Roll Number: 973
Order no. 20/97 dated April 15, 1997

ORDER

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At issue: the request for annulment of articles 24, 4◦, and 25 of the law dated December 20, 1995, pertaining to social provisions, modifying article 54 of the law pertaining to mandatory healthcare and indemnity insurance, coordinated on July 14, 1994, introduced by the Professional Union of Belgian and International Insurance Companies operating in Belgium.

The Court of arbitration,

composed of presidents M. Melchior and L. De Grève, and judges H. Boel, L. François, G. De Baets, E. Cerexhe and R. Henneuse, assisted by clerk L. Potoms, presided over by president M. Melchior,

after having deliberated, render the following order:

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I. *Subject of the request*

In a petition addressed to the Court and sent by letter registered with the postal service on June 21, 1996, and received by the clerk on June 24, 1996, the Professional Union of Belgian and International Insurance Companies, operating in Belgium, with its offices located at Square de Meeûs 29, 1040 Brussels, introduced a request to annul articles 24, 4◦, and 25 of the law dated December 20, 1995, on social provisions, modifying article 54 of the law pertaining to mandatory healthcare and indemnity insurance, coordinated on July 14, 1994 (published in the Belgian Monitor on December 23, 1995).

II. *The proceedings*

In the order dated June 24, 1996, the acting president designated the presiding judges in compliance with articles 58 and 59 of the special law dated January 6, 1989, on the Court of Arbitration.

The judges charged with legal enquiries deemed that there was no standing to make an application of articles 71 and 72 of the organic law.

Notification of the request was made in compliance with article 76 of the organic law, by letters registered with the postal service on August 12, 1996.

The notice prescribed by article 74 of the organic law was published in the Belgian Monitor of August 13, 1996.

The Council of Ministers, rue de la Loi 16, 1000 Brussels, introduced a report by letter registered with the postal service on September 27, 1996.

Notification of this report was made in compliance with article 89 of the organic law, by letter registered with the postal service on October 11, 1996.

The petitioner introduced a report in response by letter registered with the postal service on November 14, 1996.

In the order dated November 26, 1996, the Court extended until June 21, 1997, the time frame by which the order has to be rendered.

In the order dated January 8, 1997, the Court declared that the case was in order and set the hearing for January 28, 1997.

The parties as well as their respective counsel were notified of this ordinance by letters registered with the postal service on January 9, 1997.

At the public hearing dated January 28, 1997:

- appeared:

. the Hon. J. Autenne, Esq., lawyer at the bar of Brussels on behalf of the petitioning party;

. P. Brouwers, administrative secretary at the Ministry of Social Integration, Public Health, and the Environment, on behalf of the Council of Ministers;

- the judges charged with conducting legal inquiries E. Cerexhe and H. Boel made their report;

- the aforementioned parties were heard;

- the case was placed in deliberation.

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

III. *Subject of the provisions being contested*

Article 24, 4◦, of the law dated December 20, 1995, replaces section 5 of article 54, 1st §, of the law pertaining to mandatory healthcare and indemnity insurance, coordinated on July 14, 1994, with the following provision:

“The contributions paid in the framework of a retirement insurance contract and life insurance contract with a pension account certified by the King by virtue of section 3 have, for the application of the tax Code on revenues for 1992, the nature of contributions payable in execution of social legislation, at a maximum up to 150% of the participation of the Institute addressed [should read: addressed] in section 2. In the absence of a convention or an accord, the participation of the Institute taken into consideration corresponds to the final amount set in the matter.

The capital amounts spent by these pension accounts at the end of the contract or at the time of the party’s death are, in matters concerning taxes on revenues, assimilated to the capital amounts allocated at the rate of additional pensions in compliance with article 52*bis* of the royal order no. 72 dated November 10, 1967 pertaining to the retirement and survivor’s pension for independent workers.”

Article 25 of the law dated December 20, 1995 inserts a 1st*bis* paragraph in article 54 of the law pertaining to mandatory healthcare and indemnity insurance, coordinated on July 14, 1994, drafted as follows:

“A sum of 579 million francs, constituting the solvency margin of the non-profit association is guaranteed by the State”, “Physicians, Dentists, and Pharmacists Welfare Contingency Fund”. The sum guaranteed by the State is reduced by 115.8 million francs at the end of each of the years from 1995 to 1999.”

