Roll Numbers: 769 to 774
Order no. 80/95 Dated December 14, 1995

ORDER

Under consideration: actions to annul article 28 of the law dated March 30, 1994 pertaining to social provisions.

The Court of Arbitration,

Composed of the Presidents M. Melchior and De Grève, and judges L.P. Suetens, H. Boel, L. François, P. Martens, J. Delruelle, G. De Baets, E. Cerexhe, H. Coremans, A. Arts and R. Henneuse, assisted by the clerk L. Potoms, presided over by the President M. Melchior,

After having deliberated, renders the following order:

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I. *Subject of the actions*

By requests addressed to the Court through letters registered with the postal service dated September 29 and 30, 1994, and received by the clerk on September 30, and October 3, 1994, the annulment actions for article 28 of the law dated March 30, 1994 bearing on social provisions, published in the Belgian Monitor dated March 31, 1994, were introduced by:

a. the s.p.r.l. Medical Laboratory of the South, whose headquarters is located at 5004 Namur-Bouge, route de Hannut 40;

b. the s.p.r.l. Piette Medical Testing Laboratory, whose headquarters is located at 1060 Brussels, avenue Henri Jaspar 101;

c. the s.p.r.l. IBC chemistry and hormonology laboratory, whose headquarters is located at 4680 Oupeye, rue Perreau 7;

d. the s.p.r.l. Kain Biomedical Center, whose headquarters is located at 7540 Kain, rue Albert 64;

e. the s.p.r.l. Roman Pais Medical Testing Laboratory, whose headquarters is located at 1400 Nivelles, rue Seutin 11;

f. the "Vereniging voor Vlaamse Klinische Laboratoria", whose headquarters is located at 9000 Gand, Maaltecenter Blok G, Derbystraat 289.

These cases are inscribed under the numbers 769 to 774 respectively in the Court's roll.

II. *The Proceedings*

In orders dated September 30, 1994 and October 3, 1994, the acting president designated the presiding judges in each of the cases in compliance with articles 58 and 59 of the special law dated January 6, 1989, on the Court of Arbitration.

The judges in charge of legal enquiry deemed that there was no standing for applying articles 71 or 72 of the organic law.

In an order dated October 12, 1994, together in a plenary session, the Court combined the cases.

Notification of the actions, in compliance with article 76 of the organic law, was made by letter registered with the postal service on October 25, 1994; notification of the order to combine them was sent out in the same letters.

Notice provided for in article 74 of the organic law was published in the Belgian Monitor dated October 25, 1994.

In an order dated November 24, 1994, the Court filled the seat with Judge A. Arts, given the retirement of a Dutch-language presiding judge.

The Council of Ministers, rue de la Loi 16, 1000 Bruxelles, introduced a report by letter registered with the postal service dated December 8, 1994.

Notification of this report was made in compliance with article 89 of the organic law by letter registered with the postal service on January 13, 1995.

Reports in response were introduced by:

- the petitioners in the cases bearing the numbers 769 to 773 of the roll by letter registered with the postal service on February 15, 1995;

- the petitioner in the case bearing the number 774 of the roll, by letter registered with the postal service on February 16, 1995.

In orders dated February 28, 1995 and July 4, 1995, the Court extended respectively until September 29, 1995 and March 29, 1996, the time frames in which the order has to be issued.

In orders dated May 23, 1995, the Court declared that the cases were ready and set the hearing for June 22, 1995, after having invited the parties to provide to the Court by June 15, 1995 at the latest, copies of legal decisions that are addressed in their reports, as well as the status of the proceedings in these cases.

The parties as well as their lawyers were notified of this order by letters registered with the postal service on May 24, 1995.

At the public hearing on June 22, 1995:

- appeared:

. The Honorable J. Cruyplants, Esq., and the Honorable O. Louppe, Esq., lawyers at the bar of Brussels for the petitioners in the cases bearing the numbers 769 to 773 of the roll;

. The Honorable L. Nuyttinck, Esq., *loco*, the Honorable L. De Schrijver, lawyers at the bar of Ghent, for the petitioner in the case bearing the number 774 of the role;

. the Honorable J.-J. Masquelin, Esq., and the Honorable S. Borsu, Esq., lawyers at the bar of Brussels, on behalf of the Council of Ministers.

- by agreement of all the parties present at the bench, the cases were set for a hearing on September 14, 1995.

In an order dated August 10, 1995, the cases were advanced to the hearing phase on September 13, 1995 due to the requirements of the calendar.

In an order dated September 11, 1995, President M. Melchior submitted the cases to the Court assembled in plenary session.

At the public hearing dated September 13, 1995:

- appeared:

. the Honorable J. Cruyplants, Esq. and the Honorable O. Louppe, Esq., lawyers at the bar of Brussels, on behalf of the s.p.r.l. Medical Laboratory of the South and others;

. the Honorable L. Nuyttinck, Esq., *loco,* the Honorable L. De Schrijver, Esq., lawyers at the bar of Ghent, on behalf of the "Vereniging voor Vlaamse Klinische Laboratoria";

. the Honorable J.-J. Masquelin, Esq., lawyer at the bar of Brussels, on behalf of the Council of Ministers;

- judges J. Delruelle and A. Arts, judges in charge of legal enquiry, made their report;

- the aforementioned lawyers were heard;

- the cases were set for deliberation.

The proceeding took place in compliance with the articles 62 and following of the organic law pertaining to the use of languages before the Court.

