JUDGMENT OF THE COURT (First Chamber)
28 June 2001 *

In Case C-118/00,

REFERENCE to the Court under Article 234 EC by the Cour du travail de Mons (Belgium) for a preliminary ruling in the proceedings pending before that court between

Gervais Larsy

and

Institut national d'assurances sociales pour travailleurs indépendants (Inasti),

on the interpretation of Article 95a of Regulation (EEC) No 1408/71 of the Council 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 (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), and on the conditions governing a Member State's liability for damage caused to individuals by breaches of Community law,

* Language of the case: French.

THE COURT (First Chamber),

composed of: M. Wathelet, President of the Chamber, P. Jann (Rapporteur) and L. Sevón, Judges,

Advocate General: P. Léger,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Mr Larsy, by himself,

— the Institut national d'assurances sociales pour travailleurs indépendants (Inasti), by L. Paeme, acting as Agent,

— the Commission of the European Communities, by P. Hillenkamp and H. Michard, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Institut national d'assurances sociales pour travailleurs indépendants (Inasti), represented by L. Renaud, acting as Agent, and the Commission, represented by H. Michard, at the hearing on 11 January 2001,

after hearing the Opinion of the Advocate General at the sitting on 15 March 2001,

gives the following

Judgment

1 By judgment of 20 March 2000, received at the Court on 29 March 2000, the Cour du Travail de Mons (Labour Court, Mons) referred for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 95a of Regulation (EEC) No 1408/71 of the Council 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 (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 'Regulation No 1408/71'), and on the conditions governing a Member State's liability for damage caused to individuals by breaches of Community law.

2 The two questions were raised in the proceedings between Mr Gervais Larsy and the Institut national d'assurances sociales pour travailleurs indépendants (hereinafter 'Inasti') relating to an application for damages.

Legal background

3 Article 95a of Regulation No 1408/71 provides:

'1. Under Regulation (EEC) No 1248/92 no rights 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 determination 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.'

The main proceedings and the questions referred

4 Mr Gervais Larsy, the appellant in the main proceedings, is a Belgian national established in Belgium near the French border. He was a self-employed nursery gardener in Belgium and France.

5 On 24 October 1985, Mr Larsy applied to Inasti for a retirement pension as a self-employed worker.

6 By a decision notified on 3 July 1986, Inasti granted him a retirement pension as from 1 November 1986 calculated on the basis of a work record from 1 January 1941 to 31 December 1985 entitling him to a full pension of 45/45.

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

8 As a result, on 21 December 1988 Inasti adopted a fresh decision reducing his pension entitlement to a 31/45 proportion, with effect from 1 March 1987, in application of the principle, laid down in Article 19 of Royal Decree No 72 of 10 November 1967 (*Moniteur Belge* of 14 November 1967, p. 11840), that work records are unseverable.

9 On 16 January 1989, Mr Larsy brought an action against that decision before the Tribunal du travail de Tournai (Labour Tribunal, Tournai), Belgium, claiming that the initial amount of his pension award should stand, notwithstanding that he had been awarded a French retirement pension.

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

11 An action was then brought before the Tribunal du travail de Tournai by Gervais Larsy's brother, Marius Larsy, who was in a similar legal and factual situation.

12 During the proceedings, the Tribunal du travail de Tournai decided to refer to the Court of Justice for a preliminary ruling certain questions on the interpretation of Articles 12 and 46 of Regulation No 1408/71, those provisions governing overlapping benefits and their calculation by the competent institutions of Member States.

13 In its judgment in Case C-31/92 *Larsy* [1993] ECR I-4543, the Court held that Articles 12(2) and 46 of Regulation No 1408/71 did not preclude the application of a national rule against overlapping benefits when determining a pension in accordance with national legislation alone. However, those Articles did preclude the application of the rule when determining a pension under Article 46. Article 46(3) of Regulation No 1408/71 had to be interpreted as meaning that the rule against overlapping benefits in that provision did not apply where a person had worked in two Member States during one and the same period and had been obliged to pay old-age pension insurance contributions in those States during that period.

14 In view of that interpretation of Regulation No 1408/71 by the Court of Justice, the Tribunal du travail de Tournai upheld Marius Larsy's action and found that he should be awarded a retirement pension as a self-employed worker calculated on a 45/45 basis, and that the pension should not be proportionally reduced by the retirement pension awarded by the competent institutions in France.

15 Gervais Larsy requested that his situation be resolved on the same terms as those applied to his brother and, in response, Inasti asked him, relying on Article 95a(5) of Regulation No 1408/71, to submit a new application for a pension in order for his entitlement to be reviewed.