IV. *In law*

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With respect to admissibility

A.1. The collective interest of insurance companies, members of the Professional Union of Belgian and International Insurance Companies operating in Belgium (U.P.E.A.), is directly and unfavorably affected by the legal provisions undertaken. Indeed, by granting the guarantee of the State for constituting its margin of solvency to only the Physicians Welfare Contigency Fund, without granting this same guarantee to the traditional insurance companies while the latter perform identical and competing activities, are submitted to the same systems of financing and to the same obligation for results toward their affiliates, an unjustified discrimination was established in competitive matters. The same is true for the benefit of deductibility of personal dues, up to a maximum of 150% of the dues of the National Illness-Disability Insurance Institute (INAMI) to only the Physicians Welfare Contigency Fund, to the exclusion of insurance companies that do in fact perform identical activities.

For the remainder, it is possible to end positive discrimination from which certain parties are excluded. This comes in particular, at least implicitly, from the order no. 6/95 of the Court dated February 2, 1995. Even if they find themselves in a comparable situation, any persons who would not benefit from an advantage, without such advantage being justified by an objective and reasonable reason, has therefore an interest in acting before the court to contest the constitutionality of a favorable treatment granted to certain parties.

With respect to the basis

Request from U.P.E.A.

A.2.1. A single argument is taken from the violation of articles 10 and 11 of the Constitution.

A.2.2. A first branch asserts that article 24, 4◦, of the law being contested dated December 20, 1995, conferred only to the physicians pension accounts a determined competitive advantage that constitutes discrimination in violation of the articles 10 and 11 of the Constitution, while the traditional insurance companies which are members of the U.P.E.A. exercise the exact same activities, and are competitors, and are subject to the same financing system, and to the same obligation of results toward their affiliates as certified pension accounts.

A second branch supports that by providing that only dues paid in the framework of a retirement or life insurance contract concluded with a pension account have the quality of dues paid in execution of the social legislation up to 150% of the participation of INAMI, the law being contested, dated December 20, 1995, has granted an advantage that constitutes difference in treatment between the Physicians Welfare Contigency Fund and the Foreign Insurance companies, which is in violation of the articles 6 and

59 of the Treaty of Rome as well as two directives of 1992, and could not benefit from any legitimate justification. By the same fact, the legislator introduced restrictions to the free provision of services by depriving U.P.E.A. of the right that is guaranteed to it by articles 6 and 59 of the Treaty of Rome as well as the directives 92/49/CEE and 92/96/CEE, meaning the right to provide additional retirement and survivor's insurance services for physicians, dentistry professionals, and pharmacists.

A.2.3. Concerning article 25 of the law dated December 20, 1995, being contested, a first branch develops that contends that granting a State guarantee to the Physicians Welfare Contigency Fund for constituting its solvency margin confers to the latter a determined competitive advantage which constitutes discrimination. Traditional insurance companies perform identical and competing activities, they are subject to the same financing system, and have the same obligation to achieve results benefitting their affiliates as do certified retirement accounts.

A second branch asserts that the State granted its guarantee to the Physician Welfare Contigency Fund in violation of articles 92, paragraph 1, and 93, paragraph 3, of the Treaty of Rome, which requires each member state to notify the European Commission of aide projects provided by the latter regardless of the form they take. By adopting the provision being contested without the Commission having been notified in advance, the legislator deprived U.P.E.A. of a significant guarantee provided for by community law to ensure the principle of fair and unfettered competition in the common market and has thereby violated articles 10 and 11 of the Constitution.

Should the Court deem that it is necessary, two prejudicial questions could be submitted to the European Community Court of Justice, articulated in these terms:

-"Is a State guarantee granted to a certified retirement account with the goal of allowing it to constitute a solvency margin necessary for obtaining the approval required by national legislation pertaining to the oversight of insurance companies a form of State Assistance in the terms of article 92, paragraph 1, of the E.C. Treaty?"

-"If so, and in the absence of notification by the Belgian State of this assistance project in compliance with article 93, paragraph 3, of the E.C. Treaty, is it up to national jurisdiction to draw the consequences of a violation by the member State of its obligations, and as a consequence, to annul the legislative provision which institutes this assistance?"

