OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 30 March 2023(1)

Case C-106/22

Xella Magyarország Építőanyagipari Kft.
v
Innovációs és Technológiai Miniszter,
joined party:
'JANES ÉS TÁRSA' Szállítmányozó, Kereskedelmi és Vendéglátó Kft.

(Request for a preliminary ruling from the Fővárosi Törvényszék (Budapest High Court, Hungary))

(Reference for a preliminary ruling – Jurisdiction – Freedom of establishment – Free movement of capital – Regulation (EU) 2019/452 – Investment screening – Decision to block the acquisition by one EU company of another EU company due to the foreign ownership structure of the former company and the strategic status of the target company)

I. Introduction

1. The background to the present case is set in the village of Lázi in Győr-Moson-Sopron County (Hungary), where there is a quarry from which sand, clay and gravel are extracted. The Hungarian Minister for Innovation and Technology ('the Minister') blocked the proposed acquisition by the applicant, a Hungarian company, of another Hungarian company which owned the quarry in question. In the decision substantiating that veto, the Minister explained that it would be contrary to Hungarian national interests to allow a company with indirect Bermudan ownership to take control of a company which is active in the field of the extraction of construction aggregates.

2. That decision was challenged before the Fővárosi Törvényszék (Budapest High Court, Hungary). In its request for a preliminary ruling, that court seeks guidance, in particular, on whether the Hungarian law which allowed the Minister to veto the transaction at issue is compatible with Article 65(1)(b) TFEU and Regulation (EU) 2019/452 ('the FDI Screening Regulation'). (2)

3. The more important question that the Court will therefore have to answer is whether the presence of third-country shareholding in an EU undertaking may, in certain circumstances, have the potential to threaten the national public policy or public security of the Member States. Had I received such a question 20 years ago, there would have been little doubt in my mind that it concerned protectionism of the kind not tolerated by a free and open market economy.

4. However, in those days, concepts like ‘friend-shoring’ or ‘outbound investment screening’ were less well known outside national security circles, and would certainly have been deemed dirty by the convinced globalisationist. (3) Now, however, those concepts are set to shape the European Union’s new trade policy objectives. (4)

5. The world has changed, as every EU citizen has seen and felt, whether in the form of empty supermarket shelves or higher energy bills. Indeed, the Russian aggression in Ukraine has laid painfully bare the dangers of the dependency on the goodwill of yesterday’s trading partners. (5) Accordingly, and particularly when presented with measures that arguably represent a step backwards in the openness of the European Union’s internal market vis-à-vis trade with third countries, one should not jump to conclusions too quickly: tomorrow’s strategic geopolitical interests have the potential to influence today’s commitments to free trade.

6. How are these interests translated into law and how is the regulatory power divided between the European Union and its Member States? The present case requires the Court to unpick this constitutional question of EU competences over direct investments of third-country provenance. Of particular weight in that assessment will be the addition by the Treaty of Lisbon of the concept of ‘*foreign direct* investment’ to the scope of the common commercial policy. How does that square with the concept of ‘*direct* investment’ as it appears in the rules on the free movement of capital? To what extent do direct investments from abroad fall within the European Union’s exclusive competence to regulate trade and to what extent do they remain part of the shared competence of the internal market? The answer to those questions should, in turn, clarify how much discretion the Member States enjoy under today’s Treaty framework to screen and block the acquisition of companies situated on their territory on grounds of public policy or public security.

II. The legal and factual context of the present case and the questions referred for a preliminary ruling

7. Xella Magyarország Építőanyagipari Kft. (‘the applicant’) is a Hungarian company that produces concrete products for construction purposes. It is 100% owned by a German company, Xella Baustoffe GmbH (‘Xella Germany’). That German company is owned by a Luxembourg company, Xella International SA (‘Xella Luxembourg’), which, in turn, is owned by LSF10 XL Investments Limited, registered in Bermuda (‘the Bermudan company’). It appears from the referring court’s reference that the Bermudan company is a subsidiary of Lone Star Funds X (‘Lone Star’), a United States private equity firm. The founder and owner of Lone Star is a natural person with Irish nationality.

8. „Janes és Társa” Szállítmányozó, Kereskedelmi és Vendéglátó Kft. (‘Janes’) is a Hungarian company which owns a quarry in Hungary. It is engaged in the extraction of certain construction aggregates, namely sand, gravel and clay. Its production of those aggregates represents 0.52% of Hungary’s national production. According to the referring court, the applicant is Janes’ biggest buyer, acquiring approximately 90% of its total production. The remaining 10% of material extracted by Janes is acquired by local building undertakings.

9. On 29 October 2020, the applicant negotiated the takeover of 100% of the holdings in Janes.

10. The Hungarian law at issue in this case (‘Law LVIII 2020’) (6) inter alia requires that takeovers by ‘foreign investors’ of ‘strategic companies’ be notified to the Minister. Under Paragraph 276, point 2(a) of that act, the concept of ‘foreign investor’ not only encompasses a national or legal person of a third country, but also a company registered in Hungary or in another Member State in which a third-country natural or legal person holds ‘majority control’. (7) By virtue of the activities covered by Annex 1, category 22 (‘critically important raw materials’), subcategory 8 (‘other type of mining and quarrying’) to Government Decree 289/2020, (8) it appears accepted that Janes is deemed a ‘strategic company’ for the purposes of Law LVIII

2020. (9)

11. Given its indirect foreign shareholding and the designation of Janes as a 'strategic company', the applicant notified the Minister of the proposed takeover.

12. By decision of 20 July 2021, the Minister blocked that acquisition ('the contested decision'). That decision was adopted pursuant to Paragraph 283 of Law LVIII 2020, which empowers the Minister to examine whether the notified transaction damages or threatens to damage Hungarian national interests, public security or public policy. If the Minister deems that to be the case, the transaction is to be blocked.

13. In the statement of reasons accompanying the contested decision, the Minister notes that the applicant'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 construction aggregates, a significant market share is already owned by foreign companies. The Minister also emphasises that it is strategically important that the extraction and supply of raw materials is secure and foreseeable. If Janes were to fall into Bermudan hands, this would represent a long-term risk in terms of ensuring the supply of building materials.

14. The applicant challenges the contested decision before the referring court. In essence, it claims that it represents a restriction on the free movement of capital which cannot be justified under Article 65(1)(b) TFEU.

15. Against that factual and legal background, the Fővárosi Törvényszék (Budapest High Court) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(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 Title 85 of [Law LVIII 2020], and in particular those in Paragraph 276, points 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?'

16. Written observations have been submitted by the applicant, the Italian and Hungarian Governments as well as the European Commission. The Hungarian Government and Commission presented oral argument at the hearing that took place on 8 December 2022.

III. Analysis

17. This Opinion is structured as follows. I will start by explaining my understanding of the reasons why the referring court put the first question to the Court. (10) Accordingly, I propose to reformulate that question (A). I will then assess how EU law applies to Member States' foreign direct investment screening mechanisms (B). The answer to that question is relevant for both the jurisdiction of the Court (C) and the assessment of compatibility of Law LVIII 2020 with EU law, to which I will turn in the last part of the Opinion (D).

A. Reformulating the national court's first question

18. The referring court is faced with the decision whether to uphold or annul the contested decision. Its first question is, however, not formulated in such a way as to ask the Court about the compatibility of that decision with EU law. Rather, it appears to enquire only about one possible scenario in which that decision would be deemed invalid: the lack of *competence* on the part of Hungary to put adopt Law LVIII 2020. If Hungary were not allowed to enact Law LVIII 2020 in the first place, the contested decision would automatically fall with it.

