

Case C-626/21

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

Date lodged:

11 October 2021

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

29 September 2021

Appellant on a point of law:

Funke Sp. zo.o.

Defendant authority before the Verwaltungsgericht Wien (Austria):

Landespolizeidirektion Wien

Subject matter of the main proceedings

Product safety – RAPEX Guidelines – Interpretation – Right of an economic operator to complete a RAPEX notification – Request – Competence – Judicial protection

Subject matter and legal basis of the request

Interpretation of Directive 2001/95/EC, Regulation (EC) No 765/2008 and Implementing Decision (EU) 2019/417; Article 267 TFEU

Questions referred for a preliminary ruling

Are

- Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ 2002 L 11, p. 4, as amended by Regulation (EC) No 765/2008, OJ 2008 L 218, p. 30, and Regulation (EC)

No 596/2009, OJ 2009 L 188, p. 14 ('Product Safety Directive'), in particular Article 12 and Annex II,

- Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, OJ 2008 L 218, p. 30 ('Market Surveillance Regulation'), in particular Articles 20 and 22, and

- Commission Implementing Decision (EU) 2019/417 of 8 November 2018 laying down guidelines for the management of the European Union Rapid Information System 'RAPEX' established under Article 12 of Directive 2001/95/EC on general product safety and its notification system, OJ 2019 L 73, p. 121 ('RAPEX Guidelines'), to be interpreted as meaning that

1. the right of an economic operator to complete a RAPEX notification arises directly from those provisions?

2. the European Commission ('the Commission') is competent to decide on such a request?

or

3. the authority of the Member State concerned is competent to decide on such a request?

(If Question 3 is answered in the affirmative)

4. the (national) judicial protection against such a decision is sufficient where it is not afforded to everyone but only to the economic operator affected by the (obligatory) measure against the (obligatory) measure taken by the authority?

Provisions of European Union law relied on

Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety ('Product Safety Directive'): Article 12 and Annex II;

Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 ('Market Surveillance Regulation'): Articles 20 and 22;

Commission Implementing Decision (EU) 2019/417 of 8 November 2018 laying down guidelines for the management of the European Union Rapid Information System 'RAPEX' established under Article 12 of Directive 2001/95/EC on general product safety and its notification system ('RAPEX Guidelines'): Article 1 and Annex.

Provisions of national law relied on

Bundesgesetz, mit dem polizeiliche Bestimmungen betreffend pyrotechnische Gegenstände und Sätze sowie das Böllerschießen erlassen werden (Federal Law enacting police provisions concerning pyrotechnic articles and substances and cannon shooting; ‘the PyroTG 2010’): Paragraphs 4-6, 27 and 27a;

Bundesgesetz zum Schutz vor gefährlichen Produkten (Federal Law on protection against dangerous products; ‘the PSG 2004’): Paragraphs 1, 2 and 10.

Succinct presentation of the facts and procedure in the main proceedings

- 1 While conducting market surveillance in respect of a distributor of pyrotechnic articles in accordance with Paragraph 27(1) of the PyroTG 2010, the Landespolizeidirektion Wien (Regional Police Directorate, Vienna, Austria; ‘the LPD’) found that various pyrotechnic articles stocked by that distributor were not safe for the user to handle. By administrative decision, a prohibition on the sale of the firecrackers was imposed on the distributor concerned and the recall of those articles was ordered in accordance with point 3 of Paragraph 27a(1) of the PyroTG 2010.
- 2 Subsequently, a RAPEX notification procedure regarding the pyrotechnic articles objected to was initiated by the LPD in its capacity as market surveillance authority under the PyroTG 2010 and notifications regarding the articles were submitted to the Commission.
- 3 The appellant on a point of law is the importer of the pyrotechnic articles concerned by the RAPEX notifications (notification numbers A12/00297/20, A12/00290/20 and A12/00289/20).
- 4 By letter of 30 April 2020, the appellant on a point of law submitted requests for completion of the RAPEX notifications and for access to files to the LPD in accordance with Paragraph 17 of the Allgemeines Verwaltungsverfahrensgesetz 1991 (1991 General Law on administrative procedure; ‘the AVG’). Specifically, the appellant on a point of law requested that the abovementioned RAPEX notifications be completed by adding the batch numbers of the pyrotechnic articles objected to and that it be granted access to the files of the RAPEX notification procedure, in particular the risk classification of the products covered by RAPEX notifications A12/00289/20, A12/00290/20 and A12/00297/20.
- 5 In the contested judgment of the Verwaltungsgericht Wien (Administrative Court, Vienna; ‘Administrative Court’), both the request for access to the files in the RAPEX notification procedure and the request for completion of the RAPEX notifications were refused in that case (following an appeal on the merits brought by the appellant on a point of law against the administrative decision of the LPD of 29 June 2020 issued in relation to those requests). The appeal on a point of law

before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) was declared admissible.

- 6 In its reasoning, the Administrative Court stated, in essence, that the RAPEX notification procedure begins when the market surveillance authority becomes aware of facts relevant to RAPEX. The ‘rapid alert notification’ to be issued in that system enters into consideration only if there is a situation with a cross-border element. As a market surveillance authority under the PyroTG 2010, the LPD acted in the exercise of State authority. However, this consists in administrative action going beyond an administrative act (administrative decision). This is because notifications in the RAPEX rapid alert system are to be categorised as material acts (that is to say, as simple administrative action aimed at a concrete result). However, a review by an administrative court is constitutionally provided for only within the framework of Articles 131 and 132 of the Bundes-Verfassungsgesetz (Federal Constitutional Law; ‘the B-VG’), in accordance with which only persons who claim that their rights have been violated by the decision of an administrative authority may bring an appeal before the administrative courts on the ground of illegality.
- 7 Judicial protection, as required by recital 37 of the Product Safety Directive (2001/95/EC), is in principle guaranteed by the possibility for the administrative measures underlying the RAPEX notification procedure to be challenged before the administrative courts (and subsequently the supreme courts of public law). It cannot be inferred from the statutory provisions that, under the Austrian legal system, economic operators such as the appellant on a point of law (that is to say, the manufacturer or importer of a product) have been granted a right of request with regard to the points asserted concerning access to files or the completion of the RAPEX notification. However, there is also nothing in Commission Implementing Decision (EU) 2019/417 (RAPEX Guidelines) to suggest that the appellant on a point of law has a right of request or the status of party in the RAPEX notification procedure.

