OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 25 June 2009 [1]

1. Students have wanted to pursue (part of) their education outside their country of origin throughout a significant part of European history. [2] This reference raises, not for the first time, the question whether the host State can limit the number of foreign students that may enter its education system.

2. In this reference from the Cour constitutionnelle (Constitutional Court) (Belgium), the Court is asked to interpret the first paragraph of Article 12 and Article 18(1) EC, in conjunction with Article 149(1), the second indent of Article 149(2) and the third indent of Article 150(2) EC.

3. The case before the national court concerns an action for annulment brought by a number of students, the majority of whom are French, and by teaching and administrative staff of institutions of higher education of the Communauté française de Belgique (French Community of Belgium; 'the French Community') against the Décret régulant le nombre d'étudiants dans certains cursus de premier cycle de l'enseignement supérieur (Decree regulating the number of students in certain programmes in the first two years of undergraduate studies in higher education; 'the Decree') adopted on 16 June 2006 by the Parlement de la Communauté française de Belgique (Parliament of the French Community of Belgium). [3]

1 — Original language: English.

2 — See, for an historical overview, the Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161, points 37 to 47. The Ministers responsible for Higher Education in the 46 countries of the Bologna Process have recently held mobility to be 'the hallmark of the European Higher Education Area' and have called 'upon each country to increase mobility': Communiqué of the Conference of European Ministers responsible for Higher Education, Leuven and Louvain-la-Neuve, 28 and 29 April 2009, paragraph 18 (available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/675&format=HTML&aged=0&language=EN&guiLanguage=en).

3 — *Moniteur belge* of 6 July 2006, p. 34 055. The Decree was amended most recently by the Décret fixant des conditions d'obtention des diplômes de bachelier sage-femme et de bachelier en soins infirmiers, renforçant la mobilité étudiante et portant diverses mesures en matière d'enseignement supérieur (Decree fixing the conditions for obtaining the diplomas of bachelor in midwifery and bachelor in nursing, reinforcing student mobility and containing various measures regarding higher education) of 18 July 2008, *Moniteur belge* of 10 September 2008, p. 47 115. I refer in this Opinion to the original version of the Decree as set out in the order for reference. Decrees are the legal instruments by which the three Communities of Belgium, as well as the Flemish and the Walloon Regions, exercise their legislative competences. They have the same force of law as federal laws. See Articles 127(2), 128(2), 129(2), 130(2) and 134, second paragraph, of the Belgian Constitution, Article 19(2) of the Loi spéciale de réformes institutionnelles (Special law on the reform of the institutions) of 8 August 1980, *Moniteur belge* of 15 August 1980, and my Opinion in Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, points 4 to 7.

Legal framework

…

International law

4. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) [4] provides:

'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 or social origin …'

5. Article 13(2)(c) of the ICESCR 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; …'

Community law

6. Article 2 EC provides:

'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community … economic and social cohesion and solidarity among Member States.'

4 — Adopted and opened for signature, ratification and accession by United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966. The Covenant entered into force, in accordance with its Article 27, on 3 January 1976.

7. Article 10 EC provides:

'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

8. Article 12(1) EC provides:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

9. Article 18(1) EC provides:

'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 this Treaty and by the measures adopted to give it effect.'

10. Article 149(1) and (2), second indent, EC provides:

'1. The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

2. Community action shall be aimed at:

...

— encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,

…'

11. The third indent of Article 150(2) EC provides:

'Community action shall aim to:

…

— facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people,

…'

National law

12. By its Article 1, the Decree defines who qualifies as a resident student for the purpose of the Decree: [5]

'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;

5 — All translations of Belgian legislation and *travaux préparatoires* pertaining to that legislation in the present Opinion are my own.

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 [6] [and], for citizens of non-Member States, the right to reside in Belgium by virtue of [the relevant Belgian legislation].'

13. Chapter II of the Decree contains provisions in relation to access to universities. Article 2 limits the number of students enrolling for the first time in a university in the French Community in a course listed in Article 3, according to the method set out in Article 4.

14. Article 3 of the Decree provides that the provisions of Chapter II apply to

6 — Directive 2004/38/EC of the European Parliament and of 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 (corrected version in OJ 2004 L 229, p. 35).

courses leading to bachelor's degrees in physiotherapy and rehabilitation and in veterinary medicine.

15. Article 4 of the Decree provides 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 establishments of the European Union, P equals, for the next academic year, that percentage multiplied by 3.'

16. Article 5 of the Decree provides as follows:

'[1] … 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. Students … will be enrolled on a first come, first served basis.

…

[3] Each application for registration lodged starting from the 2 September preceding the academic year pursuant to the first paragraph will be recorded in a register …

[4] 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 [for the purposes of enrolment] as between those students will be determined by drawing lots…

[5] Every non-resident student may only lodge one application for registration in respect of the courses referred to in Articles 3 and 7 before the 2 September preceding the academic year. Students infringing this provision will be excluded from the higher education institution to which they would have been admitted in order to follow one of the courses referred to in Articles 3 or 7.

…'

17. Chapter III contains provisions relating to schools of higher education. The first paragraph of Article 6, and Articles 8 and 9 (which form part of that chapter) contain provisions analogous to the first paragraph of Article 2, and Articles 4 and 5.

18. Article 7 of the Decree applies the provisions of Chapter III to courses leading to bachelor's degrees in midwifery, occupational therapy, speech therapy, podiatry-chiropody, physiotherapy, audiology and educator specialised in psycho-educational counselling.

The main proceedings and the questions referred

19. According to the order for reference, the legislature of the French Community has noted for several years a large increase in the number of students enrolled for the first time in the programmes at issue. Concern has been expressed that, having regard to the budgetary, human and material resources available to the teaching institutions concerned, this is jeopardising the quality of teaching – and, because of the nature of the programmes at issue, public health.

20. In the academic year 2003/04, the number of students holding secondary school diplomas awarded by another Member State who were enrolled in other programmes not covered by the Decree represented less than

10% of enrolments. In the academic year 2004/05, it was between 41% and 75% for the programmes covered by the Decree in the schools of higher education. In the academic year 2005/06, it was between 78% and 86% for the university programmes covered by the Decree.

21. Most of the enrolled students holding secondary school diplomas obtained outside the French Community of Belgium are of French nationality. That is, according to the referring court, due to several factors.

22. First, in France admission to veterinary schools is through a national competitive examination, open only to students who have completed two years of preparatory studies after their secondary school diploma. In 2004, 329 candidates were admitted to the four national veterinary schools through that competition. That number was reduced to 221 in 2005 and increased to 436 in 2006. Generally, only one fifth of the candidates in the competitive examination are admitted.

23. Secondly, France has fixed a *numerus clausus* for physiotherapy students.

24. As a result, many French students come to study in French in the French Community of Belgium. At the end of their studies, they return to France to exercise their profession. Nearly one third of veterinarians establishing themselves in France each year have obtained their diploma in the French Community of Belgium. That does not appear to create overcrowding of the profession in France. In 2005, more than 800 students obtained diplomas in physiotherapy in the French Community of Belgium.

25. In response to this situation, the Parliament of the French Community enacted the Decree on 16 June 2006. It effectively lays down a *numerus clausus* for enrolment by non-residents and defines 'residents' who are not subject to the *numerus clausus* by means of a double condition. Essentially, 'residents' are persons who both have their principal residence in Belgium and have a right of permanent residence in Belgium.

26. Each university or school of higher education may admit only a limited number of non-resident students. That number is fixed for each course in each institution, for the academic year 2006/07, at 30% of the total number of students enrolled for the first time in the institution in the programmes concerned. Non-resident candidates may apply

for enrolment only during the three working days preceding 2 September. If their number exceeds the *numerus clausus*, the successful candidates are selected by drawing lots.

27. On 9 August 2006, Mr Bressol and 43 others brought an action before the Constitutional Court seeking the annulment of the Decree. On 13 December 2006, Ms Chaverot and 18 others likewise brought an action seeking the annulment of several articles of the Decree. They challenge the difference in treatment that the Decree establishes between residents and non-residents in regard to admission to the programmes at issue.