Report of the Council of Ministers

A.2.4. Several elements distinguish traditional insurance companies' retirement accounts.

The royal order dated April 5, 1995, limits the social subject of retirement accounts to a welfare contingency activity, meaning an activity that comes down to constituting fixed rate benefits: either in case of retirement, by the capitalization of the dues of participants and their eventual conversion into returns; or in the case of death, death by accident or disability. Retirement accounts are subject to oversight not only by the Office of Insurance Oversight but also the Minister of Social Affairs. The methods for creating retirement funds are unique: they are based on the solidarity of a category or several categories of treatment providers which participate in the management of mandatory healthcare insurance.

With respect to the advantage resulting from the deductibility up to a maximum of 150% of the participation of INAMI, it is largely tempered by the mandatory deduction of a solidarity due on any amount paid by the affiliates to a retirement fund in the framework of their retirement or life insurance contract.

What's more, retirement fund affiliates which pay dues to the fund in the framework of their retirement or life insurance contract may not be admitted to the additional free retirement system and from that point forward are not able to benefit from the favorable fiscal deduction of the dues paid for the constitution of the additional free retirement.

Finally, according to the preparatory work, the goal of article 24, 4◦ of the law being contested is to confer to the retirement system linked to the social status of physicians a fiscal treatment that is comparable to that of the pension system linked to the social status of independent workers, and this is the case, in order to place a time limit to the unfavorable situation in which the affiliates of Physicians Welfare Contigency Fund found themselves. In consequence, an affiliate to a retirement fund seems to find itself in a more advantageous position than the non-affiliate to a retirement fund who chose an additional free retirement system: the former can indeed deduct 12, 688 more francs than the second for the year 1995, and 14,609 more francs than the second for the year 1996. The more advantageous system that henceforth the affiliates to a retirement fund benefit from should nevertheless be tempered by the fact of the establishment, as a condition for the approval of the retirement funds, of a solidarity contribution on all of the amounts contributed by the affiliate in the framework of its retirement or life insurance contract. Whatever the amount of this contribution (which a royal order expects to be at 10%), owing to the mandatory deduction of a solidarity contribution on any payment made by an affiliate to a retirement fund in the framework of a retirement or life insurance contract, there is an objective and reasonably justified criterion that allows for a differentiated treatment of payments made by the affiliates to a retirement fund as compared to the payments made by non-affiliates to such a fund in the framework of the additional free retirement pension. Finally, there is no disproportion between the argument used and the goal pursued. The existence of a possible discrimination can therefore not find its source in the law, but if the cases arises, in the royal order taken in execution of that law, in the measure that the order set the solidarity at a level that is too low compared to the fiscal advantages offered. Oversight of the compliance of this royal order does not fall under the purview of the Court.

The second branch directed against article 24 4◦ of the law being contested is not admissible to the degree that the U.P.E.A. brings together both Belgian companies and foreign companies, and that this branch is only able to profit a portion of its members (foreign). The argument is also not founded to the degree that there is no difference in treatment between the Physicians Welfare Contigency Fund and the foreign insurance companies, with the law creating no distinction between insurance companies, whether Belgian or foreign, on the one hand, and the retirement funds addressed in article 54, 1st §, of the law pertaining to the mandatory health treatment and indemnity insurance on the other. In any event, European directives are not applicable in this case. In fact, the specifics of approved retirement funds are able to justify proper fiscal treatment of the deductibility of the dues paid by their affiliates.

A.2.5. With respect to article 25 of the law being contested, the State guarantee is even less of a form of discrimination because there is no example where a traditional insurance company would find itself in a situation similar to that of the Physicians Welfare Contigency Fund. No traditional insurance company has in fact ever moved from being a distribution system to a system of individual capitalization.

Next, and by any assumption, supposing that the situation of the Physicians Welfare Contigency Fund is comparable to that of traditional insurance companies, there was standing for monitoring the

preservation of the interests of the affiliates of the Physicans Welfare Contigency Fund and indirectly the social status organized by the law pertaining to mandatory health treatment and indemnity insurance; in this respect, the measure taken can be reasonably considered as being not disproportionate to the objective of the general interest pursued by the legislator, especially if one takes into account the exceptional character of the operation.