16 Following that application of 3 June 1994, Inasti, on 26 April 1995, adopted a fresh decision, awarding Gervais Larsy a full retirement pension with effect from 1 July 1994.

17 After contacting the Commission, Mr Larsy, by letter of 8 August 1997, appealed against the judgment of the Tribunal du travail de Tournai of 24 April 1990 to the Cour du travail de Mons.

18 Before that court, the Inasti acknowledged that Mr Larsy's pension rights should be calculated on a 45/45 basis, with effect from 1 March 1987, and that the administrative decision of 21 December 1988 should be revised accordingly. However, it took the view that, in the absence of any wrongful act, it could not be ordered to pay damages.

19 In its judgment of 10 February 1999, the Cour du travail de Mons upheld Mr Larsy's appeal with regard to his right to a retirement pension as a self-employed worker calculated on a 45/45 basis as from 1 March 1987.

20 As regards Mr Larsy's application for damages of BEF 1 for non-material damage and BEF 100 000 for additional material damage, the Cour du travail de Mons found that it did not have sufficient information and addressed to the parties a question relating, *inter alia*, to whether Inasti should be considered to have committed a wrongful act in adopting the decision of 26 April 1995 which, whilst it awarded Mr Larsy a full pension, provided that the decision was to take effect as from 1 July 1994, whereas the initial application for a retirement pension had been made in 1985 and the pension rights in question had been reduced by Inasti as from 1 March 1987. The court also adopted the arguments in the written opinion of the Belgian State Legal Department, of 13 January 1999, which had considered that the judgment in *Larsy* did not have the authority of *res judicata* but only moral authority and that, by partially revising its decision of 21 December 1988 in regard to its temporal application, Inasti had respected that moral authority. The Legal Department also pointed out that the imposition of a temporal limitation on the effects of the decision of 26 April 1995 appeared to be dictated by the Community legislation, that is Article 95a(5) of Regulation No 1408/71.

21 In response to the question addressed to it by the Cour du travail de Mons, Inasti submits that it did not commit any sufficiently serious breach of Community law, since the applicable rules did not authorise it to adopt of its own motion a fresh

decision taking effect from 1 March 1987. Since the application for review was brought outside the period provided for in Article 95a(5) of Regulation No 1408/71, the review had to become effective on 1 July 1994. Inasti also points out that Mr Larsy did not appeal against the judgment of 24 April 1990 until 8 December 1997 and that this delay is the cause of the damage claimed.

22 Mr Larsy claims that Inasti failed to take account of the moral authority of the *Larsy* decision and that the judgment of the Cour du travail de Mons of 10 February 1999 proves that the breach of Community law continued to subsist after the judgment of the Court of Justice in that case.

23 In those circumstances, the Cour du travail de Mons decided to stay proceedings and to refer the following two questions to the Court 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] *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 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 abovementioned Article 95a(5)?'

The first question

24 It must be observed first of all that, according to its wording, this question relates only to the interpretation of Article 95a(5) of Regulation No 1408/71, which concerns the situation where an application for review of pension rights is made within two years of 1 June 1992.

25 However, for the reasons given by the Advocate General at points 36 to 39 of his Opinion, the national court needs to know whether Inasti failed to take account

of Community law and thus incurred liability by limiting in time, on the basis of Article 95a(4), (5) and (6) of Regulation No 1408/71, the effects of a decision reviewing the pension rights of a self-employed worker such as Mr Larsy.

26 The first question must accordingly be understood as asking essentially whether Article 95a(4), (5) and (6) of Regulation No 1408/71 applies to an application for review of a retirement pension the amount of which has been limited, under an anti-overlapping rule applicable in a Member State, on the ground that the recipient has also been awarded a retirement pension paid by the competent institution of another Member State.

27 In that regard, it must be observed that Article 95a of Regulation No 1408/71 was inserted in that regulation by Regulation No 1248/92 by way of a transitional provision for the application of the latter regulation.

28 It follows that, in order for the right to review provided for in Article 95a to be capable of applying to a given situation, the application made to that effect must be based on the new provisions inserted by Regulation No 1248/92.

29 The Court has already held that the 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 Regulation No 1248/92 are more favourable to him and to have benefits awarded under the provisions of the unamended regulation maintained where these appear more advantageous than those resulting from Regulation No 1248/92 (Case C-307/96 *Baldone* [1997] ECR I-5123, paragraph 15).

30 That interpretation is confirmed by the wording of Article 95a(4) of Regulation No 1408/71, which provides that the rights of the persons concerned may be reviewed on the application of such persons 'taking into account the provisions of Regulation (EEC) No 1248/92'.