III. *Subject of the provision being contested*

Article 28 of the law dated March 30, 1994, bearing on social provisions, includes:

"To article 34 *undeciesbis* of the same law (dated August 9, 1963), the following modifications are made:

1° § 6, paragraph 3, and § 7, paragraph 4, are completed as follows:

' In this case as well, upon the request of the Service, the insurer organizations retain, in guarantee, up to the amount of sums owing, the total or partial amounts of the health insurance treatments due for the services dispensed by the laboratories owing, and this will be until the day that said Institute is notified of a definitive legal decision on the matter passed with the power of a legal judgment finding against the Institute pertaining to the said amounts. The King determines the conditions and the particular methods of the execution of the present provision and in particular those according to which the beneficiaries of the health treatment insurance are informed of the measure indicated above. These deductions are applicable to the amounts due for the services performed from the 1st of April, 1989, until December 31, 1990. ';

2° § 15, paragraph 3, and § 16, paragraph 4, are completed as follows:

' In this case as well, upon the request of the Service, the insurer organizations retain, in guarantee, up to the amount of sums owing, the total or partial amounts of the health insurance treatments due for the services dispensed by the laboratories owing, and this will be until the day that the said Institute is notified of a definitive legal decision on the matter passed with the power of a legal judgment finding against the Institute pertaining to the said amounts. The King determines the conditions and the specific methods of execution of the present provision and in particular those according to which the beneficiaries of the health treatment insurance are informed of the measure indicated above. These deductions are applicable to the amounts due for the services performed starting on January 1, 1991. "'

IV. *By law*

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Petitions in the cases bearing the numbers 769 to 773 of the roll

A.1. The first argument is taken from "the violation of articles 10 and 11 of the Constitution combined with the articles 40 and 144 of the Constitution, article 6, 1st §, of the Convention and article 1st of the First additional Protocol dated March 20, 1952, at the European Convention (...) of Human Rights (...) dated November 4, 1950".

Article 28 of the law dated March 30, 1994 institutes a system intended to guarantee the claims of INAMI on the clinical pathology laboratories.

Knowingly and retroactively, it therefore deprives the physical or moral persons addressed by this article of the benefit of the legal decisions that have already been rendered or are to be rendered, which constitutes an interference in the jurisdictional operation and damages the essential jurisdictional guarantee that is recognized to all subjects of law to challenge before the jurisdictions of the legal order the regularity of decisions made against such subject in execution of a law contrary to the provisions of the European Convention of Human Rights.
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The same kind of attack is occurring against the fundamental principles of the State of law, the separation of powers, the equality of citizens before the courts of law and justice, the independence of the courts, legal security deduced by the predictability of the rules of law and the equality of tools that should exist among the parties in a trial, without there having to be any justification drawn from the general interest, or a report of proportionality between the arguments employed and the intended goal, to suppose it to be legitimate, to justify the discriminatory treatment reserved for certain litigants.

"As a result of this retroactive provision, INAMI in fact benefits from an advantage that is not normally available to the petitioner while the fundamental element of the right to a fair trial is the requirement that each of the parties, both petitioner and respondant, have sufficient, equivalent, and adequate possibilities to take a position on the point of law and of fact and that one of the parties is not disadvantaged as compared to the other party."

Labor courts already made their ruling in the first jurisdiction in support of the laboratories in the framework of litigation regarding invoices addressed by the provision being contested, either by granting the temporary request formulated by the laboratories with respect to granting terms and time frames for the payments claimed by INAMI, or by refusing to order the laboratories to pay the amounts sued for by INAMI.

As a consequence, the laboratories are retroactively denied the benefit acquired by legal decisions that were already rendered or the expected benefit from legal decisions to be rendered since only a definitive decision in the matter that has the force of a legal ruling enables laboratories to obtain for their profit the release of amounts that were kept as a guarantee, even while INAMI would yield at each stage in the proceedings.

The intervention of the legislator can only be explained by the circumstance that a person governed by public law is a party in certain litigations; the legislative State comes in this respect to the assistance of the justiciable State in difficulty in a number of trials.

A.2. The second argument is taken from "the violation of articles 10 and 11 of the Constitution combined with articles 40 and 144 of the Constitution, article 6, 1st §, 13 of the Convention, and 1st of the additional First Protocol dated March 20, 1952 to the European Convention (...) of human rights (...) dated November 4, 1950".

INAMI benefits from an absolute privilege of jurisdiction and execution in the sense that the ordinary rules of procedure, particularly in matters of provisional execution of legal rulings can no longer apply to challenges bearing on the rights and civil obligations of physical and moral persons addressed by article 28.

The right to access the courts is damaged in its very substance: by retroactively intervening, the legislator restricts the access of laboratories to the labor courts, either to obtain reimbursement of sums claimed on the basis of a legislation that is contrary to the provisions of the European Convention of Human Rights, either to obtain from a legal order of the courts the suspension of invoices prepared on the basis of the same legislation.

The discrimination endured by the laboratories can not be justified objectively and reasonably.

A.3. The third argument is taken from "the violation of articles 10 and 11 of the Constitution combined with the 1st article of the additional First Protocol dated March 20, 1952 to the European Convention (...) of human rights (...) dated November 4, 1950".

The legislator damages retroactively the equality of the laboratories' creditors by allowing INAMI to benefit from an exorbitant privilege of common law. In this respect, one must note that article 1410, § 2, 5°, of the legal Code such as has been interpreted by the Court of Cassation, provides that sums paid for health-disability insurance paid to the providers of treatments for health treatment services on behalf of beneficiaries are by nature exempt from seizure.

