OPINION OF ADVOCATE GENERAL LÉGER

delivered on 15 March 2001 [1]

1. The Member States incur liability for breach of Community law in situations which are very diverse, even if they are all the consequence of a failure to take account of the applicable legal rules. The breach of a Community rule may take the form of a failure to transpose a directive or an incorrect interpretation of the law. In the latter case, the allegation usually made against Member States is that they have misapplied legislation.

2. However, it may also happen that the applicability as such of the legal rule is in issue. Thus, in this case, a national social security institution has limited the rights derived under a retirement pension on the basis of a provision of Regulation (EEC) No 1408/71 [2] whose applicability is contested.

3. According to that institution, the restrictive approach it adopted when awarding the pension is based on Article 95a(5) of the Regulation. The national court making the reference requests the Court of Justice to give an interpretation of that provision which will enable it to determine whether the institution had indeed acted wrongfully, as the recipient of the pension claims.

I — Article 95a of the Regulation

4. This provision, which was introduced into the Regulation by Regulation No 1248/92, [3] states:

'1. Under Regulation (EEC) No 1248/92, no right shall be acquired for a period prior to 1 June 1992.

2. All insurance periods or periods of residence completed under the legislation of a Member State before 1 June 1992 shall be taken into consideration for the deter-

1 — Original language: French.

2 — Council Regulation 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 (OJ, English Special Edition 1971 (II), p. 416), as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7), hereinafter 'the Regulation'.

3 — Hereinafter 'the amending Regulation'.

mination of rights to benefits pursuant to Regulation (EEC) No 1248/92.

3. Subject to paragraph 1, a right shall be acquired under Regulation (EEC) No 1248/92 even though relating to a contingency which materialised prior to 1 June 1992.

4. The rights of a person to whom a pension was awarded prior to 1 June 1992 may, on the application of the person concerned, be reviewed, taking into account the provisions of Regulation (EEC) No 1248/92.

5. If an application referred to in paragraph 4 is submitted within two years from 1 June 1992, the rights acquired under Regulation (EEC) No 1248/92 shall have effect from that date, and the provisions of the legislation of any Member State concerning the forfeiture or limitation of rights may not be invoked against the persons concerned.

6. If the application referred to in paragraph 4 is submitted after the expiry of the two-year period after 1 June 1992, rights which have not been forfeited or not barred by limitation shall have effect from the date on which the application was submitted, except where more favourable provisions of the legislation of any Member State apply.'

II — Facts and procedure in the main proceedings

5. Gervais Larsy is a Belgian national established in Belgium, near the French border. He worked as a self-employed nursery gardener in Belgium and France.

6. On 24 October 1985 he lodged, with the Institut national d'assurances sociales pour travailleurs indépendants,[4] an application for a self-employed worker's retirement pension.

7. By decision notified on 3 July 1986, Inasti awarded him, with effect from 1 November 1986, a retirement pension of 45/45ths, calculated on the basis of a complete working record from 1 January 1941 until 31 December 1985.

8. Since Mr Larsy had also paid social security contributions to the competent French authorities between 1 January 1964 and 31 December 1977, they granted him a retirement pension from 1 March 1987.

4 — Hereinafter 'Inasti'.

9. Accordingly, on 21 December 1988, Inasti adopted a further decision, reducing, with effect from 1 March 1987, the proportion of the retirement pension entitlement to 31/45ths, in implementation of the principle that work records are unseverable contained in Article 19 of Royal Decree No 72 of 10 November 1967. [5]

10. On 16 January 1989 Mr Larsy brought an action against the decision before the Tribunal du Travail (Labour Tribunal), Tournai, claiming that the original amount of the pension entitlement should be maintained, notwithstanding the grant of the French retirement pension.

11. On 24 April 1990 that court dismissed the action as unfounded. Since notice of it has not been served, the judgment has not become final.

12. Subsequently, Marius Larsy, Gervais Larsy's brother, who was in a similar factual and legal situation, brought an action before the Tribunal du Travail, Tournai.

13. During those proceedings, the court decided to refer questions to the Court of Justice for a preliminary ruling on the interpretation of Articles 12 and 46 of the Regulation, provisions concerning the overlapping of benefits and their payment by the competent institutions of the Member States.

14. In its judgment of 2 August 1993 in *Larsy*, [6] the Court held that 'Articles 12(2) and 46 of Regulation No 1408/71 do not preclude the application of a national rule against overlapping benefits when determining a pension in accordance with national legislation alone. However, those articles do preclude the application of the rule when determining a pension under Article 46. Article 46(3) of Regulation No 1408/71 must be interpreted as meaning that the rule against overlapping benefits in that provision does not apply where a person has worked in two Member States during one and the same period and has been obliged to pay old-age pension insurance contributions in those States during that period.'

