JUDGMENT OF THE COURT (Grand Chamber)

13 April 2010 (*)

(Citizenship of the Union – Articles 18 and 21 TFEU – Directive 2004/38/EC – Article 24(1) – Freedom to reside – Principle of non-discrimination – Access to higher education – Nationals of a Member State moving to another Member State in order to pursue studies there – Restriction on enrolment by non-resident students for university courses in the public health field – Justification – Proportionality – Risk to the quality of education in medical and paramedical matters – Risk of shortage of graduates in the public health sectors)

In Case C-73/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour constitutionnelle (Belgium), made by decision of 14 February 2008, received at the Court on 22 February 2008, in the proceedings

Nicolas Bressol and Others,

Céline Chaverot and Others

v

Gouvernement de la Communauté française,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta and C. Toader, Presidents of Chambers, C.W.A. Timmermans, A. Rosas, K. Schiemann, J. Malenovský (Rapporteur), T. von Danwitz, A. Arabadjiev and J.-J. Kasel, Judges,

Advocate General: E. Sharpston,

Registrar: M.-A. Gaudissart, head of unit,

having regard to the written procedure and further to the hearing on 3 March 2009,

after considering the observations submitted on behalf of:

– Mr Bressol and others, by M. Snoeck and J. Troeder, avocats,

– Ms Chaverot and others, by J. Troeder and M. Mareschal, avocats,

– the Belgian Government, by L. Van den Broeck, acting as Agent, and M. Nihoul, avocat,

– the Austrian Government, by E. Riedl, acting as Agent,

– the Commission of the European Communities, by C. Cattabriga and G. Rozet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 June 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the first paragraph of Article 12 EC and Article 18(1) EC, in conjunction with Articles 149(1) and (2) EC and Article 150(2) EC.

2 The reference was made in proceedings between Mr Bressol and others and Ms Chaverot and others, on the one hand, and the Gouvernement de la Communauté française (Government of the French Community), on the other hand, seeking a review of the constitutionality of the decree of the French Community of 16 June 2006 which regulates the number of students in certain programmes in the first two years of undergraduate studies in higher education (*Moniteur belge* of 6 July 2006, p. 34055; 'the decree of 16 June 2006').

Legal framework

International law

3 Under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, which was adopted by the United Nations General Assembly on 16 December 1966 and which entered into force on 3 January 1976 ('the Covenant'):

'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to … national … origin …'

4 Article 13(2)(c) of the Covenant provides:

'The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of [the right of everyone to education]:

…

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; …'

European Union law

5 Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and – corrigenda – OJ 2004 L 229, p. 35; OJ 2005 L 197, p. 34 and OJ 2007 L 204, p. 28), which was adopted in accordance with the second paragraph of Article 12 EC and Articles 18 EC, 40 EC, 44 EC and 52 EC, states in recitals 1, 3 and 20 in the preamble as follows:

'(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

…

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

…

(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law.'

6 Article 3(1) of Directive 2004/38 states:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members …'

7 Under Article 24(1) of Directive 2004/38, under the heading 'equal treatment':

'Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.'

National law

8 According to the decree of 16 June 2006, the universities and schools of higher education of the French Community are to limit, subject to certain detailed rules, the number of students not considered as resident in Belgium for the purposes of that decree at the time of their registration ('non-resident students') who may register for the first time in one of the nine medical or paramedical programmes referred to in that decree.

9 Under Article 1 of the decree of 16 June 2006:

'A resident student for the purposes of this decree is a student who, at the time of his registration in an institution of higher education, proves that his principal residence is in Belgium and that he fulfils one of the following conditions:

1° he has the right to remain permanently in Belgium;

2° he has had his principal residence in Belgium for at least six months prior to his registration in an institution of higher education, at the same time carrying on a remunerated or unremunerated professional activity or benefiting from a replacement income granted by a Belgian public service;

3° he has permission to remain for an unlimited period [in Belgium] on the basis of [the relevant Belgian legislation];

4° he has permission to remain in Belgium because he enjoys refugee status [as defined by Belgian legislation] or has submitted a request to be recognised as a refugee;

5° he has the right to reside in Belgium because he benefits from temporary protection on the basis of [the relevant Belgian legislation];

6° he has a mother, father, legal guardian, or spouse who fulfils one of the above conditions;

7° he has had his principal residence in Belgium for at least three years at the time of his registration in an institution of higher education;

8° he has been granted a scholarship for his studies within the framework of development cooperation for the academic year and for the studies for which the request for registration was introduced.

