Questions referred

1. Is the Court's judgment of 14 January 1997 in Joined Cases C-192/95 ([1]) to C-218/95 *Comateb and Others* to be interpreted as meaning that the passing-on of an unlawful levy on a product presupposes that the levy is passed on to the buyer of the product in the individual transaction, or may the passing-on in the prices also take place in the prices of other products in completely different transactions, either before or after the relevant sale of products, for example, with the result that an overall assessment is made of the passing-on over a four-year period involving a large number of product groups, including both imported and non-imported products?

2. Is the Community law concept of 'passing-on' to be understood as meaning that an unlawful levy on a sale of products may be regarded as passed on only if the price of the product is higher than that price which applied immediately before the levy was introduced, or may the levy also be regarded as passed on where the undertaking subject to the levy, at the same time as the introduction of the unlawful levy, saved on other levies charged on other bases, and the undertaking therefore maintained its prices unchanged?

3. Is the Community law concept of 'unjust enrichment' to be understood as meaning that the reimbursement of an unlawful levy on a sale of products may be regarded as giving rise to unjust enrichment, where the undertaking, before or after the sale of the taxable product, has made a saving as a result of the abolition of other levies charged on other bases, if it is assumed that that abolition of other levies also benefits other undertakings, including undertakings which did not pay the unlawful levy or only paid it to a lesser extent?

4. If it is assumed that an unlawful levy, as a result of its structure, has had the effect that proportionately more has been paid in levies by undertakings which imported products than by undertakings which to a greater extent purchased domestic products, and, at the same time as the unlawful levy was introduced, another lawful levy was charged on another basis which proportionately affected both undertakings to the same extent, irrespective of the composition of the undertaking's purchases, then guidance is sought on the following:

   (i) whether Community law allows for whole or partial refusal to reimburse the unlawful levy to an undertaking which imports products on grounds of passing-on and unjust enrichment, in so far as the refusal leads to a situation where the undertaking, as a result of having paid relatively more of the unlawful levy than a corresponding undertaking which purchased equivalent goods domestically, will thereby, all other things being equal, be placed in a worse position as a result of the tax restructuring and the refusal to reimburse than corresponding undertakings which to a greater extent purchased domestic goods;

   (ii) whether the reimbursement of the unlawful levy in the relevant situation may conceptually give rise to 'unjust enrichment' and may therefore be refused, if the reimbursement — even if the levy is regarded as having been passed on — is necessary in order to achieve a situation in which the effect of the tax restructuring, after any reimbursement, all other things being equal, remains the same for undertakings which imported products as for undertakings which purchased domestic products;

   (iii) whether refusal to reimburse in such a situation, which leads to undertakings which to a greater extent purchased domestic products and thus obtained an advantage in relation to undertakings which to a greater extent imported products, is otherwise contrary to Community law, including the principle of equal treatment; and

   (iv) whether the answer to question 3 means that it is not justified to refuse reimbursement of an unlawfully charged levy on grounds of unjust enrichment, to the extent that such reimbursement merely cancels out the advantage for those undertakings which purchased domestic products in relation to undertakings which to a greater extent imported products.

([1]) ECR [1997] I-165

Reference for a preliminary ruling from the Højesteret (Denmark), lodged on 19 October 2009 — Orifarm A/S, Orifarm Supply A/S, Handelsselskabet af 5 januar 2002 A/S, in liquidation, Ompackningsselskabet af 1 november 2005 A/S v Merck & Co. Inc., Merck Sharp & Dohme B.V., Merck Sharp & Dohme

(Case C-400/09)

(2009/C 312/38)

Language of the case: Danish

Referring court

Højesteret

Parties to the main proceedings

Appellants: Orifarm A/S, Orifarm Supply A/S, Handelsselskabet af 5 januar 2002 A/S, in liquidation, Ompackningsselskabet af 1 november 2005 A/S

Respondents: Merck & Co. Inc., Merck Sharp & Dohme B.V., Merck Sharp & Dohme

Questions referred

1. Are Case C-232/94 *MPA Pharma* v *Rhône-Poulenc Pharma* [1] and Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others* v *Paranova* [2] to be interpreted as meaning that a parallel importer which is the holder of the marketing authorisation for, and possesses information on, a medicinal product imported in parallel, and which issues instructions to a separate undertaking for the purchase and repackaging of a medicinal product, for the detailed design of the product's packaging and for arrangements in relation to the product, infringes the rights of the trade mark proprietor by indicating itself — and not the separate undertaking which holds the repackaging authorisation, has imported the product and has carried out the physical repackaging, including (re)affixing of the trade mark proprietor's trade mark — as the repackager on the outer packaging of the medicinal product imported in parallel?

2. Is it of significance in answering Question 1 that an assumption might be made that, where the marketing authorisation holder indicates itself as the repackager instead of the undertaking which physically carried out the repackaging to order, there is no risk that the consumer/end user might be misled into assuming that the trade mark proprietor is responsible for the repackaging?

3. Is it of significance in answering Question 1 that an assumption might be made that the risk of misleading the consumer/end user into assuming that the trade mark proprietor is responsible for the repackaging is excluded if the undertaking which physically carried out the repackaging is indicated as being the repackager?

4. Is it only the risk that the consumer/end user might be misled into assuming that the trade mark proprietor is responsible for the repackaging which is of significance in answering Question 1, or are other considerations regarding the trade mark proprietor also relevant, for example (a) that the entity which undertakes the importation and physical repackaging and (re)affixes the trade mark proprietor's trade mark on the product's outer packaging potentially on its own account infringes the trade mark proprietor's trade mark by so doing, and (b) that it may be due to factors for which the entity that physically carried out the repackaging is responsible that the repackaging affects the original condition of the product or that the presentation of the repackaging is of such a kind that it must be assumed to harm the trade mark proprietor's reputation (see, inter alia, Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others* v *Paranova*)?

5. Is it of significance in answering Question 1 that the holder of the marketing authorisation, which has indicated itself as being the repackager, at the time of the notification of the trade mark proprietor prior to the intended sale of the parallel imported medicinal product once repackaged, belongs to the same group as the actual repackager (sister company)?

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[1] [1996] ECR I-3671.
[2] [1996] ECR I-3457.

Reference for a preliminary ruling from the Višje sodišče v Mariboru (Republic of Slovenia) lodged on 20 October 2009 — Jasna Detiček v Maurizio Sgueglia

(Case C-403/09)

(2009/C 312/39)

Language of the case: Slovene

Referring court

Višje sodišče v Mariboru

Parties to the main proceedings

Applicant: Jasna Detiček

Defendant: Maurizio Sgueglia

Questions referred for a preliminary ruling

1. Does a court of the Republic of Slovenia (a Member State of the European Communities) have jurisdiction under Article 20 of Council Regulation (EC) No 2201/2003 [1] to take protective measures in a situation in which a court of another Member State, having by virtue of that regulation jurisdiction as to the substance, has already taken a protective measure declared enforceable in the Republic of Slovenia?

If the answer to the first question is in the affirmative:

2. May a Slovene court, pursuant to national law (as permitted by Article 20 of the regulation), take a protective measure under Article 20 of the regulation amending or rendering inoperative a final and enforceable protective measure taken by a court of another Member State which under that regulation has jurisdiction as to the substance?

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[1] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).