15. In view of that judgment, the Tribunal du Travail, Tournai, by judgment of 8 March 1994, upheld Marius Larsy's appeal.

16. In response to Gervais Larsy's request that his situation should be resolved on the same terms as his brother's, Inasti, citing

5 — *Moniteur Belge* of 14 November 1967, p. 11845.

6 — Case C-31/92 [1993] ECR I-4543, paragraph 23.

Article 95a(5), asked him to make a fresh pension application in order to have his entitlement reviewed.

17. Following that application, Inasti took a fresh decision, on 26 April 1995, granting Mr Larsy a full retirement pension with effect from 1 July 1994.

18. After contacting the Commission of the European Communities, Mr Larsy, by letter of 8 August 1997, lodged an appeal before the Cour du Travail, Mons, Belgium, against the judgment of the Tribunal du Travail, Tournai, of 24 April 1990.

19. Before that Court, Inasti acknowledged that Gervais Larsy's right to benefits should be reviewed as from 1 March 1987 and that its administrative decision taken on 21 December 1988 should be revised. However, Inasti considered that, in the absence of any wrongful act, it could not be ordered to pay damages.

20. By judgment of 10 February 1999, the Cour du Travail, Mons, allowed the appeal as regards Mr Larsy's entitlement to a self-employed worker's retirement pension on a 45/45ths basis, from 1 March 1987.

21. Since the appellant also claimed damages of BEF 1 for non-material damage and of BEF 100 000 for additional material damage, the Cour du Travail, Mons, considering that it did not have sufficient information at its disposal, addressed a question to the parties concerning, in particular, whether Inasti should be regarded as having committed a wrongful act in adopting a new decision granting Mr Larsy a full pension, but with effect only from 1 January 1994, when in fact the initial application was made in 1985 and the pension entitlement in question had been reduced by Inasti as from 1987.

22. The court also reproduced the arguments contained in the written opinion of the Belgian State Legal Department of 13 January 1999, which considered that the judgment in *Larsy*, cited above, was endowed with moral authority rather than authority as *res judicata* and that Inasti had respected that moral authority by partially revising, with regard to its temporal application, its decision of 21 December 1988. The Legal Department had also stated that the temporal limitation of the effects of the new decision adopted by Inasti appeared to be dictated by the Community legislation, namely Article 95a(5) of the Regulation.

23. Before the Cour du Travail, Mons, Inasti argued that it had not committed a sufficiently serious breach of Community law since the applicable rules did not

authorise it to take, on its own initiative, a new decision with effect from 1 March 1987. An application for review had been lodged outside the time-limit set by Article 95a(5) of the Regulation and, therefore, the review had to take effect on 1 July 1994. Inasti also pointed out that Gervais Larsy did not appeal against the judgment of 24 April 1990 until 8 December 1997 and that it was the delay in bringing the appeal which caused the damage for which he was seeking compensation.

24. Mr Larsy claimed that Inasti had disregarded the moral authority of the judgment in *Larsy* and that the judgment of the Cour du Travail, Mons, of 10 February 1999 proves that the breach of Community law continued after the preliminary ruling in that case.

III — The questions referred for a preliminary ruling

25. The Cour du Travail, Mons, considering that the pleadings of the parties did not suffice to enable it to give judgment as to whether Inasti had committed a sufficiently serious breach of Community law, decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 95a(5) of Regulation (EEC) No 1408/71 be interpreted as being applicable to the situation of a person covered by social insurance, as a self-employed worker, who has instituted legal proceedings against an administrative decision of the institution responsible for the social security of self-employed workers of a Member State of the EU applying an anti-overlapping rule of the European Regulation (Articles 12 and 46 [of Regulation] (EEC) No 1408/71), that decision having been confirmed by the national court hearing the case in that Member State and the judgment not having been notified by the parties and therefore remaining subject to appeal, even though a decision given by the [Court of Justice] after that judgment, in a similar case, interpreting Articles 12 and 46 of that regulation, held that a Community anti-overlapping rule should not be applied in those circumstances in so far as such application of Article 95a(5) by the national institution responsible for the social security of self-employed workers to the abovementioned insured person, following the judgment of the [Court of Justice], to ensure that the rights of that insured person are reviewed, and Article 95a(5) limit the effects of the abovementioned judgment of the [Court of Justice], it being necessary, in order, in the event of proceedings being brought, to give effect to the said Article 95a(5), for a new application to be made by the insured with respect to his rights and for a new decision to be adopted thereafter?