19. The referring court expressed its concern primarily as regards the conformity with EU law of two provisions of Law LVIII 2020, thus raising two separate issues of interpretation of EU law. First, the reference to Paragraph 276, point 2(a) of that law, in particular, raises the question of whether national foreign direct investment screening mechanisms can cover direct investments of third-country provenance which are carried out through EU-based companies. Second, the reference to Paragraph 283(1)(b) raises the question as to what conditions required by EU law for the adoption of individual screening decisions.

20. In my view, the answer to be provided by the Court will not necessarily leave the referring court with a binary option (that is, either to find that law valid on the question of competence and applicable in the present case, or to find it contrary to EU law and therefore inapplicable). Rather, the answer the Court is to give to the first question should also serve as a yardstick for the referring court of what is required under EU law in order for decisions enacted on the basis of Law LVIII 2020 to be deemed substantively valid. Therefore, even if the answer arising from the present case would allow the referring court to conclude that Law LVIII 2020, if interpreted in conformity with EU law, could be used as a legal basis for screening decisions taken by the Minister, that does not necessarily lead to the conclusion that the specific decision at issue in this case can also be deemed valid. The referring court must still itself determine whether that decision satisfies the requirements imposed under EU law.

21. I therefore propose to reformulate the first question as follows: do Article 4(2) TEU, Article 65(1)(b) TFEU and the FDI Screening Regulation allow, and if so under which conditions, a Member State to enact a law which obliges EU undertakings that are indirectly controlled by a third-country natural or legal person to notify the intention to acquire control over an undertaking registered in that Member State and which, after that notification, empowers the authorities to block the notified acquisition on the ground that it might threaten the Member State's national interests, public policy or public security by reason of the fact that the undertaking to be acquired extracts raw materials such as sand, gravel and clay and supplies the local construction sector with those materials?

B. How does EU law apply to national foreign direct investment screening mechanisms?

22. The referring court questions the conformity of Law LVIII 2020 with EU law, and refers in its question to Article 65(1) TFEU and the FDI Screening Regulation. The Commission, for its part, considers the FDI Screening Regulation to be inapplicable. It suggests that the present case must be resolved solely on the basis of the Treaty provisions on the freedom of establishment. It is, therefore, necessary first to unravel which of these various elements of primary and secondary EU law are relevant for answering the first question put to the Court.

1. The interplay of internal market and common commercial policy competences

23. The Treaty of Lisbon enlarged the scope of the common commercial policy by including 'foreign direct investment' within the competences listed in Article 207(1) TFEU. In Opinion 2/15 *(EU-Singapore Free Trade Agreement)*, (11) the Court for the first time gave meaning to that addition. It explained that that concept must be understood as encompassing 'investments made by natural or legal persons of [a] third State in the European Union and vice versa *which enable effective participation in the management or control of a company* carrying out an economic activity'. (12) To explain the concept of 'foreign direct investment' as contained in Article 207(1)

TFEU, the Court adopted the same definition as the one it had used to describe the internal market concept of 'direct investment'. It found that 'direct investment consists in investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity. Acquisition of a holding in an undertaking constituted as a company limited by shares is a direct investment where the shares held by the shareholder enable him [or her] to participate effectively in the management of that company or in its control.' (13)

24. Two immediate consequences flow from the quoted parts of that opinion. First, the Court's interpretation exports to the common commercial policy domain the same definition of direct investment that has been used in the case-law in internal market cases for some time. (14) Second, the concept of foreign direct investment, as enshrined in Article 207(1) TFEU, excludes minority or short-term investment from the same domain. (15)

25. The common commercial policy forms part of the European Union's exclusive competences under Article 3(1)(e) TFEU. The inclusion of foreign direct investments within the scope of that policy enables the Union to pursue, in a comprehensive and coherent manner (that is, to the exclusion of potential regulation at Member State level), a trade policy which covers the entire life cycle of an investment conducted abroad. As such, the 'enlarged' scope of the common commercial policy ensures that the Union's commercial activities vis-à-vis third countries remain dynamic and able to evolve in tandem with the nature of international trade. (16)

26. That being said, I cannot help but notice a certain overlap and tension with the shared competence of the internal market which that addition has brought about.

27. Direct investment also forms part of the free movement of capital and thus falls within the scope of the internal market. (17) However, if investment crosses only EU internal borders, it may fall within the scope of either the freedom of establishment (Articles 49 and 54 TFEU) or the free movement of capital (Article 63(1) TFEU), depending on the form of participation at issue. (18) On the one hand, direct investment, that is to say, shareholding in an undertaking that enables an investor to participate effectively in that undertaking's management and control, is governed by the rules on freedom of establishment. (19) On the other hand, short-term or minority investments – that is to say, the acquisition of shares solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking in question – must be examined exclusively in the light of the free movement of capital. (20)

28. Whereas the regulation of investments in EU undertakings by other EU undertakings within the internal market is accordingly split between two market freedoms, third-country undertakings' investments are governed solely by the rules on the free movement of capital. The latter is unique in being the only Treaty-based market freedom that grants rights not only to EU subjects, but also to third-country undertakings.

29. It follows from the foregoing that, since the entry into force of the Treaty of Lisbon, investments of third-country provenance that enable effective participation or control in an undertaking are covered by two different EU competences: one exclusive (the common commercial policy) and one shared (the internal market provisions on the free movement of capital). Within each of those fields, the Member States have a different scope for unilateral regulatory action. They are, in principle, prevented from taking any unilateral action in the field of an exclusive competence (even if the Union has not acted), whereas, if a competence is shared, the Member States may act for as long as they are not pre-empted by measures adopted at EU level. (21)

30. This overlap raises the question of the boundary between those two types of competences and brings me to the application of the FDI Screening Regulation.

2. Explaining the FDI Screening Regulation

31. The FDI Screening Regulation, adopted as a common commercial policy measure on the basis of Article 207(1) TFEU, reflects the EU legislature's response to a perceived policy need that has arisen against the backdrop of changes to the global economic order. (22)

32. I would describe the FDI Screening Regulation as a kind of a platypus, a strange creature when compared to the 'ordinary' type of regulations envisaged by Article 288 TFEU. (23) By means of those legislative instruments, the EU legislature usually enacts binding rules that are directly applicable in all Member States. However, the FDI Screening Regulation does not impose binding rules, nor does it introduce a common foreign direct investment screening mechanism. Rather, it merely authorises, and thus does not even oblige, Member States to introduce legislation that governs the screening of foreign direct investment. (24) In addition to that authorisation, that regulation also establishes a framework of common standards that such national mechanisms (if established) must comply with, thereby only partially harmonising existing national legislation.

33. One way to explain that legislative choice is to view the FDI Screening Regulation as bridging the gap between the shared competence of regulating (foreign) direct investment from the internal market angle and that of establishing a uniform approach to the screening of 'foreign direct investments' in the exercise of the European Union's exclusive competence in the field of common commercial policy. (25)

34. To my mind, there is quite some force in that argument. The fact is that, prior to the entry into force of the FDI Screening Regulation, a number of Member States had measures in place to screen for movements of capital from third countries into their territory. (26) Those mechanisms reflected the concerns of the Member States with regard to public policy or public security that could be linked to certain capital movements from abroad. In line with the Member States' shared competence in matters relating to the internal market, it would have been entirely legitimate to base those national measures on the derogations allowed under Article 65(1)(b) TFEU. (27) However, since the inclusion, by the Treaty of Lisbon, of capital movements falling within the scope of 'foreign direct investment' within the exclusive common commercial policy competence, those national mechanisms regulating capital movements from third countries arguably became invalid.