The "right to remain permanently" within the meaning of paragraph 1, 1°, means, for citizens of another Member State of the European Union, the right recognised by virtue of Articles 16 and 17 of Directive 2004/38/EC …'

10 Chapter II of that decree, comprising Articles 2 to 5, contains provisions concerning universities.

11 Under Article 2 of the decree:

'The academic authorities shall limit the number of students who enrol for the first time with a university of the French Community in one of the courses referred to in Article 3, according to the method set out in Article 4.

…'

12 Article 3 of the decree states:

'The provisions of [chapter II] are applicable to the courses leading to the following degrees:

1° Bachelor in physiotherapy and rehabilitation;

2° Bachelor in veterinary medicine.'

13 Article 4 of the decree states as follows:

'For each university and for each course referred to in Article 3, there will be a total number "T" of students enrolling for the first time in the relevant course and who are taken into account for the purposes of financing, as well as a number "NR" of students enrolling for the first time in the relevant course and who are not considered to be resident within the meaning of Article 1.

When the ratio between NR, on the one hand, and T of the previous academic year, on the other hand, reaches a specified percentage "P", the academic authorities shall refuse further registration to students who have not yet been enrolled on the relevant course and who are not considered to be resident within the meaning of Article 1.

P in the previous paragraph is fixed at 30 percent. However, when, in a particular academic year, the number of students studying in a country other than in the one where they have obtained their secondary school diploma is above 10 percent on average in all the higher education institutions of the European Union, P equals, for the next academic year, that percentage multiplied by 3.'

14 Article 5 of the decree of 16 June 2006 provides:

'… students who are not considered to be resident within the meaning of Article 1 may apply for registration in a course listed in Article 3 at the earliest three working days before 2 September preceding the relevant academic year. …

…

By derogation from the first paragraph, as regards non-resident students who present themselves in order to lodge an application for registration in one of the courses referred to in Article 3 at the latest on the last working day before the 2 September preceding the academic year, if the number of those students who have so presented themselves exceeds NR as referred to in Article 4, paragraph 2, the priority as between those students will be determined by drawing lots. …

…'

15 Chapter III of the decree of 16 June 2006, comprising Articles 6 to 9, contains provisions relating to schools of higher education. The first paragraph of Article 6, and Articles 8 and 9 of the decree, contain provisions analogous to the first paragraph of Article 2, and Articles 4 and 5 of the decree.

16 Under Article 7 of that decree, those provisions are applicable to the course leading to the following degrees:

‘1° Bachelor of midwifery;

2° Bachelor of occupational therapy;

3° Bachelor of speech therapy;

4° Bachelor of podiatry-chiropody;

5° Bachelor of physiotherapy;

6° Bachelor of audiology;

7° Educator specialised in psycho-educational counselling.’

The actions in the main proceedings and the questions referred for a preliminary ruling

17 The system of higher education of the French Community is based on free access to education, without restriction on the registration of students.

18 However, for some years, that Community has noted a significant increase in the number of students from Member States other than the Kingdom of Belgium enrolling in its institutions of higher education, in particular in nine medical or paramedical courses. According to the order for reference, that increase was due, inter alia, to the influx of French students who turn to the French Community, because higher education there shares the same language of instruction as France and because the French Republic has restricted access to the studies concerned.

19 Considering that the number of those students attending those courses had become too large, the French Community adopted the decree of 16 June 2006.

20 On 9 August and 13 December 2006, the applicants in the main proceedings brought an action before the Constitutional Court seeking annulment of the decree.

21 Some of those applicants are students, in particular of French nationality, who do not fall into any of the categories referred to in Article 1 of the decree of 16 June 2006 and who, in respect of the academic year 2006/07, applied for registration in a higher education institution of the French Community, in order to follow one of the courses referred to in that decree.

22 Since the number of non-resident students exceeded the threshold fixed by that decree, the institutions concerned organised the drawing of lots between those students, in which the applicants in the main proceedings were unsuccessful. Therefore, the institutions concerned refused to agree to their applications for enrolment.

23 The other applicants in the main proceedings are lecturers at the universities and schools of higher education covered by the decree of 16 June 2006, who consider that the application of that decree directly and immediately places their jobs in jeopardy, as it will, ultimately, lead to a reduction in the number of students enrolled in their higher education institutions.

