OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 22 October 2002 [1]

I — Introductory remarks

1. This case concerns the interpretation of Council Directive 89/397/EEC of 14 June 1989 on the official control of foodstuffs [2] (hereinafter 'the directive'). In particular, it concerns whether a manufacturer of foodstuffs has the right to apply for a second opinion where samples have been criticised by the authorities and whether the infringement of that right means that the findings based on the samples must not be used.

1 — Original language: German.
2 — OJ 1989 L 186, p. 23.

II — Relevant legislation

A — *Community law*

2. Article 6(1) of the directive provides, *inter alia*:

'1. The following shall be subject to inspection:

...

(d) finished products'.

3. Article 7 of the directive states:

'1. Samples of the products enumerated in Article 6(1)(b) to (f) may be taken for the purpose of analysis. Member States shall take the necessary steps to ensure that those subject to inspection may apply for a second opinion.

2. The analyses shall be carried out by official laboratories. Member States may also empower other laboratories to carry out these analyses.'

4. Article 12(1) of the directive provides:

'1. Member States shall take the measures necessary to ensure that natural and legal persons concerned by the inspection have a right of appeal against measures taken by the competent authority for the purpose of inspection.'

B — *National law*

5. According to the information provided by the referring court, the relevant legislation in the main proceedings is the German Lebensmittel- und Bedarfsgegenständegesetz (Law on Foodstuffs and Consumer Goods) (hereinafter the 'LMBG').

1. Provisions relating to fines

6. Paragraph 17(1)(2)(b) of the LMBG states:

'It is prohibited to place on the market in the course of business, without sufficiently precise labelling, foodstuffs the composition of which does not correspond to accepted standards, thus diminishing their value to a not inconsiderable degree, in particular their nutritional value and the level of consumer satisfaction they offer'.

7. Paragraph 52(1)(9) of the LMBG states:

'A custodial sentence of up to one year or a fine shall be imposed on any person who,

contrary to Paragraph 17(I)(1) or 17(I)(2), places foodstuffs on the market without sufficiently precise labelling'.

8. Paragraph 53(1) of the LMBG states:

'Whosoever negligently commits one of the acts described in Paragraph 52(I)(2) to (11) or 52(II), but in the cases of Paragraph 52(I)(6) and 52(II)(3) only if he has used the substances defined in Paragraph 14 or has brought the foodstuffs or tobacco products within the area to which this Law applies, shall be guilty of a summary offence'.

2. Provisions relating to the taking of samples

...

9. Paragraph 42 of the LMBG states:

'(1) So far as implementation of the provisions on trade in products within the meaning of this Law so requires, the persons charged with supervision and police officials are authorised to request or to take samples of their choosing for inspection purposes against acknowledgement of receipt. Part of the sample or, in so far as the sample cannot, or cannot without jeopardising the purpose of the inspection, be divided into portions of equivalent composition, a second piece of the same type and from the same manufacturer as that taken as a sample, shall be left behind. The manufacturer may waive the leaving behind of a sample.

(2) Samples to be left behind shall be officially closed or sealed. They must bear the date on which the sample was taken and the date after the expiry of which the closure or the seal is to be regarded as being no longer valid.

(4) Authorisation to take samples extends to products as defined in the present Law which are sold at markets, on streets or public places or by way of itinerant trade, or which have been transported before delivery to the consumer.'

III — Facts and main proceedings

10. The company Böklunder Plumrose GmbH & Co. KG manufactures small *Bockwurst* sausages, which are sold in retail outlets in glass jars with metal lids. Mr Steffensen, the person subject to inspection in the main proceedings, is responsible for production supervision.

11. Over the past number of years public authorities have on various occasions taken from retail outlets samples of products manufactured by Böklunder Plumrose GmbH & Co. KG. The products in question were, in each case, small *Bockwurst* sausages in glass jars with metal lids.

12. The samples taken underwent laboratory inspection. In the inspection results, each of the samples taken was criticised on grounds relating to the legislation on foodstuffs, in particular the fact that the products had been declared to be 'country-style *Bockwurst* sausages' ('*Landbockwürste*'), which, given their composition, they were not.

