JUDGMENT OF THE COURT (Fifth Chamber)
10 April 2003 *

In Case C-276/01,

REFERENCE to the Court under Article 234 EC by the Amtsgericht Schleswig (Germany) for a preliminary ruling in the proceedings pending before that court against

Joachim Steffensen,

on the interpretation of the second subparagraph of Article 7(1) of Council Directive 89/397/EEC of 14 June 1989 on the official control of foodstuffs (OJ 1989 L 186, p. 23),

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans (Rapporteur), P. Jann, S. von Bahr and A. Rosas, Judges,

Advocate General: C. Stix-Hackl,
Registrar: M.-F. Contet, Principal Administrator,

* Language of the case: German.

after considering the written observations submitted on behalf of:

— the German Government, by W.-D. Plessing and A. Dittrich, acting as Agents;

— the Danish Government, by J. Bering Liisberg, acting as Agent;

— the Italian Government, by U. Leanza, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato;

— the Commission of the European Communities, by J. Sack, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Steffensen, represented by M. Grube, Rechtsanwalt, of the Danish Government, represented by J. Bering Liisberg, and of the Commission, represented by J. Sack, at the hearing on 12 September 2002,

after hearing the Opinion of the Advocate General at the sitting on 22 October 2002,

gives the following

Judgment

1 By order of 5 July 2001, received at the Court Registry on 13 July 2001, the Amtsgericht Schleswig (Schleswig Local Court), Germany, referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of the second subparagraph of Article 7(1) of Council Directive 89/397/EEC of 14 June 1989 on the official control of foodstuffs (OJ 1989 L 186, p. 23, 'the Directive').

2 Those questions were raised in proceedings brought by Mr Steffensen against a decision of the Kreis Schleswig-Flensburg — Bußgeldstelle (Fines Office of the Schleswig-Flensburg local authority) imposing on him a summary fine for the marketing of foodstuffs in breach of provisions of the Lebensmittel- und Bedarfsgegenständegesetz (Law on Foodstuffs and Consumer Goods, BGBl. 1974 I, p. 1945, as amended, 'the LMBG').

Legal background

Community legislation

3 According to the first four recitals in the preamble to the Directive, the aim of the directive is to harmonise the general principles governing official inspection of

foodstuffs and to make it more effective in order to protect the health and economic interests of consumers.

4 According to the 10th recital in the Directive, 'inspections... must take the most suitable forms to guarantee their effectiveness'.

5 The 13th recital in the Directive states:

'... although... undertakings should not have the right to oppose the inspections,... their legitimate rights must be preserved, in particular... the right of appeal'.

6 Article 4(3) of the Directive provides:

'Inspection shall cover all stages of production, manufacture, import into the Community, processing, storage, transport, distribution and trade.'

7 Article 6(1)(d) of the Directive provides:

'The following shall be subject to inspection:

...

(d) finished products'.

8 According to Article 7(1) of the Directive:

'Samples of the products enumerated in Article 6(1)(b) to (f) may be taken for the purposes of analysis.

Member States shall take the necessary steps to ensure that those subject to inspection may apply for a second opinion.'

9 Article 12(1) of the Directive provides:

'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.'

National legislation

10 Paragraph 17(1)(2)(b) of the LMBG provides:

'It is prohibited to place on the market in the course of business, without adequate labelling, foodstuffs the composition of which does not correspond to accepted standards and the use and value of which, in particular their nutritional value and the level of consumer satisfaction they offer, is appreciably reduced.'

11 Paragraph 42 of the LMBG provides:

'(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 acknowledgment 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 which the closure or the seal is to be regarded as being no longer valid.

(3) Compensation is in principle not payable in respect of samples taken under official supervision pursuant to the present Law. In individual cases, compensation may be paid up to the amount of the retail price if unreasonable hardship would otherwise arise.

(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 are being transported before delivery to the consumer.'

12 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(1)(1) or 17(1)(2), places foodstuffs on the market without adequate labelling.'

13 Paragraph 53(1) of the LMBG provides:

'Whosoever negligently commits one of the acts described in Paragraph 52(1)(2) to (11) or 52(2)... shall be guilty of a summary offence.'