The second branch is founded on the arguments, on the one hand, that the guarantee does not constitute assistance in the sense of the E.C. Treaty, and, on the other hand, that the rights of the petitioner were not gravely damaged due to the fact that there was no notification of the granting of the guarantee with the European Commission.

Report in response of the U.P.E.A.

A.2.6. A difference in treatment is well established in 24, 4◦, of the law being contested, which subordinates the benefit of the deductibility of personal contributions paid in execution of the retirement or survivor's additional insurance fund contracts – up to a maximum of 150% of the contribution of INAMI – on the condition that the physician, whether authorized or not, is affiliated with the approved retirement fund. Contrary to what the Council of Ministers supports, the contributions linked to the additional free retirement do not have the quality of contributions due in execution of social legislation and therefore do not as such possess the same fiscal status as the personal conributions paid by the physicians who are affiliated with the Physicians Welfare Contigency Fund. A physician who chooses to contract an additional retirement or survivor's insurance pension with the Physicians Welfare Contigency Fund can deduct from taxes his or her personal contribution up to a maximum of 150% of the INAMI contribution, which is 96,845 francs for the year 1995, as well as INAMI's participation if this is spent directly, or a maximum amount of 64,563 francs. On the other hand, a physician who contracts an additional free retirement with a traditional insurance company can only deduct 83,498 francs for the same fiscal year.

As for the solidarity contribution, there is no fiscal advantage granted to physicians who are contributing with the Physician's Welfare Contigency Fund. The amount deductible under professional dues remains identical in fact, as does the tax savings achieved. The only thing affected is the amount of payments made by the contributors, who find themselves reduced by a percentage evaluated by the Council of Ministers at 10%.

As for the additional free retirement, the traditional insurance companies only have a limited access to its market. A traditional insurance company has in fact no guarantee of access to the additional free retirement market, as the decision belongs exclusively to the authority at each social insurance fund.

As for the remainder, the traditional insurance companies also deduct a percentage on the amount of the premiums paid by their affiliates, and this is done in order to cover the risk of company intervention in case of premature claim.

In contrast to the position supported by the Council of Ministers, traditional insurance companies and the Physicians Welfare Contigency Fund are in a similar situation, whether in terms of status, the nature of their activities, or organization. In particular, it should be recalled that traditional insurance companies offer exactly the same type of services as the Physicians Welfare Contigency Fund. Since there are common activities, there is also competition. The Physicians Welfare Contigency Fund, like traditional insurance funds, underwrites with respect to its affiliates an obligation to achieve results and it operates on the basis of a financing system founded on the principle of capitalization. The two types of organizations are subject to the law dated July 9, 1975, pertaining to oversight of insurance

companies. The traditional companies therefore are not exempt from this oversight: the intention of the legislator was precisely to place these funds under oversight so that they do not create competitive distortions on the market, and so that all insured parties can benefit from equivalent conditions.

The result of this is that the distinction enacted by the legislator is based on no objective and reasonable differentiation criteria.

With respect to the second branch directed against article 24, 4◦, of the law being contested, it is admissible since the annulment of this provision would be to the advantage of all of the members of U.P.E.A.

On the basis, a difference in treatment that is incompatible with the E.C. Treaty does in fact exist between the Physicians Welfare Contigency Fund and foreign insurance companies to the degree that the deductibility gives an advantage to the Physicians Welfare Contigency Fund as compared to the foreign insurance companies which compete with the Physicians Welfare Contigency Fund with respect to additional life and other additional insurance services.

A.2.7. Considering the general developments related to article 24, 4◦, of the law being contested, it must be specified that with respect to the arguments allowed against article 25 of the same law that, from the time when it is established that the Physicians Welfare Contigency Fund and the other traditional insurance companies perform identical activities and are therefore engaged in direct competition, no legal or regulatory measure can be taken with a view to confer to it alone a competitive advantage. To proceed in this way is contrary to the principles of equality and non-discrimination in competitive matters. Besides, the Physicians Welfare Contigency Fund are required to assume, like any other economic operator, the consequences of any disastrous financial management. In reality, the legislator wanted to ensure the financial survival of the Physicians Welfare Contigency Fund. However, sight can not be lost of the fact that in so doing, the State is straining its budget with a commitment to be charged to the entire population, including people with modest revenues, to come to the aid of a category of citizens including some who have taken abusive advantage of a retirement pension that is too high, due to an imprudent and overly-generous management of a pension system that is based on allocations.