(2) Does the fact that that institution responsible for the social security of self-employed workers of a Member State of the EU applied Article 95a(5)

of Regulation (EEC) No 1408/71 in the situation described in the first question constitute, in the circumstances in which it was applied, a serious infringement of Community law within the meaning of the case-law of the Court of Justice of the European Communities *where* that institution has already infringed Regulation (EEC) No 1408/71 (Articles 12 and 46), as stated in the judgment of the Court of Justice of the European Communities of 2 August 1993 in a similar case and the social security institution recognises that fact in the proceedings and the court hearing the case has given a ruling to that effect by judgment of 10 February 1999 and *where*, following correspondence between the Commission of the European Communities and the Member State, the Minister responsible for the national social security institution asked the latter to regularise the situation of the migrant worker and that institution acceded to that request by applying the above-mentioned Article 95a(5)?'

IV — The applicability of Article 95a of the Regulation (Question 1)

26. Article 95a(4) of the Regulation establishes the principle of the right to review, under certain conditions, of pensions paid before 1 June 1992.

27. The following two paragraphs of that article contain the two rules for determining the temporal application of the rights reviewed. Where pension rights can be reviewed under Article 95a(4), a distinction must, indeed, be made according to the date of application.

28. If the application is made within two years from 1 June 1992, the revised rights are to have effect from that date; [7] if the application is made after that time-limit, that is, after 1 June 1994, they are to have effect from the date on which the application was submitted. [8]

A — *The subject-matter of the question*

29. At this stage in the main proceedings, the national court has given a judgment on the main points of the case before it. It has upheld Gervais Larsy's claim that he should receive a pension in the proportion of 45/45ths, to take effect from 1 March 1987. The interest sought by Mr Larsy on the sums owing has also been awarded. [9]

7 — Article 95a(5) of the Regulation.

8 — Article 95a(6) of the Regulation.

9 — Judgment of the Cour du Travail, Mons, of 10 February 1999, as described in the national court's judgment making the reference, p. 8, paragraph 10.

30. It remains for the Cour du Travail, Mons, to rule on the claim for BEF 1 compensation for non-material damage and for BEF 100 000 in respect of additional material damage. [10] For that purpose it seeks to ascertain whether Inasti may be regarded as having committed a serious breach of Community law.

31. It is apparent from the judgment making the reference that it is concerned exclusively with Inasti's refusal to fix 1 March 1987 as the date on which the pension entitlement took effect, [11] as Gervais Larsy requested and as Inasti itself subsequently conceded. [12]

32. The questions raised do not, therefore, concern Inasti's initial reticence to grant the recipient his full pension entitlement. It is, on the contrary, that institutions's refusal to allow his entitlement to be retroactive which gives rise to the questions submitted and which has prompted the Belgian court's request for a preliminary ruling as to whether there was wrongful conduct.

33. That is why Article 95a of the Regulation is the main provision on which the outcome of the main proceedings depends. By applying the provision in such a way that the retroactive effect of Mr Larsy's revised pension was reduced, Inasti has limited the scope of the judgment in *Larsy*.

34. It must also be noted that the questions referred for a preliminary ruling relate exclusively to Article 95a(5) of the Regulation, which covers the situation in which an application for review is submitted within two years of 1 June 1992.

35. The Cour du Travail, Mons, accounts for this by pointing out that Inasti cited that provision and stated that Gervais Larsy had not complied with it. Consequently, Inasti had to apply national law, which fixed the effective date of the application for review as 1 July 1994. [13]

36. However, the facts and procedure in the main proceedings reveal that the question posed by the national court relates more generally to the applicability of that part of Article 95a of the Regulation which directly concerns the right to review of pensions paid before the adoption of the amending regulation. In those circumstances, only Article 95a(4) is involved. [14]

10 — Judgment making the reference, p. 10, paragraph 12.
11 — *Ibidem*, pp. 11 and 14, third paragraph.
12 — *Ibidem*, p. 14, second paragraph.
13 — *Ibidem*, p. 14, third paragraph.
14 — Case C-307/96 *Baldone* [1997] ECR I-5123, paragraphs 11 and 12.

37. The fact that the application was submitted before or after 1 June 1992 has no bearing on whether or not Article 95a(4) of the Regulation is applicable in a case such as that in the main proceedings.

38. Indeed, it is apparent from the judgment making the reference that the Cour du Travail, Mons, intends to give a ruling on the liability incurred by Inasti as a result of infringing Community law by applying a provision limiting the temporal scope of a pension review decision. [15] However, whether that limit is set at 1 June 1992 or at the date of the application, when, by that application, Gervais Larsy hoped to obtain a fully retroactive pension entitlement, does not alter the terms of the main proceedings.