24 In support of their action, the applicants in the main proceedings have claimed in particular that the decree of 16 June 2006 infringes the principle of non-discrimination by treating resident and non-resident students differently, for no valid reason. Whereas the resident students continue to enjoy free access to the courses referred to in that decree, access by non-resident students to those courses is restricted in such a way that the number of students enrolled in those courses may not exceed the 30% threshold.

25 The referring court has expressed doubts as to the legality of the decree of 16 June 2006, considering that the provisions of the Belgian constitution – the alleged infringement of which it has jurisdiction to review – must be read in conjunction with the first paragraph of Article 12 EC, Article 18(1) EC, Article 149(1) EC and the second indent of Article 149(2) EC, and the third indent of Article 150(2) EC.

26 In those circumstances, the Constitutional Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are the first paragraph of Article 12 [EC] and Article 18(1) [EC], in conjunction with Article 149(1), the second indent of Article 149(2) [EC] and the third indent of Article 150(2) [EC] thereof, to be interpreted as meaning that those provisions preclude an autonomous community in a Member State with responsibility for higher education, which is faced, as a result of a restrictive policy practised by a neighbouring Member State, with an influx of students from the neighbouring Member State in a number of programmes of study of a medical nature financed principally out of public funds, from adopting measures such as those contained in the [Decree of 16 June 2006], when that community relies on valid reasons for claiming that that situation could place an excessive burden on public finances and jeopardise the quality of the education provided?

(2) Would the answer to the first question be different if that community could show that the effect of that situation is that too few students residing in the community in question obtain diplomas for there to be, over a long period, a sufficient number of qualified medical personnel to ensure the quality of the public health system in that community?

(3) Would the answer to the first question be different if that community, having regard to the last part of Article 149(1) [EC] and Article 13(2)(c) of the [Covenant], which contains a standstill obligation, chooses to maintain wide and democratic access to quality higher education for the population of that community?'

The first and second questions

27 By its first two questions, which should be examined together, the referring court asks, essentially, whether European Union law precludes legislation of a Member State, such as that at issue in the main proceedings, which restricts the number of non-resident students who may enrol for the first time in medical and paramedical courses at higher education establishments, where that Member State faces an influx of students from a neighbouring Member State prompted by the latter Member State's pursuit of a restrictive policy and where the result of that situation is that too few students resident in the first Member State graduate from those courses.

Member States' competence in education matters

28 As a preliminary point, it should be recalled that whilst European Union law does not detract from the power of the Member States as regards the organisation of their education systems and of vocational training – pursuant to Articles 165(1) and 166(1) TFEU – the fact remains that, when exercising that power, Member States must comply with European Union law, in particular the provisions on the freedom to move and reside within the territory of the Member States (see, to that effect, Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849, paragraph 70, and Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161, paragraph 24).

29 The Member States are thus free to opt for an education system based on free access – without restriction on the number of students who may register – or for a system based on controlled access in which the students are selected. However, where they opt for one of those systems or for a combination of them, the rules of the chosen system must comply with European Union law and, in particular, the principle of non-discrimination on grounds of nationality.

Identification of the rules applicable to the cases in the main proceedings

30 Article 21(1) TFEU provides that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

31 Furthermore, the Court's case-law makes clear that every citizen of the Union may rely on Article 18 TFEU, which prohibits any discrimination on grounds of nationality, in all situations falling within the scope *ratione materiae* of European Union law, those situations including the exercise of the freedom conferred by Article 21 TFEU to move and reside within the territory of the Member States (see, to that effect, Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 24; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraphs 32 and 33; and Case C-158/07 *Förster* [2008] ECR I-8507, paragraphs 36 and 37).

32 In addition, it is apparent from that case-law that that prohibition also covers situations concerning the conditions of access to vocational training, and that both higher education and university education constitute vocational training (Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraphs 32 and 33 and case-law cited).

33 It follows that the students in question in the main proceedings may rely on the right, enshrined in Articles 18 and 21 TFEU, to move and reside freely within the territory of a Member State, such as the Kingdom of Belgium, without being subject to direct or indirect discrimination on ground of their nationality.

34 That being so, it cannot be ruled out that the situation of some of the applicants in the main proceedings may be covered by Article 24(1) of Directive 2004/38, which applies to every citizen who resides in the territory of the host Member State in accordance with that directive.

35 In that regard, it is clear from the documents before the Court, first, that the students in question in the main proceedings are citizens of the Union.

