Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 1 December 2022 [1]

Case C-626/21

Funke Sp. z o.o.
joined parties:
Landespolizeidirektion Wien

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria))

(Reference for a preliminary ruling – Approximation of laws – Directive 2001/95/EC – General product safety – European Union Rapid Exchange of Information System (RAPEX) for dangerous non-food products – Implementing Decision (EU) 2019/417 – RAPEX guidelines – Regulation (EC) No 765/2008 – Market surveillance – Directive 2013/29/EU – Placing on the market of pyrotechnic articles – Right of an economic operator to complete a RAPEX notification – Article 34 TFEU – Free movement of goods – Measure having equivalent effect to a quantitative restriction)

I. Introduction

1. The circulation of goods facilitated by the internal market means that unsafe products can easily reach consumers in multiple Member States. In order to react to such situations, the European Union established the RAPEX system [2] – its version of 'three puffs sent by smoke signals'. [3]

2. In a nutshell, 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 goods with which they trade are the object of such notification.

3. The goods at issue in the present case are bangers, namely noise-making firecrackers, imported into the European Union from China by Funke Sp. z o.o., the applicant in the main proceedings. They were sold through different distributors in several Member States, including Austria.

[1] Original language: English.

[2] RAPEX stands for the European Union Rapid Exchange of Information System. Its features will be explained in further detail below (see points 24 to 37 of this Opinion).

[3] Native Americans used smoke signals to transmit information over long distances. Three puffs meant that there was a danger of some kind threatening the sender of the signal.

II. The facts in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

4. The present case arose from a request for a preliminary ruling by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria).

5. According to the order for reference, while conducting market surveillance in respect of a distributor of pyrotechnic articles in accordance with the applicable Austrian law,[4] the Landespolizeidirektion Wien (Regional Police Directorate, Vienna, Austria; 'the LPD') found that certain kinds of firecrackers stocked by that distributor were not safe for users to handle. By administrative decision, the LPD imposed on the distributor a prohibition on the sale of those articles and ordered their recall from the market ('the administrative measures addressed to the distributor').

6. Subsequently, the LPD, as the competent market surveillance authority in Austria for that type of goods, initiated a RAPEX notification procedure. Through the national RAPEX Contact Point, the LPD submitted three separate notifications ('the RAPEX notifications'). After verification, the Commission forwarded those notifications to the Member States.

7. Funke Sp. z o.o. ('Funke'), a company established in Poland, is the importer of the firecrackers concerned by the RAPEX notifications.

8. Funke considered that those notifications, as transmitted through RAPEX, did not properly describe the products which were the subject of the administrative measures addressed to the distributor. By letter of 30 April 2020, Funke therefore submitted requests to the LPD that the RAPEX notifications be completed by adding the batch numbers of the products concerned. As explained at the hearing before the Court, by this, it in fact requested that the year of production (2017) of the firecrackers at issue be indicated.[5] Funke additionally requested access to the files of the RAPEX notification procedure, in particular, the risk classification of the products covered by those notifications.

9. On 29 June 2020, the LPD rejected Funke's requests as inadmissible on the grounds that Funke was not considered to be a party to the proceedings. Funke filed an appeal.

10. As explained in the order for reference, the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) refused Funke's claims. According to that court, notifications in RAPEX are not administrative decisions, but material acts (simple administrative actions). Under Austrian law, only persons that claim that their rights have been infringed by the decision of an administrative authority may bring an appeal before the administrative courts on the ground of illegality. That court considered, however, that, in the Austrian legal system, economic operators, such as Funke, have not been granted a right to request the completion of a RAPEX notification or access to the files. That court also considered that there was nothing in the relevant EU law to suggest that Funke has such rights or that it has the status of party in the RAPEX notification procedure.

[4] 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 (Pyrotechnikgesetz 2010 – PyroTG 2010)).

[5] In its written observations, Funke additionally argued that the LPD should also have, as part of its obligation to fill in the description of the product and packaging field, included in the RAPEX notifications the outer packaging of Peng 1 and Peng 2 concerning the products, and that the LPD had disregarded the fact that the exact designation of the product or product type was that of 'tone generator'.

11. The appeal lodged by Funke against that judgment before the Verfassungsgerichtshof (Constitutional Court, Austria) was transferred to the Verwaltungsgerichtshof (Supreme Administrative Court), which is the referring court in the present case.

12. The referring court queries whether the relevant EU law concerning RAPEX directly gives rise to a right of an economic operator to request the completion of a RAPEX notification and to adequate judicial protection against adverse effects arising from a RAPEX notification. That court explains that, in its view, an economic operator does not have a right to request completion of what it considers to be an incomplete RAPEX notification, but rather that the RAPEX notification procedure is conducted exclusively between the Commission and the authorities of the Member States, without economic operators being given any rights of their own in that respect.

13. If such a right did exist, however, the referring court wishes to know which authority is responsible for replying to an economic operator's request for completion of a RAPEX notification. It considers that some provisions of EU law point to the Member State authority as being competent to decide on such requests (given that that authority has responsibility for the information provided), while others militate in favour of the competence of the Commission (given that the Commission verifies that RAPEX notifications are correct and complete).

14. The referring court further wonders whether the administrative measures addressed to the distributor (and not Funke as the importer) should be regarded as the starting point of the RAPEX notification procedure. If the two procedures are seen as one, a right to act against the notification might be recognised in respect of the distributor. This would still not grant any right to an importer, such as Funke, which was not the addressee of the original administrative decision. The referring court questions whether such judicial protection suffices under EU law.

15. In those circumstances, the Verwaltungsgerichtshof (Supreme Administrative Court) decided to stay the main proceedings and to refer the following questions to the Court of Justice 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 [of the European Parliament and of the Council of 9 July 2008 (OJ 2008 L 218, p. 30)], and Regulation (EC) No 596/2009 [of the European Parliament and of the Council of 18 June 2009 (OJ 2009 L 188, p. 14)], 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)], 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)], 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 [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?'

