— order the intervener and the Office to pay the Appellant's costs of this Appeal

Pleas in law and main arguments

The Appellant submits that the General Court failed to recognise the errors in the decision of the Board of Appeal, based, as it was, on the illegitimate decision of the Opposition Division. In particular there was a complete failure to recognise (a) that the Medion ([1]) judgment concerned an exceptional situation in which the usual rule that the average consumer normally perceives a trade mark as a matter of overall impression is displaced but (b) no circumstances existed in this case sufficient to justify such an exceptional approach. No part of the earlier mark in this case had an 'independent distinctive role'.

Furthermore the Appellant submits that, due to the incorrect application of a Medion type principle at the earlier stage of the assessment of similarity, no proper consideration was given to the global assessment of the likelihood of confusion.

([1]) OJ C 106, 30.04.2004, p. 31

Action brought on 30 April 2010 — European Commission v Federal Republic of Germany

(Case C-206/10)

(2010/C 179/37)

Language of the case: German

Parties

Applicant: European Commission (represented by: V. Kreuschitz, acting as Agent)

Defendant: Federal Republic of Germany

Form of order sought

— Declare that, by making the grant of benefits for the blind and the disabled, including the deaf (Blindengeld or Landesblindengeld, Blindenbeihilfe or Landesblindenbeihilfe (State and *Länder* benefits and allowances for blind persons), Pflegegeld (care allowance) or assistance for deaf/blind persons, Blinden- und Gehörlosengeld (deaf/blind person's allowance) etc), under *Länder* legislation conditional, in respect of persons for whom the Federal Republic of Germany is the competent Member State, upon the recipient being resident or habitually resident in the German *Land* concerned, the Federal Republic of Germany has, on the basis of national legislation, failed to fulfil its obligations under Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community ([1]) and Article 4(1)(a), in conjunction with Title III, Chapter 1 (sickness and maternity), of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community; ([2])

— order the Federal Republic of Germany to pay the costs.

Pleas in law and main arguments

The present action concerns the incompatibility with Regulation (EEC) No 1408/71 and Regulation (EEC) No 1612/68 of German *Länder* legislation under which the grant of benefits to blind and disabled persons is conditional upon the recipients being resident or habitually resident in the German *Land* concerned.

Regulation No 1408/71 is designed to coordinate national social security legislations within the framework of freedom of movement in accordance with the objectives of Article 42 of the EC Treaty (now Article 48 TFEU). Under Article 4(2b), Regulation No 1408/71 is not to apply to the provisions in the legislation of a Member State concerning special non-contributory benefits, referred to in Annex II, Section III, the validity of which is confined to part of its territory. The German benefits at issue are listed as special benefits in Annex II, Section III to Regulation No 1408/71.

The Commission nevertheless takes the view that the mere entry of a benefit in the list in Annex II to Regulation No 1408/71 is not sufficient for a benefit to be excluded as a '*special non-contributory benefit*' from the scope of that regulation. As an exemption, Article 4(2b) of Regulation No 1408/71 must be narrowly interpreted; it can only apply to benefits which satisfy the criteria set out in that provision *cumulatively*. Accordingly, the provision covers only benefits which are both special and non-contributory benefits, which are referred to in Annex II, Section III to Regulation No 1408/71 and which are introduced by legislation the validity of which is confined to part of the territory of a Member State.

The benefits at issue which are governed by *Länder* legislation do not, however, satisfy all those criteria, inasmuch as they should be categorised as '*sickness benefits*' instead of as '*special non-contributory benefits*' for the following reasons.

First, the *Länder* benefits at issue are granted on the basis of circumstances laid down by law, without any assessment of personal need. They serve to compensate for the additional expenditure incurred as a result of a disability and are intended to improve the state of health and the living conditions of the disabled. Consequently, they are intended, essentially, to be ancillary to sickness insurance benefits. The fact that care allowances granted under German Federal legislation count towards the benefits paid by the *Länder* for the blind and the disabled proves, moreover, that both benefits cover the same risk — the risk of sickness-related additional expenditure — and that it is not a question of '*supplementary, substitute or ancillary cover against the risks*'.

Second, the classification of a certain benefit in accordance with the domestic constitution of a Member State does not determine whether that benefit is to be regarded as a social security benefit for the purposes of Regulation No 1408/71.

Moreover, from a substantive point of view, the *Länder* legislation at issue here does not represent an ancillary advantage that is valid only on a regional basis. Instead, this benefit forms part of the system of cover against the risk of additional sickness-related expenditure that has been established throughout Germany and which, by virtue of reciprocal crediting, is closely connected with Federal law.

It follows from this that the *Länder* benefits concerned should be categorised as sickness benefits, not as special benefits. The inclusion of those benefits in Annex II, Section III to Regulation (EEC) No 1408/71 is, therefore, unlawful; they fall within the scope of that regulation.

Further, the residence requirement imposed under German law infringes Regulation No 1612/68 in so far as it prevents frontier workers and members of their families from receiving those benefits.

The Court of Justice has clearly confirmed that a Member State cannot make the grant of a social advantage contingent upon the recipient's residence in that State. The Court's conclusion applies to all social advantages within the meaning of Article 7(2) of Regulation No 1612/68.

'*Social advantage*' is a very broad concept. It covers not only the advantages associated with an employment contract, but all advantages which a Member State grants to its citizens and thus also to workers. In the Commission's opinion, the fact that the grant of the benefits concerned is determined neither by the employment nor the financial resources of the person concerned or of his family, and is thus made purely on the basis of residence in the *Land* in question, cannot justify the failure to take into account the consequences for workers who work in Germany but who live in a different Member State. There is, therefore, no adequate reason why those benefits should not be regarded as social advantages within the meaning of Regulation No 1612/68.

Frontier workers who work in Germany and members of their families should, therefore, even if they do not live in Germany, be entitled to benefits granted to the disabled and the blind under *Länder* legislation. The condition requiring them to be resident or habitually resident in the *Land* concerned therefore infringes Regulation No 1612/68.

([1]) OJ, English Special Edition 1968(II), p. 475.
([2]) OJ, English Special Edition 1971(II), p. 416.

Reference for a preliminary ruling from the Højesteret (Denmark) lodged on 30 April 2010 — Paranova Danmark A/S, Paranova Pack A/S v Merck Sharp & Dohme Corp., Merck Sharp & Dohme B.V. and Merck Sharp & Dohme

(Case C-207/10)

(2010/C 179/38)

Language of the case: Danish

Referring court

Højesteret

Parties to the main proceedings

Applicants: Paranova Danmark A/S, Paranova Pack A/S

Defendants: Merck Sharp & Dohme Corp., Merck Sharp & Dohme and Merck Sharp & Dohme BV

Questions referred

1. Are Article 7(2) of Council Directive 89/104/EEC ([1]) of 21 December 1988 to approximate the laws of the Member States relating to trade marks and the associated case-law, in particular the judgments of the Court of Justice in Cases 102/77 *Hoffmann-La Roche* v *Centrafarm* ([2]) and 1/81 *Pfizer* v *Eurim-Pharm* ([3]) and Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others* v *Paranova* ([4]), to be interpreted as meaning that a trade mark proprietor may rely on these provisions in order to prevent a parallel