28. On 24 January 2007, the Commission sent a letter of formal notice to Belgium, expressing concerns about the compatibility of the Decree with Community law. On 24 May 2007, Belgium replied to that letter, providing certain statistics and explanations. On 28 November 2007, considering that, without appropriate protective measures, the French Community of Belgium ran the risk of not being 'able to maintain sufficient levels of territorial cover and quality in its public health system', the Commission decided to suspend the procedure for five years 'so as to permit the Belgian authorities to provide additional information in support of the argument that the restrictive measures imposed are both necessary and proportionate'.[7]

29. The Constitutional Court has doubts as to the compatibility of Articles 4 and 8 of the Decree with various provisions of the Belgian Constitution, read in conjunction with Articles 12, paragraph 1, 18(1), 149(1) and (2), and 150(2) EC. It has therefore referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Are the first paragraph of Article 12 and Article 18(1) of the Treaty Establishing the European Community, in conjunction with Article 149(1), the second indent of Article 149(2) and the third indent of Article 150(2) 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

7 — On the same date, the Commission sent a letter of formal notice to Austria for non-compliance with the Court's judgment in Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969. It has likewise suspended that procedure.

study of a medical nature financed principally out of public funds, from adopting measures such as those contained in the Decree of the French Community of 16 June 2006 regulating the number of students in certain programmes in the first two years of undergraduate studies in higher education, 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) of the Treaty and Article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights, which contains a standstill obligation, chooses to maintain wide and democratic access to quality higher education for the population of that community?'

30. Written observations were submitted by the applicants in the main proceedings, the Austrian and Belgian Governments and the Commission.

31. A hearing was held on 3 March 2009, at which all those parties made oral submissions.

Preliminary remarks

32. Whilst Article 149(1) EC provides that Member States remain responsible for 'the content of teaching and the organisation of education systems and their cultural and linguistic diversity', the Court has made it clear that the conditions of access to vocational training fall within the scope of the Treaty. [8]

8 — See Case 293/83 *Gravier* [1985] ECR 593, paragraph 25; Case 42/87 *Commission* v *Belgium* [1988] ECR 5445, paragraphs 7 and 8; Case C-65/03 *Commission* v *Belgium* [2004] ECR I-6427, paragraph 25; *Commission* v *Austria*, cited in footnote 7, paragraph 32; and Case C-40/05 *Lyyski* [2007] ECR I-99, paragraph 28.

It has referred in that regard to the second indent of Article 149(2) EC, which expressly provides that Community action is to be aimed at encouraging mobility of students and teachers, inter alia by encouraging the academic recognition of diplomas and periods of study and to the third indent of Article 150(2) EC, which provides that Community action should aim to facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people. [9] The Court has also held that both higher education and university education constitute vocational training. [10]

33. It is common ground that the Decree lays down conditions governing access to higher or university education in the French Community of Belgium. It therefore regulates a matter that falls within the scope of the Treaty.

34. It is equally clear that the Decree differentiates between students, classifying them as resident or non-resident depending on whether they do, or do not, fulfil certain criteria. Resident students enjoy unrestricted access to all courses. Non-resident students are subject to a *numerus clauses* for certain courses. There is therefore, self-evidently, a differentiation in treatment of the two groups of students.

35. Article 12 EC prohibits, within the scope of application of the Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality. The Decree must therefore be assessed in the light of that provision.

36. The first two questions posed by the referring Court request guidance on the applicability of three possible justifications for discriminatory treatment. The answer to those questions depends in part on whether

9 — Case C-65/03 *Commission* v *Belgium*, cited in footnote 8, paragraph 25.

10 — *Commission* v *Austria*, cited in footnote 7, paragraph 33; and *Lyyski*, cited in footnote 8, paragraph 29. The Court's approach in Case 24/86 *Blaizot* [1988] ECR 379, paragraphs 15 to 20 seemed more restrictive. There, the Court held that university education fell within the scope of the term 'vocational training' to the extent that it prepares or provides the necessary training and skills for a qualification for a particular profession, trade or employment. The Court held that that was the case 'not only where the final academic examination directly provides the required qualification for a particular profession, trade or employment but also in so far as the studies in question provide specific training and skills, that is to say where a student needs the knowledge so acquired for the pursuit of a profession, trade or employment, even if no legislative or administrative provisions make the acquisition of that knowledge a prerequisite for that purpose.' The Court concluded that, in general, university studies fulfil these criteria. 'The only exceptions are certain courses of study which, because of their particular nature, are intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation.' In any event, the courses at issue here are clearly vocational.

the discrimination is direct or indirect.[11] I must therefore first clarify the nature of the discriminatory treatment at issue.

Nature of the discriminatory treatment

37. The Decree limits the number of first time enrolments in certain courses (listed in Articles 3 and 7) of non-resident students. In order to be considered resident and escape that restriction, a student must satisfy two cumulative conditions set out in Article 1 of the Decree: (i) he must show that his principal residence is in Belgium; (ii) he needs to fulfil one of eight further conditions listed there.[12]

38. The order for reference makes it clear that, because all Belgian nationals enjoy (by virtue of their nationality) a right to remain permanently in Belgium within the meaning of the first paragraph of Article 1 of the Decree, they will automatically fulfil the two cumulative conditions for being regarded as 'residents' as long as they have their principal residence in Belgium at the time of their enrolment application.[13]

39. Conversely, for any prospective student who is not a Belgian national, the second cumulative condition presents a real obstacle. In order to satisfy that condition, EU citizens who do not have Belgian nationality may claim the right to 'reside permanently in Belgium' only within the limits laid down in Directive 2004/38, that is to say, essentially, after a continuous period of lawful residence in Belgium of five years.[14] If they cannot do so (and cannot satisfy any of the seven other criteria), they will be classified as non-resident. That is, indeed, precisely the purpose of the Decree.

40. Is this difference in treatment direct or indirect discrimination based on nationality?

41. In its letter of formal notice of 24 January 2007,[15] the Commission took the view

11 — See further point 78 below.

12 — See point 12 above.

13 — See also the *travaux préparatoires* of the Decree: Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, pp. 16-17; ibid., No 263/3, p. 18; and the opinion of the legislative section of the Belgian Council of State, Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 50.

14 — Article 16 of Directive 2004/38.

15 — See point 28 above.

that, because Belgian nationals merely have to establish their residence in Belgium to satisfy the condition in the first paragraph of Article 1 of the Decree, while all others have to satisfy an additional condition, the discrimination is direct. The Commission did not pursue this line of argument in the present proceedings, contenting itself (as did all other parties) with examining the questions referred on the basis of indirect discrimination. However, I do not believe that the Court can or should avoid the issue.

42. For clarity's sake, I shall analyse the two conditions imposed by the Decree separately. I must, however, first explain what I take to be the essential distinction between direct and indirect discrimination.

The distinction between direct and indirect discrimination

43. Rather surprisingly, the Court's case-law contains no clear definition of 'direct discrimination'. What is meant by that concept must therefore be deduced from the Court's pronouncements on the general principle of equality and on the concept of indirect discrimination.

44. The classic phrase used by the Court to define the general principle of equal treatment, as a general principle of Community law, is that that principle requires 'that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified'. [16] That appears to apply to both forms of discrimination. [17]

45. The definitions of direct discrimination in the Sex Discrimination Directive, [18] the Race Discrimination Directive [19] and the Equal Treatment Framework Directive [20] likewise provide little assistance. Essentially, these define direct discrimination as occurring where one person is treated less favourably on any of the prohibited grounds than another person is, has been or would be treated

16 — See Case C-127/07 *Arcelor Atlantique and Lorraine and Others* [2008] ECR I-9895, paragraph 23 and the case-law cited there. Case C-544/07 *Rüffler* [2009] ECR I-3389, paragraph 59, reiterates the classic definition in the specific context of discrimination based on Article 12 EC.

17 — See, similarly, the Opinion of Advocate General Van Gerven in Case C-132/92 *Birds Eye Walls* v *Roberts* [1993] ECR I-5579, points 12 to 14.

18 — Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23).

19 — Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

20 — Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

in a comparable situation. [21] These definitions may be contrasted with the definitions, in each directive, of indirect discrimination. Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons with a characteristic that may not serve to draw distinctions at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. [22]

46. Even so, the distinction between direct and indirect discrimination lacks precision.

47. The problem lies, in my view, in determining *precisely* what constitutes 'an apparently neutral provision'. That key phrase appears to be inextricably bound up with the concept of 'covert discrimination' which appears elsewhere in the Court's case-law.

48. The Court has held that 'the principle of equal treatment, of which the prohibition on any discrimination on grounds of nationality in the first paragraph of Article 12 EC is a specific instance, prohibits not only *overt* discrimination by reason of nationality but also all *covert* forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result'. [23] That formula is frequently coupled with a phrase setting out possible justifications for indirect discrimination. For example, as regards migrant workers, the Court has held that unless 'it is 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 migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage'. [24]

49. The Court therefore appears to regard the difference between 'overt' and 'covert' discrimination as the crux of what distinguishes direct from indirect discrimination. This may be seen even more clearly in the judgment

21 — See Article 2(1)(a) of the Sex Discrimination Directive, Article 2(2)(a) of the Race Discrimination Directive, and Article 2(2)(a) of the Equal Treatment Framework Directive.