16. Written observations were submitted to the Court by Funke, the Austrian Government and the Commission. A hearing was held on 21 September 2022 at which those parties presented oral argument.

III. Relevant law

17. The referring court seeks an interpretation of the following acts of EU law relating to RAPEX, which I shall jointly refer to as 'the RAPEX-relevant EU law':

Directive 2001/95 ('the General Product Safety Directive');[6]

Regulation No 765/2008 ('the Market Surveillance Regulation');[7] and

Implementing Decision 2019/417 ('the RAPEX Guidelines').[8]

18. Those provisions have been made applicable to the firecrackers at issue in the present case by virtue of Directive 2013/29/EU on pyrotechnic articles.[9]

19. As my analysis will demonstrate, the Treaty provisions relating to the free movement of goods are also relevant in the present case.

IV. Analysis

20. The questions referred in the present case arise from the particularities of Austrian administrative law. As explained by the Austrian Government at the hearing, a person's request to an administrative authority is considered to be answered by an 'administrative act' if the person had a right in relation to that authority. In such a case, that person also has the right to bring an action in an administrative court against a decision by which the administrative

6 There is a legislative proposal to replace that directive. See further footnote 18 to this Opinion.

7 That regulation has been substantially amended by Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011 (OJ 2019 L 169, p. 1). See further footnote 19 to this Opinion.

8 See further footnote 20 to this Opinion.

9 Directive of the European Parliament and of the Council of 12 June 2013 on the harmonisation of the laws of the Member States relating to the making available on the market of pyrotechnic articles (OJ 2013 L 178, p. 27).

authority replied to its request. Conversely, if the person did not enjoy such a right, the reply by the administrative authority is not considered to be an administrative act and is not reviewable by a court.

21. Therefore, by the first question, the referring court, in essence, wishes to ascertain whether, under the applicable EU law, an economic operator, such as Funke, has the right to request the completion of a RAPEX notification as a party to that procedure. By the second and third questions, the referring court asks whether the authority responsible for the accuracy of the information is the Member State authority or the Commission. In the event that it is found that an economic operator has the right to ask the Member State authority for the completion of a RAPEX notification, then the refusal by the LPD to consider Funke's request for completion of the RAPEX notifications is reviewable by the Austrian administrative courts.

22. The fourth question referred is less clear. Given that the RAPEX notification procedure in the present case was triggered by the administrative measures addressed to the distributor, the referring court appears to consider that a right to request the completion of a RAPEX notification might exist for the distributor, but not for Funke. It wonders, however, whether such judicial protection would be sufficient under EU law or whether access to the courts should be granted to other interested economic operators, including importers. In order to answer that question in a way that may be of use to the referring court,[10] I will treat this question as asking whether EU law requires that Member States provide access to the courts for interested economic operators, such as Funke, against a RAPEX notification.[11]

23. This is the first time that the Court has been asked to interpret the provisions of EU law concerning RAPEX. I will, therefore, first provide some preliminary observations on RAPEX and how its notification procedure functions (A). I will then respond to the second and third questions referred by explaining that the RAPEX-relevant EU law places responsibility for the accuracy of information in RAPEX notifications on the Member State authority (B). That same legislation, however, does not envisage economic operators as parties to the RAPEX notification procedure. Therefore, in my opinion, the right of an economic operator to request the completion of a RAPEX notification cannot be based on the RAPEX-relevant EU law (C). This does not mean that the operator, in a situation such as the one in the present case, is left without any remedies under EU law against incomplete notification. I will argue that an incomplete RAPEX notification may, from the point of view of an economic operator, present an obstacle to trade in the internal market. For that reason, the right to request the completion of a RAPEX notification may be derived from the Treaty provisions concerning the free movement of goods (D). Finally, I will address the consequences that follow from such a conclusion for the referring court (E).

[10] At the hearing, there was some discussion of the possible relevance of Article 18 of the General Safety Directive and Article 21 of the Market Surveillance Regulation, which both concern State measures restricting the placement of products on the market. In relation to such measures, the given provisions envisage the right to be heard and the appropriate remedies. However, the Austrian Government explained at the hearing that, under Austrian law, the distributor concerned with such measures would not have any right in relation to the RAPEX notifications. Therefore, even if a broad interpretation of Article 18 of the General Safety Directive and Article 21 of the Market Surveillance Regulation were possible and allowed for the inclusion of an importer that was not the addressee of the measures, this would not be relevant for the question arising in the present case, which is whether an importer, such as Funke, has any rights against a RAPEX notification.

[11] According to settled case-law, it should be borne in mind that, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may not only have to reformulate the questions referred to it, but also to consider provisions of EU law which the national court has not referred to in its questions. See, for example, judgments of 15 July 2021, *Ministrstvo za obrambo* (C-742/19, EU:C:2021:597, paragraph 31), and of 24 February 2022, *Eulex Kosovo* (C-283/20, EU:C:2022:126, paragraph 33).

A. RAPEX and the notification procedure

24. Broadly speaking, RAPEX, as its name implies, is a system established by EU law for the rapid exchange of information between the Member States [12] and the Commission regarding dangerous non-food products. [13] It originated in a series of Council decisions adopted starting in the 1980s. [14] That system was then incorporated into Directive 92/59/EC on general product safety, [15] which was the predecessor of the General Product Safety Directive.

25. The number of notifications sent through RAPEX has progressively increased over the years. [16] In 2021, there were 2 142 notifications and 4 965 follow-up notices circulated through RAPEX. [17]

26. As has been mentioned, the RAPEX-relevant EU law currently includes the General Product Safety Directive, [18] the Market Surveillance Regulation [19] and the RAPEX Guidelines. [20] All those acts are based on Article 114 TFEU.

27. RAPEX is aimed essentially at the exchange of information between the Member States and the Commission in situations which require rapid intervention in the market regarding a (non-food) product. [21] Its purpose is to prevent accidents by alerting enforcement authorities in

[12] RAPEX also includes the States party to the Agreement on the European Economic Area (Iceland, Liechtenstein and Norway). Additionally, access to RAPEX is open to third countries and international organisations pursuant to the relevant international agreements concluded with the European Union. See Article 12(4) of the General Product Safety Directive.