13. From all of the samples taken, a second sample was on each occasion left behind in the retail outlet. None of the samples left behind reached Mr Steffensen or Böklunder Plumrose GmbH & Co. KG. It is not known whether the individual retail traders informed Mr Steffensen or the company that samples had been taken. Nor has it been possible to clarify whether the sample results were in each case notified in sufficient time to enable Mr Steffensen or Böklunder Plumrose GmbH & Co. KG to apply for a second opinion.

14. By a decision of 13 September 2000 imposing a monetary fine, the fines office of the Schleswig-Flensburg local authority imposed on Mr Steffensen a fine in the amount of DEM 500. He is accused of infringing Paragraphs 17(I)(2)(b), 52(I)(9) and 53(I) of the LMBG. An appeal was lodged against that decision in due and proper form and within the specified time-limit.

15. The Amtsgericht Schleswig (Local Court, Schleswig), the court before which the appeal was brought, takes the view that Paragraph 42 of the LMBG fails to take adequate account of the case where — as here — the sample has been taken in a retail trade outlet and [part of] the sample was left behind there. The reason for this is that, so far as the Amtsgericht is aware, samples left behind are, as a rule, kept only for a period of one month. If the authorities fail to inform the manufacturer immediately that samples have been taken, the

manufacturer cannot (any longer) apply for a second opinion if the sample has been criticised by public authorities.

16. Against that background, the Amtsgericht Schleswig takes the view that the question arises as to whether the manufacturer has a right under Article 7(1) of the Council Directive on the official control of foodstuffs to apply for a second opinion and — if the answer is in the affirmative — whether infringement of that right means that the sample may not be used.

IV — Questions referred

17. Taking the view that that question involved the interpretation of Community law, the Amtsgericht Schleswig decided, on 5 July 2001, to refer the following questions to the Court of Justice for a preliminary ruling under Article 234 EC:

1. Is Article 7(1) of Council Directive 89/397/EEC of 14 June 1989 on the official control of foodstuffs to be construed as conferring on the manufacturer of a product a directly applicable right to apply for a second opinion in the case where public authorities have taken from a retail outlet a sample of the manufacturer's product for the purposes of analysis and that sample has failed to satisfy certain criteria imposed by the legislation on foodstuffs?

2. If the answer to Question 1 is in the affirmative: is Article 7(1) of that directive to be construed as giving rise to a Community-law prohibition on the use of findings based on samples removed by public authorities where it has not been made possible for the manufacturer of the product which is the subject of criticism in those findings to apply for a second opinion?

V — Question 1

A — *Submissions of the parties*

18. The German Government takes the view that, although Article 7(1) of the directive is to be understood as meaning that the person subject to inspection should be entitled to an unconditional right to choose whether or not to seek a second opinion, that provision does not establish a directly applicable right to do so. Directly applicable rights can arise only in the case of non-existent or defective transposition of the directive.

19. In this case, however, the German Government submits that Article 7 was properly transposed by Paragraph 42 of the LMBG, which states that, where official samples are taken, a comparison sample is to be left behind. This gives the person subject to inspection, such as the manufacturer or retailer, the opportunity to apply for a second opinion. Where samples are taken at a later stage in the marketing chain, the manufacturer and the network of retailers are usually under a contractual obligation to provide each other with information.

20. Consequently, it contends, the manufacturer's right to be able to apply for a second opinion follows not from the direct applicability of the directive but from the LMBG as interpreted in accordance with the directive.

21. The Italian Government submits that the analysis referred to in Article 7(1) of the directive serves to establish infringements of Community law and that the adversarial nature of the proceedings and the right to a fair hearing of the person subject to inspection are therefore to be safeguarded. More specifically, therefore, either the taking of samples itself must be carried out in the presence of the person subject to inspection or that person must actually be given the opportunity to apply for a second opinion. Although the rules governing adversarial proceedings are at the discretion of the Member States, the protection of the rights of those involved must in any event be guaranteed, which is not the case where the person suspected of an infringement was neither present at the time when the samples were taken nor informed about it as he should have been in those circumstances.