22 — See Article 2(1)(b) of the Sex Discrimination Directive, Article 2(2)(b) of the Race Discrimination Directive, and Article 2(2)(b) of the Equal Treatment Framework Directive.

23 — See Case C-65/03 *Commission* v *Belgium*, cited in footnote 8, paragraph 28 (emphasis added) and the case-law cited there and, as regards Article 39(2) EC, Case C-228/07 *Petersen* [2008] ECR I-6989, paragraph 53 and the case-law cited there.

24 — *Petersen*, cited in footnote 23, paragraph 54 and the case-law cited there.

in the second *Defrenne* case (the start of the Court's case-law on sex discrimination), where the Court referred to 'direct and overt discrimination' and contrasted it with 'indirect and disguised discrimination'. [25]

50. I must confess that I do not find it helpful to draw the distinction in this manner. [26] It is quite clear that the distinction between overt and covert discrimination does not necessarily always coincide with that between direct and indirect discrimination.

51. A clear example of covert *direct* discrimination is found in *Dekker*. Ms Dekker was told in terms that the reason she did not get the job for which she was indisputably the best candidate was not her pregnancy per se, but the financial consequences for her prospective employer. The Court was asked whether the refusal to hire her should be regarded as direct discrimination on grounds of sex. It rightly held that the answer depended 'on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex'. The Court concluded that 'only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex'. [27] The Court has subsequently confirmed this approach in a number of other cases. [28]

52. Advocate General Jacobs put the distinction between direct and indirect discrimination slightly differently – and, I think, more clearly – in his Opinion in *Schnorbus*: 'it may be said that discrimination on grounds of sex arises where members of one sex are treated more favourably than the other. The discrimination is direct where the difference in treatment is based on a criterion which is either

25 — Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455, paragraph 18. See also the remarks on this distinction, which the Court seemed to suggest coincided with the difference between direct effect or the lack of it, by Advocate General Warner in his Opinion in Case 69/80 *Worringham and Humphreys* v *Lloyds Bank* [1981] ECR 767, pp. 802 and 803.

26 — See, similarly, E. Ellis, *EU Anti-Discrimination Law* (2005), pp. 89 and 90. See, further, Advocate General VerLoren van Themaat who, in his Opinion in Case 19/81 *Burton* v *British Railways Board* [1982] ECR 554, point 2.6, considered that the Court's judgment in Case 96/80 *Jenkins* v *Kingsgate* [1981] ECR 911, had shown that the distinction drawn in the second *Defrenne* judgment between direct and indirect discrimination, which is important in determining whether or not Article 119 is directly applicable, does not coincide with a distinction as regards content between direct discrimination or discrimination in form, on the one hand, and indirect discrimination or discrimination in substance, on the other.

27 — Case C-177/88 *Dekker* [1990] ECR I-3941, paragraphs 10 and 12.

28 — See Case C-179/88 *Handels- og Kontorfunktionærernes Forbund (Hertz)* [1990] ECR I-3979, paragraph 13; Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, paragraph 15; Case C-32/93 *Webb* [1994] ECR I-3567, paragraph 19; and Case C-207/98 *Mahlburg* [2000] ECR I-549, paragraph 20.

explicitly that of sex or *necessarily linked to a characteristic indissociable from* sex. It is indirect where some other criterion is applied but a substantially higher proportion of one sex than of the other is in fact affected.' [29]

53. That analysis of what constitutes direct discrimination can be adapted to suit direct discrimination on any prohibited ground. Thus, as regards discrimination on grounds of nationality, discrimination can be considered to be direct where the difference in treatment is based on a criterion which is either explicitly that of nationality or necessarily linked to a characteristic indissociable from nationality.

54. In *Dekker* the Court would have reached the same conclusion that the discrimination was direct if it had applied a 'but for' test, according to which, 'but for' a particular characteristic (sex, race, age, nationality, etc), the person concerned would have enjoyed the more favourable treatment experienced by the relevant comparator. [30] Thus reformulated, the question the national court had to resolve was: 'but for her pregnancy (a characteristic indissociably linked to sex), other things being equal, would Ms Dekker have been hired?' If the answer was yes the refusal to hire constituted direct discrimination based on sex. [31]

55. This analysis implies – crucially – that, for there to be direct discrimination, it is sufficient that at some point in the chain of causation, the adverse treatment received by the victim is grounded upon, or caused by, using a characteristic that may not serve to draw distinctions to distinguish that person from others. I shall refer to this process, for convenience, as 'a prohibited classification'.

56. A general definition can be formulated on this basis that, so far as I can see, accurately reflects all situations recognised by the Court as constituting direct discrimination on any ground prohibited by Community law. I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering

29 — Case C-79/99 [2000] ECR I-10997, point 33 (emphasis added).

30 — See also C. Barnard, *EC Employment Law* (3rd edition, 2006), p. 321, referring to the decision of the House of Lords in *James* v *Eastleigh Borough Council* [1990] 3 WLR 55, in which it recognised the 'but for' test.

31 — *Dekker*, cited in footnote 27, paragraphs 10, 12 and 14.

a correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification.

57. Thus, in the case of Ms Dekker, the category of those receiving a certain advantage (those considered suitable for employment) coincided exactly with the category of persons distinguished only by applying a prohibited classification (sex – specifically, people who can under no circumstances get pregnant, i.e. men). The category of those suffering the correlative disadvantage (those not considered suitable for employment) coincided exactly with the corresponding category of persons distinguished only by applying a prohibited classification (sex, in this case people who can get pregnant, i.e. women). The adverse treatment (refusal to hire) therefore constituted direct discrimination on the basis of the prohibited classification (sex).

58. What is the result of applying this test for direct discrimination to the two conditions set out in Article 1 of the Decree?

The first cumulative condition in the first paragraph of Article 1 of the Decree

59. The first cumulative condition in the first paragraph of Article 1 of the Decree requires prospective students to have their principal residence in Belgium at the time of their registration in an institution of higher education ('the principal residence requirement').

60. It is clear that such a condition does not constitute direct discrimination on the basis of nationality. Belgians and non-Belgians alike may establish their principal residence in Belgium. Thus, the category of those satisfying the first cumulative condition in the first paragraph of Article 1 of the Decree does not coincide with the category of Belgian nationals.

61. Does the principal residence requirement constitute indirect discrimination?

62. The Court has held that the prohibition on discrimination on the basis of apparently

neutral criteria of differentiation which lead in fact to a discriminatory result applies, in particular, to a measure which draws a distinction on the basis of residence. That requirement is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners. [32]

63. It is not seriously disputed that the principal residence requirement constitutes an indirectly discriminatory measure.

The second cumulative condition in the first paragraph of Article 1 of the Decree

64. It seems to me, in contrast, that the second cumulative condition in the first paragraph of Article 1 of the Decree constitutes direct discrimination based on nationality.

65. All Belgian nationals *automatically* enjoy the right to remain permanently in Belgium (the first of the eight possible criteria within the second cumulative condition of Article 1 of the Decree). No non-Belgians automatically have such a right. Therefore, they must either meet certain additional conditions to acquire such a right (namely those prescribed by Directive 2004/38) or fulfil one of the other criteria listed in that provision. [33]

66. The category of those receiving a certain advantage (those *automatically* having a right to remain permanently in Belgium and thus *automatically* satisfying the second cumulative condition in the first paragraph of Article 1 of the Decree) therefore coincides exactly with the category of persons distinguished only on the basis of a prohibited classification (nationality, in this case those possessing Belgian nationality). The category of those suffering a corresponding disadvantage (those *not automatically* having such a right) coincides exactly with the category of persons distinguished only on the basis of a prohibited classification (nationality, in this case those not possessing Belgian nationality).

32 — See Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraph 14 and the case-law cited there; and Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 53. See also, to that effect, for example, Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraphs 30 and 31; and *Petersen*, cited in footnote 23, paragraphs 54 and 55.

33 — See points 38 and 39 above.

67. The difference in treatment is clearly based on a criterion (the right to remain permanently in Belgium) which is necessarily linked to a characteristic indissociable from nationality. [34] The discrimination based on nationality at issue is therefore direct.