[13] See, in that regard, judgment of 26 January 2017, *GGP Italy* v *Commission* (T-474/15, EU:T:2017:36, paragraph 12).

[14] See Council Decision 84/133/EEC of 2 March 1984 introducing a Community system for the rapid exchange of information on dangers arising from the use of consumer products (OJ 1984 L 70, p. 16; corrigendum OJ 1984 L 96, p. 44); Council Decision 89/45/EEC of 21 December 1988 on a Community system for the rapid exchange of information on dangers arising from the use of consumer products (OJ 1989 L 17, p. 51); Council Decision 90/352/EEC of 29 June 1990 amending Decision 89/45/EEC on a Community system for the rapid exchange of information on dangers arising from the use of consumer products (OJ 1990 L 173, p. 49). See further, for example, Falke, J., 'The Community System for the Rapid Exchange of Information on Dangers Arising from the Use of Consumer Products' in Micklitz, H.-W., Roethe, T. and Weatherill, S. (eds), *Federalism and Responsibility: A Study on Product Safety Law and Practice in the European Community*, Graham & Trotman, London, 1994, pp. 215 to 232; Howells, G. and Wilhelmsson, T., *EC Consumer Law*, Ashgate, Oxford, 1997, pp. 75 to 79.

[15] Council Directive of 29 June 1992 on general product safety (OJ 1992 L 228, p. 24). See, in particular, the fifteenth recital, Article 8 and the Annex thereto ('Detailed procedures for the application of the Community system for the rapid exchange of information provided for in Article 8').

[16] See European Commission, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (COM(2021) 342 final), 30 June 2021, points 2.4 and 3.

[17] See European Commission, Safety Gate 2021 results: Modelling cooperation for health and safety of consumers in the European Union, 2022, available at: https://ec.europa.eu/safety-gate/, pp. 9 and 13.

[18] There is a legislative proposal to replace the General Product Safety Directive: see European Commission, Proposal for a Regulation of the European Parliament and of the Council on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council, and repealing Council Directive 87/357/EEC and Directive 2001/95 of the European Parliament and of the Council (COM(2021) 346 final), 30 June 2021. While that proposal would change the name RAPEX to Safety Gate (see proposed recital 50), it would maintain the same characteristics of RAPEX (see Explanatory Memorandum, point 5, p. 16).

[19] The Market Surveillance Regulation has been substantially amended by Regulation 2019/1020, which is part of the Commission's 'Goods Package' (Commission Communication, The Goods Package: Reinforcing trust in the single market, (COM(2017) 787 final), 19 December 2017). In particular, Regulation 2019/1020 replaces Articles 15 to 29 of the Market Surveillance Regulation (see recital 7 and Article 39(1)(4) thereof). However, according to Article 44 of Regulation 2019/1020, it applies from 16 July 2021. Therefore, as indicated by the Austrian Government, it is not applicable *ratione temporis* to the present case. In any event, as indicated by the Austrian Government and the Commission at the hearing, it does not make substantive changes for the purposes of the present case.

[20] Those guidelines are the third such guidelines issued by the Commission, following, first, Commission Decision 2004/418/EC of 29 April 2004 laying down guidelines for the management of the Community Rapid Information System (RAPEX) and for notifications presented in accordance with Article 11 of Directive 2001/95 (OJ 2004 L 151, p. 83); and, second, Commission Decision 2010/15/EU of 16 December 2009 laying down guidelines for the management of the Community Rapid Information System 'RAPEX' established under Article 12 and of the notification procedure established under Article 11 of Directive 2001/95 (the General Product Safety Directive) (OJ 2010 L 22, p. 1). Such guidelines are, according to recital 28 of the General Product Safety Directive, non-binding.

[21] See, in that regard, General Product Safety Directive, recital 27 and Annex, Part II, point 2; Market Surveillance Regulation, recital 30; RAPEX Guidelines, Annex, Part II, point 3.5.1(a).

other Member States to potentially dangerous products.[22] RAPEX plays an important role in the area of product safety and, in particular, prevents and restricts the supply of dangerous products that pose a serious risk to the health and safety of consumers, thus helping to ensure the proper functioning of the internal market and a high level of consumer protection.[23]

28. RAPEX itself consists of several elements including the legal framework that regulates how the system operates (that is to say, the General Product Safety Directive and the RAPEX Guidelines); the RAPEX online application that allows the Member States and the Commission to exchange the information rapidly; the national RAPEX Contact Points responsible for operating RAPEX in the Member States; and the RAPEX website,[24] which provides summaries of RAPEX notifications and weekly updates to the general public.[25]

29. RAPEX functions in the following three stages.[26] First, there is the notification stage in which the competent authorities of a Member State create a notification, which is then transmitted through the national RAPEX Contact Point to the Commission. Second, there is the validation and distribution stage in which the Commission checks all the notifications to ensure that they are correct and complete and then forwards them to the Member States, in addition to publishing them on the RAPEX website. Third, there is the follow-up stage in which the Member States, upon receipt of a RAPEX notification, examine the information provided and take appropriate action, of which they also notify the Commission.[27]

30. Under Article 12 of the General Product Safety Directive and Article 22 of the Market Surveillance Regulation, the Member States are obliged to send a RAPEX notification to the Commission where the following four conditions are met.[28] First, *the product* falls within the scope of the General Product Safety Directive or of the Market Surveillance Regulation. Second, the product is *subject to measures* that prevent, restrict or impose specific conditions on its possible marketing or use, which can be taken either on the initiative of an economic operator (voluntary measures) or as ordered by the competent authorities of the Member State (compulsory measures), as in the present case.[29] Third, the product poses *a serious risk* to the health and safety of consumers or, in the case of the Market Surveillance Regulation, other relevant public interests. Fourth, the serious risk goes beyond the territory of the notifying Member State and thus has *cross-border effects*.[30]

22 See Howells and Wilhelmsson, cited in footnote 14 to this Opinion, p. 78.

23 See General Product Safety Directive, recital 4; RAPEX Guidelines, recitals 12 and 13; Annex, Part II, point 1.1.

24 This website, entitled Safety Gate: the EU rapid alert system for dangerous non-food products, is available at: https://ec.europa.eu/safety-gate/.