The essential arguments of the parties in the main proceedings

- 8 In the appeal on a point of law brought before the Supreme Administrative Court against the decision of the Administrative Court, the appellant on a point of law argued that, as an economic operator, it was directly concerned in the matter by the administrative action taken by the LPD in the exercise of State authority and therefore has the rights of a party under Austrian administrative procedural law (Paragraph 8 of the AVG). It submits that this also gives rise to the right of access to the RAPEX notifications (in accordance with Paragraph 17 of the AVG). There is no case-law of the Supreme Administrative Court on the right of request with regard to the action of public authorities under the RAPEX notification procedure. In particular, there is no case-law on the question of whether a right for the appellant on a point of law, as an economic operator concerned, to request the correction, completion or withdrawal of a RAPEX notification can be derived

directly from the RAPEX Guidelines. Nor is there any case-law on the question of whether adequate judicial protection is guaranteed with regard to action taken in the exercise of State authority in the RAPEX notification procedure. It was precisely the measures in the RAPEX notification procedure that led to the direct impairment of the ability of the appellant on a point of law, as an economic operator, to sell its products on the Austrian and European markets. This is exacerbated by the lack of the batch numbers of the pyrotechnic articles objected to. The denial of any judicial protection in the RAPEX notification procedure conducted by the authorities must be regarded as having significance that goes beyond the individual case, because every other economic operator in a RAPEX notification procedure would also be denied such judicial protection.

- 9 In its response to the appeal on a point of law, the LPD submits, in essence, that it was in relation to the distributor that the LPD withdrew the pyrotechnic articles from the market. The distributor would therefore be free to contest that administrative decision and thus to challenge the administrative measure before the administrative courts and the supreme courts of public law. Referring to points 3.4.3 and 3.4.3.5 of the RAPEX Guidelines, the LPD submits that, on those legal bases, the appellant on a point of law would have had the possibility at any stage of the RAPEX procedure to take the matter to the competent body, namely the Commission, in order to bring about the correction/completion of the RAPEX notification submitted. Furthermore, the Commission can permanently withdraw a notification from RAPEX in accordance with point 3.4.7.1. of the RAPEX Guidelines.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 10 The request for a preliminary ruling seeks to clarify, in particular, whether the RAPEX Guidelines directly give rise to a right of the economic operator to request the completion of a RAPEX notification – whereby, if that is the case, competence in that regard is to be clarified – and to adequate judicial protection for the economic operator against adverse effects arising from a RAPEX notification.
- 11 As regards the right to complete the RAPEX notification, the Supreme Administrative Court takes the view that certain provisions of the RAPEX Guidelines suggest that EU law does not provide for a right of an economic operator to complete a RAPEX notification, and a request to that effect is therefore inadmissible.
- 12 Accordingly, those guidelines state, in relation to the actors and roles involved in the notification process, that economic operators are not directly involved in the submission of notifications in the RAPEX application (Part II, Chapter 3.3.1.). In particular, the provisions concerning the permanent withdrawal of a notification from RAPEX state that the Commission may withdraw notifications from RAPEX only at the request of the notifying Member State, as the latter takes full

responsibility for the information transmitted through the system (Part II, Chapter 3.4.7.1.2. of the RAPEX Guidelines).

- 13 This might mean that, under the relevant EU law, the economic operator does not have a right to complete what it considers to be an incomplete RAPEX notification, but, rather, the RAPEX notification procedure is conducted exclusively between the Commission and the (authorities of the) Member States, without the economic operators being given any rights of their own in that respect.
- 14 As regards the competence to decide on an economic operator's request to complete a RAPEX notification, the Supreme Administrative Court takes the view that a number of provisions militate in favour of the authority of the Member State concerned being competent to decide on such requests. Examples of such provisions are Chapter 3.2.4. of Part II of the RAPEX Guidelines, according to which responsibility for the information provided lies with the notifying Member State, and the Commission does not assume any responsibility for the information transmitted, or Chapter 5.4. of Part I of the RAPEX Guidelines, according to which responsibility for the information provided lies with the notifying Member State.
- 15 On the other hand, the Supreme Administrative Court takes the view that other provisions militate in favour of the Commission having such competence. Examples of such provisions are Chapters 3.4.3. and 3.4.3.2. of Part II of the RAPEX Guidelines, according to which the Commission must check all notifications to ensure that they are correct and complete, and Chapter 3.4.4. of Part II of the RAPEX Guidelines, according to which the Commission is to validate and distribute through the RAPEX application all notifications assessed as correct and complete during its examination.
- 16 As regards judicial protection, clarification is sought as to whether the RAPEX Guidelines must be interpreted as meaning that the obligatory measure (namely the order to recall the pyrotechnic articles, issued vis-à-vis the distributor and not vis-à-vis the appellant on a point of law, as the importer) is to be regarded only as the starting point for further investigations conducted by the authorities of the Member States for the purposes of a RAPEX notification, and as meaning, in particular, that additional information going beyond the obligatory measure is processed in the RAPEX notification and subsequently distributed. In that case, a separate judicial protection procedure would most likely be required.