68. The fact that non-Belgian EU citizens can, if they satisfy the conditions in Directive 2004/38, obtain the right to remain permanently in Belgium does not alter that conclusion. The direct discrimination lies precisely in the fact that, for *all* non-Belgians, including all other EU citizens, the right to remain permanently in Belgium is *conditional* upon the fulfilment of either one of the remaining criteria in the second cumulative condition, or those in Directive 2004/38. For Belgians, the right is necessarily and automatically linked to being Belgian and therefore to a prohibited classification: nationality.

69. I reach the same conclusion by applying the 'but for' test. Let us take two prospective students of veterinary medicine, both finishing their secondary schooling in Luxembourg, where their parents live and work. Both wish to study in Belgium. Student A is Belgian. Student B is Bulgarian. Both move to a student room in Louvain-la-Neuve in the same building and take up residence there at the start of the academic year 2008/09 in anticipation of registration. Both can therefore prove that they satisfy the principal residence requirement.

70. Student A will *automatically* satisfy the second cumulative condition in the first paragraph of Article 1 of the Decree. As a Belgian, he has the right to remain permanently in Belgium. He will therefore count as a 'resident student' and enjoy unrestricted access to the course in veterinary medicine. Student B will

34 — Compare the Opinion of Advocate General Jacobs in *Schnorbus*, cited in footnote 29, point 33. In that case, if the number of applications for admission to practical legal training in Germany on a particular commencement date exceeded the number of available training places, admission could be deferred by up to 12 months; but that rule did not apply if deferment would result in particular hardship, which was taken to occur when an applicant had completed compulsory national service. The Advocate General rightly held that this resulted in indirect discrimination based on sex. Under German law as it stood, women could never be accorded priority under the rule in issue whereas the *overwhelming majority* of men could. That resulted directly from the fact that the criterion used – completion of compulsory national service – related to an obligation imposed by law on all men and on men alone. Because some men did not complete compulsory national service and were therefore (like all women) not granted priority admission, the category of persons receiving a certain advantage (those accorded priority on the basis of having completed compulsory national service) did not coincide exactly with the category of persons distinguished only on the basis of a prohibited classification (sex, in this case men).

not *automatically* satisfy that condition. Nor presumably will he satisfy the requirements of Directive 2004/38. Unless he happens to satisfy either that or one of the remaining criteria in the second cumulative condition (which, on these facts, is unlikely), student B will be subject to the *numerus clausus*.

71. It is clear that, 'but for' the fact that student A has Belgian nationality, he would not *automatically* have satisfied the second cumulative condition. [35]

72. I note that, in its opinion on the draft Decree, the Belgian Council of State already appeared to entertain some doubts as to whether what was being proposed was not direct discrimination – at all events, it pointed out that the national legislation at issue in *Commission* v *Austria* treated Austrian students who had obtained their secondary education diploma outside Austria in the same (adverse) manner as students from other Member States. [36]

73. Finally, contrary to the Belgian Government's submissions at the hearing, the Court's judgment in *Bidar* does not support the claim that any discrimination arising from application of the second cumulative condition in the first paragraph of Article 1 of the Decree is indirect, and not direct. The United Kingdom legislation giving rise to *Bidar* made eligibility for a student loan conditional upon (i) being 'settled' in the United Kingdom for the purposes of national law and (ii) satisfying certain residence conditions. [37] Under the applicable United Kingdom immigration law,

35 — The 'but for' test is usually applied to the person discriminated against rather than the person who enjoys the advantage; and here the reverse, *mutatis mutandis*, is also true but slightly more clumsy to express: but for the fact that student B is *not* a Belgian national, he too would have a right to remain permanently in Belgium derived from his nationality; and he too would automatically satisfy the second cumulative condition.

36 — Opinion of the legislative section of the Belgian Council of State, Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 50. The Council of State also drew attention to Articles 3, second paragraph, and 7, second paragraph, in the draft Decree, which provided for the relevant restrictions to be abolished if and when France abolished its restrictions for similar studies. The Council of State observed in that regard: 'Thus again a condition has been formulated that is very close to the nationality criterion, given that *students of French nationality are directly targeted*' (emphasis added). These provisions were deleted from the final text of the Decree as adopted.

37 — Namely that the person concerned must be resident in England and Wales on the first day of the first academic year and must have resided in the United Kingdom and Islands for the three years preceding that day, not including years spent in the United Kingdom as a student.

a person was 'settled' in the United Kingdom if he was ordinarily resident there without being subject to any restriction on the period for which he could remain in the territory. [38] A national of another Member State could not, in his capacity as a student, obtain the status of being settled in the United Kingdom, because he would fail both limbs of that test.

74. It is true that (like a Belgian national in Belgium) no United Kingdom national is subject to a restriction on the period for which he can remain in the territory of the United Kingdom. However, it was clear from the United Kingdom's response to the questions asked by the Court in *Bidar* that United Kingdom nationals could, under certain circumstances, *also* fall foul of the 'ordinary residence' limb of the test and therefore not have the status of being 'settled' in the United Kingdom. [39] The category of those receiving a certain advantage (those having the status of being settled in the United Kingdom) therefore did *not* coincide exactly with the category of persons distinguished only on the basis of a prohibited classification (nationality, in this case United Kingdom nationality).

75. The Court therefore correctly held the discrimination in *Bidar* to be indirect rather than direct. None the less, because United Kingdom legislation precluded any possibility of a national of another Member State obtaining settled status as a student, and thus made it impossible for him to qualify for a loan whatever his actual degree of integration into the society of the host Member State, the Court made short shrift of the 'settlement condition.' [40]

76. It is of course for the national court to determine what the position under Belgian law is. However, if it should conclude that all Belgian nationals automatically and without exception enjoy the right to remain permanently in Belgium and thus *automatically* satisfy the second cumulative condition, whilst all others, including all other EU citizens, do *not automatically* enjoy that right, the second cumulative condition in the first paragraph of Article 1 of the Decree would discriminate directly on the basis of nationality, contrary to Article 12 EC.

38 — *Bidar*, cited in footnote 32, paragraphs 14 to 18.

39 — For example, the British child of British parents who had worked in Austria for the previous 10 years, and who had completed his secondary education in Austria, would not have been eligible for a student loan to assist with his maintenance costs on taking up a place at Cambridge.

40 — *Bidar*, cited in footnote 32, paragraphs 61 and 62.

The first and second questions

Is the first cumulative condition in the first paragraph of Article 1 of the Decree justifiable?

77. The first and second questions essentially request clarification on whether the Decree can be justified on the basis of three possible reasons: (i) the influx of foreign students poses an excessive burden on public finances; (ii) the quality of education is likely to be jeopardised; (iii) the quality of the French Community's public health system is likely to be jeopardised because of a shortage of qualified medical personnel.

78. The answer depends in part on whether the discriminatory treatment is direct or indirect. [41] It is well established that indirect discrimination is, in principle, capable of justification. [42] The position in respect of direct discrimination is much more restrictive. [43] Given that I consider the first cumulative condition to be indirectly discriminatory, and the second to be directly discriminatory, I shall analyse each condition in turn.

79. The Belgian Government relies heavily on the Court's judgment in *Bidar* which, it submits, sanctions the legitimacy of residence requirements as regards access to education, because it allows the host State to require the prospective student, through such a residence requirement, to demonstrate a certain degree of integration into the society of the host State. [44]

80. There is, however, a fundamental difference between *access to financial aid* to cover the costs of education in another Member State, at issue in *Bidar*, and *access to education itself* in other Member States, at issue in the present case.

81. In *Bidar*, the Court rightly took into account the legitimate interests of Member States faced with claims to financial assistance by students from other Member States. It held that the Member States must show a certain degree of financial solidarity with nationals

41 — See point 36 above.

42 — See points 45 to 48 above.

43 — See points 128 and 131 below.

44 — *Bidar*, cited in footnote 32, paragraphs 57 to 59. See in general on residence as a potentially justifiable alternative to nationality: G. Davies, "'Any Place I Hang My Hat?' or: Residence is the New Nationality', *European Law Journal* 2005, pp. 43 to 56.

of other Member States in the organisation and application of their social assistance systems. [45] However, they may 'ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State'. [46]

82. By contrast, the possibility for a student from the European Union to gain access to higher or university education in another Member State under the same conditions as nationals of that Member State constitutes the very essence of the principle of freedom of movement for students guaranteed by the Treaty. [47] What the Court held as regards residence requirements for financial assistance in *Bidar* cannot therefore be transposed to the present case. [48]

83. It is settled case-law that indirectly discriminatory treatment on the basis of nationality may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued. [49]

84. The Court has likewise held that it is for the national authorities invoking a derogation from the fundamental principle of freedom of movement for persons to show, in each individual case, that their rules are necessary and proportionate to attain the aim pursued. The reasons that may be invoked by a Member State by way of justification 'must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State and specific evidence substantiating its arguments'. [50]

85. The order for reference quotes the *travaux préparatoires* [51] of the Decree as indicating that the principal purpose of its contested provisions is 'to ensure wide and democratic access to quality higher education for the population of the French Community'. The contested provisions are also inspired by public health considerations.