36 Second, the fact that they do not exercise, if that be the case, any economic activity in Belgium is irrelevant, since Directive 2004/38 applies to all citizens of the Union irrespective of whether they exercise an economic activity as an employee or as a self-employed person in the territory of another Member State or whether they do not exercise any economic activity there.

37 Third, it cannot be ruled out that some of the applicants concerned in the main proceedings already resided in Belgium before deciding that they would like to enrol in one of the courses concerned.

38 Fourth, it must be held that Directive 2004/38 applies *ratione temporis* to the cases in the main proceedings. The Member States were obliged, first, to implement that directive before 30 April 2006. Second, the decree at issue in the main proceedings was adopted after that date, on 16 June 2006. In addition, it is common ground that the students in question in the main proceedings applied for enrolment in the institutions of higher education concerned for the academic year 2006/07, and that their enrolment was refused on the basis of that decree. Their request must therefore have been refused after 30 April 2006.

39 However, as the Court is not in possession of all the facts which would enable it to hold that the situation of the applicants in the main proceedings also falls within Article 24(1) of Directive 2004/38, it is for the referring court to assess whether that provision actually applies in the cases in the main proceedings.

The existence of unequal treatment

40 It should be recalled that the principle of non-discrimination prohibits not only direct discrimination on grounds of nationality but also all indirect forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, to that effect, Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraph 29).

41 Unless objectively justified and proportionate to the aim pursued, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect nationals of other Member States more than nationals of the host State and there is a consequent risk that it will place the former at a particular disadvantage (see, to that effect, Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, paragraph 40, and *Hartmann*, paragraph 30).

42 In the cases in the main proceedings, the decree of 16 June 2006 provides that unrestricted access to the medical and paramedical courses covered by that decree is available only to resident students, that is those who satisfy both the requirement that their principal residence be in Belgium and one of the eight other alternative conditions listed in points 1° to 8° of the first paragraph of Article 1 of that decree.

43 The students who do not satisfy those conditions, by contrast, enjoy only restricted access to those institutions, since the total number of those students is in principle limited, for each university institution and for each course, to 30% of all enrolments in the preceding academic year. Once that percentage has been reached, the non-resident students are selected, with a view to their registration, by drawing lots.

44 Thus, the national legislation at issue in the main proceedings creates a difference in treatment between resident and non-resident students.

45 A residence condition, such as that required by that legislation, is more easily satisfied by Belgian nationals, who more often than not reside in Belgium, than by nationals of other Member States, whose residence is generally in a Member State other than Belgium (see, by analogy, Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraphs 23 and 24, and *Hartmann*, paragraph 31).

46 It follows, as the Belgian Government moreover admits, that the national legislation at issue in the main proceedings affects, by its very nature, nationals of Member States other than the Kingdom of Belgium more than Belgian nationals and that it therefore places the former at a particular disadvantage.

The justification for the unequal treatment

47 As stated in paragraph 41 of the present judgment, a difference in treatment, such as that put in place by the decree of 16 June 2006, constitutes indirect discrimination on the ground of nationality which is prohibited, unless it is objectively justified.

48 In addition, in order to be justified, the measure concerned must be appropriate for securing the attainment of the legitimate objective it pursues and must not go beyond what is necessary to attain it (see, to that effect, Case C-527/06 *Renneberg* [2008] ECR I-7735, paragraph 81, and Joined Cases C-171/07 and C- 172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-0000, paragraph 25).

The justification relating to excessive burdens on the financing of higher education

49 The Belgian Government, supported by the Austrian Government, submits, first, that the difference in treatment of resident and non-resident students is necessary to avoid excessive burdens on the financing of higher education arising as a result of the fact that, were a difference in treatment not to be made, the number of non-resident students enrolled in higher education institutions of the French Community would reach an excessively high level.

50 In that regard, it should be held that, according to the explanations of the French Community as they appear from the order for reference, the financial burden is not an essential reason which justified the adoption of the decree of 16 June 2006. Those explanations indicate that the financing of education is organised through a 'closed envelope' system in which the overall allocation does not vary depending on the total number of students.

51 In those circumstances, the fear of an excessive burden on the financing of higher education cannot justify the unequal treatment of resident students and non-resident students.