The main proceedings

14 The company Böklunder Plumrose GmbH & Co. KG ('Plumrose') manufactures veal and pork sausages, 'Bockwürstchen', which are sold in retail outlets in glass jars sealed with metal lids.

15 Mr Steffensen, a member of staff of Plumrose, is responsible for product supervision at the company.

16 On 6 May and 4 June 1997, 9 December 1998, 1 February, 25 February and 25 March 1999, the German administrative authorities took from retail outlets samples of products manufactured by Plumrose.

17 On each occasion a second sample was left at the retail outlet. However, none of those samples reached Mr Steffensen or Plumrose.

18 The national court states that it does not know whether the retail traders concerned informed Plumrose or Mr Steffensen that samples had been taken and that it has not been possible to ascertain whether the results of the analyses of those samples were in each case notified to Mr Steffensen and Plumrose in time to enable them to apply for a second opinion.

19 The samples were analysed in laboratories, which in each case reported that the quality of the samples failed to reach the standard required under the German legislation on foodstuffs.

20 The laboratories based their criticism, in particular, on the fact that the products had been declared as country-style veal and pork sausages, '*Landbockwürste*', or as similar products. Given that designation, the products were supposed to fall within the category of medium quality.

21 However, the results of the analyses showed that the products were in fact of lower quality within the meaning of point 2.18 of the German Code on Foodstuffs because prepared sausage, sometimes including the casing, had been used in its manufacture.

22 By administrative decision of 13 September 2000, the Kreis Schleswig-Flensburg — Bußgeldstelle imposed on Mr Steffensen a fine of DEM 500 for infringement of Paragraphs 17(1)(2)(b), 52(1)(9) and 53(1) of the LMBG based on the fact that, as the member of Plumrose's staff responsible for product supervision, Mr Steffensen had in a number of respects negligently authorised the marketing of the products concerned without adequate labelling.

23 Mr Steffensen lodged an appeal against that administrative decision before the Amtsgericht Schleswig.

24 The national court takes the view that Paragraph 42 of the LMBG fails to take adequate account of the case where — as in the main proceedings — the sample has been taken in a retail trade outlet.

25 On the information available to it, it appears that samples of foodstuffs left in retail outlets are, as a rule, kept only for a month, and if the German administrative authorities fail to inform the manufacturer immediately that samples have been taken, the manufacturer can no longer apply for a second opinion if those authorities have criticised the quality of the foodstuffs.

26 Against that background, the national court asks whether the manufacturer has a right under Article 7(1) of the Directive to apply for a second opinion and, if so, whether infringement of that right means that the results of the analyses ordered by the competent authorities of a Member State may not be used.

The questions referred for a preliminary ruling

27 In light of the above, the Amtsgericht Schleswig decided to suspend proceedings and refer the following questions to the Court for a preliminary ruling:

'(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

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) 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?'

The first question

28 By its first question, the national court asks essentially whether the second subparagraph of Article 7(1) of the Directive must be construed as meaning that a manufacturer may rely on a right to a second opinion based on that article against the competent authorities of a Member State where those authorities claim that his products fail to meet the standard required by the national rules on foodstuffs on the basis of an analysis of samples of those products taken from retail outlets.

Observations submitted to the Court

29 Mr Steffensen submits that the second subparagraph of Article 7(1) of the Directive lays down a right of the manufacturer to a second opinion. That right is not guaranteed by Paragraph 42(1) of the LMBG in cases such as that at issue in

the main proceedings. In such cases, the manufacturer risks being penalised despite not being informed that samples have been taken and that samples have been left at the retail outlet and despite the fact that, when informed of the results of the analyses of those samples, he is no longer able to exercise his right to a second opinion because the samples left at the retail outlet no longer exist.

30 The German Government submits, first, that the second subparagraph of Article 7(1) of the Directive has been properly transposed into German law and that, therefore, any right to a second opinion must be derived from German law and cannot be based on the Directive as a directly applicable right. According to the German Government, Paragraph 42(1) of the LMBG does enable the person subject to inspection — in the main proceedings, the manufacturer — to apply for a second opinion. That paragraph is based on the principle that the manufacturer is informed by the retailer that samples have been taken and that a second sample has been left. That obligation to provide information is to be governed by the contractual relations between the manufacturer and retailers selling his products.