35. Assessed in that light, the FDI Screening Regulation may be understood as restoring the lawfulness of Member States' existing foreign direct investment screening mechanisms. (28) In other words, the FDI Screening Regulation 'delegates' competences back to the Member States in an area in which they lost them with the entry into force of the Treaty of Lisbon. (29)

36. A related question is whether the common commercial policy competence can be used as a tool to harmonise national laws. As explained, the FDI Screening Regulation contains some rules which must be followed by all Member States' screening mechanisms. As such, one could take the position that the harmonisation of national law allowing for the screening of foreign direct investments should be based on the internal market provisions, such as Article 64 TFEU. However, I am of the opinion that the mere fact that an EU measure harmonises national laws does not necessarily exclude it from the scope of the common commercial policy. Indeed, an EU measure may fall within the scope of the common commercial policy if that measure is 'essentially intended to promote, facilitate or govern [trade with one or more third countries] and has direct and immediate effects on it.' (30) It is clear that the harmonisation of national foreign direct investment screening mechanisms has such an impact. (31)

37. Taking the above into consideration, the FDI Screening Regulation, which at the same time preserves national screening mechanisms and introduces some common rules, may be understood as a way of giving effect to Article 207(6) TFEU. That provision states that competences conferred on the Union under the common commercial policy shall not affect the delimitation of competences between the Union and its Member States. Given that direct investment of third-country provenance

remains also an internal market matter (that is to say, a shared competence), the introduction of a common 'foreign' direct investment screening mechanism, which would supersede Member States' own mechanisms, would need to be justified in terms of subsidiarity. That could explain the choice of the EU legislature to opt (at least for the time being) (32)for a decentralised system of foreign direct investment screening that defers to the regulatory choices of the Member States. Those choices are, however, framed by the internal market rules, including those that govern derogations from fundamental market freedoms.

3. Does the FDI Screening Regulation apply to this case?

38. The foregoing leads me to conclude that there is no obstacle to subsume a national 'foreign' direct investment screening mechanism – such as the one established by Law LVIII 2020 – within the scope of the FDI Screening Regulation.

39. That brings me to the Commission's position. It considers that the FDI Screening Regulation cannot be applied to the present case, because EU undertakings cannot be subject to screening under that regulation. The applicant, whose proposed investment was blocked, is an EU-based company. Under Article 54 TFEU and the relevant case-law, the 'nationality' of a company depends only on its corporate seat, while its shareholding is irrelevant. (33)

40. At the hearing, the Commission pointed out that, according to Article 2(2) of the FDI Screening Regulation, a 'foreign investor' is an undertaking of a third country intending to make or having made a foreign direct investment. It placed particular emphasis on the fact that that definition covers only a natural or legal person '*of a third country*'. Accordingly, that regulation could not, in principle, apply to EU-based companies. The applicant, a Hungarian-registered company, could thus not be regarded as an undertaking of a third country. The FDI Screening Regulation would not apply '*ratione personae*'.

41. To my mind, in its observations on the non-applicability of the FDI Screening Regulation, the Commission conveniently overlooks Article 2, paragraph 1 thereof. That provision defines what is, for the purposes of that regulation, understood as foreign direct investment. It is '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.' (34)

42. The scope of the FDI Screening Regulation, as laid down in Article 1(1) thereof, covers the establishment of a framework for the screening by Member States of *foreign direct investments* into the European Union. That concept, in turn, encompasses any type of investment through which the foreign investor gains effective participation in or control over an EU undertaking.

43. It goes without saying that the FDI Screening Regulation targets only foreign investors. However, in order to enable control of those investors, it encapsulates all possible types of investment through which a foreign investor acquires control over an EU undertaking. In other words, it imposes no limitation as to the structure or the investment process itself. Accordingly, for an investment to fall within the scope of the FDI Screening Regulation, the investment process need not necessarily be conducted directly (such as where a foreign investor acquires control over an EU undertaking by directly buying its shares), but may be carried out indirectly (such as where a foreign investor acquires control over an EU undertaking by acquiring its shares through another EU undertaking). What matters is *who* ultimately *acquires control* over the EU undertaking in question.

44. The Italian Government supports that interpretation of the scope of the FDI Screening Regulation. That government also points to a relevant contextual argument in that respect. When setting out, in Article 4(2)(a) thereof, factors that may be taken into consideration in determining

whether a foreign direct investment is likely to affect security or public order, the FDI Screening Regulation states that account may be taken of 'whether the foreign investor is directly or indirectly controlled by the government'. Consequently, the Italian Government notes that if indirect control by a third-country investor is relevant for determining whether a third country is responsible for a given investment, it must also be relevant in the context of an EU-based investor, which may in fact be controlled by an investor from a third country. The FDI Screening Regulation therefore would include 'indirect' foreign direct investment.

45. To my mind, any other interpretation would run counter the purpose of the FDI Screening Regulation. That is, to enable the screening of foreign direct investments in order to establish whether the investment at issue could endanger (or at least threaten to endanger) the European Union's or the Member States' public policy or security. That applies as much to direct acquisitions from abroad as to arrangements by which capital is transferred to an EU-based entity for the purpose of acquiring a certain target. In my opinion, to accept the Commission's position and to use as a basis only the formal criterion of the seat of a company, without taking account of who acquires control of an investment target through a particular transaction, would be to ignore both the reality of doing business as well as the purpose of screening for foreign direct investment. (35)

46. Both in its written observations and at the hearing, the Commission took the position that 'indirect' foreign direct investments could fall within the scope of the FDI Screening Regulation *only* exceptionally, for the purposes of preventing the circumvention of screening mechanisms. The FDI Screening Regulation, it notes, refers to circumvention in recital 10 and requires, by virtue of Article 3(6) thereof, that those Member States which have screening mechanisms in place adopt the measures necessary to identify and prevent circumvention of national screening mechanisms and related screening decisions. The concept of 'circumvention' extends to 'investments from within the Union' only if those investments (i) are made 'by means of *artificial arrangements*'; (ii) '*do not reflect economic reality*'; and, (iii) '*circumvent* the screening mechanisms and screening decisions'. That does not appear to be the situation in the present case.

47. However, unless circumvention is established by means of a different instrument specifically drawn up for that purpose, the very act of establishing circumvention of a screening mechanism requires the screening of a particular capital transaction. In other words, a transaction must first fall within the scope of the FDI Screening Regulation in order for it to be determined whether it is indeed intended to circumvent the national screening mechanisms or decisions.

48. In any event, to exclude a type of transaction, such as that at issue in the present case, from the scope of the FDI Screening Regulation would be to undermine the very objective of screening for foreign direct investment that threatens the national or Union interest. Indeed, for the purposes of an *ex ante* tool like national investment screening mechanisms, what is the difference between a third-country investor acquiring control over a strategic EU undertaking directly from abroad or through another EU undertaking? In both cases, the foreign investor acquires control over the EU undertaking at issue and thus acquires the possibility of determining the future of that undertaking: be that to operate it in line with market conditions; to strip it of all valuable assets (in our case, for instance, to flood the quarry, making it unusable); to resell the undertaking; or simply to close it down completely. The crux of the matter is that control is acquired by a foreign investor over a strategic EU undertaking.