25 See RAPEX Guidelines, Annex, Part II, point 1.2.

26 See, for example, Commission Notice, The 'Blue Guide' on the implementation of EU product rules 2022 (OJ 2022 C 247, p. 1), point 7.6.4.

27 See RAPEX Guidelines, Annex, Part II, points 3.4 and 4.

28 RAPEX notifications are therefore mandatory under EU law in the case of 'Article 12 notifications' and 'Article 22 notifications'. The present case concerns such a mandatory notification (on the basis of Article 22 of the Market Surveillance Regulation). There are other types of notifications (see RAPEX Guidelines, Annex, Part II, point 3.1), which are not at issue in this case.

29 See General Product Safety Directive, Article 12(1) and (2); RAPEX Guidelines, Annex, Part I, point 4.1.

30 See General Product Safety Directive, Article 12(1) and (2) and Annex II, point 2; RAPEX Guidelines, Annex, Part I, points 3 to 6; Part II, point 2.1. Where those conditions are met and there are additional serious circumstances involved (for example, the product poses a life-threatening risk), the notification is classified as one requiring emergency action, thus with even shorter timelines: see RAPEX Guidelines, Annex, Part II, point 3.1.1.

31. More specifically, of relevance for the purposes of the present case, it is possible to distinguish several aspects with regard to the RAPEX notification procedure. First, when in the context of market surveillance the competent authorities of a Member State are confronted with a product presenting a serious risk requiring rapid intervention, such a product must be recalled, withdrawn or prohibited from the market. [31]

32. Second, when a Member State takes such a measure or intends to do so, it must assess whether the reasons which prompted the measure or the effects of that measure go beyond its territory. [32] The Member State must also assess whether the product poses a serious risk, which means that, before the Member State decides to submit a RAPEX notification, it must perform a risk assessment. [33]

33. Third, if the conditions for a RAPEX notification have been met, a Member State is required to send a notification 'immediately' to the Commission. [34] The notifying Member State provides all available details, including, in particular, information enabling the product to be identified. [35] A RAPEX notification, created by the relevant authorities of the Member State, [36] is submitted via a standard notification form, as set out in the RAPEX Guidelines. [37] Each Member State is required to establish a single RAPEX Contact Point to operate RAPEX at the national level. [38] The national RAPEX Contact Point checks and validates the completeness of the information received from the competent authorities before transmitting a RAPEX notification to the Commission. [39]

34. In that regard, RAPEX notifications are supposed to contain several types of data, including information enabling the notified product to be identified. The idea behind this is that 'detailed and accurate product information is a key element for market surveillance and enforcement, as it allows national authorities to identify the notified product, to distinguish it from other products of the same or similar type or category that are available on the market and to find it on the market and take or agree on appropriate measures'. [40] For this purpose, as emphasised in the RAPEX Guidelines, notifications should be as complete as possible, and all fields of the notification template should be completed with the required data. Where that data is not available at the time a notification is submitted, this should be clearly indicated and explained, and once the information becomes available, the notifying Member State must update the notification. [41] According to the notification template set out in the RAPEX Guidelines, certain information

31 See Market Surveillance Regulation, Article 20.

32 See General Product Safety Directive, Article 12; Market Surveillance Regulation, Article 22; see also RAPEX Guidelines, Annex, Part I, point 6.1, indicating that 'national authorities are encouraged to interpret the cross-border effects criterion in a fairly broad sense.'

33 See General Product Safety Directive, Article 12; Market Surveillance Regulation, Article 22; see also RAPEX Guidelines, Annex, Part I, points 5.1 and 5.3, indicating that Part III, Appendix 6 sets out a risk assessment method that can be used by the Member States in that regard, and that there is a specific tool (Risk Assessment Guidelines or 'RAG') available to facilitate risk assessments, along with point 5.4, indicating that the risk assessment is to be performed or checked by the relevant authority of the Member State which, inter alia, took the appropriate measures.

34 See General Product Safety Directive, Article 12(1); Market Surveillance Regulation, Article 22(1). Member States must send a RAPEX notification within 10 days after adoption of the appropriate measures (and for emergency notifications, within three days), and they must confirm measures within 45 days after submission of the notification if the notification was sent before deciding to adopt measures. See General Product Safety Directive, Annex II, point 4; RAPEX Guidelines, Annex, Part III, Appendix 4.

35 See General Product Safety Directive, Annex II, point 3; RAPEX Guidelines, Annex, Part II, point 3.2.1.

36 See RAPEX Guidelines, Annex, Part II, points 3.4.1 and 3.4.1.1.

37 See General Product Safety Directive, Annex II, point 3; RAPEX Guidelines, Annex, Part III, Appendix 1.

38 See RAPEX Guidelines, Annex, Part II, point 5.1.

39 See RAPEX Guidelines, Annex, Part II, points 3.4.2 and 5.1.2(e).

40 RAPEX Guidelines, Annex, Part II, point 3.2.1(a).

41 See RAPEX Guidelines, Annex, Part II, point 3.2.2.

concerning the product – including the type/number of model, the batch number/bar code and the product and packaging description – are designated as mandatory fields, which means that in principle they must be filled in. [42]

35. According to the General Product Safety Directive, the responsibility for the information provided lies with the notifying Member State. [43] For that reason, the RAPEX Guidelines require that 'the notifying Member State and the national authority responsible ensure that all data provided through the RAPEX application are accurate so as to avoid any confusion with similar products of the same category or type that are available on the EU market'. [44]