31 Second, the German Government maintains that, although the second subparagraph of Article 7(1) of the Directive uses the wording 'may apply for a second opinion', it contains an unconditional right solely for those subject to inspection, including manufacturers, to choose whether they wish to apply for a second opinion. This interpretation is confirmed by Article 12 of the Directive, which implies that those subject to inspection must be able to decide freely whether they wish to challenge the results of an analysis by way of an appeal brought under that article.

32 The Danish Government proposes that the question should be answered in the negative. It submits, first, that the term 'those subject to inspection' in the second subparagraph of Article 7(1) of the Directive must be limited to those undertakings from which samples have been taken — in the main proceedings, the retailers — and therefore excludes undertakings acting at other stages of the marketing process, such as the manufacturer in the main proceedings.

33 The Danish Government submits, second, that, in any event, in so far as it states that the Member States are to take the 'necessary steps', the second subparagraph of Article 7(1) of the Directive is not sufficiently clear, precise and unconditional to establish a directly applicable right for a manufacturer to be informed by the national competent authorities that samples have been taken at the retail stage. The national legislation at issue in the main proceedings is in conformity with the Directive since it is open to manufacturers wishing to be informed that such samples are being taken to conclude contracts in that regard with the undertakings further down the marketing chain.

34 The Italian Government submits that the second subparagraph of Article 7(1) is intended to guarantee observance of the adversarial principle in the inspection of foodstuffs and, accordingly, the rights of defence of the person suspected of infringing the Community rules. There can be no such guarantee where the person suspected of an infringement was not present when the samples were taken or was not informed either that they had been taken or of where a second sample had been stored.

35 The Commission submits that those subject to inspection must be recognised as having a right to a second opinion, particularly in view of the 13th recital in the Directive, which expressly states that the legitimate rights of the undertakings, in particular the right of appeal laid down in Article 12(1) of the Directive, must be preserved.

36 The word 'may' in the second subparagraph of Article 7(1) of the Directive does not preclude the recognition of such a right. However, it indicates that the right is not absolute and will normally be relied on only if a second opinion might give rise to findings useful to the defence of the person subject to inspection, which is not the case where a second opinion does not enable that person to dispute the results of the analyses.

37 The Commission adds that, in the case in the main proceedings, in view of the period which elapsed between the taking of samples and notification of the results of the analyses, the manufacturer's right to a second opinion was infringed. Accordingly, the authorities also infringed the right of the person subject to inspection to lodge an appeal under Article 12(1) of the Directive, which requires that that person be able to exercise his rights fully in appeal proceedings.

Reply of the Court

38 As the Court has consistently held, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, *inter alia*, Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 25 and the case-law cited).

39 In view of that case-law, the Court must examine the German Government's argument that the second subparagraph of Article 7(1) of the Directive cannot give rise to a directly applicable right to a second opinion because that article has been properly transposed into German law by Paragraph 42(1) of the LMBG.

40 The national court expresses doubt as to whether Paragraph 42(1) of the LMBG properly transposed the second subparagraph of Article 7(1) of the Directive.

41 In those circumstances, it must be considered whether, in accordance with the case-law referred to in paragraph 38 of this judgment, the second subparagraph of Article 7(1) of the Directive is, in so far as its subject-matter is concerned, unconditional and sufficiently precise to be relied upon before a national court against the State as the basis for a right to a second opinion.

42 It is clear from the very wording of that article that each Member State is obliged to grant the undertaking concerned a right to a second opinion. That is made even clearer in the language versions which refer to the obligation of the Member States to ensure that a second opinion may be obtained, such as the Danish, Spanish, French, Italian, Portuguese and English versions.

43 Moreover, the word 'may' used in the second subparagraph of Article 7(1) of the Directive is not inconsistent with a right to a second opinion based on that article.

44 As the German Government and the Commission pointed out, that word means that a second opinion does not have to be given automatically but that, in each case, the person subject to inspection must be able to choose whether or not to apply for one.

45 Moreover, the interpretation of the second subparagraph of Article 7(1) of the Directive as providing for an unconditional right to a second opinion is confirmed by the link between that article and Article 12(1) of the Directive. It is clear from those two articles read together, and from the 13th recital in the Directive, that the purpose of the second opinion is to safeguard the legitimate rights of the undertakings concerned, in particular their right of appeal against the measures taken for the purpose of inspection.