39. In those circumstances, it is only the interpretation of Article 95a(4) of the Regulation which matters, since application of that provision, through either Article 95a(5) or Article 95a(6), inevitably involves a limitation. [16] The first question raised therefore needs to be formulated differently.

40. It should be understood as seeking to ascertain, in essence, whether the review of rights for which provision is made in Article 95a(4) of the Regulation applies to an application for review of an old-age pension the amount which has been limited, pursuant to a national anti-overlapping rule, on the ground that its recipient also receives an old-age pension paid by the competent institution of another Member State.

B — *Findings*

41. We must proceed to interpret the provision. As the Commission has pointed out, Article 95a was inserted into the Regulation by the amending Regulation as a transitional provision. That description appears in the title of the Article: 'Transitional provisions for application of Regulation (EEC) No 1248/92.' [17]

42. Like any transitional measure, this one is intended to resolve the problems linked to the temporal application of the new measures, in particular with regard to previously existing legal situations, whether they are already wholly constituted or in the course of being constituted.

15 — The Cour du Travail, Mons, is unsure whether it is necessary to rely on Article 95a(5) in the main proceedings, in which Inasti has acknowledged that the Belgian pension payable to Gervais Larsy should be paid without any limit on its retroactivity (see, in particular, the judgment making the reference, p. 14, fourth paragraph).

16 — The more favourable application of the provision, namely Article 95a(5) of the Regulation, limits the review to 1 June 1992, which is a long way from 1987, the date sought by Gervais Larsy.

17 — That point is confirmed by the 26th recital in the preamble to the amending Regulation, which announces the insertion in the Regulation of transitional provisions for the application of the amending Regulation.

43. In this instance, we know that Article 95a(4) of the Regulation is at issue because the old-age pension was paid before the amending Regulation came into force.

44. For the right to review established in the provision to be applicable, the application must be based on the new rules introduced by the amending Regulation. Any application for review of rights relating to a pension paid before 1 June 1992 is therefore not subject to the provisions of Article 95a(4) to (6) of the Regulation.

45. In other words, the right to review — as well as the conditions, established by Article 95a(5) and (6) of the Regulation, for implementing that right — is granted only to the recipient of social benefits who believes that they may be reviewed *in order to take account of the amending Regulation.*

46. The description of Article 95a as constituting transitional provisions adopted 'for application of Regulation No 1248/92', and the wording of Article 95a(4), which specifies that the rights may be reviewed 'taking into account the provisions of Regulation (EEC) No 1248/92' requires such an interpretation.

47. As the Court of Justice has clearly stated, '[t]he purpose of Article 95a(4) is to enable the person concerned to ask for the benefits awarded under the unamended Regulation to be reviewed where it appears that the rules of the amending Regulation are more favourable to him, and to benefit from the benefits awarded in accordance with the provisions of the unamended Regulation being maintained where they appear more advantageous than those resulting from the amending Regulation.' [18]

48. It is necessary to determine whether the application for review of a pension the amount of which has been limited pursuant to a national rule against overlapping, but in breach of the Regulation, seeks to allow the person concerned to benefit from the more favourable rules of the amending Regulation. In the light of the information at my disposal and subject to the findings of the national court, I believe that it does not.

49. By his application for review, Gervais Larsy is seeking to be awarded a full retirement pension from the date on which he was awarded a second pension. That is based on Articles 12 and 46 of the Regulation. It does not appear from the file that

18 — *Baldone*, cited above, paragraph 15.

Mr Larsy intended to rely on whichever provision of the amending Regulation was the most favourable to him.

50. Inasti, however, relies on Article 95a. The institution was confronted with a rule of national law which prevented it, following a legal decision endowed with the authority of *res judicata* dismissing an action brought against an administrative decision, from amending its own decision. It therefore decided that the adoption of a new decision had to be conditional on the submission of a fresh application from the person concerned, pursuant to Article 95a(4) of the Regulation. Its interpretation of that provision led it to believe that any decision reviewing a pension paid before the amending Regulation came into force had to follow that procedure. This, as we have seen, is not in accordance with the objective of the Article.

51. In any event, it is clear from the above that the review of entitlement established in Article 95a(4) of the Regulation unquestionably does not apply to an application for review of an old-age pension the amount of which has been limited, pursuant to a national rule against overlapping, on the grounds that its recipient also receives an old-age pension from the competent authority of another Member State, where the application for review is based on provisions other than those of the amending Regulation. Consequently, the time-limits imposed on applications by Article 95a(5) and (6) of the Regulation do not apply in those circumstances either.