36. Fourth, in the RAPEX notification procedure, the Commission is essentially the 'central hub' [45] or 'distributor of messages' [46] between the Member States. It must, 'in the shortest time possible', verify all RAPEX notifications to ensure that they are correct and complete before transmitting them to the other Member States. [47] As regards completeness, special attention is given to the parts of a RAPEX notification that concern product identification. [48] The Commission also publishes summaries of RAPEX notifications on the RAPEX website in order to inform the public about products posing serious risks. [49] However, the RAPEX Guidelines state that any action taken by the Commission, such as validating and distributing RAPEX notifications and publishing them on the RAPEX website, is not to imply any assumption of liability for the information transmitted, which remains with the notifying Member State. [50]

37. Finally, upon receipt of a RAPEX notification, the other Member States must ensure appropriate follow-up. [51] They are to examine the information provided in a RAPEX notification and take appropriate action to establish whether the product was marketed on its territory, assess what preventive or restrictive measures should be taken, perform additional risk assessment and testing, if necessary, and collect any additional information that may be relevant for other Member States (for example, information on distribution channels of the product). [52] The Member States then notify the Commission of their findings and actions resulting from these activities in the form of follow-up notifications. [53]

38. It is in this light that the questions referred in the present case will be examined.

42 See RAPEX Guidelines, Annex, Part III, Appendix 1.

43 See General Product Safety Directive, Annex II, point 10.

44 RAPEX Guidelines, Annex, Part II, point 3.2.4.

45 Falke, cited in footnote 14 to this Opinion, p. 220.

46 Howells and Wilhelmsson, cited in footnote 14 to this Opinion, p. 79.

47 General Product Safety Directive, Annex II, point 5; RAPEX Guidelines, Annex, Part II, point 3.4.3. The Commission is in principle required to validate and distribute all RAPEX notifications within five days after receipt (and for those requiring emergency action, within three days). See RAPEX Guidelines, Annex, Part III, Appendix 5.

48 See RAPEX Guidelines, Annex, Part II, point 3.4.3.2.

49 See RAPEX Guidelines, Annex, Part II, point 3.4.5.1. There are exceptions to general disclosure and notifying Member States may request confidentiality of notifications: see RAPEX Guidelines, Annex, Part II, points 3.4.5.2 to 3.4.5.5.

50 See RAPEX Guidelines, Annex, Part II, point 3.2.4.

51 See General Product Safety Directive, Annex II, point 6; RAPEX Guidelines, Annex, Part II, point 4.1.

52 See RAPEX Guidelines, Annex, Part II, point 3.4.6.1 and 3.4.6.2.

53 See RAPEX Guidelines, Annex, Part II, point 4.2. Follow-up notifications are subject to a procedure similar to that of original RAPEX notifications. For example, the follow-up notification is created by the relevant national authority, the national RAPEX Contact Point checks and validates the follow-up notification before transmitting it to the Commission, and the Commission verifies all follow-up notifications to ensure that they are correct and complete before transmitting them to the Member States. See RAPEX Guidelines, Annex, Part II, points 4.2.4 and 4.4.

B. Responsibility for the accuracy of information in RAPEX notifications

39. Under the RAPEX-relevant EU law, the notifying Member State is responsible for the information provided in a RAPEX notification and ensures its accuracy (see points 33 to 36 of this Opinion).

40. At the same time, point 5 of Annex II to the General Product Safety Directive places some responsibility on the Commission requiring it to verify, 'in the shortest time possible', all RAPEX notifications to ensure that they are correct and complete (see point 36 of this Opinion). However, as indicated by the Austrian Government and the Commission, it is apparent that this is, by and large, a formal check and that it does not replace the primary responsibility of the notifying Member State for ensuring the completeness of a RAPEX notification. [54]

41. The notifying Member State remains responsible for the notified data as long as the RAPEX notification relating to certain products remains present within the system and must inform the Commission of any developments that require changes to a RAPEX notification. [55] Furthermore, as the notifying Member State takes full responsibility for the information transmitted through RAPEX, any permanent or temporary withdrawal of a RAPEX notification can occur only at the request of that State. [56]

42. All of this indicates that the EU legislature intended to place primary responsibility for the accuracy of information notified through RAPEX, including responsibility for the completeness of the information about the product concerned, on the notifying Member State. I therefore propose that the Court answer the second and third questions referred for a preliminary ruling to that effect.

C. The right to request the completion of a RAPEX notification under the RAPEX-relevant EU law

43. If the notifying Member State is responsible for the accuracy of the notified information, the question arises whether the interested economic operators enjoy, as part of the RAPEX notification procedure, a right to request from the competent Member State authorities the completion of a RAPEX notification.

44. According to the arguments put forward by Funke, such a right can be derived from the RAPEX-relevant EU law. The Austrian Government and the Commission disagree.

[54] The case-law seems to lend some support for this position. See, in that regard, judgment of 4 July 1989, *Francesconi and Others* v *Commission* (326/86 and 66/88, EU:C:1989:282, in particular paragraphs 10 to 12 and 23), and Opinion of Advocate General Lenz in Joined Cases *Francesconi and Others* v *Commission* (326/86 and 66/88, EU:C:1989:211, points 7, 21, 22 and 25). In that judgment, the Court dismissed an action for damages based on the Commission's alleged neglect in failing to disclose information on adulterated wine, indicating that it is the Member States that, pursuant to the early EU legislation introducing RAPEX (see footnote 14 to this Opinion), may decide to take urgent steps to prevent the marketing of a product because of the serious and immediate risk which that product presents for the health or safety of consumers, and that the Commission passes on such information. There have also been cases involving actions for damages against the European Union concerning a similar EU rapid alert system for food and feed (RASFF), which, in that context, confirms the Member States' responsibility for the accuracy of the information provided, as opposed to the Commission's. See, in that regard, judgments of 10 March 2004, *Malagutti-Vezinhet* v *Commission* (T-177/02, EU:T:2004:72, paragraphs 43 to 67, in particular paragraphs 51 and 52) (dismissing action brought by applicant whose products had been the subject of an erroneous notification), and of 29 October 2009, *Bowland Dairy Products* v *Commission* (T-212/06, EU:T:2009:419, paragraphs 34 to 46, in particular paragraphs 40 and 41) (dismissing action based on the Commission's alleged refusal to circulate a supplementary notification).