The justification relating to the protection of the homogeneity of the higher education system

52 The Belgian Government, supported by the Austrian Government, claims that the presence of non-resident students in the courses concerned has reached a level which is likely to cause a deterioration in the quality of higher education owing to the inherent limits in the capacity of the educational establishments to welcome them and in the staff available. Thus, to safeguard the homogeneity of that system and to ensure wide and democratic access for the population of the French Community to quality higher education, it proved necessary to treat resident students and non-resident students differently and to limit the number of the latter.

53 Admittedly, it cannot be excluded from the outset that the prevention of a risk to the existence of a national education system and to its homogeneity may justify a difference in treatment between some students (see, to that effect, *Commission* v *Austria*, paragraph 66).

54 However, the matters put forward as justification in that regard are the same as those linked to the protection of public health, since all the courses concerned fall within that field. They must, therefore, be examined only in the light of the justifications relating to the safeguarding of public health.

The justification relating to public health requirements

– Observations submitted to the Court

55 The Belgian Government, supported by the Austrian Government, confirms that the legislation at issue in the main proceedings is necessary to attain the objective of ensuring the quality and continuing provision of medical and paramedical care within the French Community.

56 The large number of non-resident students causes, first, a significant reduction in the quality of teaching in the medical and paramedical courses, as that teaching requires, inter alia, the provision of a significant number of hours of practical training. It became apparent that such training cannot be correctly provided where a certain number of students is exceeded, because the capacity of the higher education establishments, the available staff and the possibilities of practical training are not unlimited.

57 In order to illustrate the teaching difficulties which have been experienced, the Belgian Government refers, in particular, to the situation of veterinary medicine studies. It points out, with reference to the quality standards for veterinary education – which require inter alia clinical practice by each student on a sufficient number of animals – that it had been established that it was not possible to train, within the French Community, more than 200 veterinarians per year in the second part of the university-level studies. However, because of an influx of non-resident students, the total number of students spread over the six years of studies rose from 1233 to 2343 between the academic years 1995/96 and 2002/03.

58 The situation is similar with regard to the other courses covered by the decree of 16 June 2006.

59 Second, the Belgian Government maintains that the large numbers of non-resident students are likely ultimately to bring about a shortage of qualified medical personnel throughout the territory which would undermine the system of public health within the French Community. That stems from the fact that, after their studies, the non-resident students return to their country of origin to exercise their profession there, whereas the number of resident graduates remains too low in some specialties.

60 The applicants in the main proceedings claim in particular that, even assuming those justifications were admissible, the Belgian Government has not established that the circumstances referred to above actually exist.

61 The Commission states that it takes the risks referred to by the Belgian Government very seriously. It considers however that it does not, at present, possess all the facts which would enable it to judge whether the justification is well founded.

– The Court's reply

62 It follows from the case-law that a difference in treatment based indirectly on nationality may be justified by the objective of maintaining a balanced high-quality medical service open to all, in so far as it contributes to achieving a high level of protection of health (see, to that effect, Case C-169/07 *Hartlauer* [2009] ECR I-0000, paragraph 47 and case-law cited).

63 Thus, it must be determined whether the legislation at issue in the main proceedings is appropriate for securing the attainment of that legitimate objective and whether it goes beyond what is necessary to attain it.

64 In that regard, it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such legislation satisfies those conditions (see, to that effect, Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 15, and Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575, paragraph 82).

65 However, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance based on the documents relating to the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 52, and *Schönheit and Becker*, paragraph 83).

66 In the first place, it is for the referring court to establish that there are genuine risks to the protection of public health.

67 In that regard, it cannot be ruled out a priori that a reduction in the quality of training of future health professionals may ultimately impair the quality of care provided in the territory concerned, since the quality of the medical or paramedical service within a given area depends on the competence of the health professionals who carry out their activity there.

68 It also cannot be ruled out that a limitation of the total number of students in the courses concerned – in particular with a view to ensuring the quality of training – may reduce, proportionately, the number of graduates prepared in the future to ensure the availability of the service in the territory concerned, which could then have an effect on the level of public health protection. On that point, it must be acknowledged that a shortage of health professionals would cause serious problems for the protection of public health and that the prevention of that risk requires that a sufficient number of graduates establish themselves in that territory in order to carry out there one of the medical or paramedical occupations covered by the decree at issue in the main proceedings.