V — The existence of a serious breach of Community law (Question 2)

52. By this question, the national court asks, in essence, whether the application, by the competent authority of a Member State, of Article 95a(4) to (6) of the Regulation to an application for review of an old-age pension, thus limiting the retroactive effect of the review to the detriment of the person concerned, constitutes a serious breach of Community law, since, on the one hand, Article 95a(4) to (6) of the Regulation is not applicable to the application in question and, on the other, the effect of a judgment delivered by the Court of Justice before the competent authority took its decision is that the application for review must be accepted, and it is impossible to infer from that judgment that the retroactive effect of the review may be limited.

A — *The subject-matter of the question*

53. This question, which has been referred in proceedings concerning the liability of a

social security body under Community law, relates more specifically to the way in which its conduct towards a retired worker may be characterised.

54. We know that three conditions must be fulfilled if a Member State is to incur liability in the event of an infringement of Community law. The rule of law infringed must be intended to confer rights on individuals, the breach must be sufficiently serious, and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. [19]

55. It is apparent from the judgment referring questions to the Court and from the wording of this question that it relates only to the *second condition* established by the Court's case-law.

The other two conditions have not given rise to a question from the Cour du Travail, Mons. It points out that Inasti acknowledged that the condition that the legislation infringed must have been intended to confer rights on individuals was satisfied. [20] Nor has that court asked the Court of Justice about the existence of a causal link between the breach of the obligation on the State and the damage sustained by the appellant in the main proceedings. Moreover, according to the settled case-law of the Court, it is for the national courts to determine that point. [21]

56. It is also clearly established that, in principle, it is for the national courts to determine whether a breach of Community law is sufficiently serious for a Member State to incur non-contractual liability *vis-à-vis* individuals. [22]

57. However, the national courts are helped in their task by the Court of Justice which, when consulted on the liability of Member States by virtue of their Community obligations, indicates certain guidelines for the national courts to take into account in their evaluation. [23]

19 — Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 51.

20 — National court's judgment, p. 12, paragraph 13.

21 — See, for example, Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 30.

22 — See, for example, Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 59, and Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 38.

23 — See, for example, *Brasserie du pêcheur and Factortame*, cited above, paragraphs 56 and 58; Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 41; Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit and Others* [1996] ECR I-5063, paragraph 49; *Konle*, cited above, paragraph 58; and *Stockholm Lindöpark*, cited above, paragraph 38.

B — *The criteria to be applied in determining the existence of a sufficiently serious breach of Community law*

58. According to the case-law of the Court, a breach is sufficiently serious where, in the exercise of its legislative powers, a Member State has manifestly and gravely disregarded the limits on the exercise of its powers. [24] On the other hand, if, at the time when it committed the infringement, the Member State in question did not have legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach. [25]

59. We must therefore determine the extent of the discretion which a body such as Inasti may reasonably be thought to have had when it was asked to review the pension at issue.

60. The relevant judgments delivered by the Court may be distinguished according to the subject-matter of the infringement of Community law which the Member State is alleged to have committed.

61. In a first series of judgments, the main action arose from the incorrect transposition of a Community directive by a Member State. That case occurs typically when the Member States exercise a legislative power. [26] Although they may have greater or lesser leeway depending on the degree of precision of the legislation to be transposed, they nevertheless have a task which, given the nature of directives, may leave them with a certain number of choices to make. The requirement that there should be a serious and manifest disregard of the applicable rules is, in those circumstances, dictated by the concern that the legislative function should not be hindered by the prospect of actions for damages. [27]

62. A second category of judgments covers cases of breach of Community law in which

24 — See, in particular, Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 25; Case C-140/97 *Rechberger and Others* [1999] ECR I-3499, paragraph 50; in Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 38; and *Stockholm Lindöpark*, cited above, paragraph 39. The links between Inasti and the Belgian Government seem to be hierarchical in national law, as the national court gives us to understand (see the notion of 'minister with responsibility [for the respondent]', p. 7 of the national court's judgment). It is therefore likely that, under that law, the liability of the State is indissociable from that of its administrative divisions. The fact that this characteristic is not absolutely certain has no bearing on the observance of Community law since, even if certain legislative or administrative tasks are devolved to a public-law body legally distinct from the State, reparation for loss and damage caused to individuals by national measures taken in breach of Community law need not necessarily be provided by the Member State itself in order for its obligations under Community law to be fulfilled (judgment in *Haim*, cited above, paragraphs 29 to 31).

25 — See, for example, *Dillenkofer and Others*, cited above, paragraph 25, and *Haim*, cited above, paragraph 38.