31 It is common ground in the main proceedings that Mr Larsy's application under Articles 12 and 46 of Regulation No 1408/71 was for a retirement pension calculated on a 45/45 basis, including for the period during which he enjoyed the benefit of a second pension in another Member State. There is nothing in the file to suggest that he relied on any provision in Regulation No 1248/92 which would be more favourable to him.

32 The answer to the first question must therefore be that Article 95a(4), (5) and (6) of Regulation No 1408/71 does not apply to an application for review of a retirement pension, the amount of which has been limited under an anti-overlapping rule applicable in a Member State, on the ground that the person receiving that pension has also been awarded a retirement pension paid by the competent institution of another Member State, where the application for review is based on provisions other than those in Regulation No 1248/92.

The second question

33 By this question the national court is essentially asking whether the fact that the competent institution of a Member State applies Article 95a(4), (5) and (6) of Regulation No 1408/71 to an application for review of a retirement pension, thus limiting the retroactivity of the review to the detriment of the person concerned, constitutes a serious breach of Community law if those provisions are not applicable to the application in question and if it follows from a judgment of the Court of Justice delivered before the decision by the competent institution that the institution wrongly applied an anti-overlapping rule of that Member State,

and where it cannot be inferred from that judgment that the retroactive effect of such a review could be limited.

34 First of all, it should be recalled that liability for loss and damage caused to individuals as a result of breaches of Community law attributable to a national public authority constitutes a principle, inherent in the system of the EC Treaty, which gives rise to obligations on the part of the Member States (see Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 38; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 24; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 20; Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531, paragraph 106; and Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 26).

35 It is for each Member State to ensure that individuals obtain reparation for loss and damage caused to them by non-compliance with Community law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation (Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 62, and *Haim*, cited above, paragraph 27).

36 As regards the conditions to be satisfied in order for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible, it is clear from the case-law of the Court that there are three: the rule of law infringed must have been 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 loss or damage sustained by the injured parties (see the cases cited above of *Brasserie du Pêcheur and Factortame*,

paragraph 51; *Dillenkofer and Others*, paragraphs 21 and 23; *Norbrook Laboratories*, paragraph 107, and *Haim*, paragraph 36; see also Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 37).

37 It is clear from the order for reference in the main proceedings and from the wording of the question raised that the question is confined to the second condition laid down by the case-law mentioned in paragraph 36 above.

38 In that regard, it must be recalled, first, that a breach of Community law is sufficiently serious where a Member State, in the exercise of its legislative powers, has manifestly and gravely disregarded the limits on its powers (see *Brasserie du Pêcheur and Factortame*, paragraph 55; *British Telecommunications*, paragraph 42; and *Dillenkofer and Others*, paragraph 25) and, secondly, that where, at the time when it committed the infringement, the Member State in question 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 (see *Hedley Lomas*, paragraph 28; *Norbrook Laboratories*, paragraph 109, and *Haim*, paragraph 38).

39 In order to determine whether such an infringement of Community law constitutes a sufficiently serious breach, all the factors which characterise the situation put before the national court must be taken into account. 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 (*Haim*, paragraphs 42 and 43).

40 Whilst it is in principle for the national courts to determine whether the conditions for Member States to incur liability for an infringement of Community law are met, the situation in the present case is that the Court has all the necessary information to be able to assess whether the facts of the case must be held to constitute a sufficiently serious breach of Community law.

41 In that connection, it must be observed that in circumstances such as those which led to the main proceedings, the competent national institution had no substantive choice.

42 Inasti's breach of Community law relates, first of all, to Articles 12 and 46 of Regulation No 1408/71, which entitled Mr Larsy to maintain a retirement pension calculated on a 45/45 basis, including for the period during which he enjoyed a retirement pension from the competent institution of another Member State, and, secondly, to Article 95a of that regulation, which cannot limit that entitlement in time, contrary to Inasti's interpretation of the provision.

43 As regards Articles 12 and 46 of Regulation No 1408/71, the Court of Justice held, at paragraphs 19 and 22 of the *Larsy* judgment, cited above, that overlapping pensions to the benefit of a person who has, during the same period, worked in two Member States and who has during that period been obliged to pay old-age insurance contributions in both of those Member States cannot be deemed unjustified. The factual and legal situation on which that judgment is

based is comparable in every respect to that which gave rise to the main proceedings.

44 In that connection, it must be recalled that a breach of Community law will be sufficiently serious if it has persisted despite a preliminary ruling from the Court from which it is clear that the conduct in question constituted an infringement (*Brasserie du Pêcheur and Factortame*, cited above, paragraph 57).