49. In my opinion, the FDI Screening Regulation is aimed precisely at preventing possible third-country control where a particular investment is considered to present a threat to security or public policy. Accordingly, I suggest that the Court accept that 'indirect' foreign direct investments made through an EU-based undertaking may also fall within the scope of the FDI Screening Regulation, where such investments would allow the foreign investor to gain control over the acquired undertaking.

50. That said, it should be clear that the screening of direct investment of third-country provenance carried out through an EU-based undertaking does not automatically imply that such an investment may be blocked without any further conditions. It cannot be ignored that subjecting the acquisition of EU companies by third-country investors to screening is in itself already an obstacle to the exercise of the four market freedoms. (36)

51. In my opinion, when an area is a matter of overlapping EU competences, the EU legislature has to pay due regard to the concerns arising in both areas. Therefore, even if legislating on the basis of Article 207(1) TFEU as the predominant legal basis, (37) the EU legislature was obliged to take into consideration rights arising under the Treaty rules on the four market freedoms, whether those rights are to the benefit of EU or third-country undertakings. In other words, even though the FDI Screening Regulation 'empowers' the Member States, under the auspices of Article 207(1) TFEU, to put in place screening mechanisms for foreign direct investment on the basis that such investment may raise concerns of public policy and security, that regulation cannot evade the requirements of Article 65(1) TFEU. It is precisely in that light that the reference to Article 65(1) TFEU in recital 4 of the FDI Screening Regulation should be understood. (38)

52. The FDI Screening Regulation indeed reflects the possible justifications, and thereby implicitly also the general criteria for assessing the proportionality of a restriction of a free movement right, which arise from the derogating clauses of the Treaty. That is especially apparent from Article 4 of that regulation, which lays down a non-exhaustive list of factors which Member States may take into consideration when determining whether a particular foreign capital transaction is likely to affect security or public order.

53. If the rules relating to the internal market were not built into the FDI Screening Regulation and the national mechanisms authorised on that basis, the market freedoms available to all EU companies could be disproportionately burdened simply because of foreign shareholding in those companies. To avoid an infringement of those freedoms, national legislation, such as Law LVIII 2020, which is authorised by the FDI Screening Regulation, should not be excluded from potential scrutiny under the Treaty rules of the internal market. Rather, I would stress that any transaction covered by a screening mechanism must benefit from a complete proportionality review in accordance with the criteria of Article 65(1) TFEU. (39)

54. To summarise the above discussion, I am of the opinion that national legislation, such as Law LVIII 2020, falls within the scope of the FDI Screening Regulation even though it allows for the screening of 'indirect' foreign direct investment carried out through an EU undertaking.

C. Jurisdiction of the Court

55. The applicability of the FDI Screening Regulation also resolves the question of the Court's jurisdiction in this case.

56. That question was raised by the Commission, which saw this case as being exclusively a matter of the internal market. All the elements of the dispute before the national court can be construed as being internal to Hungary: a Hungarian company is seeking to acquire another Hungarian company but is prevented from doing so on the basis of Hungarian law. Internal situations are outside the scope of the internal market rules. However, despite raising that objection, the Commission nonetheless concluded that the Court enjoys jurisdiction, relying on the fact that the applicant is wholly owned by Xella Germany. That, in the Commission's opinion, opens the door for not classifying the present case as internal to a single Member State.

57. At the hearing, those observations on jurisdiction provoked some discussion as to what makes a situation 'internal' as well as what elements may be taken into consideration in order to classify a transaction between two companies in the same Member State as a 'cross-border' transaction. (40) Given also the possibility of qualifying the situation in the present case as internal,

the discussion also turned on the pertinence of the Court's judgment in *Ullens de Schooten*. (41)

58. Even though I find those questions intriguing and only partially clarified in the case-law of the Court, I will resist the temptation to discuss them in this Opinion. I simply do not believe that they are relevant to the circumstances of the present case.

59. As explained in points 49 and 54 of this Opinion, this case falls within the scope of the FDI Screening Regulation. As I conclude, the proposed acquisition by the applicant of Janes can be qualified as 'foreign direct investment' within the meaning of the FDI Screening Regulation. Since the dispute in the main proceedings thus falls within the scope of EU legislation which is aimed, among other things, at harmonising national screening mechanisms, the question whether the situation at issue is internal is irrelevant. The Court's jurisdiction is established by the mere applicability of secondary EU law to the dispute at hand. (42)

60. As was confirmed at the hearing, an additional argument to qualify the case in this way is that the Hungarian Government understands Law LVIII 2020 as falling within the scope of the FDI Screening Regulation. Indeed, as was also confirmed by the Commission, in compliance with its obligation under Article 3(7) of that regulation, the Hungarian Government notified that legislation to the Commission. In line with that notification and in accordance with Article 3(8) of that regulation, the Commission then published the relevant Hungarian legislation as part of the list of Member States' screening mechanisms. Given that Law LVIII 2020 is, according to the referring court, the law applicable in the case before it since it served as the legal basis for the contested decision, the applicability of EU law and the usefulness of the interpretation requested from the Court under the preliminary ruling procedure is obvious. The clarification sought will enable the referring court to assess whether Law LVIII 2020 exceeded the boundaries set by EU law.

61. Should the Court nonetheless disagree with my understanding of jurisdiction in this case, I shall briefly offer three other possibilities of establishing jurisdiction.

62. First, and while I am not an ardent supporter of that case-law, it is obvious that the Court could establish jurisdiction on the basis of the potential cross-border effects arising from the Hungarian screening mechanism. (43)There can be little debate that it is 'not inconceivable' that an undertaking from another Member State, which is owned by a third-country undertaking, may be interested in acquiring a 'strategic' Hungarian company. That is easy to imagine in the case at hand, given that the acquisition could have just as well been carried out directly by Xella Germany. The Hungarian law at issue thus has a potential cross-border effect.

63. Second, inspiration could also be drawn from the judgment in *Felixstowe Dock and Railway Company and Others*. (44) *In that case the claimants, United Kingdom-based companies, were able to rely on their Luxembourg subsidiary's freedom of establishment, since the former were 'less well treated for tax purposes [by reason of that Luxembourg link company] than if they had been connected to the loss-surrendering company through a link company established in the United Kingdom'*. (45) *Jurisdiction could thus be established both, for the EU mother company(ies) at issue in the present case (Xella Germany and Xella Luxembourg) and the ultimate beneficial owner of Lone Star (the Irish national) on the basis of the freedom of establishment as well as the third-country 'grandmother' company (the Bermudan company) on the basis of the free movement of capital*.

64. Finally, there is even the possibility of establishing abstract jurisdiction on the basis of the *Dzodzi*-like (46) references in *Paragraph 276, point 3 of Law LVIII 2020 on the definition of a 'strategic company' (which appears to align that definition with Article 4(1)(a) to (e) of the FDI Screening Regulation) and in Paragraph 283(1)(b) of Law LVIII 2020 on the limits of the Minister's justification for resorting to the veto powers assigned to him (which refers to Article 52(1) and Article 65(1) TFEU)*.

65. Thus, regardless of the way the case is framed, the Court has jurisdiction to answer the questions raised by the referring court.

D. Conditions under which Member States can screen and block 'indirect' foreign direct investment

66. As explained in points 50 to 53 of this Opinion, all Member States' screening mechanisms, as authorised by the FDI Screening Regulation, have to comply with the internal market freedoms laid down by the Treaty.