26 — See *British Telecommunications*, cited above; *Denkavit and Others*, cited above; Case C-319/96 *Brinkmann* [1998] ECR I-5255; *Rechberger and Others*, cited above, and *Stockholm Lindöpark*, cited above.

27 — The reasoning is the same as in the context of the non-contractual liability of the European Community (see Wathelet, M. and Van Raepenbusch, S., 'La responsabilité des États membres en cas de violation du droit communautaire. Vers un alignement de la responsabilité de l'État sur celle de la Communauté ou l'inverse?', *Cahiers de droit européen*, 1997, p. 13). Following the example of this body of rules, the condition under which Member States incur liability for a serious and manifest disregard of Community law applies where the exercise of legislative activities involves choices of economic policy (see the aforementioned article and the judgment in *Brasserie du pêcheur and Factortame*, cited above).

the Member State is a priori *denied any margin of discretion*. That is evidently the case where there has been a complete failure to transpose a directive. [28] The same is true, in principle, of disputes arising out of the misapplication of Community rules which do not, in themselves, require an implementing provision. Examples of those, from amongst the rules already considered by the Court, are Article 34 of the EC Treaty (now, after amendment, Article 29 EC) [29] and Article 52 of the EC Treaty (now, after amendment, Article 43 EC). [30]

63. It is specifically in that type of judgment that the Court has recourse to the principle that the mere infringement of Community law may suffice to establish the existence of a sufficiently serious breach.

64. The institution in question, in circumstances such as those in this case, did not face any legislative choice, in that it did not have to enact any new legal provision. Its task was merely to respond to an application for review of pension rights by applying the existing rules, resulting primarily from the relevant area of Community law, which it did not do.

65. Its margin of discretion was therefore reduced, if not non-existent. Accordingly a mere infringement must be found to have been committed which, it may be concluded, constitutes a sufficiently serious breach of Community law.

66. However, the Court has held that, although a mere infringement of Community law may constitute such a breach, it does not necessarily do so. [31]

67. There are circumstances in which it is more difficult to evaluate an infringement of Community law than in the case of a straightforward failure to transpose a directive. In the present case, as the question referred shows, the breach of Community law has a dual aspect, since two sets of provisions are involved.

On the one hand, it follows from the Court's interpretation of Articles 12 and 46 of the Regulation in *Larsy* that Gervais Larsy should have his entitlement to a full pension restored. On the other hand, Inasti interpreted Article 95a of the Regulation as meaning that the application of those articles could be subject to temporal limits, if the interested party submitted his application for review out of time.

28 — See Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, and in *Dillenkofer and Others*, cited above.

29 — *Hedley Lomas*, cited above.

30 — *Haim*, cited above.

31 — *Ibidem*, paragraph 41.

68. Although this question relates to Article 95a of the Regulation, the interpretation of that provision is closely linked, in the present case, to that of Articles 12 and 46 of the Regulation. The Court's interpretation of Articles 12 and 46 has not been followed, and Article 95a of the Regulation has been applied inappropriately.

69. In order to determine whether an infringement of Community law constitutes a sufficiently serious breach, a national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it. Those factors include, in particular, the clarity and precision of the rule infringed, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law. [32]

70. As regards the application of those criteria in the present case, it is clear from the case-law of the Court that, in principle, they must be applied by the national courts in accordance with the guidelines laid down by the Court of Justice for their implementation. [33]

71. I shall now examine to what extent the applicable Community rules could have led Inasti to be mistaken about the meaning they should be given.

72. It is worth noting the following circumstances, which the national court could take into account.

73. According to the judgment in *Larsy*, the overlapping of pensions may be permitted where a person has worked in two Member States during one and the same period and has been obliged to pay old-age pension insurance contributions in those States during that period. That judgment is based on a factual and legal situation which is comparable in every respect to the one which has given rise to the main action in the present case. As the national court points out, that case was similar to the present one in that old-age pension contributions were paid to the French and Belgian authorities, consequently it was decided to reduce the amount of the Belgian retirement pension, and an action was brought against that decision. [34]

74. Following that judgment, the national court hearing the case between Marius Larsy and Inasti granted the application for review of the pension. As for Inasti, we

32 — *Ibidem*, paragraphs 42 and 43.

33 — *Ibidem*, paragraph 44.

34 — National court's judgment, pp. 5 and 6, paragraph 5.

know that it did not spontaneously amend Gervais Larsy's pension rights in accordance with that recent case-law.

75. Inasti maintains that the judgment in question was binding only on the court which had referred the question for a preliminary ruling in the *Larsy* case, and that Inasti was required only to observe any moral authority deriving from it.