The guarantee granted INAMI, which is just an unsecured creditor, has as a consequence the deprivation, in case of competition, of other creditors of the benefit of the privileges it possesses legally. This discrimination can not be objectively or reasonably justified.

A.4. The fourth argument is taken from "the violation of articles 10 and 11 of the Constitution, combined with the 1st article of the additional First Protocol dated March 20, 1952 at the European Convention (...) of Human Rights (...) dated November 4, 1950".

The law retroactively deprives physical or moral persons, addressed by article 28, of the right to a claim that is part of their assets, with the intent of avoiding the risk that laboratories would not be in a position to contend with payable debts by using their assets. There is no proportional relationship between this objective and the measure taken by the legislator, since the laboratories are not and can not be at the origin of the increase in ambulatory clinical pathology expenses caused only by the increase in medical prescriptions (see Court order n° 60/94 dated July 14, 1994).

The mechanism put in place by the provision that is being contested is without equivalent in the system to which are subjected the other treatment providers who benefit from payments coming from insurers in the framework of the health-disability insurance system. One must also remember that the mechanism put in place by the legislator to retrieve a budgetary excess for which it has not mastered all the efforts leads certain laboratories to have to reimburse nearly 70% of their profits, which shows under any scenario that it is impossible for these laboratories, except for having to compromise their very existence, to contend with the amounts claimed by INAMI through the fees that they receive for the services legally performed and billed.

Once again, there is discrimination that can not be justified objectively and reasonably.

Petitioner in the case bearing the number 774 of the roll

A.5. The sole argument is taken from "the violation of articles 10 and 11 of the Constitution, *juncto* articles 13, 16 and 144 of the Constitution, *juncto* article 6 and articles 13 and 14 of the European Convention of Human Rights dated November 4, 1950 and the 1st article of the additional First Protocol of the European Convention of Human Rights dated March 20, 1952".

A.6. In the first branch, the petitioner asserts that the goal pursued by the legislator – guarantee the claims of INAMI on the clinical pathology laboratories in the framework of the procedure for recuperating overspending of the budgetary allocation – does not present any objective and reasonable justification for the discrimination the measure undertaken creates among the laboratories, on the one hand, and all of the other subjects of law, on the other hand, to which there is in fact a jurisdictional protection offered to contest the claims, as well as for asking for the execution of legal decisions granting a suspension to the execution of invoices. In fact, laboratories' non-payment of advanced invoices prepared by INAMI were always followed up by a legal decision by which the execution of the invoices concerned had been suspended. What's more, it can not be a question of an accumulation of debts which would engender the real risk that the laboratories can not contend with a payable debt through use of their assets. In fact, INAMI prepared, in execution of the articles 20 to 22 of the law dated June 26, 1992, a summary invoice that includes reinvoicing of all of the amounts that INAMI had already invoiced in execution of the regulation repealed retroactively. Also, in compliance with the provisions of the law dated July 17, 1975 pertaining to accounting and to the annual accounts of companies, the laboratories concerned constituted provisions up to the limit of the amounts of advance invoices. One must also take note of the fact that in the quality of creditor of the amounts for which it is qualified to establish invoices, INAMI benefits from all of the guarantees in common law that any creditor of a payable, certain, and established debt has at its disposal.

By the provision undertaken, the legislator deprives an entire category of citizens of an essential legal guarantee, that applies to all citizens, without such unequal treatment being justified in any objective sense.

A.7. In a second branch, the petitioner asserts that the provision undertaken violates articles 10 and 11 of the Constitution because any violation of a fundamental right, in this case right of property and the right, guaranteed by the Allarde decree, for payment for a profesional activity, as well as

the freedom of association, constitutes in itself a violation of the principle of equality. The measure undertaken in fact deprives clinical pathology laboratories, during a period that one can reasonably determine in advance, of the right to receive an indemnity for services they regularly provide.

Now, non-payment of advance invoices follows a legal decision; by providing the services concerned and not honored as a result of a legal measure, clinical pathology laboratories do not engage in any culpable act – the laboratories are therefore damaged in their right guaranteed by the Allarde decree, since whoever exercises a professional activity has the right to obtain reasonable compensation for it, which is set in advance, so that it can ensure the continuity of the company and the employment that it provides as well as obtaining revenues that are reasonably justified from the industry performed and the services provided -; the non-payment of fees for services provided will have a damaging effect on the operation of the laboratories; the litigious measure therefore accords a de facto privilege to INAMI for an unprivileged claim by which the deposit made by privileged creditors is at a risk of loss because of an uncertain and contested claim in jurisdictions.

Report of the Council of Ministers

A.8. The provision undertaken entrusts to the King the responsibility for determining the particular conditions and modes for the execution of the law. The relevance of the arguments therefore escapes the control of the Court.

With respect to the first argument raised in the cases bearing the numbers 769 to 773 of the roll

A.9. Article 28 of the law dated March 30, 1994 does not damage the fundamental principles raised and does not deprive a category of justiciable parties of the benefit of legal decisions that have been rendered or will be rendered. On the contrary, these decisions conserve all of their utility.

In fact, the standard undertaken does not pertain either to the existence of the modes of payment of the laboratories' debt with respect to INAMI. It simply allows INAMI to dispose of a payment guarantee for credits that it is supposed to have by virtue of the legal provisions, whose constitutionality was recognized by the Court.