45 — *Bidar*, cited in footnote 32, paragraph 56, citing Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 44.

46 — *Bidar*, cited in footnote 32, paragraphs 56 and 57.

47 — See, to that effect, *Commission* v *Austria*, cited in footnote 7, paragraph 70.

48 — See Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 54, where the legislative section of the Belgian Council of State alerted the Government of the French Community to precisely this issue.

49 — See Case C-524/06 *Huber* [2008] ECR I-9705, paragraph 75 and the case-law cited there.

50 — *Commission* v *Austria*, cited in footnote 7, paragraph 63, and the case-law cited there.

51 — Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, pp. 12 and 13.

First, a reduction in the quality of education is likely to alter, in the long term, the quality of the care provided. Second, the great majority of non-resident students do not intend to practise in Belgium, which leads to a risk of shortage of professionals. A shortage is said to be 'certain' if selection before entry were introduced.

86. Under the separation of functions between this Court and the referring court, it is for this Court to say whether, if established, any of the grounds advanced would provide objective justification for indirect discrimination. If so, it is then for the national court to determine whether, on the evidence, the grounds are in fact established.

Excessive burden on public finances

87. The *travaux préparatoires* of the Decree contain the following reference to an excessive burden on public finances as a justification: [52]

'The number of those obtaining a diploma in the higher education system of the French Community in the [courses concerned] manifestly exceeds the needs of the sectors concerned in francophone Belgium. The French Community cannot support the excessive burden represented by students not resident in Belgium, who come to study in the French Community for the sole reason that they do not have access to those studies in their country of origin, and who have absolutely no intention of exercising their profession in the French Community.'

88. The first sentence, which asserts that the number of students obtaining a diploma 'manifestly exceeds' the needs of the French Community, is not immediately reconcilable with the alternative justification based on the risk that the public health system will be jeopardised, which is predicated upon a potential future shortage of qualified health personnel. [53]

89. The argument advanced in the second sentence is, essentially, purely economic. It is problematic for the following reasons.

90. First, I recall that according to settled case-law, aims of a purely economic nature

52 — Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 9.

53 — See further points 114 to 126 below.

cannot normally constitute overriding reasons in the public interest that justify restricting a fundamental freedom guaranteed by the Treaty. [54]

91. The Court has, it is true, accepted that it cannot be excluded that the risk of seriously undermining the financial balance of a social security system might constitute an overriding reason in the public interest capable of justifying a barrier to freedom to provide services. [55] Thus, economic or budgetary reasons may, in particular circumstances, be advanced as a justification. That may, in part, reflect the inescapable fact that every public service provided by our welfare states is dependent on there being sufficient budgetary means to finance it.

92. However, I share the reservations expressed by Advocate General Jacobs as regards applying statements made by the Court in the context of burdens on national social security systems to the domain of higher education. Such statements contain a double derogation: they derogate both from the fundamental principle of freedom of movement for persons and from the accepted grounds on which those derogations can be justified (which, in Treaty terms, are exclusively *non*-economic). Justifications argued on an economic basis therefore need to be treated with particular circumspection. [56]

93. Advocate General Jacobs also suggested that, should the Court extend the actual scope of student entitlement to financial assistance beyond tuition and registration fees, the range of possible justifications available to Member States should likewise be extended in line with the case-law on recipients of public health-care services. [57] In *Bidar*, the Court did indeed extend the scope of student entitlement to financial assistance, to include maintenance loans, and accepted (in parallel)

54 — Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 34 and the case-law cited there. The phrase 'raisons impérieuses d'intérêt général', used systematically by the Court in French, has been translated in English in a variety of ways. It seems to me that 'overriding reasons in the public interest' is the translation which best reflects the meaning. It was recently used, for example, in Case C-326/07 *Commission* v *Italy* [2009] ECR I-2291, paragraph 41.

55 — See Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 41, and Case C-368/98 *Vanbraekel* [2001] ECR I-5363, paragraph 47.

56 — Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, point 31; see also points 33 to 35 on why higher education differs significantly from national social security systems (most obviously because it is not a service within the meaning of Article 49 EC: see, in that respect, Case 263/86 *Humbel* [1988] ECR 5365, paragraphs 17, 18 and 19; and Case C-109/92 *Wirth* [1993] ECR I-6447, paragraphs 15 to 19).

57 — Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, point 46.

that a student must demonstrate a certain level of integration in the host Member State before he may access such a loan. Budgetary reasons can therefore, within certain constraints, justify limiting access to financial support for education.

94. However, as I have already emphasised, the present case concerns access to education, not access to financial support for education; and the Court's decision in *Bidar* is not therefore transposable. I do not accept that budgetary reasons can be invoked to justify limiting access to education for non-resident students. Rather, it seems to me that the Court's statement in *Grzelczyk* that Directive 93/96 [58] 'accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States', [59] made in the context of financial support for education, applies a fortiori to access to education.

95. Second, the French Community legislator appears to be relying on the familiar 'free rider' argument: students moving abroad to study reap the benefits from publicly funded education in the host Member State but do not contribute to financing it through (their parents') national taxes, nor do they necessarily themselves 'pay back' by staying to work in the host Member State and becoming taxpayers there. [60] The implicit argument is that the non-Belgian students concerned are committing some form of abuse. That is plainly not the case. Students moving to another Member State in order to pursue their education there are exercising their right to freedom of movement – a right which, as citizens of the Union, they are entitled to enjoy without any discrimination based on nationality. [61] Their supposed intentions, invoked by the legislator of the French Community, are quite irrelevant. [62]

96. I likewise share the views expressed by Advocates General Jacobs and Geelhoed (in *Commission* v *Austria* and *Bidar* respectively)

58 — Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59).

59 — Cited in footnote 45, paragraph 44.

60 — See the Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, point 36.

61 — *Commission* v *Austria*, cited in footnote 7, paragraph 45 and the case-law cited there.

62 — See *Commission* v *Austria*, cited in footnote 7, paragraph 70, and (in the same vein), the Opinion of Advocate General Jacobs, point 41. The Court has held unequivocally that the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no importance as regards his right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an effective and genuine activity: see Case 53/81 *Levin* [1982] ECR 1035, paragraph 23; and Case C-109/01 *Akrich* [2003] ECR I-9607, paragraph 55.

that whilst students may not contribute directly to the tax system of the State in which they pursue their university studies, they are a source of income for local economies where the university is located, and also, to a limited extent, for the national treasuries via indirect taxes. [63] Taken to its logical conclusion, the argument that only those who have contributed through taxes should be allowed to benefit from State-financed benefits would bar a Member State's own nationals who have not so contributed, or who have done so only modestly, from claiming any such benefits. [64]

97. Thirdly, the explanation given by the French Community, as it appears from the order for reference and Belgium's submissions before the Court, does not show in what way the financial burden placed on the French Community by these categories of students is 'excessive' or how the Decree resolves the alleged problem. [65] Rather, it appears that higher education is financed through a 'closed envelope' system. If I have understood it correctly, that implies that a decrease in the number of students (of whatever nationality) does not entail any corresponding saving of money for the French Community. An increase or decrease in student numbers is budget-neutral.

98. Finally, I note that, before the Constitutional Court, the applicants suggested that all non-resident students should be admitted to their chosen course of studies but not necessarily to financial support. In its written submissions to the Court of Justice, the Belgian Government responded by stating that such a proposal 'would not make it possible to attain the objectives [of the Decree], which are after all not of a financial nature'.

99. To summarise in respect of the first ground of justification advanced by the Belgian Government: I do not accept that the danger of an excessive burden on public finance should be available in principle

63 — Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, footnote 29. See, in that regard, the statements by Mr Rémy, director of paramedical and pedagogical studies at the Haute École provinciale du Hainaut occidental, who emphasises the beneficial consequence of the presence of foreign students: 'The massive presence of French students has permitted us to broaden our perspectives. An entire series of projects have been developed thanks to the success of our physiotherapy and occupational therapy courses which ensure us a good level of financing, for example as regards research and continuing education. Sadly, all that will disappear.' ('C'est une vraie catastrophe pour notre école', *La Libre*, 3 February 2006).