67. The Court considers all measures which prohibit, impede, or render less attractive the exercise of market freedoms to constitute restrictions to those freedoms. (47)

68. The mere existence of a screening mechanism in itself makes direct investments of third-country provenance less attractive. The contested decision blocking the acquisition of Janes obviously makes the exercise of the right to invest in an EU undertaking (based on Article 63(1) TFEU) and the right of establishment (based on Articles 49 and 54 TFEU) not only less attractive, but in fact entirely impossible. (48)

69. However, restrictions of the exercise of fundamental freedoms are possible if they are justified by legitimate reasons of public interest and if they are appropriate and necessary for the protection of those interests. Whether these two requirements – of acceptable justification and proportionality – are satisfied is subject to judicial review on the basis of EU law. National laws, such as Law LVIII 2020, as well as individual decisions based thereon, have to comply with the conditions imposed on them by EU law. Accordingly, and given that in a preliminary ruling procedure the Court's jurisdiction is limited to providing an interpretation of the conditions imposed by EU law, it will fall to the national court to assess whether Law LVIII 2020, as applied by the Minister, satisfies those conditions.

1. Legitimate aim

70. Article 1(1) of the FDI Screening Regulation enables national screening mechanisms to restrict capital flows on two possible grounds: protecting security, on the one hand, and public order, on the other. In that respect, that regulation makes use of the justifications already set out in the Treaty (49) as well as the international agreements binding on the European Union. (50) More specifically, recital 35 of that regulation explains that its implementation, by the European Union or its Member States, must comply with Articles XIV(a) and XIV *bis* of the General Agreement on trade in Services (GATS) (51) as well as with EU law more generally.

71. In the present case, the question referred concerns only the justifications on the ground of public policy or security as envisaged by Article 65(1)(b) TFEU. It is worth noting that the same reasons are also envisaged as possible justifications for a restriction of the freedom of establishment contained in Article 52(1) TFEU. I will, therefore, turn to the treatment of those justifications in the case-law of the Court.

72. It is first necessary to explain – and this, to my mind, answers the referring court's reference to Article 4(2) TEU – that the Member States remain, in principle, free to determine the requirements of public policy and public security in the light of their national needs. (52) Those concerns may differ from one era to another and from Member State to Member State. (53) EU law does not regulate those determinations.

73. However, EU law does frame national policy choices by demanding that the justificatory reasons be interpreted narrowly, given that they permit derogations from the rule, on the basis of which direct investments are, in principle, liberalised. (54) Accordingly, those justifications can be relied on only if there is a genuine and sufficiently serious *threat* to a fundamental interest of

society, (55) even if only the *likelihood* thereof. (56)

74. Therefore, a Member State is required to explain, first, why the interest causing the restriction at issue is perceived as fundamental in its society; and, second, why the restricted activity represents a genuine and sufficiently serious threat to that fundamental interest.

75. According to the Hungarian Government, Law LVIII 2020 seeks to protect two fundamental interests of Hungarian society. The first stated interest is to prevent speculative acquisitions in sectors deemed strategic to the Hungarian economy, particularly in the wake of the COVID-19 pandemic. The second stated interest is the protection of the security of supply, in the present case of sand, gravel and clay in Hungary.

76. In my view, and as shared by the applicant, the Italian Government and the Commission, the first ground invoked by the Hungarian Government cannot be accepted under the public policy exception. It is clear from the case-law that, in the abstract, exclusively economic reasons are not capable of justifying an obstacle to one of the fundamental freedoms. (57) To be clear, I do not dispute that, in certain circumstances, a health crisis like COVID-19 may lead to an increase in speculative investments from abroad. However, such investments are part of economic life. They are part of the business strategy of investment funds, such as Lone Star. Therefore, shielding the Hungarian national economy from speculative investments cannot, in itself, be accepted as an interest which may be protected for reasons of public policy. (58)

77. It is true that the Court has explained that, in certain circumstances, reasons which otherwise cannot be accepted as being capable of justifying restrictions on transactions between the subjects of the internal market may be capable of justifying an obstacle to movement of capital of third-country provenance. Thus, in its judgment in *Test Claimants in the FII Group Litigation,* the Court explained that 'it may be that a Member State will be able to demonstrate that a restriction on capital movements to or from non-member countries is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States'. (59) However, in that and other similar cases, what motivated the Court's acceptance of differentiating between acceptable justifications in an intra and extra-EU context was the existence of a *high degree of legal integration* between the Member States in the internal market (such as through tax harmonisation) in contrast to the lack of a similar level of integration with the third State at issue. (60)

78. That case-law is not applicable in the present case. To my mind, a high degree of legal integration within the internal market cannot justify the reliance on purely economic reasons in order to restrict speculative 'indirect' foreign direct investments in general. (61) For as much as speculative investments are seen as a legitimate business activity and are not specifically regulated inside the internal market, they cannot be prevented under the guise of a public policy justification solely because they are directly or indirectly of third-country provenance.

79. The second ground invoked by the Hungarian Government, the security of supply, may, in my view, be raised either as a matter of public policy or of public security.

80. Here, the Hungarian Government explains, in essence, that the security of supply of construction aggregates is important for the industrial and public infrastructure of the country, including at local level. The applicant, the Italian Government and the Commission note that such a concern may, in principle, and in certain circumstances, justify an interference with the free movement rules. However, the applicant and the Commission also note that they do not consider that that justification could succeed in the present case.

81. The Court has so far recognised the need to ensure the security of supply of certain basic public services and the proper functioning of certain network services considered necessary for the economic and social life of a Member State as acceptable justifications under the public policy

exception. (62)

82. Consequently, this does not exclude the possibility, in my view, that securing the supply of certain construction aggregates may, in times of crisis, be viewed from the perspective of a Member State as a concern capable of justifying the restriction of a fundamental market freedom on grounds of public policy (or public security). The same applies to sand, gravel and clay, notwithstanding the fact that the Commission has not (yet) placed those aggregates on the list of 'critical' raw materials. (63) Indeed, there are studies that support the view that these materials are scarce and that their supply might be of concern. (64) Therefore, efforts to secure the supply of sand, gravel and clay may be viewed as being in the fundamental interest of society.

83. That view is also supported by the text of the FDI Screening Regulation. Article 4 thereof provides that, in determining whether a foreign direct investment is likely to affect security or public order, the Member States (and the Commission) may consider the potential effects of a capital transaction on, inter alia, the supply of critical inputs, including raw materials. Similarly, under Article 8 of that regulation, the Commission may address an opinion to the Member State concerned where it considers that a foreign direct investment is likely to affect projects and programmes of EU interest which are covered by EU law regarding critical inputs and which are essential for security or public policy.

84. Despite that general possibility of relying on the need for security of supply of certain raw materials, I find it difficult to conclude, in the circumstances of the present case, that foreign ownership of a producer that accounts for just 0.52% of the Hungarian national production of sand, gravel and clay represents a genuine and sufficiently serious threat to the fundamental interest of supply chain security in Hungary.