For as long as a doubt remains regarding the existence of a debt, in this case for as long as a definitive legal decision issued with the force of a legal ruling going against INAMI has not occurred, the latter should be able to take measures that protect its claim.

The standard undertaken does not violate the authority of a legal ruling of the legal decisions when it anticipates that the guarantee ends as soon as a definitive legal ruling is issued with the force of a legal ruling that is unfavorable to INAMI. Therefore, the guarantee is not out of proportion with the goal sought. What's more, it in no way modifies the right of the laboratories and INAMI to dispose of ample, equivalent, and adequate possibilities to take a position on the points of law and of fact regarding the debt of the laboratories and the methods of payment of that debt.

Article 6 of the European Convention of Human Rights applies only to litigations pertaining to civil rights. The relationship between laboratories and public authority is covered by public law.

The 1st article of the additional First Protocol does not apply either in this case because article 28 of the law undertaken only provides for protective measures and does not apply to a property as debined by this article.

With respect to the second argument invoked in the cases bearing the numbers 769 to 773 in the roll

A.10. The standard undertaken does not limit the right of laboratories to introduce a petition before the labor courts against the decision by INAMI to ask insurance organizations to retain in guarantee certain sums due to the aforementioned laboratories.

What's more, article 1.6 of the European Convention of Human Rights and the 1st article of the additional First Protocol to this Convention do not apply to the present litigation.

According to the European Court of Human Rights, article 13 of this Convention does not go so far as to require the establishment of a petition through which the laws of a contracting State can be denounced before a national authority as being contrary to the Convention. The European Commission of Human Rights rules that article 13 is not applicable to the acts of the legislative authority.

The right to access a court can also be limited when the goal sought is legitimate and when the arguments used are in a reasonable relation of proportionality. Such is the case here. The Court itself confirmed this in its order n° 5/94 dated January 20, 1994.

With respect to the third argument invoked in the case bearing the numbers 769 to 773 of the roll

A.11. The petitioning parties can not be admitted to invoke this argument in the sense that their petition does not show the interest that they would need to raise.

A.12. The situation of other creditors is not comparable to the INAMI situation with respect to the sums that the latter may ask insurers to retain in guarantee. The issue in fact is of sums that INAMI allocates as part of the intervention of health insurance in the health costs of corporate insured parties. The creditors are not denied their privileges to the degree that article 28 does not regulate the possible sharing of the sums addressed.

What's more, it is in error that the petitioning parties consider that the guarantee granted to INAMI has as a consequence denying other creditors the benefit of the privileges that they have at their disposal by virtue of the law. In fact, article 28 does not regulate the possible sharing of sums held in guarantee by insurers upon the request of INAMI.

With respect to the fourth argument invoked in the cases bearing the numbers 769 to 773 of the roll

A.13. First, one must consider that it is the result of the jurisprudence of the Court of Arbitration and the European Commission of Human Rights that the laboratories do not in this case benefit from a property right. By even admitting that they are endowed with such a right, a limitation to this right can be admitted because the objective sought by the legislator is perfectly legitimate, and the arguments used are proportionate to the goal sought. The Court order no. 60/94 dated July 14, 1994, can not be invoked in this instance, given that the provision undertaken has a completely different scope. In fact, the laboratories directly play a role and have a responsibility in the framework of clinical pathology expenses and can be at the origin of an increase in ambulatory clinical pathology expenses since by virtue of article 24, § 12, point 1, of the appendix in the royal order dated September 14, 1984, establishing the nomenclature for the health services in terms of obligatory insurance against disease and disability, the pathologist at a clinical pathology laboratory can bring into account the modifications made to the original prescription written by the treating physician.

With respect to the argument invoked in the case bearing the number 774 of the roll

A.14. Concerning the first branch of the argument, other than what has already been said, it is appropriate to note that the judgments of the labor tribunal dated March 4, 1994, concern only the period ranging from the second quarter, 1989, to the fourth quarter, 1991. In addition, it is exactly true that the terms and time periods are granted for the payment of invoices. The provision under litigation however only permits protective measures.

Concerning the accumulation of debts, it is appropriate to note that all of the laboratories have not constituted balance sheet provisions and that the amounts that remain unpaid to this day are significant and justify the provision undertaken, as the preparatory work of the law shows.

A.15. With respect to the second branch of the argument, it is not accurate to maintain that the non-payment of invoices is the result of a legal decision: "The suspension of invoices was requested in summary before the President of the Labor Court. This request was rejected. This rejection was upheld by the Labor Court of Brussels (2nd chamber), ruling in the French language. In the procedures at hand at the foot of article 19, § 2, of the legal Code, the provisional rulings find that the invoices are to be paid by arranging the terms and the time frames".

Concerning the Allarde decree, one may remember the order issued by the Court, no. 84/93 dated December 7, 1993. The subject of the provision undertaken is not the mode of operations of a laboratory, and does not damage freedom of commerce and industry.

In conclusion, the provision under litigation in no way violates the fundamental right of the petitioning parties and in no case violates the principle of equality. In addition, the provision contested takes place within the limits of the objective sought and constitutes a protective measure which is in no respect disproportionate with the goal pursued.

Petitioning parties' report in response in the cases bearing the numbers 769 to 773 of the roll

A.16. It is without basis that the Council of Ministers maintains that the Court would be incompetent to proceed to monitoring the constitutionality of the provision being contested because this provision relegates to the King the responsibility for taking operational measures. In fact, the provision undertaken sets not only the objective to be reached, but also the only means for achieving it. The Court is therefore competent to appreciate, with respect to the principles of equality and non-discrimination, the distinction operated between justiciable parties since the difference in treatment established is not conditional or subordinate to an intervention by the King. .