64 — Opinion of Advocate General Geelhoed in *Bidar*, cited in footnote 32, point 65. See, already in that vein, the Opinion of Advocate General Slynn in *Gravier*, cited in footnote 8, p. 604.

65 — As also noted in the *Avis du Corps interfédéral de l'inspection des finances* of 31 January 2006, included in the file before the Court, p. 5.

as a justification for indirect discrimination in respect of access to education. Nor (if, contrary to my view, such a justification is theoretically available to a Member State) do I consider that it has been made out in the present case.

Jeopardising the quality of education

100. The *travaux préparatoires* of the Decree continue by invoking an alternative justification: [66]

'In addition to the financial burden …, there is also an issue of the quality of education. If there are too many students, it is impossible to guarantee them an adequate educational framework in terms of both quantity and quality. Nor are there unlimited possibilities for internships in a professional environment.'

101. Before the referring court, the French Community argued that the Decree targets the 'perverse effects of absolute mobility': namely, that the ever-increasing number of non-resident students threatened the quality of education to the detriment of all students. Educational establishments had a finite capacity to welcome students. Teaching personnel, budget and opportunities for practical training were all limited.

102. The problem of overcrowded classes is familiar to students and academics alike. It is a legitimate concern. The Court has recognised that 'the preservation or improvement of the education system' [67] and 'ensuring high standards of university education' [68] constitute legitimate aims under the Treaty. Restrictions based on these grounds must nevertheless satisfy the proportionality test: they must be suitable for attaining the objective which they pursue and must not go beyond what is necessary in order to attain it. [69]

103. The material before the Court indicates that the adoption of the Decree was based primarily on statistics showing the increase in the number of registered students who had

66 — Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 9. See point 87 above.

67 — *Lyyski*, cited in footnote 8, paragraph 39.

68 — Case C-153/02 *Neri* [2003] ECR I-13555, paragraph 46.

69 — *Neri*, paragraph 46.

not obtained their secondary school diploma in Belgium. That varies significantly between the different courses covered by the Decree. [70] Figures showing the numbers of non-resident students enrolled in the courses at issue were not available before the adoption of the Decree. Overall, one is left with the clear impression that legislation imposing a *numerus clausus* on non-Belgian students for a number of courses with rather different profiles was introduced on the basis of rather patchy information about some aspects of student enrolment on some of those courses. That is impermissible. To avoid misunderstanding, I should make it clear that I am not saying that the French Community had to wait passively until significant damage had been caused to specific sectors of its higher education system before taking any action. My point is, rather, that the specific material that would lead a prudent legislator legitimately to conclude that a specific burgeoning problem needed to be nipped in the bud (and that, accordingly, specific focused measures were necessary and proportionate) was – so far as I can tell from what has been placed before the Court – simply not to hand and/or not examined when the Decree was enacted.

104. Moreover, it seems to me that if student numbers are a problem, they are not more or less problematic depending on where the extra students come from. The problem is an excess of student numbers *per se*, not an excess of *non-resident* student numbers. It seems, rather, that the intention of the Decree was to preserve unrestricted access to higher education for Belgians, while making it more difficult for those foreign students (coming mainly from France) for whom the higher education system in the French Community constitutes a natural alternative to access that system. Such an aim is clearly discriminatory in essence and inconsistent with the objectives of the Treaty. [71]

105. The Court has already held that excessive demand for access to certain courses can lawfully be addressed by adopting specific non-discriminatory measures such as an entrance examination or requiring a minimum grade for registration. Such measures comply with Article 12 EC. [72]

106. Individual Member States may wish to maintain unlimited free access to higher education. They are of course at perfect liberty to do so. If so, they must however be prepared

70 — The comments accompanying the statistical data contained in the documents before this Court note explicitly that the increase in students with a foreign secondary school diploma is attributable exclusively to two courses: 'physiotherapy and re-adaptation' and 'veterinary medicine'.

71 — See, by analogy, the Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, point 30.

72 — *Commission* v *Austria*, cited in footnote 7, paragraph 61. See also the Opinion of Advocate General Jacobs, point 52.

to offer unlimited free access for *all* EU students regardless of nationality. Article 12 EC requires each Member State to ensure that nationals of other Member States in a situation governed by Community law are placed on a completely equal footing with its own nationals. [73] Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality. [74] Free access to education cannot mean 'free access – but only for our own nationals'.

107. A restrictive policy as regards access to certain courses (such as is practised by France) is in principle equally acceptable. That choice is as open to a Member State as the choice of unlimited access. Indeed, Belgium nowhere claims that France is contravening the EC Treaty by acting as it does. It is settled case-law that, even if another Member State may be infringing Community law, that does not legitimise corrective or defensive measures by another Member State that would otherwise be unlawful. [75] A fortiori that is so if a Member State enacts discriminatory measures in response to the side-effects of another Member State's legitimate policy choice.

108. It seems to me very possible that implementing less discriminatory measures may mean abandoning the current system of unrestricted public access to higher education for all Belgians. I can well see that that will be thought undesirable and that it might well be better if (to the extent that it is necessary) the flow of students across borders were regulated at Community level. [76] In the absence of such a system, however, the fact that such changes may be necessary reflects the need to comply with the obligations arising from the principle of equal treatment under the Treaty. [77]

109. Belgium and certain other Member States facing similar situations have sought to

73 — Case C-360/00 *Ricordi* [2002] ECR I-5089, paragraph 31.

74 — *Grzelczyk*, cited in footnote 45, paragraph 31; *Commission* v *Austria*, cited in footnote 7, paragraph 45 and the case-law cited there.

75 — Case C-111/03 *Commission* v *Sweden* [2005] ECR I-8789, paragraph 66 and the case-law cited there.

76 — See points 151 to 153 below.

77 — See, to the same effect, the Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, point 53.

claim that they are in a uniquely vulnerable position. [78]

110. The problems faced by the French Community in Belgium and by the Austrian Government arising from the influx of a number of foreign students able or willing to pursue their studies in, respectively, French and German are, in fact, not exclusive to Belgium and Austria. Other Member States may also find that they have to cope with an influx of students from other Member States that is driven by a common language or by some other particular consideration. [79]

111. The *travaux préparatoires* of the Decree [80] state that an entrance examination (the obvious neutral solution to a perceived threat to the quality of education from excessive student numbers) [81] would favour students who, through their advantaged social background or for other reasons, are best prepared for their proposed courses of study. That assertion was not buttressed by any empirical evidence that the Court has seen. If such is indeed the case, it seems to me that the appropriate remedies must lie elsewhere. The problem per se cannot justify recourse to discriminatory measures that infringe Community law.

112. It is conceivable that circumstances might arise in which a real, serious and imminent threat to the quality of university education in a specific sector was shown to exist. The Court might, in such a case, wish to reexamine whether indirectly discriminatory measures to counter such a threat are in principle capable of objective justification. In the present proceedings, even if such justification may theoretically be possible (a question that I expressly leave open), the material available to the Court falls far short of what would be required to justify discriminatory treatment.

113. I therefore conclude that the measures taken in the Decree at issue cannot be

78 — Notably Austria in *Commission* v *Austria*, cited in footnote 7.

79 — According to the OECD's statistics for 2006 (available online at www.oecd.org), Belgium had 40 607 non-citizen students out of a total population of 10 511 382 (a ratio of 1 : 258,8). By comparison, Denmark, had 19 123 non-citizen students out of a total population of 5 427 459 (a ratio of 1 : 283,8); Sweden had 41 410 non-citizen students out of a total population of 9 047 752 (a ratio of 1 : 218,4); and the United Kingdom had 418 353 non-citizen students out of a total population of 60 412 870 (a ratio of 1 : 144,4). Given the prevalence of English-language studies, that last figure is hardly surprising. It is however not possible to tell what proportion of those non-citizen students are non-EU nationals whose access to higher education may lawfully be restricted.

80 — Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 9.

81 — See point 105 above and *Commission* v *Austria*, cited in footnote 7, paragraph 61.

justified on the basis of perceived jeopardy to the quality of university education in the French Community.

The quality of the public health system

114. The final justification advanced is that too few students residing in the French Community (as distinct from non-resident students) obtain diplomas in certain specialities. Over the longer term, there may therefore not be sufficient qualified medical personnel to ensure the quality of that community's public health system.