46 In addition, that interpretation cannot be called into question by the fact that the second subparagraph of Article 7(1) of the Directive requires the Member States to take the 'necessary steps' to ensure that those subject to inspection may apply for a second opinion. While the implementation of that obligation entails an obligation for the Member States to lay down the detailed rules for the exercise of that right, those rules must in any event ensure that the Directive is fully applicable, that is to say, in this instance, they must guarantee the right to a second opinion.

47 Next, it is necessary to examine the Danish Government's argument that the persons covered by the second subparagraph of Article 7(1) include only the undertakings inspected — in the main proceedings, the retailers — and that, therefore, it does not cover undertakings acting at earlier stages of the marketing chain, such as the manufacturer concerned in the main proceedings.

48 The Court observes in that regard that, as stated in paragraph 45 of this judgment, the purpose of the second opinion is to safeguard the legitimate rights of the undertakings, in particular their right of appeal against the measures taken for the purpose of inspection.

49 Accordingly, where, as in the case at issue in the main proceedings, a fine is imposed on a manufacturer on the basis of the results of the analyses of samples taken from retail outlets, that manufacturer must be regarded as a person subject to inspection for the purposes of the second paragraph of Article 7(1) of the Directive and is therefore among the persons covered by that article. If that were not the case, the exercise of the right of appeal expressly conferred on him by the Directive would be directly affected.

50 In that regard, it is clear from the statements made by the national court that, in the main proceedings, it has not been established whether Plumrose was informed

by the German administrative authorities that samples of its products had been taken from retail outlets and that some of those samples had been left with those retail outlets. Particularly in a case such as that at issue in the main proceedings, that information is an essential condition for ensuring that the manufacturer is able to exercise effectively his right to a second opinion and not merely a procedural aspect of the exercise of that right which falls within the Member States' discretion as regards the transposition of the second subparagraph of Article 7(1) of the Directive.

51 The argument put forward by the German and Danish Governments that the obligation to provide information falls within the scope of the contractual relations between the manufacturer and retailers therefore cannot be upheld. If the right to a second opinion were to be subject to a contractual obligation, it would not be guaranteed as the Directive requires.

52 In the light of the above, the answer to the first question must be that the second subparagraph of Article 7(1) of the Directive is to be construed as meaning that a manufacturer may rely on a right to a second opinion based on that article against the competent authorities of a Member State where those authorities claim that his products fail to meet the standard required by the national rules on foodstuffs on the basis of an analysis of samples of those products taken from retail outlets.

The second question

53 By its second question, the national court asks essentially whether a national court before which an action such as that at issue in the main proceedings has been brought is prohibited from using the results of analyses of samples of a

manufacturer's products as evidence that the manufacturer has infringed the national rules of a Member State on foodstuffs where the manufacturer has been unable to exercise his right to a second opinion under the second subparagraph of Article 7(1) of the Directive.

Observations submitted to the Court

54 Mr Steffensen claims that it follows from, in particular, the fundamental right to a fair hearing and the principle of equality of arms arising from that right that the results of analyses of foodstuff samples which, as in the case in the main proceedings, it was not possible to challenge by way of a second opinion cannot be used as evidence.

55 The German Government submits essentially that the question whether such evidence is to be excluded if it is obtained improperly is a procedural matter which is not governed by Community law and therefore falls within the scope of national law, subject, however, to observance of the Community principles of equivalence and effectiveness.

56 According to the German Government, in a case such as that at issue in the main proceedings German law does not impose a general prohibition on the admission of evidence obtained in an improper administrative procedure. The principles of German procedural law, in particular those relating to *ex officio* investigations and the free evaluation of evidence, make it possible to challenge the results of irregular analyses. In addition, those national principles are not contrary to the Community principles of equivalence and effectiveness.

57 The Danish Government likewise submits that it does not follow from fundamental rights such as the right to a fair hearing that evidence obtained improperly must be excluded under the Directive or Community law in general. Moreover, in its view, the fundamental right to a fair hearing is not applicable in the case in the main proceedings since it concerns an administrative act and not judicial proceedings. Furthermore, the adversarial principle can be observed here, even in the absence of a second opinion.