A.17. Upon a proportionality evaluation for the standard undertaken, the Court will need to take into account the cumulative effect produced by all of the legal and regulatory provisions that have been taken over a number of years with respect to the ambulatory clinical pathology laboratories sector. In addition, it is not these laboratories that are the cause of budgetary overages that are noted in the sector. The only adequate structural measures that allow for the limiting of expense are the measures taken against prescribing physicians.

A.18. Concerning the first argument, one must first take note that it is not correct to affirm that the balance of health treatments could be put into peril if, due to their insolvency, the laboratories do not effect the payments of the amounts claimed by INAMI. In fact, there is no cause and effect link between the situation that contends that the laboratories could not pay their "debt" in the time intended and the statement that they accumulated such amounts to be paid that there is a real risk that they won't be able to handle their debt. This phenomenon in reality is only the result of the policy that has been conducted for several years against the clinical pathology laboratories. What's more, the amounts that are claimed against the laboratories

for the period from 1989-1991 only represent a negligeable percentage of the total of health treatment expenditures. Now, it is difficult to consider that there was urgency in taking the provision being contested since, as of today, no measure for the execution of the law has yet been taken by the King.

The principles articulated in article 6 of the European Convention of Human Rights is applicable in the present case, because the present litigation bears without question on civil rights and obligations since this qualification is recognized both for social insurance services and indemnity claims whose origins are in the illegality of a regulation that retroactive legislative provisions have validated. The jurisprudence of the European Court of Human Rights is invoked in support of this thesis. The litigation presents in fact numerous aspects of private law that reveal that the right at issue is a civil right: these elements are the personal, patrimonial, and subjective nature of the right claimed, meaning the right to not be deprived of a part of fees that are legally and regularly earned, its connection to the operation of the clinical pathology services performed in the framework of the private relation that is established between the treatment provider and his or her patient, the affinities that it presents with an assurance of common law as well as the negative repercussion engendered on the civil activity performed by the petitioning parties.

To be overly exhaustive, it should be pointed out that to the degree that it also bears upon an indemnity credit whose origin is found in an illegal regulation, the right claimed before the labor courts already shows in this sense alone a civil character beyond question based in the dispute pertaining to the civil responsibility of the public authority.

The provision being contested also affects another property in terms of the 1st article of the additional First Protocol in the European Convention of Human Rights. The illegal nature of the regulation prior to the law dated June 26, 1992, noted on several occasions by the regular jurisdictions, constitutes a fault in the terms of article 1382 and following of the Civil Code. The payment of invoices issued in execution of these illegal regulations immediately creates a certain damage and opens up the right to reparation. The provision undertaken has as its goal to bypass, to the exclusive profit of INAMI, the provisions of the legal Code that is normally applicable to any justiciable party, to any ordinary creditor.

“Through its duration and the total unavailability it creates, the mechanism established by the provision being contested resembles less a true guarantee than a measure of constraint and coercion likely to bring damage to the very existence of the laboratories addressed.

The effects of this exorbitant mechanism of common law are closer to those of an effective forced payment than to those of a guarantee.”

There does not exist a true relation of proportionality between the means employed and the goal intended by the legislator, the protection of general interests, which can not be assimilated to the protection of the particular interests of INAMI.

A.19. With respect to the second argument, article 13 of the European Convention of Human Rights, does not organize an action as such against the acts of the legislative power; when this action exists – as is the case in the constitutional system of Belgium -, it should nevertheless benefit from the guarantees provided for in the Convention and, in particular, be effective.

Now, the guarantee established by INAMI has the effect of depriving the laboratories of the use of the amounts that are the subject of the litigation as long as no definitive decision, unfavorable to INAMI, has been rendered.

The prejudice experienced by the laboratories, due to the fact that the very continuity of their activity is imperiled, is out of proportion with the prejudice experienced by INAMI if the guarantee is taken away from it.

The discrimination created by the provision undertaken stems from the fact that INAMI is qualified to block to its advantage and for numerous years the amounts that are the subject of the litigation. The laboratories, deprived of their main resources, can at that point quickly be brought to a state of collapse, while the legal decision rendered, after several years of procedures, could be permanently in their favor. Yet, an effective action should be useful and efficient.

"For the right of access to the courts to be respected, it is not enough that a physical or moral person be able to be heard at court, the degree of access procured by the national legislation has to be sufficient to ensure this right under normal and reasonable conditions, in light of the principle of the pre-eminence of law in a democratic society."

A.20. Concerning the third argument, it is first appropriate to specify that as soon as the interest to act on the part of the petitioning parties is established, their interest to raise an argument of unconstitutionality of the standard is also established. In any event, the petitioning parties have an interest in invoking a breach of equality among the various creditors of a laboratory since they can themselves be creditors of another laboratory, for example, because they send out analyses to sub-contractors, as the possibility was allowed for in the royal order dated September 24, 1992.

Also, a result is that there is no basis for an adversarial party to maintain that the other creditors of a laboratory would not find themselves in a situation comparable to that of INAMI.

"A clinical pathology laboratory can manifestly be a creditor of another laboratory for claims of the same type as those being claimed by INAMI. If one had to sustain the justification advanced by the adversarial party, *quod non*, the respect for the principles of equality and non-discrimination would contend that this laboratory could at least benefit from the same guarantees as those granted to INAMI by the provision that is being contested."