[55] See RAPEX Guidelines, Annex, Part II, point 3.2.3.

[56] See RAPEX Guidelines, Annex Part II, points 3.4.7.1.2 and 3.4.7.2.2.

45. It is common ground that there are no provisions of EU law concerning RAPEX which expressly provide for such a right.

46. In my view, such a right of participation in the RAPEX notification procedure, which would allow an economic operator to request the completion of a RAPEX notification, cannot be derived from the RAPEX-relevant EU law, including the provisions which the referring court mentions in its questions.

47. It is apparent from the RAPEX-relevant EU law that, as indicated by the Austrian Government and the Commission, the RAPEX notification procedure is designed as a procedure involving the competent authorities of the Member States and the Commission. The General Product Safety Directive (under its Article 12) and the Market Surveillance Regulation (under its Article 22) oblige a Member State immediately to notify the Commission through RAPEX where it adopts or decides to adopt voluntary or compulsory measures which prevent, restrict or impose conditions on the marketing of products which pose a serious risk (see points 30 and 33 of this Opinion).

48. It is possible that information concerning products posing a risk can be submitted by economic operators through a specific tool (the Product Safety Business Alert Gateway) on the RAPEX website. However, risk assessments carried out by economic operators are not binding on the national authorities, who are responsible for carrying out their own risk assessment and thus may come to a different conclusion.[57] In that respect, the RAPEX Guidelines clearly indicate that economic operators are not directly involved in the submission of RAPEX notifications,[58] even though they may be indirectly involved to some extent. Economic operators have an obligation immediately to inform the competent authority in all Member States on whose markets the product is made available if they discover that it poses a risk. Nevertheless, the RAPEX notification of such information, which triggers the obligation on all Member States to react, is exchanged between the Member States and the Commission.

49. Consequently, it seems to me that the RAPEX-relevant EU law, whether under the General Product Safety Directive, the Market Surveillance Regulation or the RAPEX Guidelines (or otherwise[59]), has not been designed with the aim of treating economic operators as parties enjoying certain rights within the RAPEX notification procedure.

50. I observe that, as noted in the scholarly literature, EU systems of information exchange in which the relevant legislation expressly grants the persons concerned a right to request the correction of information do indeed exist.[60] Nonetheless, it seems to me that RAPEX is not currently one of them.

[57] See RAPEX Guidelines, Annex, Part II, point 3.3.1.

[58] See RAPEX Guidelines, Annex, Part II, point 3.3.1.

[59] It is worth noting that this conclusion would not change on account of the legislative proposal to replace the General Product Safety Directive or the changes to the Market Surveillance Regulation made by Regulation 2019/1020: see footnotes 18 and 19 to this Opinion.

[60] See, in that regard, Eliantonio, M., 'Information Exchange in European Administrative Law: A Threat to Effective Judicial Protection?', *Maastricht Journal of European and Comparative Law*, Vol. 23, 2016, p. 531; and Special issue of *European Public Law*, Vol. 20, 2014, p. 65. They mention, for example, Article 43 of Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ 2006 L 381, p. 4); and Article 59 of Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ 2007 L 205, p. 63), both of which provide that: 'any person may bring an action before the courts or the authority competent under the law of any Member State to access, correct, delete or obtain information or to obtain compensation in connection with an alert relating to him.' See also Research Network on EU Administrative Law (ReNEUAL) Model Rules on EU Administrative Procedure, Article VI-19 'Obligations to update, correct or delete data', 2014, available at: http://reneual.eu.

51. Therefore, in answer to the first question referred, I consider that an economic operator's right to request from the competent Member State authorities the completion of a RAPEX notification cannot be derived from the RAPEX-relevant EU law.

52. That being said, I am of the opinion that 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 flows from the Treaty provisions which prohibit the Member States from imposing disproportionate obstacles to trade.

D. The right to request the completion of a RAPEX notification based on the Treaties

1. Incomplete RAPEX notification as an obstacle to trade

53. In my view, an incomplete RAPEX notification might, from the point of view of an economic operator, such as Funke, represent a measure having equivalent effect to a quantitative restriction ('measure of equivalent effect') if it hinders the possibility, for that operator, of placing safe products with which that operator trades on the markets of other Member States.

54. The free movement of goods between Member States is a fundamental principle of the FEU Treaty, which, among others, is expressed in the prohibition set out in Article 34 (and Article 35) TFEU, of quantitative restrictions on imports (and exports) between Member States and all measures having equivalent effect. [61]

55. It is settled case-law that Articles 34 and 35 TFEU have direct effect in the sense that they bestow justiciable rights on economic operators in relation to Member States. [62]

56. Therefore, if an incomplete RAPEX notification can be characterised as a measure of equivalent effect, an economic operator, such as Funke, would derive a justiciable right directly from the Treaties to request that such a measure not be applied in relation to its trade. An incomplete RAPEX notification may cease to be a measure of equivalent effect by being completed. Consequently, an economic operator could derive the right to request the completion of a RAPEX notification directly from the Treaties.

57. When questioned on this point at the hearing, the Austrian Government and the Commission took the view that a RAPEX notification cannot be qualified as a measure of equivalent effect. Funke took the opposite view, claiming that it was precisely the RAPEX notifications that led to the direct impairment of its right as an economic operator to sell its products on the markets of other Member States. In that regard, Funke explained that it cannot sell the products that have been unduly caught by the RAPEX notifications and that, by virtue of the publication on the RAPEX website, consumers are influenced not to buy those products.

[61] See, for example, judgments of 1 July 2014, *Ålands Vindkraft* (C-573/12, EU:C:2014:2037, paragraph 65), and of 18 June 2019, *Austria* v *Germany* (C-591/17, EU:C:2019:504, paragraph 119).