69 In assessing those risks, the referring court must take into consideration, first, the fact that the link between the training of future health professionals and the objective of maintaining a balanced high-quality medical service open to all is only indirect and the causal relationship less well established than in the case of the link between the objective of public health and the activity of health professionals who are already present on the market (see *Hartlauer*, paragraphs 51 to 53, and *Apothekerkammer des Saarlandes and Others*, paragraphs 34 to 40). The assessment of such a link will depend inter alia on a prospective analysis which will have to extrapolate on the basis of a number of contingent and uncertain factors and take into account the future development of the health sector concerned, but also depend on an analysis of the situation at the outset, that is to say, as it currently stands.

70 Second, when specifically assessing the circumstances of the cases in the main proceedings, the referring court must take into account the fact that, where there is uncertainty as to the existence or extent of the risks to the protection of public health in its territory, the Member State may take protective measures without having to wait for the shortage of health professionals to materialise (see, by analogy, *Apothekerkammer des Saarlandes*, paragraph 30 and case-law cited). The same applies with regard to the risks to the quality of education in that field.

71 That being the case, it is for the competent national authorities to show that such risks actually exist (see, by analogy, *Apothekerkammer des Saarlandes and Others*, paragraph 39). According to settled case-law, it is for those authorities, where they adopt a measure derogating from a principle enshrined by European Union Law, to show in each individual case that that measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. The reasons invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments (see, to that effect, Case C-8/02 *Leichtle* [2004] ECR I-2641, paragraph 45, and *Commission* v *Austria*, paragraph 63). Such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to public health.

72 In the main proceedings, that analysis must inter alia make it possible to assess, for each of the nine courses covered by the decree of 16 June 2006, the maximum number of students who can be trained at a level which complies with the desired training quality standards. It must, in addition, state the number of graduates who must establish themselves within the French Community to carry out a medical or paramedical occupation there in order to be able to ensure adequate public health services.

73 In addition, that analysis cannot just refer to the figures concerning one or other group of students and infer, in particular, that at the end of their studies all the non-resident students will establish themselves in the State in which they resided before commencing their studies and pursue there one of the occupations at issue in the main proceedings. Consequently, that analysis must take into account the impact of the group of non-resident students on the pursuit of the objective of ensuring the availability of professionals within the French Community. Also, it must take into account the possibility that resident students may decide to exercise their profession in a State other than the Kingdom of Belgium at the end of their studies. Equally, it must take into account the extent to which persons who have not studied within the French Community may establish themselves there later in order to exercise one of those professions.

74 It is for the competent authorities to provide the referring court with an analysis which satisfies those requirements.

75 In the second place, if the referring court considers that there are genuine risks to the protection of public health, that court must assess, in the light of the evidence provided by the national authorities, whether the legislation at issue in the main proceedings can be regarded as appropriate for attaining the objective of protecting public health.

76 In that context, it must in particular assess whether a limitation of the number of non-resident students can really bring about an increase in the number of graduates ready to ensure the future availability of public health services within the French Community.

77 In the third place, it is for the referring court to assess whether the legislation at issue in the main proceedings goes beyond what is necessary to attain the stated objective, that is whether it could be attained by less restrictive measures.

78 In that regard, it should be pointed out that it is for that court to ascertain, in particular, whether the objective in the public interest relied upon could not be attained by less restrictive measures which aim to encourage students who undertake their studies in the French Community to establish themselves there at the end of their studies or which aim to encourage professionals educated outside the French Community to establish themselves within it.

79 Equally, it is for the referring court to examine whether the competent authorities have reconciled, in an appropriate way, the attainment of that objective with the requirements of European Union law and, in particular, with the opportunity for students coming from other Member States to gain access to higher education, an opportunity which constitutes the very essence of the principle of freedom of movement for students (see, to that effect, *Commission* v *Austria*, paragraph 70). The restrictions on access to such education, introduced by a Member State, must therefore be limited to what is necessary in order to

obtain the objectives pursued and must allow sufficiently wide access by those students to higher education.

80 In that regard, it is apparent from the documents before the Court that non-resident students who are interested in higher education are selected, with a view to their registration, by drawing lots which, as such, does not take into account their knowledge or experience.

81 In those circumstances, it is for the referring court to ascertain whether the selection process for non-resident students is limited to the drawing of lots and, if that is the case, whether that means of selection based not on the aptitude of the candidates concerned but on chance is necessary to attain the objectives pursued.