Also, one must note that the intention of the authors of the provision undertaken was clearly to guarantee in an absolute fashion the rights of INAMI, and this would also be in the case of a laboratory's bankruptcy. The other creditors of the laboratories therefore lose all their privileges on the amounts guaranteed which are no longer part of the common deposit of the creditors. "It is only starting from the time that intervention in the form of illness-disability insurance is paid to the laboratories that it enters into the common deposit of the creditors and it loses its attributes (inaccessibility and non-seizability)."

A.21. Concerning the fourth argument, one must first recall that the claim retained by the clinical pathology laboratories against INAMI should be considered to be property in the sense of the 1st article of the additional First Protocol at the European Convention of Human Rights and can not be compared to a disability fund. The laboratories are in fact really at all times holders "of a claim sufficiently established that its payment can be demanded". Court order no. 60/94 dated July 14,, 1994 is recalled, as is the total absence of all responsibility of the clinical pathology laboratories in any type of over-consumption of health treatments. It is once again specified that the only adequate measures to fight against medical over-consumptions are measures taken against prescribing physicians.

The fact that a pathologist can modify the original prescription of the treating physician should be nuanced by the following objections: the adversarial party remains incapable of producing the slightest statistic that would enable demonstrating that this possibility is employed and leads to an over-consumption; this possibility can only be employed to the extent that there is a medical justification on the basis of objective and individual data, that this justification is written on the request for tests, and that the tests performed are accompanied by a statement of "service requested by a pathologist". If the provision of article 24, § 12, of the appendix to the royal order dated September 14, 1984 in fact enabled there to be a thoughtless increase in clinical pathology expenses, one must be surprised that it was modified but not disallowed in the royal order dated December 9, 1994.

Report in response from the petitioning party in the case bearing number 774 of the roll

A.22. It is not accurate to affirm that the constitutionality of the legislative provisions, upon which INAMI is basing its position to maintain that it has a right of claim over the laboratories, is uncontestable, following the orders of the Court dated December 7, 1993, and January 20, 1994. The constitutionality test performed by the Court is in fact a test limited with respect to articles 10, 11, and 24 of the Constitution. The Court was unable to rule on the compliance of the legislative provisions with other provisions of the Constitution or with the provisions of international treaties like the European Convention of Human Rights. It is therefore possible that the ordinary tribunals deem that INAMI does not possess a claim that is liquid, certain, and payable with respect to the laboratories. The provision undertaken has henceforth the automatic effect of serving as a defacto prevention of these legal decisions becoming executory.

If INAMI is relying on article 28, the laboratories concerned risk being placed in the impossibility of respecting the reimbursement methods that were eventually granted to them by the tribunal, and it also risks finding itself faced with treasury difficulties such that the survival of the laboratory will be threatened. Now, neither the presentation of reasons nor the report in response from the adversarial party present a justification or explanation regarding the absolute necessity to make conservatory measures possible, in violation of the rules related to ordinary jurisdictions and the rules of common law. To determine if article 6.1 of the European Convention of Human Rights is applicable in this instance, one must not take into consideration the question of finding out if INAMI is or is not part of the public authorities, since only the nature of the dispute is relevant. This dispute pertains to the rights and obligations of a private nature which stem from the illness-disability insurance law, and which, by virtue of this law, belongs to the exclusive competence of the labor courts. This thesis is confirmed by the opinion given by the auditor of the labor tribunal of Brussels on January 15, 1995.

The jurisprudence invoked by the Council of Ministries concerning article 13 of this Convention is no more relevant, given that the actions undertaken by the laboratories before the labor jurisdictions and before the Council of State do not address a legislative act, but rather a number of measures of execution taken by INAMI in virtue of article 61 of the law on illness-disability insurance.

Of course, one must take into consideration the fact that even if they come from the social security budget, the amounts due to the laboratories are nothing other than the exchange for services provided by the laboratories which, in the framework of the third party payment system, are not invoiced to the beneficiaries but directly to the social security institutions. Taking into account the nature of the amounts to be paid by INAMI for this purpose – the only relevant criterion -, there is no justification for the damage created by the provision undertaken in the principle of creditor equality.

A.23. Concerning the second branch of the sole argument, one must first recall that the orders invoked by the petitioning party are the orders rendered in the Dutch language of the labor court of Brussels dated July 20, 1993, by which the requests for the suspension of the summary invoice were accepted. It also has to be known

that the refusal of payment by INAMI for the services provided by the laboratories inevitably prevents, or at the very least, seriously interferes with the laboratoires' function since the laboratories need these revenues to maintain their infrastructure, to resupply, and to pay their personnel.

Now, these laboratories can assert a right of property with respect to these amounts. It is in error that the orders of the Court dated December 7, 1993, and January 20, 1994, are invoked, because at issue in these orders was the amount of the exchange to be paid by INAMI while the current issue in question related to the right of the exchange. This right for the exchange was undeniably a part of the laboratories' assets following the execution of clinical pathology service and the invoicing of this service to social security institutions in the framework of the system of third party payor. This right of property belonging to the laboratories is also confirmed by the order of the Court number 60/94 dated July 14, 1994, in which the Court accepts the idea that this exchange concerns "fees" and deems that it is unreasonable and unacceptable that the legislative provision contains the possibility that laboratories are not indemnified for the services provided.