22. As far as the Danish Government is concerned, the answer to the first question depends on how the terms 'those subject to inspection' and 'necessary steps' in the second subparagraph of Article 7(1) of the directive are to be interpreted.

23. The Danish Government submits that the term 'those subject to inspection' refers exclusively to those undertakings from which samples are actually taken. In its view, it follows from the wording and the context of the second subparagraph of Article 7(1) of the directive that it is only to these undertakings, and not to those at previous stages in the marketing chain, that Member States are to afford the opportunity to apply for a second opinion. An inspected undertaking is free to inform the relevant operators at previous stages in the marketing chain about the inspection measures taken and to send any samples to the manufacturers or to subject the samples to a second opinion together with the manufacturers or at the manufacturers' request. Moreover, legal certainty for the undertakings responsible for the infringement of legislation on foodstuffs is also taken into account by the right of appeal under Article 12 of the directive.

24. With regard to the 'necessary steps', the Danish Government contends, in the event that operators at previous stages in the marketing chain are also to be regarded as being among 'those subject to inspection', that the directive does not impose an obligation on the authorities to inform those operators that samples are being taken. In its view, the second subparagraph of Article 7(1) is not sufficiently clear, precise and unconditional to support the inference of such a right (to information) on the part of manufacturers. After all, the fact that the authorities leave behind a second sample with the retailer is sufficient to afford operators at previous stages in the marketing chain the opportunity to apply for a second opinion.

25. The Commission takes the view that, after samples are taken, those subject to inspection clearly have a right to a second opinion under the second subparagraph of Article 7(1). In its submission, this is apparent, on the one hand, from the 13th recital in the preamble to the directive and, on the other, from the fact that those subject to inspection would otherwise not be able to assert fully the right of effective appeal laid down in Article 12 of the directive. In the Commission's view, the word 'gegebenenfalls' ('if appropriate') [see footnote 14] restricts the right to apply for a second opinion only in so far as the second opinion can be in any way relevant.

26. In view of this, the Commission takes the view that there is no longer any need for the usual examination as to whether Article 7(1) of the directive is an unconditional and sufficiently clear provision which, by way of exception, is capable of establishing a subjective right accruing to individuals from a directive, although the wording of that provision removes any doubts in this regard.

27. It goes on to state that where, as in the present case, so much time passes between the taking of a sample by the inspection authorities and the imposition of a fine on the basis of the sample that the person subject to inspection cannot exercise his right to a second opinion, the authorities infringe not only the right to a second opinion under Article 7(1), but also the right of the person subject to inspection to an effective appeal under Article 12.

28. As regards the issues of practical implementation raised by the German and Danish Governments, it was stated at the hearing that this could be achieved in ways other than those suggested by those two governments; a second, frozen sample could be kept by the authorities, for example.

B — *Assessment*

29. In order to be able to give to the first question an answer which will be of assist-

ance in resolving the dispute in the main proceedings, it is necessary first of all to discuss in greater detail the purpose of the question, in particular in the light of the situation in the main proceedings. [3]

30. In this connection, the parties to the proceedings clearly proceed on completely different assumptions of emphasis in their submissions, a fact which can be explained by the wording of the provision which the Court has been asked to interpret in this case. Firstly, the second subparagraph of Article 7(1) refers to an obligation on Member States to take the 'necessary steps' specifically to ensure that those subject to inspection 'may apply for' a second opinion. To that extent the obligation to create the conditions for applying for a second opinion appears at first sight to take priority over granting the actual right to a second opinion.

31. The governments taking part in the proceedings have all — to varying degrees — commented on the scope of the 'necessary steps' and in particular on the question whether the authorities of the Member States have an obligation under the directive to inform a manufacturer of the fact that samples have been taken from a retailer. Of course, the two issues — which measures are necessary to create the conditions for applying for a second opinion and whether a right to a second opinion exists — are closely connected. After all, if Member States — in infringement of Article 7 of the directive — do not adequately create the conditions for applying for a second opinion, they thereby also infringe the right to obtain such an opinion which those subject to inspection may derive from that provision.