115. The *travaux préparatoires* of the Decree focus, in this respect, on veterinary medicine, for which it appears that the French Community organised an entrance examination in 2003, 2004, and 2005. In the 2005 competition, only 192 candidates out of a total of 795 had obtained their secondary school diploma in the French Community. Of the 250 successful candidates (a number fixed by the legislator), 216 obtained their secondary school diploma abroad. That implies that only 34 home-grown candidates were able to start their studies in veterinary medicine. [82] The legislator draws the following conclusions: [83]

'That number is clearly insufficient. If no measure is taken, the French Community runs the risk of encountering a lack of veterinarians. There is a significant chance that the insufficient number of veterinarians will not be compensated by veterinarians from other States, because of the limitations that exist in other countries. It is self-evident that such a lack of veterinarians is likely to pose very serious dangers to public health.'

116. In the context of infringement proceedings, the Court requires a detailed assessment of the risk alleged by the Member State when invoking the public health derogation in Article 30 EC. [84] A similar standard of

82 — I note that even if all the 192 candidates who had obtained their secondary school diplomas in the French Community had been successful, there would still have been a shortage of such candidates to fill the 250 available places.

83 — Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 5.

84 — See, for example, Case 178/84 *Commission* v *Germany* [1987] ECR 1227; Case C-24/00 *Commission* v *France* [2004] ECR I-1277, paragraph 54; and Case C-192/01 *Commission* v *Denmark* [2003] ECR I-9693, paragraph 47.

scrutiny is applicable in references for a preliminary ruling, [85] although the final determination of the facts is of course a matter for the national court.

117. In my view, the material provided by Belgium in the documents before the Court indicates that the risk assessment underpinning the public health justification that is claimed falls well short of the required standard.

118. First, as the written submissions of the Belgian Government show, the potential lack of veterinarians appears to have been created by the system put in place by the French Community itself – namely, reducing the number of students in veterinary science in order to ensure the quality of education. It is (to say the least) conceptually curious that action taken to preserve the quality of education (a justification duly advanced for the discriminatory measures enacted) should simultaneously lead the Belgian Government to invoke the potential shortage of suitably qualified health professionals.

119. Second, the material before the Court suggests that the perceived potential problem for the future is traceable to some combination of (at least) the following: (i) a shortage of candidates who have obtained their secondary school diplomas in the French Community who want to study to be veterinarians *and* who are good enough to get one of the 250 places to study veterinary science in the face of competition from other EU candidates; (ii) a presumption that the majority of students admitted to the courses in veterinary science who have *not* obtained their secondary school diplomas in the French Community will automatically return to their home Member State(s) after completing their studies. Of these, (i) seems to find some foundation in the statistics; [86] but (ii) is a mere presumption. It assumes, specifically, that non-Belgian veterinarians will generally return to their own Member State(s) after qualifying, *irrespective* of job prospects locally. One might have thought that (on the contrary), if there were to be a shortage of qualified veterinarians in Francophone Belgium, such a shortage might prompt a reaction (from the market or from the public authorities) that would render local job prospects more attractive and

85 — See, for example, Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraphs 112 to 124.

86 — See the figures in point 115 and footnote 82 above.

encourage some newly qualified non-Belgian veterinarians to start their professional careers in the Member State in which they trained.

120. Third, either the French Community or the Federal Government (or both acting together) [87] have the necessary regulatory tools to address the potential problem. The possible solutions mentioned in the material referred to before the Court include adjusting the number of veterinarians who are allowed to graduate each year or who are admitted into the second (clinical) part of studies in veterinary medicine, [88] cooperation between secondary schools and faculties to adjust the level of pre-university education in order to ensure that enough Belgians meet the requirements of an examination set at an appropriate standard, and putting in place a preparatory year of study to prepare potential veterinarians better for the actual university course. [89]

121. I understand that implementing such measures might pose practical difficulties. It is, however, settled case-law that such difficulties cannot of themselves justify the infringement of a freedom guaranteed by the Treaty. [90]

122. Moreover, the legislative section of the Belgian Council of State noted that the experience with veterinary medicine does not necessarily extend to other courses. For example, despite the federal quota for physiotherapy studies, the number of those obtaining a diploma who want to exercise their profession in Belgium apparently corresponds closely to the needs of the profession, as estimated by the Federal Government. [91]

87 — At the hearing, the applicants claimed that public health is, in fact, not a competence of the French Community, but of the Federal Government and that the procedures under Belgian constitutional law required to enact a measure intended to safeguard public health had not been followed in the present case. That issue is for the referring court to decide.

88 — It appears that the competition for veterinaries that has caused problems was set up largely because of an excess of students in the second part of the course: Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, pp. 5 and 6.

89 — As suggested by Mr Claude Ancion, member of the parliament of the French Community, in a question to the Minister of Higher Education, Scientific Research and International Relations: *Compte rendu intégral*, Parlement de la Communauté française, 2004/05, 13 October 2005, p. 53 (the question and reply by the Minister are referred to in the *travaux préparatoires* of the Decree: Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 9, footnote 8).

90 — Case C-418/07 *Papillon* [2008] ECR I-8947, paragraph 54 and the case-law cited there. The same holds true of financial difficulties, which it is for the Member States to overcome by adopting appropriate measures: see Case C-42/89 *Commission* v *Belgium* [1990] ECR I-2821, paragraph 24.

91 — Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 53 and 56. The latest available Eurostat data (2007) show that Belgium has a national average of 242,7 physiotherapists per 100 000 inhabitants. The Walloon Region of Belgium has 268 per 100 000 inhabitants (and as many as 416,9 per 100 000 inhabitants for the province of Walloon Brabant). The Brussels-Capital Region has 218,1 per 100 000 inhabitants. That compares to a national average of 104 physiotherapists per 100 000 inhabitants for France and 103 physiotherapists per 100 000 inhabitants for Germany (Eurostat 2006 data). The Minister for Health has indicated that the examination at the end of the physiotherapy studies (which enables the physiotherapist to get a Belgian National Institute for Health and Invalidity Insurance number which gives their patients the right to be reimbursed by their health insurance) will have to be abolished – perhaps, to be replaced by an examination at the beginning of the studies: Note de Politique Générale de la Vice-première Ministre et Ministre des Affaires sociales et de la Santé publique, Doc. parl., Chambre, 2008/09, No 1529/5, p. 16.

123. Fourth, 'the knowledge acquired by a student in the course of his higher education does not in general assign him to a particular geographical employment market'.[92] Non-residents obtaining a diploma in the French Community might therefore be encouraged, by appropriate incentives, to start their professional career in the region in which they studied.

124. These observations apply *mutatis mutandis* to the other courses targeted by the contested Decree.

125. In respect of any putative public health justification, the Decree seems essentially to have been preventive. Unless the national court is presented with substantially stronger material than has been shown to this Court, the proportionality test cannot in my view be said to be satisfied.[93] Where discriminatory treatment as a precautionary measure against a perceived future problem is concerned, the proportionality test must be applied with particular vigilance.

126. On the basis of the material before the Court, I conclude that the contested Decree cannot be justified on the basis that too few students residing in the French Community 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.

Conclusion as to the first cumulative condition in the first paragraph of Article 1 of the Decree

127. It follows that the (indirectly discriminatory) residence requirement in the first paragraph of Article 1 of the Decree cannot be justified on any of the grounds relied on by Belgium.

92 — *Bidar*, cited in footnote 32, paragraph 58.

93 — See, by analogy, the Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, point 51.

The second cumulative condition in the first paragraph of Article 1 of the Decree

128. To the best of my knowledge, the Court has never held that a measure that discriminates directly on grounds of nationality, contrary to Article 12 EC, may be justified. [94] I have indicated earlier why I consider that the second cumulative condition in the contested Degree constitutes direct discrimination. [95]

129. The Court's approach hitherto seems logical. Direct discrimination on grounds prohibited by the Treaty is so contrary to the very idea of a European Union that it should be tolerated only for very good reason. According to settled case-law, such discrimination can only be justified on the basis of explicit Treaty derogations. [96] There is no such Treaty derogation from the *general* prohibition on discrimination on grounds of nationality contained in Article 12 EC. [97]

130. The prohibition of discrimination on grounds of nationality has immense symbolic importance. As Advocate General Jacobs so eloquently stated, it demonstrates that the Community is 'not just a commercial arrangement between the governments of the Member States but is a common enterprise in which all the citizens of Europe are able to participate as individuals. No other aspect of Community law touches the individual more directly or does more to foster that sense of common identity and shared destiny without which the "ever closer union among the

94 — For cases in which the Court, having established that there had been direct discrimination on the basis of nationality, did not go on to examine potential justifications see for example *Gravier*, cited in footnote 8, paragraphs 15, 25 and 26; Case 186/87 *Cowan* [1989] ECR 195, paragraph 10; and Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraphs 32 and 33. Advocate General Kokott rightly observes in her Opinion in Case C-164/07 *Wood* [2008] ECR I-4143 (at point 42 and footnote 11) that, while it is questionable whether a national rule that discriminates directly on grounds of nationality can ever be justified, a number of cases do hint at the theoretical possibility of justifying direct discrimination (for example, *Ricordi*, cited in footnote 73, paragraph 33; Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325, paragraph 26 et seq.; and Case C-323/95 *Hayes* [1997] ECR I-1711, paragraph 24).