The analysis of this order which was done by the Council of Ministers is in contradiction with the terms of the order. It is also incorrect to affirm that the clinical pathology laboratories have a responsibility in the expenses generated by clinical pathology, since they act solely in executing the orders prepared by physicians. It is only in exceptional circumstances and following a procedure that is imposed that the pathologist can request additional tests that may not have the slightest influence in the progression of clinical pathology expenses. Because there is damage to the right of property, there is also violation of the principle of freedom of commerce and industry. The discriminatory nature of the measure in this respect appears as soon as one takes into consideration the concrete effects of the measure: due to a contested debt of INAMI, whose certain, liquid, and payable nature has not yet been established by the court, the laboratory will not receive its due for the provision of clinical pathology services that were performed and invoiced.

Also, it should be noted that the jurisprudence of the European Court for Human Rights invoked by the Council of Ministers is not relevant, given that a disability annuity can not be compared to compensation that the laboratories obtain in exchange for the clinical pathology services that they have performed.

- *B* -

With respect to the provision undertaken

B.1. Article 34*undeciesbis* of the law dated August 9, 1963, creating and organizing a plan for mandatory insurance to counter illness and disability – at present article 61 of the law related to mandatory healthcare and indemnity insurance coordinated on July 14, 1994 – provides that laboratories are endebted to INAMI for a rebate when the clinical pathology expenses for a specific fiscal period exceed at least 2% of the global budget established for this fiscal period. The laboratories have to pay

quarterly advances that are recoupable against this rebate. The healthcare Service informs the laboratory concerned, by registered letter, of the amounts due as part of the quarterly advance. The quarterly advance is payable within thirty days following the notification of the laboratory concerned. When this time period is up, the laboratory is then given full notice to pay the sums that are still owing. In case of non-payment, late interest of 12% is due.

An analogous rule is applicable when there is a balance owing after imputation of the quarterly advances paid.

The provision being contested from article 28 of the law dated March 30, 1994, pertaining to social provision provides for complementary measures.

Paragraph 6, section 3, and paragraph 7, section 4, of article 61 of the coordinated law dated July 14, 1994, are completed as followed:

“In this case as well, the insuring organizations, upon the request of the Service, retain in guarantee, up to the sums due, the total or partial amounts of the services delivered for the health insurance treatments due for the services provided in the laboratories owed, and this is the case until the day of the notification of the aforementioned Institute of a definitive final legal decision that has the weight of a legal ruling, going against the Institute, concerning the aforementioned amounts. The King determines the conditions and particular modes of execution of the present provision and in particular those according to which the beneficiaries of the healthcare insurance are informed of the aforementioned measure. These deductions are applicable to the amounts due for the services performed dated April 1, 1989, until December 31, 1990.”

In addition, paragraph 15, section 3, and paragraph 16, section 4, of the same article are completed as follows:

“In this case as well, the insuring organizations, upon the request of the Service, retain in guarantee, up to the sums due, the total or partial amounts of the services delivered for the health insurance treatments due for the services provided in the laboratories owed, and this is the case until the day of the notification of the aforementioned

Institute of a definitive final legal decision that has the weight of a legal ruling, going against the Institute, concerning the aforementioned amounts. The King determines the conditions and particular modes of execution of the present provision and in particular those according to which the beneficiaries of the healthcare insurance are informed of the aforementioned measure. These deductions are applicable to the amounts due for the services performed starting on January 1, 1991."

With respect to the first and second arguments in the cases bearing the numbers 769 to 773 of the roll and with respect to the first branch of the sole argument in the case bearing the number 774 of the roll

B.2. The arguments are taken in violation of articles 10 and 11 of the Constitution combined with articles 13, 16, 40 and 144 of the Constitution, with 6, 13 and 14 of the European Convention for Human Rights, and with the 1st article of the additional First Protocol to this Convention.

These arguments support essentially that the provisions under dispute have the effect of depriving a certain category of justiciable parties – in this case, the laboratories concerned – from the effective benefit of legal decisions that have already been rendered or are to be rendered.

B.3. The provisions undertaken allow the health treatment Service of INAMI to require insuring organizations to retain the amounts that they owe laboratories for the services the latter have performed, in guarantee of the sums that the laboratoies have to reimburse to INAMI, and this is the case until the day of the notification of the aforementioned Institute of a definitive judicial decision in the case with the force of a legal ruling, unfavorable to the Institute, concerning the aforementioned sums.

B.4. These provisions can only be interpreted to mean that they allow for the deduction to be withheld even when the laboratories had introduced or would introduce actions before the labor courts that contest the amounts to be paid to INAMI, or when the legal decisions that are not yet final would have decided to annul an invoice, to suspend its payability, or grant time deadlines for the payment that is being claimed.

B.5. From the preparatory work it appears that the intention is to guarantee INAMI's claims against the clinical pathology laboratories in the framework of the procedure for recuperating the excess of the budget allotment in this matter, established since April 1st, 1989, because "the laboratories concerned, by not paying their debts according to the terms set, have accumulated such amounts to pay that there exists a real risk that they are unable to deal with their payable debt by use of their assets." Also, it appears from the same preparatory work that if the insuring organizations are forced to withholdthe deduction, for its part INAMI can take into account the particular situations that could arise or the general interest. It is also made clear that in cases where a legal decision that is unfavorable to INAMI occurs, the amounts retained will be paid to the laboratories, with legal interested added (*Parl. Doc.*, Senate, 1993-1994, n° 980-1, pp. 27 and 28, p. 216 (notice of the Council of State), and n° 980-2, p. 58).