32. As is apparent from the order for reference, however, the referring court proceeds on the premiss that the necessary steps under Article 7(1) of the directive were not sufficiently taken by Paragraph 42 of the LMBG, and that it was not made possible to apply for a second opinion. The manufacturer's right to a second opinion, if he has one, has thus been infringed. That very issue, whether the directive establishes such a right for individuals which it is for the courts to protect, is addressed in the first question referred.

33. Moreover, in the light of the foregoing, it does not seem appropriate to concur with the view of the German Government that the first question, if it is to be answered in the negative, should be so on the ground that the right to a second opinion derives from national law as interpreted in accordance with the directive and not from the directive itself. Here, account should be taken of the findings of the Court in the judgment in *Simmenthal* to the effect that,

3 — See the judgments in Case 1/80 *Salmon* [1980] ECR 1937, paragraph 6, and Case 222/84 *Johnston* [1986] ECR 1651, paragraph 11.

in any event, 'rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force' and 'every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals'. [4] That principle, that national courts must effectively enforce and protect rights conferred on individuals by Community law applies irrespective of whether, in a particular case, those rights can be inferred from national law (as interpreted in accordance with Community law) or derive from directly effective Community law where this has been inadequately transposed. It is ultimately for the national courts to decide whether the full effect of the directive or of any right which it confers on individuals is to be ensured by interpreting national implementing provisions in accordance with the directive. [5]

34. According to settled case-law, wherever the provisions of a directive appear to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State and those rights are to be protected where the directive has not been correctly implemented in national law by the end of the period prescribed. [6]

35. A provision of Community law is sufficiently precise in order to be relied upon by individuals and applied by courts where it unequivocally constitutes an obligation. [7]

36. Moreover, a provision is unconditional where it constitutes an obligation which is neither qualified by any condition, nor subject, in its performance or effects, to the taking of any measure either by the institutions of the Community or by the Member States. [8]

37. In my opinion, in the light of the objective and contents of the directive, [9] Article 7(1) exhibits those characteristics, in particular as regards the question whether those subject to inspection have a right to a second opinion.

38. Although it must be assumed that Article 7(1) allows the Member States some

4 — Judgment in Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 14 and 21.

5 — See in this connection, for example, the judgments in Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, paragraphs 22 to 24, and Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld and Others* [1996] ECR I-5403, paragraph 59.

6 — See in particular the judgments in Case 8/81 *Becker* [1982] ECR 53, paragraph 25, and Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 29.

7 — See the judgments in Case 152/84 *Marshall* [1986] ECR 723, and Case 71/85 *Federatie Nederlands Vakbeweging* [1986] ECR 3855.

8 — See, in particular, the judgement in Case 28/67 *Molkerei-Zentrale Westfalen/Lippe* [1968] ECR 143.

9 — With regard to this criterion, see, for example, the judgment in Case C-31/90 *Johnson* [1991] ECR I-3723, paragraph 34.

discretion in implementing at national level the 'necessary steps' to facilitate applications for a second opinion, [10] that fact alone does not rule out the possibility that the directive is sufficiently clear and precise as regards the grant of the right to a second opinion. After all, as the Court has already so held, even if a directive allows the Member States a varying degree of latitude, individuals may not be denied the right to rely on provisions of the directive insofar as, owing to their particular subject-matter, they are capable of being severed from the general body of provisions and applied as such. [11]

39. It should be noted, firstly, that, taken by itself, the wording of Article 7(1) permits the conclusion that it is intended not only to make it possible to apply for a second opinion, but ultimately to grant a right to do so ('that those subject to inspection may'). This is more readily apparent from other language versions. [12]

40. As the Commission has rightly submitted, that conclusion is confirmed by the 13th recital in the preamble to, and Article 12(1) of, the directive. The 13th recital in the preamble to the directive states that the 'legitimate rights' of undertakings 'must be preserved, in particular the right to manufacturing secrecy and the right of appeal'.

