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

importer's marketing company, which is the holder of a marketing authorisation for a medicinal product in a Member State, from selling that product with an indication that the product is repackaged by the marketing company, although the marketing company has the physical repackaging carried out by another company, the repackaging company, to which the marketing company gives instructions for the purchasing and repackaging of the product, for the detailed design of the product's packaging and for other arrangements in relation to the product, and which holds the repackaging authorisation and reaffixes the trade mark on the new package in the course of repackaging?

2. Is it of significance in answering Question (i) that an assumption might be made that the consumer or end-user is not misled with regard to the origin of the product and will not be led to believe that the trade mark proprietor is responsible for the repackaging through the indication by the parallel importer of the manufacturer's name on the packaging along with the indication as described of the undertaking responsible for the repackaging?

3. Is it only the risk that the consumer or end-user might be misled into assuming that the trade mark proprietor is responsible for the repackaging which is of significance in answering Question (i), or are other considerations regarding the trade mark proprietor also relevant, for example (a) that the entity which in fact undertakes the purchasing and repackaging and reaffixes the trade mark proprietor's trade mark on the product's packaging thereby potentially infringes independently the trade mark proprietor's trade mark rights, and that that may be due to factors for which the entity that physically carried out the repackaging is responsible that (b) the repackaging affects the original condition of the product or that (c) the presentation of the repackaged product is of such a kind that it may be assumed to harm the trade mark or its proprietor's reputation?

4. If, in answering Question (iii), the Court finds that it is also relevant to take account of the fact that the repackaging company potentially infringes independently the trade mark rights of the trade mark proprietor, the Court is asked to indicate whether it is of significance to this answer that the marketing company and repackaging company of the parallel importer are jointly and severally liable under national law for the infringement of the trade mark proprietor's trade mark rights?

5. Is it of significance in answering Question (i) that the parallel importer which holds the marketing authorisation and has indicated itself as being responsible for repackaging, at the time of the notification of the trade mark proprietor prior to the intended sale of the repackaged medicinal product, belongs to the same group as the company which undertook the repackaging (sister company)?

6. Is it of significance in answering Question (i) that the repackaging company is indicated as the manufacturer in the package leaflet?

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(1) OJ L 40, 11.2.1989.
(2) [1978] ECR 1139.
(3) [1981] ECR 2913.
(4) [1996] ECR I-3457.

Action brought on 30 April 2010 — European Commission v Portuguese Republic

(Case C-208/10)

(2010/C 179/39)

Language of the case: Portuguese

Parties

Applicant: European Commission (represented by: A. Nijenhuis and M. Teles Romão, Agents)

Defendant: Portuguese Republic

Form of order sought

— Declare that, by failing to bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2007/44/EC (1) of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector and, in any event, by failing to communicate them to the Commission, the Portuguese Republic has failed to fulfil its obligations under Directive 2007/44/EC.

— Order the Portuguese Republic to pay the costs.

Pleas in law and main arguments

The period prescribed for transposing the directive expired on 20 March 2009.

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(1) OJ 2007 L 247, p. 1.