On the second branch, the legislative provision being contested allows for the Physicians Welfare Contigency Fund, to allow for the constitution of its margin of solvency, to benefit from a State guarantee. European law is clear on the subject: such an ability constitutes State assistance according to the meaning of article 92, paragraph 1, of the E.C. treaty. This guarantee is by itself and based on its very existence a type of assistance that is prohibited by the Treaty because the State is in fact granting the considerable power of its guarantee to a single company, while its competitors, for their part, can not benefit from such an advantage. As a consequence, the point of knowing if the guarantee was or wasn't implemented is completely foreign to the qualification of the guarantee as a form of assistance. It is by its very nature that the guarantee is a form of assistance. One must add that the provisions of article 93, paragraph 3, of the E.C. Treaty are in fact direct, which means that they can be directly invoked by the justiciable parties before any national jurisdiction empowered to draw out the consequences of this misreading, "with respect both to the validity of the acts that bring about the execution of this assistance measure and the recovery of the financial support provided."

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On article 24, 4◦, of the law dated December 20, 1995

B.1. Article 24, 4◦, of the law dated December 20, 1995, on social provisions, subordinates the benefit of the fiscal deductibility of physicians' personal contributions made in execution of the retirement and life insurance contracts, up to a maximum of 150% of the participation of INAMI, provided that the physician is affiliated with a retirement fund certified by the King. The result of this condition is that physicians who have taken out a retirement or life insurance contract from an insurance company are excluded from the benefit of this fiscal advantage.

According to the petitioning party, the provision undertaken would then grant certified funds a competitive advantage in contrast to articles 10 and 11 of the Constitution to the degree where "traditional companies" perform identical and competing activities and would be subject to the same financing system and contend with the same obligation to earn results for their affiliates as approved retirement funds.

B.2. Royal order no. 72 dated November 10, 1967, related to retirement and survivor's pension funds for independent workers organized, in favor of independent workers, a mandatory retirement system.

On the one hand, in order to improve the social status of physicians and dental practitioners, and on the other hand, to promote the creation of national conventions with insurer organizations regarding the financial and administrative relations between physicians and dental practitioners and beneficiaries, the article 34quinquie of the law dated August 9, 1963 instituting and organizing a mandatory insurance system against illness and disability (currently article 54 of the law coordinated on July 14, 1994) gave the King the authority to institute a system of social benefits for physicians, dental practitioners, and

pharmacists who adhere to these conventions or who are reputed to have adhered to them.

These social benefits may consist in particular of an INAMI participation in the premiums or contributions paid by the interested parties in execution of insurance contracts guaranteeing annuities or pensions in case of disability, retirement, or death. Since the law dated December, 1994, this possibility is extended to include contracts guaranteeing a capital in case of disability, retirement, or death, while the King can determine acording to which methods the participation of INAMI can be paid in the form of advances to the institutions with which the aforementioned contracts were created.

With respect to retirement insurance and life insurance, these insurance contracts should, at the very least to the degree that it involves physicians and dental practitioners, be concluded with a retirement fund authorized by the King, created at the initiative of one or several organizations that represent the medical corps or dental practitioners.

It bears observing that by virtue of the 1st article, 3◦, of the royal order dated July 20, 1981, physicians and dental practitioners who paid contributions to such a retirement fund are not authorized to constitute the additional retirement fund addressed in article 52*bis* of the royal order no. 72 dated November 10, 1967 related to the retirement and survivor's pension of independent workers.

B.3.1. Created in 1968 in application of article 34*quinquies* of the aforementioned law dated August 9, 1963 (today article 54, 1st §, section 3, of the law related to mandatory health treatment and indemnity insurance, coordinated on July 14, 1994), the Physicians Welfare Contigency Fund offers treatment providers an additional retirement or survival insurance fund or services for disability matters. For physicians who are authorized, this fund is financed by INAMI contributions, and completed by the personal contributions of these affiliated physicians.