41. Article 12 of the directive lays down specific rules to preserve the 'legitimate right' to lodge an appeal. Under that provision, the Member States are to take the measures necessary 'to ensure that natural and legal persons concerned by the inspection have a right of appeal against measures taken by the competent authority for the purpose of inspection'. In this respect, that provision can be regarded as reflecting and laying down the general principle of effective (judicial) protection which underlies the constitutional traditions common to the Member States. [13]

42. Effective legal protection against the taking and analysis of samples in turn requires that those subject to inspection have the right to apply for a second opinion.

10 — For a provision of a directive with similar wording ('the Member States are to adopt the necessary measures to ensure'), see in this connection the judgment in Case C-287/98 *Linster* [2000] ECR I-6917, paragraphs 9 and 36.

11 — See, *mutatis mutandis*, the judgments in Case C-346/97 *Braathens Sverige* [1999] ECR I-3419, paragraph 30, and Case 8/81 (cited in footnote 6), paragraph 25.

12 — 'Member States shall take the necessary steps to *ensure* that those subject to inspection *may apply* for a second opinion,' and '[l]es États membres prennent les dispositions nécessaires *afin d'assurer* aux assujettis *le bénéfice* d'une éventuelle contre-expertise.' See also the Spanish version: '... para *garantizar* que quienes estén sujetos a dicha obligación *puedan recurrir* a un eventual contraperitaje'; the Dutch version: '*opdat* de betrokkenen eventueel een tegenexpertise *kunnen laten uitvoeren*'; and the Danish version: '*for at sikre*, at virksomhederne *kan* lade de paagaeldende produkter underkaste en eventuel kontraekspertise'.

13 — See the judgment in *Johnston* (cited in footnote 3), which is comparable in this respect, paragraphs 17 to 20.

43. However, contrary to the view of the Danish Government, there is in my opinion no doubt that manufacturers too — and not just retail traders — are among 'those subject to inspection' who enjoy that right. After all, it is their products that are analysed and it is ultimately they who, like Mr Steffensen, are liable to be held responsible for defects in the preparation and composition of foodstuffs, and who must therefore be provided with guarantees of legal protection in this regard.

44. Lastly, I share the view expressed by the Commission and the German Government in the conclusion to their submissions that the word 'gegebenenfalls' in the second subparagraph of Article 7(1) must not be interpreted as a restriction or qualification of the right to a second opinion. Rather, this element merely reflects the fact that the provision confers a discretion on those subject to inspection. They have a right to apply for a second opinion, but they also have a choice as to whether or not to exercise that right depending on the particular circumstances, such as, for example, whether or not the authorities' findings criticise the product. [14]

45. In the light of the foregoing considerations, it follows, therefore, that Article 7(1) confers in a sufficiently clear and unconditional manner a right on manufacturers to apply for a second opinion. The referring court's first question must accordingly be answered in the affirmative.

VI — Question 2

A — *Submissions of the parties*

46. In connection with the provisions laid down in Article 6 of the ECHR (European Convention for the Protection of Human Rights and Fundamental Freedoms), Mr Steffensen submitted that, in this case, that provision serves only as a criterion for interpreting the directive and is applicable to this case too, a circumstance not altered even by the fact that the conduct at issue is classified in German law as a summary offence. The case-law of the European Court of Human Rights, he contends, can be construed as conferring the right to a second opinion in matters involving evidence based on complex examination procedures. That is precisely the case with inspections of foodstuffs.

47. The German Government takes the view that, even in cases where a manufacturer or other persons subject to inspec-

14 — Moreover, the English version of that provision contains no such element and merely states: 'may apply for a second opinion'.

tion have been given no opportunity to apply for a (second) opinion, the directive contains no Community-law prohibition on the use of findings from a first analysis.

48. Community law, it contends, is in principle implemented in accordance with national procedural provisions, and the German law of criminal procedure — like German administrative law — does not provide for a general prohibition on the use of evidence as the legal consequence for breaches of procedure. Moreover, given the principles of ex-officio investigation and the free evaluation of evidence that apply to criminal proceedings in Germany, there is no necessity for a second test to challenge the results of an analysis.

