prohibit acquisition of the ownership or of the right of ownership over bonds, right of usufruct or operating right (“the prohibition decision”).’

- The Magyarországi székhelyű gazdasági társaságok gazdasági célú védelméhez szükséges tevékenységi körök meghatározásáról szóló 289/2020. (VI. 17.) Korm. rendelet (Government decree 289/2020 of 17 June 2020 defining the areas of activity necessary for the economic protection of commercial companies whose registered office is in Hungary):

‘Paragraph 1

Annex 1 defines the areas of activity on the basis of which commercial companies whose registered office is in Hungary shall be considered to belong to a sector of strategic importance.

...

Annex 1 to Government decree 289/2020 of 17 June 2020

...

[heading] 22. – Critically important raw materials – [point] 8: other type of mining and quarrying’.

Brief description of the facts and the main proceedings

- 1 The main activity of the applicant in the main proceedings, Xella Magyarország Építőanyagipari Kft. (‘Xella’), is the production of concrete products for construction purposes. Xella is directly owned by the German company Xella Baustoffe GmbH. That German company is owned by a company whose registered office is in Luxembourg, Xella International S.A., which in turn is owned by LSFIO XL Investments Limited, a company registered in Bermuda. That ownership structure was created by the Xella group being sold to a subsidiary of Lone Star by the United States investment group Goldman Sachs in 2016. In 2017 the European Commission decided not to oppose that merger (Case M.8604 – Xella International / Ursa). The founder and beneficial owner of Lone Star is a natural person with Irish nationality.
- 2 The company ‘Janes és Társa’ Szállítmányozó, Kereskedelmi és Vendéglátó Kft. (‘Janes’) is engaged in the extraction of sand, gravel and clay and owns a mine in Hungary. Under Paragraph 276(3) of Law LVIII of 2020, in conjunction with Article 4(1)(c) of Regulation 2019/462 and Annex 1, heading 22, point 8 to Government decree 289/2020, Janes is considered to be a strategic company. The raw materials extracted by Janes represent 0.52% of national production. Approximately 90% of that production is acquired by Xella and the remaining 10% by local building undertakings.
- 3 With a view to acquiring a 100% holding in Janes, on 29 October 2020 Xella entered into a sale and purchase agreement and sent notification to the competent authority in the main proceedings, the Minister for Innovation and Technology (‘the Minister’), as required under Paragraph 277(1)(a) of Law LVIII of 2020, requesting acknowledgement of receipt of the notification of the legal transaction.
- 4 By decision of 30 December 2020, the Minister prohibited implementation of the legal transaction. Xella appealed against that decision to the Fővárosi Törvényszék (Budapest High Court, Hungary), which found that the Minister had not complied with the procedural rules and had not complied with the duty to state reasons. The Fővárosi Törvényszék (Budapest High Court) therefore annulled the decision and ordered the Minister to commence a new procedure.
- 5 By the decision made in the new procedure (‘the contested decision’), the Minister again prohibited implementation of the legal transaction at issue. Xella brought non-contentious administrative proceedings before the Fővárosi Törvényszék (Budapest High Court) in relation to that latter decision. That court has referred two questions to the Court of Justice for a preliminary ruling.

Principal arguments of the parties in the main proceedings

- 6 In the statement of reasons of the contested decision, the Minister notes that Xella's ownership structure consists of direct ownership by a German company and indirect ownership by Luxembourg and Bermudan companies. According to the Minister, one of the problems affecting the construction sector in Hungary is the scarcity of sufficient quantities of building materials. In the field of the production of additives for construction, a significant market share is already held by Hungarian producers in foreign hands, primarily as a result of the botched privatisation in the 1990s and 2000s. If Janes were to fall into Bermudan hands, it would represent a long-term risk in terms of ensuring the supply of building materials.
- 7 The Minister also highlights that it is strategically important that the extraction and supply of raw materials is secure and foreseeable. It has become very evident in the context of the Covid-19 pandemic that the operation of global supply networks can quickly suffer serious disruptions that are harmful to the national economy. Since Xella belongs to a Bermudan company, the acquisition of Janes enables a third-country, that is to say, foreign, undertaking to acquire influence. If Janes, a strategic company, were to pass into foreign hands, the proportion of undertakings belonging to Hungarian nationals would be reduced, which could damage the national interest in the broad sense. The intended legal transaction could also jeopardise the security of supply in the regions in which Janes has its registered office. Bearing in mind that the prices of building materials are also increasing, the acquisition of Janes by a foreign undertaking means that particular investments in Hungary may not be made at all or may be delayed.
- 8 In response to the foregoing, Xella claims that the contested decision amounts to an administrative practice contrary to Article 65(3) TFEU amounting to arbitrary discrimination or a disguised restriction on the free movement of capital. Xella states in that respect that its beneficial owner is a natural person who is a national of an EU Member State and that the Minister has barred Xella from acquiring the ownership at issue solely because its ownership structure is not Hungarian. Lastly, Xella notes that the principle of the rule of law could be infringed because the concept of 'national interest' is unclear.