B.3.2. At the time it was created, the Physicians Welfare Contigency Fund operated according to a financing system based on the principle of distribution, meaning a system of solidarity of working physicians for the benefit of those not working. The perpetuation of such a system supposes the continuation of a certain relation between the number of contributors and the number of beneficiaries. Now, the extension of life expectancy as well as the prolongation of the duration of study and practical training of physicians has placed the viability of the system in peril. In order to contend with the growing financial problems the Physicians Welfare Contigency Fund was facing, several successive measures were taken. This is how article 16 of the law dated December 21, 1994, authorized the payment of pensions in the form of a capital. This modification implies that the additional retirement system functions henceforth on the basis of the capitalization technique and no longer on the basis of the distribution technique.

B.4. The constitutional rules of equality and non-discrimination do not exclude that a difference in treatment is established between categories of persons, despite the fact that it relies on an objective criterion and that it is reasonably justified. Besides, the same rules oppose that categories of persons who find themselves in situations that are essentially different with respect to the measure under consideration, should be treated in an identical manner without there appearing to be some reasonable justification.

The existence of such a justification should be strengthened by taking into account the goals and the effects of the measure being critiqued as well as the nature of the principles at issue; the principle of equality is being violated when it is established that there is no reasonable relation of proportionality between the means employed and the intended goal.

B.5. Article 24, 4◦, undertaken from the law dated December 20, 1995, assigns the quality of contributions due in execution of social legislation to the personal contributions paid by physicians affiliated with the Physicians Welfare Contigency Fund. As such, these contributions benefit from the deductibility system created by article 52 of the 1992 Tax Code on Revenues. On this issue, a circular of the Fiscal Administration (Ci. RH 234/420.633) made explicit its interpretation of said article by reserving the benefit of deductibility of contributions paid in the framework of the social status of physicians as a professional expense only for the physicians making contributions to the Physicians Welfare Contigency Fund.

The personal contributions made by physicians who have taken out an additional retirement insurance contract for retirement or survivor's benefits from an insurance company do not enter into the field of application of the provision undertaken and they are therefore subject to the tax reduction system of article 145, 1, of the same tax Code.

Finally, the contributions paid by the physicians who have taken out an additional free retirement pension from an insurance company are deductible as professional expenses, according to article 52*bis*, § 3, of the royal order no. 72 dated November 10, 1967 pertaining to the retirement and survivor's pension of independent workers, at the maximum of 7% of their professional reevaluated revenue, but limited to two thirds of the revenue addressed by article 12, 1st §, 2◦, a), of the royal order no. 38 dated July 27, 1967 organizing the social status of independent workers.

A difference in treatment linked to their respective fiscal treatment is thereby established between the physicians, depending on whether they are affiliated with the Physicians Welfare Contigency Fund or if they have a policy with an insurance company, either in the form of an additional insurance contract, or an additional free retirement pension.

B.6.1. As it was presented in B.2., article 54, 1st §, section 3 of the law coordinated on July 14, 1994 pertaining to mandatory healthcare and indemnity insurance intends, on the one hand, to improve the social status of physicians and dentists, and on the other hand, to promote their adherence to national conventions with insurance organizations in the framework of mandatory healthcare insurance. The retirement fund addressed by this provision is therefore an organization participating in the function of the social security system.

In the terms of article 3 of its statutes, the Physicians Welfare Contigency Fund has as its goal to administer, in the framework of the aforementioned law, the contributions paid by the health treatment service of INAMI or by any other social security organization in support of the social status of physicians and the personal contributions of physicians as well as to provide the latter and their families with social benefits.

This Welfare Contingeny Fund differs in many ways from an insurance company. It is not a non-profit. By virtue of the aforementioned article 54, it can only be created at the initiative of one or more organizations that represent the medical corps and practitioners of dentistry. The Fund has to be authorized by the King under the authorization conditions that He sets. Among these, one must mention the obligation to guarantee affiliates the services financed by, among others things, a solidarity contribution deducted on payments made by the affiliates. There is no doubt but that the retirement fund is subject to the authorization required by the law dated July 9, 1975, pertaining to the oversight of insurance companies; however, in addition, it is the subject of a specific oversight consisting of the presence of a governmental commissioner who, in a consultative role, attends the meetings of the management and oversight bodies and who can make arguments before the Minister who is assigned to social Welfare Contingency, against any decision that he or she deems contrary not only to the law and to the statutes, but also to the general interest. The minister can annul such decisions.