49. The German Government submits that such procedural rules must of course comply with the requirements of Community law, but they do in this case. For, on the one hand, they do not infringe the prohibition on discrimination because infringements of procedural requirements laid down in the directive are dealt with in exactly the same way as irregularities in proceedings concerning the enforcement of provisions of purely national law. On the other hand, the enforcement of Community law is not rendered impossible in practice by the principle of the free evaluation of evidence and therefore fulfils the requirement of effectiveness. In its view, the second opinion under the directive does not serve any purpose in itself, but is rather just one of many possible means of defence against an accusation of infringement of provisions from the legislation on foodstuffs.

50. The Danish Government expresses the same view as the German Government in the conclusion to its submissions and contends that it is to be left to national courts to determine what if any consequences under the law of criminal procedure are to follow from an infringement of any obligation there may be to provide information under the second subparagraph of Article 7(1) of the directive. It cannot be inferred either from the directive or from Community law in general that evidence in national criminal proceedings may not be used in a case such as this.

51. With regard to Article 6 of the ECHR and the case-law of the European Court of Human Rights concerning that article, the Danish Government submits that the provisions of the ECHR apply only to judicial proceedings and not to the preliminary administrative proceedings pending in this case. Moreover, it contends, the adversarial system has been safeguarded.

52. Even in the light of Article 6 of the ECHR, the Commission opposes a prohibition — an absolute one at least — on the use of findings from samples inspected solely by the public authorities. It takes the view that the rights conferred on those

subject to inspection by Article 7(1) and Article 12 of the directive would be stretched too far if sample findings on which those subject to inspection were unable to obtain a second opinion could not be used even if they were so clear that a second opinion could not under any circumstances have invalidated them. It bases that qualified view on the word 'gegebenenfalls' in [the German language version of] Article 7(1) of the directive, which, it submits, indicates that a second opinion is intended to be possible only in cases where it may lead to findings of use to the defence.

53. At the hearing, the Commission stated that the obligation to provide information is directly incumbent only on retailers and that, with regard to informing manufacturers, notification within the marketing chain is sufficient.

B — *Assessment*

54. Generally speaking, the referring court's second question concerns the relationship between Community law and national procedural provisions. The referring court would like to know whether findings which criticise a manufacturer's product may be used as evidence in proceedings before a court if it has not been made possible for the manufacturer of the product to exercise the right to apply for a second opinion conferred on him by the directive. In other words, against the background of the main proceedings, the question is to be understood as seeking to ascertain whether Community law precludes the application of a national rule of evidence which permits findings obtained in the circumstances described to be used as evidence in court.

55. In that connection, it should be noted that, according to settled case-law of the Court, in the absence of a rule of Community law, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, [15] provided, however, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). [16]

15 — The detailed rules of judicial procedure referred to include national rules of evidence also; see the judgments in Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 17, and Case C-228/98 *Dounias* [2000] ECR I-577, paragraph 69.

16 — See, to that effect, the judgments in Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5, Case 45/76 *Comet* [1976] ECR 2043, paragraphs 13 and 16, Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995] ECR I-4705, paragraph 17, Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 27, Case C-246/96 *Magorrian and Cunningham* [1997] ECR I-7153, paragraph 37, and Joined Cases C-279/96, C-280/96 and C-281/96 *Ansaldo Energia and Others* [1998] ECR I-5025, paragraph 16.

56. In this case, it is necessary first to place those principles in their proper context. As I stated in connection with the first question, although the directive does confer on individuals the right to apply for a second opinion, the main proceedings are concerned only indirectly with the enforcement of that right. Their direct concern is the exercise of the right laid down in Article 12 of the directive to an effective legal remedy against measures taken by the competent authority for the purpose of inspection. The right to apply for a second opinion, as I have again already stated, serves ultimately to give expression to the right to an effective legal remedy.