Brief description of the grounds of the request for a preliminary ruling

- 9 According to the referring court, in order to resolve the dispute in the main proceedings it is necessary to examine the relationship between the national rules under Law LVIII of 2020 and EU law. In particular, doubt arises as to how the provisions of national law used to justify prohibiting Xella's intended legal transaction dovetail with Article 65(1)(b) TFEU and with the public policy exception in that article, having regard to recitals 4 and 6 of Regulation 2019/452 and Article 4(2) TEU.

- 10 The referring court refers to the statement of reasons annexed to the draft of Law LVIII of 2020 during the legislative process. Although under Hungarian law that statement of reasons is not binding, according to the Hungarian Constitution it must be taken into consideration when interpreting legislation on the basis of purpose.
- 11 According to that statement of reasons, in order to mitigate the economic effects of the pandemic, economic operators in strategic sectors of the national economy must be protected. Against that background, there needs to be protection from acquisitions that have adverse effects on the national economy, sideline innovation and the development of the Hungarian economy, reduce national capacity and represent a threat to jobs.
- 12 The Hungarian legislature later extended the temporary validity of the legislation approved on the aforementioned grounds for legal transactions taking place up to 30 June 2021 and, subsequently, up to 31 December 2021. In view of the date of Xella's intended legal transaction, the original restriction in force until 31 December 2020 applies to the dispute in the main proceedings.
- 13 As regards the relevant circumstances of general interest, the referring court emphasises that the products that Janes extracts qualify as essential raw materials and, therefore, are of critical importance for construction activities in the Member State. Any fluctuations in or interruptions of the supply of raw materials would adversely affect first of all small and medium-sized enterprises in the construction sector of the Member State. Those small and medium-sized enterprises – which according to data for 2018 employed nearly two thirds of the workers employed in businesses in Hungary – are increasingly exposed to the economic crisis caused by the measures adopted to combat the pandemic. The referring court mentions – as a lesson to be learned from history and a well-known fact – that in times of economic crisis the flow of capital is also driven by speculation consisting of the acquisition of sources of raw materials at low prices. The European Union has acknowledged the link between the economic crisis associated with the pandemic and speculative movements of capital (see the Communication from the Commission published in OJ 2020 C 99 I p. 1).
- 14 It can be seen from the foregoing that legal transactions capable of jeopardising the security of supply in strategic sectors may be examined under Law LVIII of 2020. That examination supplements the instruments available in EU law. First, an examination under Law LVIII of 2020 relates not only to direct foreign investment but also to indirect foreign investment. Secondly, where the specific case can be regarded as falling within the public policy exception under Article 65(1)(b) TFEU, Law LVIII of 2020 allows that exception to be extended to apply to the guarantee of supply for purposes other than purely economic protection.
- 15 As regards ensuring supply, the referring court finds that, for the purposes of the analysis, it is necessary to consider who is affected by the potential adverse

effects. If the small and medium-sized enterprises operating in the construction sector cannot obtain essential raw materials and, as a result of the pandemic-related restrictions, the fact that the supply is substitutable likewise cannot remedy those adverse effects, the measures to counter the adverse effects at regional level can be found to have a legally justified purpose. Those regional level adverse effects may result in the paralysation of the small and medium-sized enterprises that use the raw materials concerned, a reduction in the regional employment rate, the bankruptcy of the owners of the small and medium-sized enterprises or the suspension of certain projects financed by national and/or EU funds. According to the referring court, those adverse effects justify applying the public policy exception, even though EU case-law does not yet contain any example of that exception being recognised.

- 16 According to the referring court, when assessing the national provisions relating to examination of foreign direct investment, where the acquiring company is considered to be a foreign investor because at the end of the chain of ownership there is a legal person registered in a third country, it is necessary to determine whether the fact that the European Commission has decided not to oppose that chain of ownership in a merger control procedure in itself precludes the examination under the national provisions.