58 The Commission submits that neither the Directive nor the fundamental rights guaranteed by Community law establish an absolute prohibition on the use of the results of analyses on which it has not been possible to obtain a second opinion.

59 That view is supported by the use of the word 'may' in the second subparagraph of Article 7(1), which confirms that a second opinion need not be possible in all cases but only in those cases in which it may prove useful to the defence of the rights of the person subject to inspection. Moreover, the Commission concurs with the Danish Government's argument that the fundamental right to a fair hearing is not applicable in the case in the main proceedings since it concerns an administrative act and not judicial proceedings.

Reply of the Court

60 As the German Government submitted, it follows from the settled case-law of the Court that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community

law, provided that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness) (see, *inter alia*, Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29, and Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 33).

61 The second question seeks to establish whether, where — contrary to the second subparagraph of Article 7(1) of the Directive — it has not been possible to obtain a second opinion on the analysis of samples of foodstuffs, the results of those analyses are nevertheless admissible as evidence in an action brought before a national court against an administrative decision based exclusively, or at least for the most part, on those results.

62 First, it is common ground that the admissibility of evidence in a procedure such as that described in the preceding paragraph is not governed by any Community rule.

63 It follows that that issue falls within the scope of the applicable national law, subject, however, to observance of the principles of equivalence and effectiveness within the meaning of the case-law of the Court referred to in paragraph 60 of this judgment.

64 It must therefore be examined whether national rules such as the provisions of German law on the taking of evidence referred to in paragraph 56 of this judgment are compatible with the abovementioned principles of equivalence and effectiveness.

65 The Court notes that there is nothing in the case documents submitted to it which casts doubt on the compatibility of those provisions of German law with the principle of equivalence. However, the national court must consider that point in the light of all the factual and legal evidence available to it in order to guarantee observance of that principle.

66 With respect to the principle of effectiveness, the Court observes that each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances and that, in the light of that analysis, the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration (see Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 14).

67 Thus, the German procedural rule that evidence, such as the results of analyses, which has been obtained in an irregular administrative procedure remains, as a general rule, admissible in subsequent appeal proceedings can, according to the German Government, be explained by certain basic principles of German law, in particular those relating to *ex officio* investigations and the free evaluation of evidence, which make it possible to challenge that evidence effectively.

68 In the main proceedings, the national court must consider whether, in the light of all the factual and legal evidence available to it, the provisions of German law governing the taking of evidence do in fact allow an infringement of the right to a second opinion to be taken into consideration so that the application of those provisions to the case in the main proceedings cannot be regarded as rendering enjoyment of the guarantees provided by that right to a second opinion impossible or excessively difficult.

69 Second, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures (see, *inter alia*, Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 17; Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37; and Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 23).

70 According to the Court's case-law, where national legislation falls within the field of application of Community law, the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights — as laid down, in particular, in the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') — whose observance the Court ensures (see, *inter alia*, Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 15; and *Roquette Frères*, cited above, paragraph 25).

71 In this instance, since observance of the right to a second opinion guaranteed by Community law and the consequences which an infringement of that right may have as regards the admissibility of evidence in an appeal such as that in the main proceedings are at issue, the national rules applying in relation to the taking of evidence fall within the scope of Community law. Accordingly, those rules must comply with the requirements arising from the fundamental rights.

72 In this case, account must be taken, more specifically, of the right to a fair hearing before a tribunal, as laid down in Article 6(1) of the ECHR and as interpreted by the European Court of Human Rights.

73 It is necessary, first of all, to examine the argument of the Danish Government and the Commission that in this instance the right to a fair hearing and the consequences arising from it are not applicable in the case in the main proceedings since the question referred concerns an administrative act and not proceedings before a tribunal.

74 Although the evidence at issue in the main proceedings was obtained in an administrative procedure preceding the appeal brought before the national court, it is nevertheless clear that the specific question referred by it seeks to establish whether that evidence may be admitted in a proceeding pending before it. Therefore, the question clearly concerns the admissibility of evidence in a procedure before a tribunal within the meaning of Article 6(1) of the ECHR.