57. With regard to the principle of equivalence, it must be examined in this case whether the procedure applicable to the appeal under Article 12 of the directive is less favourable than those applicable to similar remedies which concern only domestic law.

58. As regards the national rules of evidence in question, the documents before the Court show that, in general, German procedural law contains no such prohibition on the use of evidence and does not therefore distinguish according to whether legal remedies relate to measures by the authorities to monitor compliance with Community law or domestic law. [17]

59. Consequently, it is compatible with the principle of equivalence for the national procedural rules not to contain a prohibition on the use of findings in cases where it has not been possible for the manufacturer to apply for a second opinion pursuant to Article 7(1) of the directive.

60. As regards, next, the principle of effectiveness, the rule of evidence to the effect that findings of authorities may be used where the manufacturer has been unable to apply for a second opinion must not render it virtually impossible or excessively difficult for the manufacturer to enjoy the legal protection conferred by the directive.

61. It follows from the case-law of the Court that that question must be analysed by reference to the role of the rule of evidence in question 'in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of

17 — See the judgements in Case C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraph 31 et seq., and Case C-228/98 (cited in footnote 15), paragraph 70.

the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration'. [18]

62. Moreover, it should be observed in this connection — as I have already pointed out in the context of the first question [19] — that the right of effective appeal laid down in Article 12 is the expression of a general principle of law which underlies the constitutional traditions common to the Member States. As the Court has already held in this respect in its judgments in *Johnston* and *Heylens*, [20] that principle 'is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950', and 'the principles on which that convention is based must be taken into consideration in Community law'.

63. Under the principle of effectiveness as applied to this case, Community law therefore precludes the use of findings against which the manufacturer has not been able to apply for a second opinion where this makes it virtually impossible or excessively difficult to provide actual and effective legal protection against measures taken by the competent authority for the purpose of inspection.

64. In my opinion, that would be the case in any event if a second opinion were the only appropriate means by which an individual could defend himself effectively against the authority's criticism or produce counter-evidence.

65. It is, however, for the national court to make certain that that opportunity is available, having regard to the national procedural rules, and in particular taking into consideration the principle of the free judicial evaluation of evidence applicable to the referring court and the specific facts of the case. [21]

66. Lastly, the parties to the proceedings considered the question whether and to what extent the right to a fair trial laid down in Article 6 of the ECHR imposes a prohibition on the use as evidence of findings obtained in circumstances such as those of this case.

18 — Judgments in Case C-312/93 *Peterbroeck, Van Campenhout & Cie* [1995] ECR I-4599, paragraph 14, and Joined Cases C-430/93 and C-431/93 (cited in footnote 16), paragraph 19.

19 — See point 41 above.

20 — Judgments in Case 222/84 (cited in footnote 3), paragraph 18, and Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 14.

21 — See the judgment in *Charalampos* (cited in footnote 15), paragraph 71.

67. Firstly, the Danish Government's objection that Article 6 of the ECHR is not applicable because this case concerns preliminary administrative proceedings and not judicial proceedings cannot be sustained. The second question is not concerned primarily with whether or not a manufacturer can or is entitled to obtain a second opinion in administrative proceedings, but rather with what conclusions in relation to the use of findings as evidence the court in the main proceedings must draw from the fact that the manufacturer is unable to submit a second opinion because it was not made possible for him to apply for one (during the administrative proceedings). Consequently, even if the causes of the lack of a second opinion have their origins in the administrative stage of the procedure, the question arises as to whether the findings can be used in judicial proceedings, with the result that the provisions of Article 6 of the ECHR must be complied with.