[62] See, in relation to Article 34 TFEU, judgments of 22 March 1977, *Iannelli & Volpi* (74/76, EU:C:1977:51, paragraph 13), and of 29 November 1978, *Redmond* (83/78, EU:C:1978:214, paragraphs 66 and 67). The latter judgment also confirms the direct effect of Article 35 TFEU. In that respect, see also judgment of 3 March 2011, *Kakavetsos-Fragkopoulos* (C-161/09, EU:C:2011:110, paragraph 22).

58. It should be recalled that, ever since *Dassonville*,[63] it is settled case-law that the prohibition of measures of equivalent effect covers any measure of the Member States that is capable of hindering, directly or indirectly, actually or potentially, intra-Union trade.

59. Consequently, not only measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably, but also any other measure which hinders access of products originating in one Member State to the market of another Member State is to be regarded as a measure of equivalent effect within the meaning of Article 34 TFEU.[64]

60. 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 (see points 33 and 34 of this Opinion). That obligation imposed on national authorities enables authorities of other Member States, as well as economic operators and consumers, to identify the product that is considered to pose a risk and to distinguish it from other similar products on the market, so as to avoid obstacles to trade in safe products.

61. Applied to the present situation, the mere possibility that, due to an incomplete notification transmitted by the Austrian authorities through RAPEX, an economic operator in another Member State might be dissuaded from importing or marketing the products erroneously included in the RAPEX notifications constitutes, in my view, a restriction on the free movement of goods for an economic operator, such as Funke.[65]

62. It is true that a RAPEX notification is not a measure typically at issue in cases concerning Article 34 TFEU. Usually, the Court is faced with measures taken by the importing Member State. In the light of the facts of the present case, such a measure would be taken, for example, by the German authorities, who would, upon receiving the RAPEX notifications, prohibit the sale of all firecrackers imported by Funke on the German market. Indeed, Funke indicated that the German authorities undertook certain measures, without explaining any details.

63. In my view, even without any measure taken by the German authorities (as in the example above), the relevant economic operators in Germany (for instance, the distributors with whom Funke had business relations) might decide not to import its products into Germany simply because of the RAPEX notifications issued by the Austrian authorities. Likewise, given that the RAPEX notifications are publicly available on the RAPEX website, a number of consumers might decide not to buy products imported by Funke and distributed on the markets of different Member States, which could, in turn, lead to reduced imports.

64. The Austrian Government and the Commission consider, however, that the mere possibility that imports might be affected due to an incomplete RAPEX notification is too remote to allow for its qualification as a measure of equivalent effect.

[63] See judgment of 11 July 1974 (8/74, EU:C:1974:82, paragraph 5). See also, for example, judgments of 10 February 2009, *Commission* v *Italy* (C-110/05, EU:C:2009:66, paragraph 33), and of 15 July 2021, *DocMorris* (C-190/20, EU:C:2021:609, paragraph 34).

[64] See, for example, judgments of 10 February 2009, *Commission* v *Italy* (C-110/05, EU:C:2009:66, paragraph 37), and of 18 June 2019, *Austria* v *Germany* (C-591/17, EU:C:2019:504, paragraph 121).

[65] See, for example, judgments of 20 September 2007, *Commission* v *Netherlands* (C-297/05, EU:C:2007:531, paragraph 53), and of 12 July 2012, *Fra.bo* (C-171/11, EU:C:2012:453, paragraph 22).

65. In that respect, I would like to recall the established case-law according to which the mere possibility that a fewer number of products will be sold as a consequence of a State measure (or action) suffices to qualify it as a measure of equivalent effect. To take a classic example, in *Commission* v *Ireland ('Buy Irish' campaign)*,[66] the Court held that a marketing campaign sponsored by the Irish Government encouraging its citizens to buy Irish goods hindered the free movement of goods, since by influencing the conduct of traders and consumers in that Member State, the campaign's potential effect on imports was comparable to that resulting from measures of a binding nature. Additionally, in *AGM-COS.MET*,[67] statements of an official attributable to a Member State, to the effect that certain products were dangerous and contrary to the requirements of the applicable EU harmonisation legislation, were regarded as capable of hindering, at least indirectly and potentially, the placing on the market of the products and thus as constituting an obstacle to trade for the purposes of Article 34 TFEU.

66. It follows that an incomplete RAPEX notification might be qualified as a measure of equivalent effect.

2. Effective judicial protection against alleged measures of equivalent effect

67. Not all obstacles to trade are prohibited. They are allowed if there is a legitimate aim which justifies the obstacle and the measure is not disproportionate in relation to such aim.

68. 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 do not pose a serious risk. In my opinion, 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.

69. 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.

70. The representative of the Austrian RAPEX Contact Point explained at the hearing that the year of production which is, according to Funke, missing from the RAPEX notifications could not be found on the products at issue. It could not, therefore, be indicated in those notifications. Furthermore, it claimed that such information is irrelevant for the assessment of the level of the risk posed by the firecrackers at issue. The defect in the product (in the case at hand, a fuse that was too short) is, in its view, an indicator of inadequate monitoring in the country of production, making such products generally dangerous, notwithstanding the year of production.

71. That may well be so. However, issues of this kind need to be assessed and decided by the appropriate fora in the Member States, including necessarily a court with the power of judicial review of decisions of national administrative authorities. It cannot be presumed, as claimed by the Commission, that Member States always transmit only accurate and complete information and that the system as established under RAPEX guarantees that.

[66] See judgment of 24 November 1982 (249/81, EU:C:1982:402, in particular paragraphs 27 to 30).

[67] See judgment of 17 April 2007 (C-470/03, EU:C:2007:213, in particular paragraphs 56 to 60 and 65).

72. Access to a court with sufficient powers to rule on alleged infringements of the rights of economic operators based on EU law is a requirement that flows from the principle of effective judicial protection, enshrined today in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). It is at the heart of the rule of law as understood in the EU legal order.