85. When prompted at the hearing, the Hungarian Government was unable to provide a convincing reason as to why the protection from foreign ownership of Janes would constitute a *fundamental* interest for Hungarian society (be that locally or nationally). It also remains unexplained how such foreign ownership threatens the *supply* of those materials to local construction businesses. After all, Janes already now sells 90% of its production to the applicant, while only 10% is sold to local businesses. (65)

86. I am certainly not swayed by the Hungarian Government's argument that any foreign ownership of a quarry, or over a company operating such a quarry, may, in itself, represent a threat to the security of supply that would thus justify restricting foreign direct investments in such target objects as a matter of public policy. To my mind, even against the background of different legal and political contexts within and outside the European Union, there is no sensible or convincing reason why the Member States should operate on a general suspicion of all foreign direct investment with regard to transactions of third-county provenance. (66)

87. Therefore, even if national law, such as Law LVIII 2020 could, in principle, provide that 'indirect' foreign direct investment screening is justified by reason of the need to ensure security of supply of certain raw materials, that justification may be raised only if it can be proven that foreign ownership over the source of such materials represents a genuine and sufficiently serious threat to the security of supply for either a particular region or Hungary as a whole.

88. While it falls to the national court to confirm whether such reasoning was provided in the contested decision, I note that it does not appear from the court file that the Minister explained whether and how the indirect foreign ownership of Janes represents a genuine and serious threat to the security of supply of gravel, sand and clay in Hungary (as a whole or in the specific region concerned).

89. That does not necessarily mean that Law LVIII 2020 in itself contravenes EU law. A reference in that law to the Treaty articles governing derogations from the fundamental market

freedoms, with which the Minister has to comply, (67) might suffice. However, that can be the case only if, for the purposes of Hungarian law, that reference constitutes a sufficiently clear obligation for the Minister to explain, in each individual screening decision, *why* a particular foreign direct investment represents a genuine and sufficiently serious threat to the fundamental interest of Hungary. Since the necessary degree of precision by which that duty is imposed in the legislative text itself depends, in my view, on the legal culture of a particular Member State, that is a matter that only a national court can assess.

2. Proportionality

90. National law governing foreign direct investment screening mechanisms should also provide for the requirement that each screening decision enacted by the Minister on the basis of that law is *appropriate* and *necessary* for the protection of a genuine threat to a fundamental interest of the society of a Member State.

91. In the same way as the requirement that the justification itself is compliant with the Treaty (see point 89 of this Opinion), it might be sufficient that national law refers only to the free movement provisions which require a complete review of the proportionality of the restrictions to those freedoms. It is important that that law imposes an obligation on the executing national authorities to explain why the adopted measure (such as, in the case at hand, blocking the acquisition of an EU undertaking) is proportionate.

92. Whether a particular measure is proportionate is for the national court to assess. In other words, should the referring court consider that the supply of sand, gravel and clay constitutes a fundamental interest of Hungarian society under genuine threat, it should further assess whether blocking the applicant's acquisition of Janes would respond to that threat. That means that the contested decision has to be appropriate and necessary for removing the alleged threat.

93. I will limit myself to observing that, it is not clear from the information in the court file, how prohibiting indirect foreign ownership of Janes contributes to securing the unimpeded supply of sand, gravel and clay to local building undertakings. As was also raised by the Court at the hearing, there is nothing to prevent a Hungarian company from selling all material extracted from the quarry to businesses abroad. However, even assuming that the link to the stated aim were somehow established, there still remains the (equally unexplored) question of why a less restrictive measure, such as a local distribution quota at market terms, could not have been used instead.

94. However, as already stated, it is ultimately for the national court to assess whether the Minister has sufficiently reasoned how the measure at hand was appropriate and necessary (which I fail to see).

IV. Conclusion

95. In the light of the foregoing, I propose that the Court answer the first question referred by the Fővárosi Törvényszék (Budapest High Court, Hungary) as follows:

Article 4(2) TEU, Article 65(1)(b) TFEU and 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

do not preclude national legislation which allows for the screening of foreign direct investment of third-country provenance into an EU undertaking, carried out through another EU undertaking, if that investment results in effective participation of the third-country undertaking in the management or control of the EU undertaking in which it has invested.

Such national legislation may provide that the screening of a transaction is justified by the need to ensure the security of supply of certain raw materials.

Such national legislation must provide that individual screening decisions explain why a particular foreign direct investment represents a genuine and sufficiently serious threat to the security of supply and why a particular screening decision is appropriate and necessary for addressing that threat.

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1 Original language: English.

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2 Regulation 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).

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3 On the larger policy context of such measures, see Hellendoorn, E., 'What US outbound investment screening means for Transatlantic relations', Atlantic Council, 8 November 2022, available at: https://www.atlanticcouncil.org/blogs/econographics/what-us-outbound-investment-screening-means-for-transatlantic-relations/.

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4 See, generally, Commission work programme 2023: A Union standing firm and united, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (COM(2022) 548 final), pp. 7 to 8.

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5 See, in that respect, Politico, 'Russia threatens to limit agri-food supplies only to "friendly" countries', available at: https://www.politico.eu/article/russias-former-president-medvedev-warns-agricultural-supplies-restricted-to-friendly-countries/.

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6 A veszélyhelyzet megszűnésével összefüggő átmeneti szabályokról és a járványügyi készültségről szóló 2020. évi LVIII. törvény (Act No LVIII of 2020 on transitional provisions relating to the end of the state of emergency and to the pandemic crisis).

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7 For the meaning of 'majority control', Law LVIII 2020 refers to the Hungarian Act on the Civil Code, which appears to regard a holding of over 50% as satisfying that threshold. It is thus without question that that threshold is met in the present case.

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8 A 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).

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9 Although, as I point out in point 82 of this Opinion, it could be argued that sand, gravel and clay do not (yet) constitute 'critically important' raw materials.

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10 As the Court has asked for my opinion only in relation to the first question, I shall not deal with the second question posed by the referring court.

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11 Opinion of 16 May 2017 (EU:C:2017:376).

12 Ibid, paragraph 82. Emphasis added.

13 Ibid, paragraph 80. In the same paragraph, the Court refers to its earlier internal market cases on the distinction between direct and minority investments; see judgments of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraphs 181 and 182); of 26 March 2009, *Commission* v *Italy* (C-326/07, EU:C:2009:193, paragraph 35); and of 24 November 2016, *SECIL* (C-464/14, EU:C:2016:896, paragraphs 75 and 76).

14 See, for instance, judgment of 26 March 2009, *Commission* v *Italy* (C-326/07, EU:C:2009:193, paragraphs 35 and 36 and the case-law cited) (distinguishing investment leading to the exercise of effective participation in an undertaking from lesser types of shareholding).

15 According to the Court, only investment leading to control or effective participation in an entity is such as to cover economic activities which 'have direct and immediate effects on trade between [a] third State and the European Union.' See Opinion 2/15 *(EU-Singapore Free Trade Agreement)* of 16 May 2017 (EU:C:2017:376, paragraph 84).

16 See, to that effect, in particular, Opinion 1/78 *(International Agreement on Natural Rubber)*, of 4 October 1979 (EU:C:1979:224, paragraphs 44 and 45) (explaining that a restrictive interpretation would render the common commercial policy 'nugatory in the course of time'). See also, in that regard, Opinion of Advocate General Wahl in Opinion 3/15 *(Marrakesh Treaty on access to published works)* (EU:C:2016:657, point 43) (noting that as trade practices, patterns and trends evolve over time, the subject matter of the common commercial policy must evolve with it).

17 See judgment of 22 October 2013, *Essent and Others* (C-105/12 to C-107/12, EU:C:2013:677, paragraph 40 and the case-law cited).

18 Judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 37) (concluding that the freedom of establishment applies despite the legislation at issue in that case potentially also affecting the free movement of capital in case of lesser shareholdings). That approach was later upheld in the judgment of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraph 95 and the case-law cited).

