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Advocate General's Opinion in Case C-626/21 | Funke

Advocate General Ćapeta: economic operators have the right to request the completion of a RAPEX notification on the basis of the Treaty provisions concerning the free movement of goods

In her view, while an economic operator's right to request the completion of a RAPEX notification does not arise directly from the EU legislation relating to RAPEX, such a right can be derived from the prohibition of measures having equivalent effect to a quantitative restriction enshrined in Article 34 TFEU

By the present request for a preliminary ruling submitted by the Supreme Administrative Court of Austria, the Court of Justice has been asked for the first time to interpret the provisions of EU law concerning the Rapid Exchange of Information System (RAPEX) for dangerous non-food products.

Under the RAPEX system, a Member State which discovers that a dangerous product was placed on its market notifies other Member States via the European Commission. The present case is concerned with that system and, more specifically, with the rights of economic operators to intervene in that system if the products which they trade are the subject of a RAPEX notification.

The products at issue in this case are firecrackers imported into the European Union from China by Funke, a Polish company. They were sold to different distributors in several Member States, including Austria. The competent Austrian authorities, after finding that those firecrackers were unsafe for users to handle, initiated a RAPEX notification procedure, and through the national RAPEX Contact Point, submitted three separate notifications. After verification, the Commission forwarded the notifications to the Member States.

Funke considered that those RAPEX notifications did not properly describe the products and submitted requests to the competent Austrian authorities that those notifications be completed by adding the batch numbers of the products concerned. However, its requests were refused. Funke's access to the courts in Austria to ask for the judicial review of that refusal is possible under Austrian law only if it enjoyed the right to request the completion of a RAPEX notification. In that light, the Supreme Administrative Court of Austria submitted a series of questions to the Court of Justice.

In her Opinion delivered today, Advocate General Tamara Ćapeta **proposes to the Court of Justice to find that an economic operator's right to request the completion of a RAPEX notification can be derived from the Treaty provisions which prohibit Member States from imposing unjustified obstacles to trade. An economic operator whose request for completion was refused by the competent national authorities must be granted access to a court to challenge that refusal and claim that the incomplete notification is an unjustified obstacle to trade.**

Advocate General Ćapeta considers that the RAPEX-relevant EU law has not been designed with the aim of treating economic operators as parties enjoying certain rights within the RAPEX notification procedure. Nevertheless, in her view, although a right to request the completion of a RAPEX notification cannot be derived from that law, economic operators who are adversely affected by an incomplete RAPEX notification are not left without legal protection within the EU legal order. Their right to request the completion of a RAPEX notification stems from the Treaty provisions concerning the free movement of goods.

The Advocate General points out that an incomplete RAPEX notification may hinder trade with safe products which are unjustifiably covered by it. That is precisely why the relevant EU legislation requires that the notified data be as accurate and as complete as possible. The mere possibility that, due to an incomplete notification transmitted by the competent national authorities through RAPEX, an economic operator in another Member State might be dissuaded from importing or marketing the products erroneously included in the RAPEX notification constitutes a restriction on the free movement of goods for an economic operator.

The Advocate General also emphasises that, while the protection of the health and safety of consumers is certainly a legitimate aim which justifies RAPEX notifications, it does not necessarily justify incomplete ones. Whereas an accurate RAPEX notification prevents damage to the health and safety of consumers, an inaccurate RAPEX notification might hinder the placing on the market of products that does not pose a serious risk. Therefore, an incomplete RAPEX notification may represent a prohibited measure of equivalent effect if it imposes a disproportionate obstacle to trade in safe products erroneously included in the notification. Given such a possibility, an economic operator must be given access to a court with powers to verify whether an incomplete RAPEX notification is justified.

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

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

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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