73. The Commission, however, claims that an action allowing an economic operator to request the completion of an incomplete RAPEX notification is not necessary to satisfy the requirement of effective judicial protection. It suffices, in the Commission's view, that the operator harmed by an incorrect RAPEX notification can introduce an action for damages against the notifying Member State.

74. I do not agree. An action for damages does not seem to me to be an effective remedy within the meaning of Article 47 of the Charter in this situation. [68]

75. First, the court's decision would, as pointed out by Funke, be likely to come years later. A decision awarding damages would, more importantly, have no direct and specific impact on the erroneous RAPEX notification at issue. In other words, it would not eliminate the unjustified obstacle to trade. An economic operator might, in the meantime, have lost its business. Moreover, as such an action for damages would be based on a Member State's alleged breach of EU law (the principle of State liability), it would entail the fulfilment of stringent conditions (namely the existence of a sufficiently serious breach of a rule of EU law which confers rights on individuals and a direct causal link with the damage sustained [69]), which in fact would seem to bring full circle the question of conferred rights.

76. Given that direct access to a court to challenge a measure that allegedly represents an unjustified obstacle to trade imposed by a Member State is mandated under EU law, an action for damages cannot be seen as an effective replacement in that regard.

77. Finally, contrary to the arguments put forward by the Austrian Government, the recognition of an economic operator's right to request the completion of a RAPEX notification does not, in my view, run counter to the objective pursued by RAPEX to provide for a speedy exchange of information between the Member States and the Commission on dangerous non-food products.

78. The solution that I propose does not provide a possibility for an economic operator to participate in the RAPEX notification procedure as a party or to prevent the notification by requesting its completion. It merely recognises the right which exists for all economic operators on the basis of the Treaties that Member States do not impose unjustified restrictions on their trade activities. That obligation is given concrete expression by the legislation relating to RAPEX in the requirement that the information sent through the system should be as accurate and as

[68] See, in that regard, Opinion of Advocate General Kokott in Joined Cases *État luxembourgeois (Right to bring an action against a request for information in tax matters)* (C-245/19 and C-246/19, EU:C:2020:516, point 102), who considered that an indirect legal remedy in the context of subsequent State liability proceedings is not an effective remedy within the meaning of Article 47 of the Charter, given that such a legal remedy, which is also subject to further conditions, cannot prevent a violation of the rights of the applicants concerned, but can at most provide compensation for any damage suffered, and that secondary means of redress alone does not constitute an effective remedy. It is true that, in its judgment, the Court found that, in that particular case, the possibility for an individual of bringing proceedings in order to obtain a finding that the rights guaranteed to that individual by EU law have been infringed and to obtain compensation for the harm suffered satisfied the requirement for effective judicial protection. See judgment of 6 October 2020, *État luxembourgeois (Right to bring an action against a request for information in tax matters)* (C-245/19 and C-246/19, EU:C:2020:795, paragraph 101). However, I am of the opinion that, in the present case, such a remedy is not effective.

[69] See, for example, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 51), and of 28 June 2022, *Commission* v *Spain (Breach of EU law by the legislature)* (C-278/20, EU:C:2022:503, paragraph 31).

complete as possible. Taking into account a complaint of an economic operator relating to the incompleteness of the information sent can result in a decision of the competent authorities to complete the notification or in their refusal to do so, which needs to have a rational explanation. The decision to complete the notification remains the prerogative of the Member State authorities.

79. Requiring the authorities to take into consideration and respond to the request of an economic operator to complete the notification cannot be seen as inconsistent with what was intended by RAPEX. On the contrary, it seems to me that recognising that economic operators have (*post festum*) a right to request the completion of a RAPEX notification is likely to enhance the effectiveness of that system. It would contribute to ensuring that the correct products are identified and can be traced in all Member States, which can then take appropriate action.

80. Therefore, on the basis of the reasons outlined above, I consider that the right of an economic operator 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 authority must be granted access to a court to challenge that refusal and claim that the incomplete notification is an unjustified obstacle to trade. The most efficient way to remove such obstacle is to complete the notification.

E. Consequences

81. There remains the issue of what, in the circumstances of the present case, are the consequences for the referring court of the recognition of an economic operator's right to request the completion of a RAPEX notification on the basis of EU law.

82. As the Court has consistently held, the principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that EU law is fully effective and to achieving an outcome consistent with the objective pursued by it.[70]

83. In that regard, the Austrian Government indicated that, under Austrian administrative procedural law, where a person has the right, on the basis of a directly applicable provision of EU law, to request an administrative authority to adopt a given course of action, the authority concerned is required, if it does not grant this request, to take a decision in this regard. It would seem to follow that the recognition of an economic operator's right to request the completion of a RAPEX notification, based on the Treaties, would change the assessment of possible remedies in Austrian administrative procedural law. The refusal of the competent authority to take into consideration Funke's request could therefore be qualified as an administrative act, which would, in turn, allow for its judicial review under Austrian law.

84. In those circumstances, an interpretation consistent with the requirements of EU law appears possible to me. However, in the division of tasks between the national courts and the Court of Justice in the preliminary ruling procedure, this is for the referring court to ascertain.

[70] See, for example, judgments of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 27), and of 13 July 2016, *Pöpperl* (C-187/15, EU:C:2016:550, paragraph 43).

V. Conclusion

85. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) as follows:

Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, 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, 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 Exchange System 'RAPEX' established under Article 12 of Directive 2001/95/EC on general product safety and its notification system

must be interpreted as meaning that the primary responsibility for the accuracy of information transmitted through the RAPEX notification procedure lies with the notifying Member State, but that the right of an economic operator to request the completion of a RAPEX notification does not arise directly from those provisions.

Such a right, however, can be derived from the prohibition of measures having equivalent effect to a quantitative restriction enshrined in Article 34 TFEU.

Member States have the obligation to provide judicial protection to all economic operators who claim that an incomplete RAPEX notification constitutes an unjustified obstacle to trade for them.