19 See, originally, judgment of 13 April 2000, *Baars* (C-251/98, EU:C:2000:205, paragraphs 21 and 22) (finding that the holder of a definite influence over an undertaking's decisions allow it to determine the undertaking's activities, so that the freedom of establishment will apply).

20 See, inter alia, judgment of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen* (C-436/08 and C-437/08, EU:C:2011:61, paragraph 35 and the case-law cited).

21 See, to that effect, my Opinion in *ÖBB-Infrastruktur Aktiengesellschaft* (C-500/20, EU:C:2022:79, point 64).

22 See, in that respect, Commission Reflection Paper on Harnessing Globalisation (COM(2017) 240 final), p. 15 (referring to the risks associated notably with State-owned enterprises taking over European companies with key technologies for strategic reasons). Some authors claim that tightening control over inward investments is useful for creating a better negotiating position for the European Union in its external relations, allowing it to work towards the opening up of foreign markets for EU investment. See, generally, Schill, S., 'The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization', *Legal Issues of Economic Integration*, Vol. 46(2), 2019, pp. 105 to 128.

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23 That being said, it is quite obvious that the EU legislature made use of a regulation because Article 207(2) TFEU prescribes the use of a regulation to adopt measures 'defining the framework for implementing the common commercial policy'. That is, despite the terms of Article 288 TFEU, that legislative instrument is more readily assimilated to a directive.

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24 Note that while recital 8 of the FDI Screening Regulation states that the Member States are not obliged to adopt a screening mechanism, it very much appears that the latter are strongly encouraged to do so. See, in this regard, Communication from the Commission, 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 [the FDI Screening Regulation] (OJ 2020 C 99I, pp. 1 and 2).

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25 See, in that respect, Cremona, M., 'Regulating FDI in the EU Legal Framework', in Bourgeois, J.H.J. (ed.), *EU Framework for Foreign Direct Investment Control*, Wolters Kluwer, Alphen-sur-le-Rhin, 2019, p. 35.

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26 According to the list of screening mechanisms notified by Member States and drawn up by the Commission pursuant to Article 3(8) of the FDI Screening Regulation, it appears that a large number of Member States had some sort of screening mechanism in place prior to the date of entry into force of that regulation.

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27 See, in that respect, recital 4 of the FDI Screening Regulation, which states that that 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', and which the referring court refers to as part of its first question.

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28 Article 2(1) TFEU, relating to exclusive EU competences, states that, in those areas, Member States may legislate only if empowered by the Union.

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29 Otherwise, given that the FDI Screening Regulation does not even require that Member States establish screening mechanisms, one could argue that a legally binding act was unnecessary. It would, indeed, have been sufficient for the European Union to use some form of soft law measure to nudge Member States into action. Therefore, the choice of a legally binding act could also be explained by the need to resolve the competence problem created by the Treaty of Lisbon, thereby requiring some expression of an 'empowerment' of the Member States.

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30 Opinion 2/15 *(EU-Singapore Free Trade Agreement)* of 16 May 2017 (EU:C:2017:376, paragraph 36 and the case-law cited). See also, by analogy, judgment of 18 July 2013, *Daiichi Sankyo and*

Sanofi-Aventis Deutschland (C-414/11, EU:C:2013:520, paragraph 52) (finding that EU measures in the field of intellectual property, a shared competence, 'with a specific link to international trade are capable of falling within the concept of "commercial aspects of intellectual property" in Article 207(1) TFEU and hence in the field of common commercial policy').

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31 In that respect, see Opinion 2/15 *(EU-Singapore Free Trade Agreement)* of 16 May 2017 (EU:C:2017:376, paragraph 84), in which the Court explained that the 'definition of the scope of the common commercial policy so far as concerns foreign investment reflects the fact that any EU act promoting, facilitating or governing participation – by a natural or legal person of a third State in the European Union and vice versa – in the management or control of a company carrying out an economic activity is such as to have direct and immediate effects on trade between that third State and the European Union, whereas there is no specific link of that kind with trade in the case of investments which do not result in such participation'.

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32 I observe that the Commission's 2023 work programme appears to be aimed at strengthening the FDI Screening Regulation. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission work programme 2023, A Union standing firm and united (COM(2022) 548 final), pp. 7 and 8.

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33 See, inter alia, judgment of 1 April 2014, *Felixstowe Dock and Railway Company and Others* (C-80/12, EU:C:2014:200, paragraph 40).

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34 Emphasis added.

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35 As Cohen already noted in his seminal 1935 article, the seat of a corporation says next to nothing about its activities; see, in this regard, Cohen, F. S., 'Transcendental Nonsense and the Functional Approach', *Columbia Law Review*, Vol. 35(6), 1935, p. 809, at p. 810.

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36 See, by analogy, judgments of 31 January 1984, *Luisi and Carbone* (286/82 and 26/83, EU:C:1984:35, paragraph 34); of 23 February 1995, *Bordessa and Others* (C-358/93 and C-416/93, EU:C:1995:54, paragraphs 24 to 26); and of 14 December 1995, *Sanz de Lera and Others* (C-163/94, C-165/94 and C-250/94, EU:C:1995:451, paragraph 24) (which explain that the prior authorisation of currency exports represents a restriction on the free movement of capital).

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37 See, for instance, judgment of 22 October 2013, *Commission* v *Council* (C-137/12, EU:C:2013:675, paragraph 53) (finding that where a measure reveals that it pursues a twofold purpose or that it has a twofold component, with one predominant and one incidental, the measure must be based on the legal basis that serves the predominant purpose or component).

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38 Accordingly, I do not find it convincing to suggest that the reference to Article 65(1) TFEU in recital 4 of the FDI Screening Regulation means that Member States can choose to put in place different screening mechanisms covering direct investment of third-country provenance, which are outside of the scope of that regulation.

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39 I will return to this question in Section D.2 of this Opinion.

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40 On the basis of the fact that Xella Germany owns 100% of the applicant's shares, the Commission further considered that this case should be resolved on the basis of the rules relating to freedom of establishment, given that intra-EU 'foreign' direct investment establishing control falls within the scope of that market freedom. In support of that finding, the Commission relied on the judgments of 1 February 2001, *Mac Quen and Others* (C-108/96, EU:C:2001:67, paragraph 16), and of 17 October 2002, *Payroll and Others* (C-79/01, EU:C:2002:592, paragraph 25). In its opinion, the relevant cross-border element, which justifies the Court's jurisdiction, is based on the fact that the applicant could rely on the cross-border right of establishment of Xella Germany. At the hearing, the Commission could not explain, however, why tracing the line of ownership should stop at Xella Germany, and not at Xella Luxembourg or the Bermudan company. If the transaction at issue is viewed from the perspective of the latter undertaking, the applicant could equally rely on the free movement of capital of its 'grandmother' in Bermuda, since, by virtue of Article 63(1) TFEU capital movements from third countries to the European Union are also liberalised.

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41 Judgment of 15 November 2016 (C-268/15, EU:C:2016:874).

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42 As scholarship demonstrates, the internality of a situation constitutes an obstacle to the Court's jurisdiction only in cases involving negative integration (the direct application of the fundamental freedoms of the Treaty), but not in cases involving positive integration (the application of harmonising EU secondary law to otherwise internal situations). See, for instance, Mataija, M., 'Internal Situations in Community Law: An Uncertain Safeguard of Competences Within the Internal Market', *Croatian Yearbook of European Law and Policy*, Vol. 5, 2009, pp. 31 to 63, pp. 37 to 40.