45 Thus, by refusing Mr Larsy's application for his retirement pension to be calculated on a 45/45 basis, as it did in his brother's case, the competent institution failed to draw all the consequences from a judgment of the Court providing, by means of an interpretation of the relevant provisions of Regulation No 1408/71, which applied to the situation of the persons concerned in exactly the same manner, a clear answer to the issues before that institution.

46 As regards the misapplication by Inasti of Article 95a of Regulation No 1408/71, regard must also be had to the clarity and precision of that provision.

47 The reply to be given to the first question, namely that Article 95a of Regulation No 1408/71 did not apply in the circumstances of the case, should not have been in any doubt, given the wording and purpose of that provision.

48 Furthermore, as the Commission observed in its submissions and the Advocate General pointed out at point 87 of his Opinion, paragraphs (4), (5) and (6) of Article 95a Regulation No 1408/71 are worded in terms similar to paragraphs

(5), (6) and (7) of Article 94 of the same regulation. The Court had already held, well before Inasti adopted its decision on the basis of Article 95a, that the transitional provisions in Regulation No 1408/71, which include Article 94(5), are based on the principle that benefits awarded under the old version of Regulation No 1408/71 are not to be reduced. The purpose of that provision is therefore to give the person concerned the right to request the review in his favour of benefits payable under the old version of Regulation No 1408/71 (see Case 83/87 *Viva* [1988] ECR 2521, paragraph 10).

49 It must therefore be observed that application of Article 95a of Regulation No 1408/71 to a situation such as that at issue in the main proceedings, which resulted in limiting the effect of Articles 12 and 46 of that regulation in time, constitutes a serious breach of Community law.

50 That breach cannot be justified by the fact that Inasti applied, as it claims it did, Article 95a of Regulation No 1408/71 to Mr Larsy's situation because, under national procedural law, that was the only provision under which his pension rights could be reviewed with partial retroactive effect.

51 Suffice it to observe in that regard that the Court has held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law (Cases 106/77 *Simmenthal* [1978] ECR 629, paragraph 22, and C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 20).

52 That principle of the primacy of Community law means that not only the lower courts but all the courts of the Member State are under a duty to give full effect to Community law (see, to that effect, Cases 48/71 *Commission* v *Italy* [1972] ECR 529, paragraph 7, and C-101/91 *Commission* v *Italy* [1993] ECR I-191, paragraph 24).

53 So, to the extent that national procedural rules precluded effective protection of Mr Larsy's rights derived under the direct effect of Community law, Inasti should have disapplied those provisions.

54 Moreover, Inasti's argument that the binding nature of the judgment of the Tribunal du travail de Tournai of 24 April 1990 prevented it from reviewing Mr Larsy's rights with retroactive effect is totally undermined by the manner in which that institution dealt with his application, which was, by decision of 26 April 1995, to review his pension rights with effect from 1 July 1994.

55 It follows from all the foregoing that the reply to the second question must be that the application by the competent institution of a Member State of Article 95a(4), (5) and (6) of Regulation No 1408/71 to a request for review of a retirement pension, thus limiting the retroactivity of the review to the detriment of the person concerned, constitutes a serious breach of Community law if those provisions are not applicable to the application in question and if it follows from a judgment delivered by the Court of Justice before the decision by the competent institution that the institution wrongly applied an anti-overlapping rule of that Member State, and where it cannot be inferred from that judgment that the retroactive effect of such a review could be limited.

Costs

56 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Cour du travail de Mons by judgment of 20 March 2000, hereby rules:

1. **Article 95a(4), (5) and (6) of Regulation (EEC) No 1408/71 of the Council 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 a retirement pension, the amount of which has been limited under an anti-overlapping rule applicable in a Member State, on the ground that the person receiving that pension has also been awarded a retirement pension paid by the competent institution of another Member State, where the application for review is based on provisions other than those in Regulation No 1248/92.

2. The application by the competent institution of a Member State of Article 95a(4), (5) and (6) of Regulation No 1408/71 to a request for review of a retirement pension, thus limiting the retroactivity of the review to the detriment of the person concerned, constitutes a serious breach of Community law if those provisions are not applicable to the application in question and if it follows from a judgment delivered by the Court of Justice before the decision by the competent institution that the institution wrongly applied an anti-overlapping rule of that Member State, and where it cannot be inferred from that judgment that the retroactive effect of such a review could be limited.

Wathelet Jann Sevón

Delivered in open court in Luxembourg on 28 June 2001.

R. Grass

Registrar

M. Wathelet

President of the First Chamber