68. It follows from the case-law of the European Court of Human Rights that, although the convention does not lay down rules on evidence as such, the particular proceedings considered as a whole, including the way in which evidence was taken, must meet the requirements of a fair trial within the meaning of Article 6(1) of the ECHR. [22] Among those requirements are, above all, the adversarial nature of proceedings and the equality of arms of parties to the proceedings. In accordance with those principles, a party to a criminal or civil trial must have the opportunity to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision; moreover, he must be able to present his case in court in circumstances which do not put him at a significant disadvantage in relation to his adversary. [23]

69. Thus, according to the case-law of the European Court of Human Rights, the use in court of evidence which is vitiated by irregularities is not automatically precluded. What is decisive here too is whether the party to the proceedings can effectively defend himself in the circumstances of the case. [24]

70. For example, in the judgment in *Kahn*, cited by the Danish Government, which concerned the use of a tape recording as evidence in criminal proceedings in breach of the principle of legality, the European Court of Human Rights based its decision largely on the fact that the defendant in those proceedings had sufficient opportunity to challenge the authenticity of the

22 — *Inter alia*, Eur. Court H. R., *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, §§ 45 and 46, and *Mantovanelli v. France*, judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II, pp. 436—37, § 34.

23 — See, for example, Eur. Court H. R., *Vermeulen v. Belgium*, judgment of 20 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 233, § 33, *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 101, § 23, and *Morel v. France*, judgment of 6 June 2000, *Reports of Judgments and Decisions* 2000-VI, § 27.

24 — See, for example, Eur. Court H. R., *Schenk v. Switzerland* (cited in footnote 22), § 46.

recording and to raise objections to its use in court. [25]

71. More specifically, the question whether the use of findings as evidence in court is consistent with the requirements of a fair trial within the meaning of Article 6(1) of the ECHR in a situation where the party adversely affected by those findings cannot submit a second opinion likewise depends on whether that party is nevertheless in a position to present his case effectively and to submit observations on the findings. [26] However, it can be particularly difficult to safeguard the rights of the defence without a second opinion if the findings pertain to a technical field that is not within the judge's knowledge and is therefore likely to have a preponderant influence on the assessment of the facts by the court. [27]

72. The question whether the use of findings against which there is no second opinion fulfils the requirements of a fair trial within the meaning of Article 6(1) of the ECHR is therefore determined on the basis of the specific circumstances of the case concerned, and in particular the type of findings involved and their impact on the decision-making process, and the availability of possible means of ensuring an effective defence other than a second opinion.

73. The answer to the referring court's second question must, for the reasons given and also in the light of Article 6(1) of the ECHR, be that Community law precludes the use of findings which are based on samples removed by public authorities and on which it has not been made possible for the manufacturer of the product criticised in those findings to apply for a second opinion, where it would otherwise be virtually impossible or excessively difficult to pursue an effective legal remedy against the inspection measures taken by the authorities. It is for the national court to examine whether, in the absence of a second opinion available to the manufacturer in the national proceedings and in view of the specific circumstances of the case, there is an appropriate means by which he can effectively defend himself against the authorities' criticism or produce counter-evidence.

25 — See Eur. Court HR, *Kahn v. United Kingdom*, judgment of 12 May 2000, *Reports of Judgments and Decisions* 2000-V, § 38.

26 — See, in particular, Eur. Court H. R, *G.B. v. France*, judgment of 2 October 2001, not yet published in *Reports of Judgments and Decisions*, § 69, and *Mantovanelli v. France* (cited in footnote 22), § 36.

27 — See Eur. Court H. R, *Mantovanelli v. France*, judgment (cited in footnote 22), § 36.

VII — Conclusion

74. I propose that the Court answer the questions referred for a preliminary ruling as follows:

(1) Article 7(1) of Directive 89/397/EEC is to be construed as conferring on the manufacturer a directly applicable right to apply for a second opinion in the case where public authorities have taken from a retail outlet a sample of the manufacturer's product for purposes of analysis and that sample has failed to satisfy certain criteria imposed by the legislation on foodstuffs.

(2) Community law precludes the use of findings which are based on samples removed by public authorities and on which it has not been made possible for the manufacturer of the product criticised in those findings to apply for a second opinion, where it would otherwise be virtually impossible or excessively difficult to pursue an effective legal remedy against the inspection measures taken by the authorities. It is for the national court to examine whether, in the absence of a second opinion available to the manufacturer in the national proceedings and in view of the specific circumstances of the case, there is an appropriate means by which he can effectively defend himself against the authorities' criticism or produce counter-evidence.