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43 See, to that effect, judgments of 11 March 2010, *Attanasio Group* (C-384/08, EU:C:2010:133, paragraph 24); of 8 May 2013, *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraph 34); and of 5 December 2013, *Venturini and Others* (C-159/12 to C-161/12, EU:C:2013:791, paragraph 25).

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44 Judgment of 1 April 2014 (C-80/12, EU:C:2014:200).

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45 Ibid, paragraph 24.

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46 Judgment of 18 October 1990 (C-297/88 and C-197/89, EU:C:1990:360, paragraph 41).

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47 See, *ex multis*, as regards the freedom of establishment, judgment of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 46 and the case-law cited). As regards the free movement of capital, see, for instance, judgment of 18 June 2020, *Commission* v *Hungary (Transparency of associations)* (C-78/18, EU:C:2020:476, paragraphs 52 and 53 and the case-law cited).

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48 As I have explained in point 63 of this Opinion on the issue of jurisdiction, depending on which subject one takes, the present case could be understood as restricting the free movement of capital (the Bermudan company) or the freedom of establishment (of Xella Germany, Xella Luxembourg, or even the Irish national at the end of the corporate ownership chain of the entire Xella group).

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49 Recall that recital 4 of the FDI Screening Regulation states that the framework established thereby 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.'

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50 See, in that respect, recital 3 of the FDI Screening Regulation, which states that the commitments undertaken at WTO and OECD level, and in the trade and investment agreements concluded with third countries permit 'the Union and the Member States to adopt restrictive measures relating to foreign direct investment on the grounds of security or public order, subject to certain requirements.'

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51 On the scope of the security and public order exception in those GATS provisions, see Velten, J., 'Screening Foreign Direct Investment in the EU. Political Rationale, Legal Limitations, Legislative Options', *European Yearbook of International Economic Law*, Vol. 26, 2022, p. 59 et seq.

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52 See, for instance, judgment of 14 March 2000, *Église de scientologie* (C-54/99, EU:C:2000:124, paragraph 17 and the case-law cited).

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53 As the Court explained in the context of freedom to provide services in its judgment of 14 October 2004, *Omega* (C-36/02, EU:C:2004:614, paragraph 31), and in the context of citizenship in its judgment of 2 June 2016, *Bogendorff von Wolffersdorff* (C-438/14, EU:C:2016:401, paragraph 68).

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54 See, for instance, judgment of 14 March 2000, *Église de scientologie* (C-54/99, EU:C:2000:124, paragraph 17 and the case-law cited).

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55 Ibid and, more recently, judgment of 18 June 2020, *Commission* v *Hungary (Transparency of associations)* (C-78/18, EU:C:2020:476, paragraph 91 and the case-law cited).

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56 See, by analogy, the Panel Report of the WTO Dispute Settlement Body in *European Union and its Member States – Certain Measures Relating to the Energy Sector* (WT/DS476/R, point 7.1163), finding, as regards the interpretation of the concept of 'a genuine and sufficiently serious threat' in footnote 5 to Article XIV(a) of the General Agreement of Trade in Services, that 'the term "sufficiently serious" is used to qualify a threat, which … should be understood as referring to the potential consequences or the potential gravity of the effects of a threat materialising.'

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57 See, *ex multis*, judgment of 21 December 2016, *AGET Iraklis* (C-201/15, EU:C:2016:972, paragraph 72 and the case-law cited).

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58 That being said, if, during a pandemic like COVID-19, those investments were to be directed at, for instance, national production facilities of face masks, thus potentially disrupting the protection of the population or the provision of healthcare-related services, then I would entirely concur that the restriction of such investments may be justified on grounds of public policy. See also, in that regard, Communication from the Commission, 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 (FDI Screening Regulation) (OJ 2020 C 991, pp. 1 and 2).

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59 Judgment of 12 December 2006 (C-446/04, EU:C:2006:774, paragraph 171). See also judgments of 18 December 2007, *A* (C-101/05, EU:C:2007:804, paragraphs 35 and 37 and the case-law cited), and of 20 May 2008, *Orange European Smallcap Fund* (C-194/06, EU:C:2008:289, paragraph 90).

60 See, to that effect, judgments of 24 November 2016, *SECIL* (C-464/14, EU:C:2016:896, paragraph 64 and the case-law cited), and of 26 February 2019, *X (Controlled companies established in third countries)* (C-135/17, EU:C:2019:136, paragraphs 90 to 92 and the case-law cited).

61 In that respect, it has previously been noted that the existing EU framework for foreign direct investment screening would not be suitable for achieving all aims that the Member States and the European Union may want to achieve by the introduction of such screening mechanisms, not least concerns regarding reciprocity of market access. See, generally, Velten, J., 'Screening Foreign Direct Investment in the EU. Political Rationale, Legal Limitations, Legislative Options', *European Yearbook of International Economic Law*, Vol. 26, 2022.

62 See, for instance, judgments of 20 June 2002, *Radiosistemi* (C-388/00 and C-429/00, EU:C:2002:390, paragraph 44) (relating to the proper functioning of the public telecommunications network); of 28 September 2006, *Commission* v *Netherlands* (C-282/04 and C-283/04, EU:C:2006:608, paragraph 38) (relating to the guarantee of a universal postal service); of; 22 October 2013, *Essent and Others* (C-105/12 to C-107/12, EU:C:2013:677, paragraph 53) (relating to the rules on the public or private ownership of an electricity or gas distribution system operator); 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) (relating to tender specifications aimed at ensuring sufficient scheduled air services to and from Portuguese-speaking third countries with which Portugal has particular ties).

63 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability (COM(2020) 474 final), p. 3.

64 See, for instance, United Nations Environment Programme Global Environmental Alert Services, 'Sand, rarer than one thinks' (March, 2014), available at: https://na.unep.net/geas/archive/pdfs/GEAS_Mar2014_Sand_Mining.pdf (concluding that 'sand and gravel represent the highest volume of raw material used on earth after water … their use greatly exceeds natural renewal rates'; also noting that 'most sand from deserts cannot be used for concrete … as the wind erosion process forms round grains that do not bind well'). See also BBC Future, 'Why the world is running out of sand' (November, 2019), available at: https://www.bbc.com/future/article/20191108-why-the-world-is-running-out-of-sand (explaining that, in India, commercially useful sand is now so scarce that markets for it are dominated by 'sand mafias'). See also, more generally, Ioannidou, D.; Meylan, G.; Sonnemann, G.; and Habert, G., 'Is gravel becoming scarce? Evaluating the local criticality of construction aggregates', *Resources, Conservation and Recycling*, Volume 126 (2017), pp. 26 to 33 (finding a scarcity of commercially useful gravel, particularly at local level).

65 See point 2 of the referring court's order.

66 To that effect, Hindelang, S., *The Free Movement of Capital and Foreign Direct Investment. The Scope of Protection in EU Law*, Oxford University Press, Oxford, 2009, p. 238 (where it states that 'to maintain that capital movements originating from the United States of America constitute on average a more serious danger of infringement of national law and regulation than – for the sake of the argument let us say – those from Romania is highly speculative, to say the least').

67 Paragraph 283(1)(b) of Law LVIII 2020 requires the Minister to examine whether a particular

investment compromises Hungarian state interest ‘in accordance with Article 36, Article 52(1) and Article 65(1) TFEU’.