76. Without entering into a debate relating to the nature of the authority with which the Court of Justice's rulings on interpretation are endowed, which a reply to the question raised does not warrant, I should make it clear that Inasti's liability will need to be evaluated in the light of the Court's judgment in *Brasserie du pêcheur and Factortame*, cited above. [35]

77. A breach of Community law will clearly be sufficiently serious if it has persisted despite a preliminary ruling or settled case-law from which it is clear that the conduct in question constituted an infringement. [36]

Failure on the part of a Member State or administrative authority to apply, to an identical situation, the approach taken by Community case-law constitutes a serious breach of Community law. The judgment in *Brasserie du pêcheur and Factortame* refers, in particular, to the existence of a preliminary ruling or settled case-law from which it is clear that the conduct in question constituted an infringement. [37]

78. It is true that, in the present case, the *Larsy* judgment did not, strictly speaking, arise from the proceedings between Gervais Larsy and Inasti before the Court du Travail, Mons. That court was not bound by the content of the judgment for the purposes of the decision to be given in the main proceedings, as it would have been if it had itself referred the questions for a preliminary ruling. [38] Nor does it appear that the judgment is based on case-law of particularly long standing characterised by a significant number of judgments giving the same interpretation of the Community law in question.

79. Nevertheless, when evaluating the liability of the competent authority, the national court cannot overlook the fact that that authority did not draw all the appropriate conclusions from a recent judgment which, by interpreting identical

35 — Paragraph 57.

36 — *Ibidem.*

37 — *Ibidem.*

38 — See, for example, the order in Case 69/85 *Wünsche* [1986] ECR 947, paragraph 13, and Case C-446/98 *Fazenda Pública* [2000] ECR I-11435, paragraph 49.

rules, gave a clear reply to a question raised in similar terms.

80. Amongst the other circumstances which the national court might take into account is the Commission's letter of 21 February 1997, communicated to Inasti by the authority with responsibility for the respondent, giving the impression that Treaty-infringement proceedings might be commenced against the Kingdom of Belgium if the relevant provisions of the Regulation, as interpreted in the *Larsy* judgment, were not applied. [39] It is within the discretion of the national court to take that purely factual point into consideration.

The same is true of the request from the authority with responsibility for Inasti asking it to regularise Gervais Larsy's situation in the light of the *Larsy* judgment. [40]

81. The national court could hardly be unaware that a higher authority had drawn the institution's attention to the existence of a breach of Community law and the possibility of proceedings against the Belgian Government.

82. The above factors can only in part be helpful to the Cour du Travail, Mons, in determining whether the application of Article 95a of the Regulation constitutes a sufficiently serious breach of Community law. Article 95a had not yet been inserted into the Regulation when the Court of Justice was asked to give a preliminary ruling by the national court hearing the *Larsy* case.

83. In order to deal fully with Gervais Larsy's claim that Inasti committed a breach of Community law, the national court will have to be satisfied that the interpretation of the Regulation given in the *Larsy* judgment could not be affected as a result of a new legal rule such as Article 95a of the Regulation.

84. We have seen that that provision does not apply in a situation such as that in the main proceedings. [41] It is for the national court to give judgment in accordance with the criterion referred to in this Opinion that the clarity and precision of the rule infringed must be taken into account. [42] The point is to establish whether there could be reasonable doubt that the provision was applicable to the case before the court, having regard to its objective and the scope which it may be acknowledged to have.

39 — National court's judgment, p. 7, paragraph 7.
40 — *Ibidem*.
41 — See points 41 to 51 of this Opinion.
42 — Point 69.

85. The judgments in which the Court of Justice has interpreted Article 95a of the Regulation are not numerous and are, in any event, subsequent to Inasti's partial regularisation of Gervais Larsy's situation in 1995. [43] They cannot, therefore, be taken into account to establish a serious breach of Community law. [44]

86. On the other hand, the points noted above, relating to the interpretation of Article 95a of the Regulation, must be taken into consideration by the national court in evaluating the clarity and precision of that provision. [45] I believe that the nature of a transitional provision which must be ascribed to Article 95a largely determines its scope of application and the interpretation which it may be given. The transitional character of a legal rule confers on it the function of preparing for the entry into force of new legislation in relation to the legislation which it is intended to replace. It must therefore be interpreted taking into account the legislation in which it has its origin.