B.6. The litigious provisions have the effect of exercising discretionary power by an administrative authority and the administrative act that stems from it – the "petition" of the healthcare Service in the insuring organizations to retain certain amounts, a "petition" which contains an obligation for these insuring organizations and therefore constitutes an administrative act accompanied by major legal effects – are at least temporarily beyond any effective jurisdictional control.

It follows that the category of persons to whom these provisions are applicable is treated differently from other justiciable parties.

B.7. It is for the legislator to determine if there is standing to allow INAMI to guarantee itself against the insolvency of some of its debtors. The Court should however verify if the measures that the legislator authorizes are not discriminatory.

B.8. For the reasons articulated in B.5, there is an objective difference between the clinical pathology laboratories concerned and the other categories of justiciable parties: in order to maintain the budget dedicated to clinical pathology services within the limits anticipated, the legislator has organized a system for recuperating the amounts paid by INAMI that are beyond this budget. It complies with such an objective to take measures that prevent INAMI from being able to recuperate its claims against debtors that have become insolvent.

B.9. However, the provisions under dispute organize a particular form of protective garnishing which constitutes a substantial exemption to the common law on seizures. The legal Code contains provisions that allow any creditor to equip itself in advance against the insolvency of its debtors, particularly through the recourse of protective seizures organized by articles 1413 and following, with the exception of the problem of non-recuperability of certain debts, which will be examined in B.12 to B.17.

B.10. By taking the common law of seizures, which in any case guarantees that there will be jurisdictional control, and substituting for it a general measure which infringes in certain aspects upon the authority of a final legal ruling, and which, without any effective jurisdictional control being provided for, may be applied “upon the request of the Service”, the legislator took a measure which, in a discriminatory manner, damages the recognized right of each person to

submit to an effective legal control any request for payment formulated by itself or against itself and any seizure of which it is the subject .

B.11. There is standing for removing from the first phrase of the two provisions cited in B.1, the words “and this is the case until the day that the aforementioned Institute is notified of a definitive legal decision in the matter that has the force of a final ruling, unfavorable to the Institute, concerning the aforementioned amounts.”

With respect to the third and fourth arguments in the cases bearing the numbers 769 to 773 of the roll and with respect to the second branch of the sole argument in the case bearing the number 774 of the roll

B.12. The result of the partial erasure specified in B.11 is that the first phrases of the provisions undertaken read as follows:

“In this case as well, the insuring organizations, at the request of the Service, retain, in guarantee up to the total of the sums due, the total or partial amounts of the health treatment insurance procedures due for the services dispensed in the debtor laboratories.”

It is advisable again to examine if this provision does not compromise in a discriminatory way the equality of the laboratories’ creditors, the right of property of these laboratories, the right to compensation for a professional activity and freedom of association.

B.13. By allowing INAMI to force insuring organizations to retain the sums that they owe the laboratories in guarantee of the sums that the laboratories owe INAMI, the legislator makes a decision that has a double effect.

On one hand, it organizes a particular form of protective garnishing which escapes the formalities anticipated by articles 1445 to 1460 of the legal Code. On the other, the legislator infringes on article 1410, § 2, 5°, of the legal Code, according to which, in the interpretation given by the Court of Cassation in its orders dated January 26, 1987, and March 15, 1990, the sums due by the insuring organizations to the laboratories can not be seized.

The legislator thus establishes a double difference in treatment: on the one hand, among persons who operate a clinical pathology laboratory and other persons, whose claims can only be retained by respecting the forms imposed by articles 1445 to 1460 of the legal Code; on the other hand, between clinical pathology laboratories and other creditors of sums due for health services, protected by article 1410, § 2, 5°, of the legal Code.

B.14. Between clinical pathology laboratories and the two categories of persons mentioned above, there is however an objective difference: certain laboratories have significant sums of debt owing to INAMI. The legislator may, without creating discrimination, guarantee INAMI against the risk of insolvency of laboratories by bringing to common law the exemptions that are described in B.13.

B.15. Such measures would be excessive if they left the laboratories without defence against arbitrary deductions. Still, the result from the partial cancellation decided upon in B.11 is that the laboratories will be able to legally contest the deduction they are subject to, and that the decision which would be rendered in their favor will not be deprived of the authority of a final legal ruling, which by virtue of article 23 of the legal Code, are attached thereto upon pronouncement.

B.16. As soon as they are analyzed as organizing protective measures that are reasonably justified and subject to legal control, the provisions being contested do not infringe upon the equality of the laboratories' creditors, they do not create any expropriation, they do not hamper in any excessive fashion the freedom of commerce and industry of those who operate a laboratory, and they do not create any restriction to their freedom of association. It follows that they do not damage the rights and freedoms guaranteed by the provisions invoked in the arguments.

B.17. The arguments are not founded.

Based on these reasons,

the Court

- annuls, in article 28, 1° and 2°, of the law dated March 30, 1994, bearing on the social provisions, and by way of consequence in article 61, § 6, section 3, and in article, § 7, section 4, as well as in article 61, § 15, section 3, and in article 61, § 16, section 4, of the law pertaining to the mandatory insurance of healthcare and indemnities coordinated on July 14, 1994, the words: “and this is so up until the day of notification of the aforementioned Institute of a definitive legal decision in the matter with the force of a legal ruling, unfavorable to the Institute, concerning the aforementioned amounts”;

- rejects the request as for the rest.

This decision is pronounced in the French, Dutch, and German languages, in compliance with article 65 of the special law dated January 6, 1989 on the Court of Arbitration, at the public hearing dated December 14, 1995.

The clerk, The president,

L. Potoms M. Melchior