82 Consequently, the answer to the first and second questions is that Articles 18 and 21 TFEU preclude national legislation, such as that at issue in the main proceedings, which limits the number of non-resident students who may enrol for the first time in medical and paramedical courses at higher education establishments, unless the referring court, having assessed all the relevant evidence submitted by the competent authorities, finds that that legislation is justified in the light of the objective of protection of public health.

The third question

83 By its third question, the referring court asks the Court to explain, essentially, the effect on the situation at issue in the main proceedings of the Member States' obligations under Article 13(2)(c) of the Covenant.

84 The Belgian Government submits that the adoption of the decree of 16 June 2006 was indispensable in order to comply with the right to education of members of the French Community as that right to education flows from Article 13(2)(c) of the Covenant. The provision contains a standstill clause obliging that community to maintain wide and democratic access to quality higher education. In the absence of that decree, the maintenance of such access would be undermined.

85 In that regard, it must however be pointed out that there is no incompatibility between the Covenant and the requirements flowing, as the case may be, from Articles 18 and 21 TFEU.

86 As is apparent from the wording of Article 13(2)(c), the Covenant pursues in essence the same objective as Articles 18 and 21 TFEU, that is to ensure that the principle of non-discrimination is observed in relation to access to higher education. That is confirmed by Article 2(2) of the Covenant, according to which the States Parties to the Covenant undertake to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind as to, inter alia, national origin.

87 By contrast, Article 13(2)(c) of the Covenant does not require a State Party, nor indeed authorise it, to ensure wide access to quality higher education only for its own nationals.

88 In the light of the foregoing, the answer to the third question is that the competent authorities may not rely on Article 13(2)(c) of the Covenant if the referring court holds that the decree of 16 June 2006 is not compatible with Articles 18 and 21 TFEU.

Temporal effect of the judgment

89 If the Court were to hold that European Union law precludes the national legislation at issue in the main proceedings, the Belgian Government requests that the temporal effect of the judgment delivered be limited. That limitation would be necessary because a large number of legal relationships have been established in good faith, on account of the fact that a large number of non-resident students have filed documents with a view to enrolment for the academic year 2006/07 in one of the courses referred to by the decree of 16 June 2006. Were

those relationships to be called into question, there could therefore be serious economic repercussions tending to destabilise the French Community's education budget.

90 It has consistently been held that the interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, gives to a rule of European Union law clarifies and where necessary defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted can, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions are satisfied for bringing an action relating to the application of that rule before the courts having jurisdiction (see Case 24/86 *Blaizot and Others* [1988] ECR 379, paragraph 27, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 141).

91 It is only exceptionally that the Court may, having regard to the general principle of legal certainty inherent in the European Union legal order, find it necessary to limit the possibility for interested parties, relying on the Court's interpretation of a provision, to call in question legal relations established in good faith. For there to be such a limitation, two essential criteria must be fulfilled, namely that those concerned acted in good faith and there is a risk of serious difficulties (see, inter alia, Case C-57/93 *Vroege* [1994] ECR I-4541, paragraph 21, and Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 51).

92 It is also settled case-law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effect of the ruling (see, inter alia, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 52).

93 Indeed, the Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that both individuals and national authorities had been led into adopting practices which did not comply with European Union law by reason of objective, significant uncertainty regarding the implications of European Union provisions, to which the conduct of other Member States or the Commission may even have contributed (*Grzelczyk*, paragraph 53).

94 In the cases in the main proceedings, it must be held that the Belgian Government has not provided the Court with any specific evidence making it possible to maintain that the framers of the decree of 16 June 2006 had been led into adopting practices which may not have complied with European Union law by reason of objective, significant uncertainty regarding the implications of that law.

95 Equally, that government has clearly failed to substantiate in any way, by specific evidence, its argument that there is a risk that the present judgment would have serious financial consequences if its temporal effects are not limited.

96 In those circumstances, there is no need to limit the temporal effects of the present judgment.

Costs

97 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Articles 18 and 21 TFEU preclude national legislation, such as that at issue in the main proceedings, which limits the number of students not regarded as resident in Belgium who may enrol for the first time in medical and paramedical**

courses at higher education establishments, unless the referring court, having assessed all the relevant evidence submitted by the competent authorities, finds that that legislation is justified in the light of the objective of protection of public health.

2. **The competent authorities may not rely on Article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966, if the referring court holds that the decree of the French Community of 16 June 2006 which regulates the number of students in certain programmes in the first two years of undergraduate studies in higher education is not compatible with Articles 18 and 21 TFEU.**