The result of the preceding is that the petitioning party is wrong in contending that insurance companies would be exercising identical and competing activities and would be subjected to the same financing system and the same obligation toward their affiliates to achieve results as the authorized retirement fund.

B.6.2. The difference in treatment between the Physicians Welfare Contigency Fund, on the one hand, and the insurance companies, on the other hand, which results from article 24, 4◦, of the law undertaken (article 54, 1st §, section 5, of the law coordinated on July 14, 1994) is not unjustified.

B.7.1. According to what is said in the second branch of the argument, the provision being contested would created a prohibited form of discrimination between the Physicians Welfare Contigency Fund and foreign insurance companies both by articles 10 and 11 of the Constitution and by articles 6 and 59 of the E.C. Treaty. By hampering the free provision of services, it would deprive the companies mentioned above of the right that is guaranteed to them by the aforementioned conventional provision as well as by the directives 92/49/CEE and 92/96/CEE to provide additional retirement and survivor's insurance services to physicans, dental practitioners, and pharmacists.

B.7.2. The activities of the Physicians Welfare Contigency Fund – which, as it was indicated, is an organization participating in the functioning of the social security system – are not services in the sense of the articles 59 and following of the E.C. Treaty, given that it is not a question of services of an economic nature provided in exchange for compensation, comparable to the economic activities listed in article 60, paragraph 2, of the Treaty. At that point, they did not fall under the application of the directives cited by the petitioning parties.

B.8. The argument, in all of its branches, is not founded.

With respect to article 25 of the law dated December 20, 1995

B.9 Article 25 of the law dated December 20, 1995 grants the Physicians Welfare Contingency Fund, for purposes of constituting its solvency margin, a State guarantee in the amount of 579 million francs. The same provision provides that this sum be reduced by 115.8 million francs at the end of each of the years from 1995 to 1999.

With respect to the first branch

B.10 The article 25 undertaken from the law dated December 20, 1995, which only grants a State guarantee to the Physicians Welfare Contingency Fund, results in a difference in treatment with respect to traditional insurance companies which do not benefit from the same guarantee.

B.11.1. A difference in treatment is justified, in the presentation of the arguments preceding the legal project at the origin of the article 25 being undertaken, by the transition from the solidarity technique to the capitalization technique, with respect to the Physicians Welfare Contingency Fund. To contend with the financial consequences of a transformation like this, and in particular, to ensure the solvency margin required by the Office of Insurance Oversight, a State guarantee had to be expected. However, this guarantee would decrease over time and would have to come to an end at the end of the transitional period set for December 31, 1999 (Presentation of the arguments, mentioned above, pp. 3-4, and pp. 58-59).

B.11.2. It is the legislator's responsibility to undertake measures that it deems necessary to guarantee the financial balance of an organization which is part of the framework of the social security system. The difference in treatment between the Physicians Welfare Contingency Fund

on the one hand, and the insurance companies, on the other, which results from this, is justified for the arguments presented in B.6.1 and B.6.2.

In its second branch, the argument is not founded.

With respect to the second branch

B.12.1 The petitioning party reproaches the Belgian state for having granted the guarantee addressed by the aforementioned article 25 in violation of the articles 92, paragraph 1, and 93, paragraph 3, of the E.C. Treaty, which requires that each member State notify the Commission of assistance projects. By so doing, the legislator would have deprived the petitioning party of a guarantee provided for by community law. The result would be a violation of articles 10 and 11 of the Constitution in that the petitioning party would have been deprived of a significant guarantee with respect to free and unfettered competition.

B.12.2. The petitioning party reproaches the authors of the law undertaken for not having submitted the project which it considers to be a measure of assistance in the sense of the aforementioned provisions to the European Community Commission. Its complaint does not pertain to the content of the law being contested, but actually on its formulation process. It lies therefore outside the competence of the Court.

The argument, in its second branch, can not be received.

By these reasons,

the Court

rejects the request.

Thus pronounced in 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 held on April 15, 1997.

The clerk,

L. Potoms

The president,

M. Melchior