75 It should be noted, next, that, it follows from the case-law of the European Court of Human Rights that Article 6(1) of the ECHR does not lay down rules on evidence as such and, therefore, it cannot be excluded as a matter of principle and in the abstract that evidence obtained in breach of provisions of domestic law may be admitted. According to that case-law, it is for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced (see *Mantovanelli v. France*, judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II, § 33 and 34; and *Pélissier and Sassi v. France*, judgment of 25 March 1999, *Reports of Judgments and Decisions* 1999-II, § 45).

76 However, according to the same case-law, the review carried out by the European Court of Human Rights under Article 6(1) of the ECHR of the fairness of a hearing — which requires essentially that the parties be given an adequate opportunity to participate in the proceedings before the court — relates to the

proceedings considered as a whole, including the way in which evidence was taken.

77 Lastly, it should be observed that the European Court of Human Rights has held that, where the parties are entitled to submit to the court observations on a piece of evidence, they must be afforded a real opportunity to comment effectively on it in order for the proceedings to reach the standard of fairness required by Article 6(1) of the ECHR. That point must be examined, in particular, where the evidence pertains to a technical field of which the judges have no knowledge and is likely to have a preponderant influence on the assessment of the facts by the court (see *Mantovanelli*, cited above, § 36).

78 It is for the national court to assess whether, in the light of all the factual and legal evidence available to it, the admission as evidence of the results of the analyses at issue in the main proceedings entails a risk of an infringement of the adversarial principle and, thus, of the right to a fair hearing. In the context of that assessment, the national court will have to examine, more specifically, whether the evidence at issue in the main proceedings pertains to a technical field of which the judges have no knowledge and is likely to have a preponderant influence on its assessment of the facts and, should this be case, whether Mr Steffensen still has a real opportunity to comment effectively on that evidence.

79 If the national court decides that the admission as evidence of the results of the analyses at issue in the main proceedings is likely to give rise to an infringement of the adversarial principle and, thus, of the right to a fair hearing, it must exclude those results as evidence in order to avoid such an infringement.

80 In view of all of the above considerations, the answer to the second question must be that it is for the national court before which an action such as that at issue in the main proceedings has been brought to assess, in the light of all the factual and legal evidence available to it, whether or not the results of analyses of samples of a manufacturer's products are to be admitted as evidence that the manufacturer has infringed a Member State's national rules on foodstuffs where the manufacturer has been unable to exercise his right to a second opinion under the second subparagraph of Article 7(1) of the Directive. In that regard, the national court must verify that the national rules on the taking of evidence applicable to such an action are not less favourable than those governing similar domestic actions (the principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness). In addition, the national court must consider whether such evidence must be excluded in order to avoid measures incompatible with compliance with fundamental rights, in particular the right to a fair hearing before a tribunal as laid down in Article 6(1) of the ECHR.

Costs

81 The costs incurred by the German, Danish and Italian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Amtsgericht Schleswig by order of 5 July 2001, hereby rules:

1. The second subparagraph of Article 7(1) of Council Directive 89/397/EEC of 14 June 1989 on the official control of foodstuffs is to be construed as meaning that a manufacturer may rely on a right to a second opinion based on that article against the competent authorities of a Member State where those authorities claim that his products fail to meet the standard required by the national rules on foodstuffs on the basis of an analysis of samples of those products taken from retail outlets.

2. It is for the national court before which an action such as that at issue in the main proceedings has been brought to assess, in the light of all the factual and legal evidence available to it, whether or not the results of analyses of samples of a manufacturer's products are to be admitted as evidence that the

manufacturer has infringed a Member State's national rules on foodstuffs where the manufacturer has been unable to exercise his right to a second opinion under the second subparagraph of Article 7(1) of Directive 89/397. In that regard, the national court must verify that the national rules on the taking of evidence applicable to such an action are not less favourable than those governing similar domestic actions (the principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness). In addition, the national court must consider whether such evidence must be excluded in order to avoid measures incompatible with compliance with fundamental rights, in particular the right to a fair hearing before a tribunal as laid down in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Wathelet Timmermans Jann

von Bahr Rosas

Delivered in open court in Luxembourg on 10 April 2003.

R. Grass — Registrar

M. Wathelet — President of the Fifth Chamber