87. I should add that, as the Commission has pointed out, Article 95a(4) to (6) of the Regulation is similar to Article 94(5) to (7) of the same Regulation, as amended by Regulation No 2001/83. As the Court of Justice has pointed out, the transitional provisions of Regulation No 1408/71, including Article 94(5), are based on the principle that benefits awarded under the former Regulation which are more favourable than those payable under the new Regulation will not be reduced. The aim of the provision is, therefore, to give to a person to whom benefits were awarded under the old Regulation the right to request the review, in his favour, of such benefits. [46]

88. Consequently, when Gervais Larsy's case was submitted to Inasti, the Court of Justice had already given a precise interpretation of the provision. According to that interpretation, there was no doubt about the transitional character of Article 94(5) of the Regulation. Its aim was to determine precisely and restrictively the possible retroactive effect of new legal rules on situations covered by the legal rules established by the text it was to replace. Nor was there any indication that the provision could apply to all applications for pension review.

89. Finally, we must turn our attention to the argument put forward by Inasti to justify having applied Article 95a of the Regulation to Gervais Larsy's application.

43 — *Baldone*, cited above, and Joined Cases C-52/99 and C-53/99 *Camarotto and Vignone* [2001] ECR I-1395.

44 — For a similar example of national legislation adopted in breach of the applicable Community law, but prior to a judgment of the Court of Justice interpreting that law, see *Haim*, cited above, paragraph 46.

45 — See points 41 to 51 of this Opinion.

46 — Case 32/76 *Saieva* [1976] ECR 1523, paragraphs 14 to 17, and Case 83/87 *Viva* [1988] ECR 2521, paragraph 10.

According to Inasti, the applicable law did not authorise it to review, on its own initiative, an administrative decision whose compliance with Community law was uncertain, since a judgment had been delivered dismissing the appeal brought against that decision. Since it was bound by the judgment and had no legal authorisation, Inasti was compelled to ask the person concerned to submit a fresh pension application, in accordance with national law and Article 95a of the Regulation. However, having had recourse to this latter provision, it had to limit the retroactive effect of the revised rights because the time-limits set by the provision in question had been exceeded. [47]

90. All in all, according to Inasti, the disregard for Community law which it is alleged to have shown arises from the fact that no procedural rule under national law allowed it, in those circumstances, to grant Gervais Larsy's application in full, on a mere request that his pension be reviewed. The lesser of two evils was to use Article 95a of the Regulation and the applicable national law, with the inevitable consequence of limiting the scope of the judgment in *Larsy*.

91. The fact that the unjustified application of Article 95a of the Regulation — and, consequently, misapplication of Articles 12 and 46 of the Regulation — is attributable to the competent authority's intention to mitigate the alleged inadequacies of national law provides no justification whatsoever for a breach of Community law.

47 — Inasti's written observations, points 13 et seq.

92. The primacy of Community law requires all the authorities of the State to give effect to the Community rule. [48]

93. Furthermore, although it is true that, by virtue of the principle of procedural autonomy, the Member States are free to establish the procedural rules designed to safeguard the rights acquired by individuals directly from Community law, those rules are still required to satisfy the two conditions of equivalence and effectiveness. On the one hand the procedural rules in question must not be less favourable than those applying to similar claims based on domestic law. On the other, they must not be framed in such a way as to make it impossible or excessively difficult in practice to exercise the rights which the national courts have a duty to protect. [49]

94. The Cour du Travail, Mons, might find it necessary to examine the procedural inadequacies mentioned by Inasti in the light of the abovementioned principles. It is therefore conceivable that, in addition to an infringement of the Regulation on the part of Inasti for which it may incur liability, the matters should be raised of an infringement by the authority responsible, under national law, for establishing the procedural rules governing the application of Community law.

48 — Case 48/71 *Commission* v *Italy* [1972] ECR 529, paragraph 7.

49 — See, as a recent example of settled case-law, *Camarotto and Vignone*, cited above, paragraph 21.

95. Consequently, the information provided by Inasti regarding the procedure applicable to pension review could be useful to the Cour du Travail, Mons, for the purpose of allocating, on the basis of any possible assessment it might make as to whom the infringement found was attributable, ultimate responsibility for compensation.

Conclusion

96. In the light of those considerations, I therefore propose that the Court give the following reply to the questions submitted by the Cour du Travail, Mons:

(1) The review of pension rights provided for in Article 95a(4) 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992, does not apply to an application for review of an old-age pension the amount of which has been limited, pursuant to a national rule against overlapping, on the grounds that its recipient also receives an old-age pension paid by the competent authority of another Member State, where the application for review is based on provisions other than those of Regulation No 1248/92.

(2) A breach of Community law is sufficiently serious where, in the exercise of its legislative powers, a Member State has manifestly and gravely disregarded the limits on the exercise of its powers. If, at the time when it committed the infringement, the Member State in question did not have legislative choices and had only considerably reduced, or even no, discretion, a mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

It is for the national courts to determine whether a breach of Community law is sufficiently serious for a Member State to incur non-contractual liability *vis-à-vis* individuals.