95 — See points 64 to 76 above.

96 — See, for example, the derogation from free movement of workers in Article 39(4) EC (employment in the public service) and the derogation from freedom of establishment in Article 45 EC (exercise of official authority) – derogations that, as is well known, are interpreted very strictly. See further Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraph 86 and the case-law cited there.

97 — See Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 64, where the Court held: 'Since the unequal treatment in question thus comes within the scope of the Treaty, it cannot be considered to be justified: it is discrimination directly based on the appellant's nationality.' It is true that the Court then added: 'and, in any event, nothing to justify such unequal treatment has been put before the Court'. However, I read that as an afterthought which does not undermine the clear implications of the first statement.

peoples of Europe", proclaimed by the preamble to the Treaty, would be an empty slogan.' [98]

131. Should the Court nevertheless be prepared to entertain the idea that direct discrimination on grounds of nationality falling within Article 12 EC is capable in principle of justification, I refer to the reasons (set out above) why I consider that the indirectly discriminatory first cumulative condition imposed by the contested Decree cannot be justified. A fortiori, those considerations apply to the Decree's directly discriminatory second cumulative condition.

Conclusion as to the second cumulative condition in the first paragraph of Article 1 of the Decree

132. It follows that the provisions in the first paragraph of Article 1 of the Decree (whereby a Belgian national *automatically* satisfies the second cumulative condition by virtue of possessing the right, indissociable from his nationality, to remain permanently in Belgium whilst all non-Belgian nationals – including all other EU citizens – have either to satisfy one of the seven other criteria there laid down or fulfil the requirements of Directive 2004/38) cannot be justified.

Answer to the first and second questions

133. To accept the restrictions put in place by the French Community would amount to allowing Member States to compartmentalise their higher education systems. [99] The Court should therefore be very slow to accept that access to higher education may be restricted even by indirectly discriminatory measures that satisfy the proportionality test (which, so far as appears from the material before the Court, the Belgian measures do not). It should not be prepared to countenance measures that discriminate directly on that basis for such a purpose.

134. I therefore conclude that the first paragraph of Article 12 and Article 18(1) EC, in conjunction with Article 149(1), the second

98 — Opinion in *Phil Collins and Others*, cited in footnote 94, point 11.

99 — See, by analogy, the Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, point 53.

indent of Article 149(2) and the third indent of Article 150(2) EC, should be interpreted as precluding measures such as those contained in the Décret régulant le nombre d'étudiants dans certains cursus de premier cycle de l'enseignement supérieur enacted by the French Community of Belgium.

The third question

135. The referring court's third question asks whether the answer to the first question would be different if the French community, having regard to the last part of Article 149(1) EC and to Article 13(2)(c) of the ICESCR, [100] which contains a standstill obligation, chooses to maintain wide and democratic access to quality higher education for the population of that community.

136. The Court has held that the International Covenant on Civil and Political Rights (ICCPR) [101] is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law. [102] It seems to me that the same should hold good for the ICESCR which, like the ICCPR, binds each individual Member State. [103]

137. The referring court rightly notes that Article 13(2)(c) of the ICESCR, inasmuch as it requires 'the progressive introduction of free education' contains a standstill clause.

138. The General Comments on this provision note that the prohibition against discrimination enshrined in Article 2(2) of the ICESCR is 'subject to neither progressive realisation nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.' [104]

100 — See footnote 4.

101 — Adopted and opened for signature, ratification and accession by United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966. The Convention entered into force, in accordance with its Article 49, on 23 March 1976.

102 — See Case C-244/06 *Dynamic Medien* [2008] ECR I-505, paragraph 39; and Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 37 and the case-law cited there.

103 — See, by analogy, *Parliament* v *Council*, cited in footnote 102, paragraph 37.

104 — General Comments on the right to education (Art.13), E/C.12/1999/10 ('E/C.12/1999/10'), paragraph 31 (see also paragraph 43).

By way of illustration, the General Comments provide that 'violations of article 13 include: the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education.' [105] Article 2(2) of the ICESCR lists 'national or social origin' among the prohibited grounds.

139. Article 13 of the ICESCR is – quintessentially – a measure that outlaws discrimination, on a prohibited ground, in access to education. The attempt to rely upon Article 13(2)(c) of the ICESCR to justify a measure that clearly discriminates on one of the grounds explicitly prohibited by both Article 12 EC and Article 2(2) of the ICESCR is therefore inexplicable. [106] (Indeed, the applicants in the main action relied in part on Article 13 of the ICESCR to challenge the contested Decree.)

140. For completeness, I add that the General Comments on Article 13(2)(c) of the ICESCR also provide that 'while secondary education "shall be made generally available and accessible to all", higher education "shall be made equally accessible to all, on the basis of capacity". According to that article, higher education is not to be "generally available", but only available "on the basis of capacity". The "capacity" of individuals should be assessed by reference to all their relevant expertise and experience.' [107]

141. As regards Article 149(1) EC, I repeat that while that Article provides that Member States remain responsible for 'the content of teaching and the organisation of education systems and their cultural and linguistic diversity', the Court has made it clear that the conditions of access to vocational training fall within the scope of the Treaty. [108] Moreover, it is settled case-law that, even in matters which do not fall within the scope of the Treaty (which is the case as regards certain aspects of education policy) the competences retained by the Member States must be exercised consistently with Community law and, in particular, in compliance with the Treaty provisions on the freedom to move and reside

105 — E/C.12/1999/10, paragraph 59.

106 — The Belgian Government made the following interpretative declaration to the ICESCR: 'With respect to Article 2, paragraph 2, the Belgian Government interprets non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals. The term should be understood to refer to the elimination of any arbitrary behaviour but not of differences in treatment based on objective and reasonable considerations, in conformity with the principles prevailing in democratic societies.' Regardless of whether this declaration should be considered as a disguised reservation to the ICESCR, it cannot affect the interpretation of the principle of non-discrimination within the EC Treaty. See further on disguised reservations: A. Aust, *Modern Treaty Law and Practice* (2007), pp. 129 and 130.

107 — E/C.12/1999/10, paragraph 19.

108 — See point 32 above and the case-law referred to in footnote 8.

within the territory of the Member States, as conferred by Article 18(1) EC. [109]

142. The prohibition on discrimination should indeed be seen as the cornerstone of the Treaty precisely because it leaves Member States' regulatory autonomy intact – provided that their laws apply equally to nationals and non-nationals. The key underlying principle is that all citizens of the Union must be treated as individuals, without regard to their nationality. [110] 'Free and equal access to education for all' therefore means exactly what it says. It may not mean 'free and equal access to education for all my nationals'.

143. I accept that the problems faced by the French Community are not insignificant. However, they must be resolved in a way that is not a variant of 'equality for those inside the magic circle' [111] (in this case Belgian nationals), but that respects the 'fundamental status' of EU citizenship by ensuring equal access to education for all EU citizens regardless of nationality.

144. The answer to the first and second questions is therefore not invalidated by the last part of Article 149(1) EC. It is, on the contrary, reinforced by a proper reading of Article 13(2)(c) of the ICESCR.

The request for the judgment to be limited in time

145. The Belgian Government has asked the Court, should it interpret Article 12 EC as precluding national legislation such as the Decree at issue, to limit the temporal effects of its judgment.

146. In support of its request, the Belgian Government invoked the following grounds: the impact on the public finances of the

109 — See *Morgan and Bucher*, cited in footnote 2, paragraph 24 and the case-law cited there.

110 — See also the Opinion of Advocate General Jacobs in *Phil Collins and Others*, cited in footnote 94, point 11: 'They must not simply be tolerated as aliens, but welcomed by the authorities of the host State as Community nationals who are entitled, "within the scope of application of the Treaty", to all the privileges and advantages enjoyed by the nationals of the host State'.

111 — See my Opinion in Case C-427/06 *Bartsch* [2008] ECR I-7245, point 45.

French Community; the fact that the Decree was conceived specifically to comply with the Court's case-law and with Community legislation; the fact that the Commission has indicated that the system may be justifiable; and the lack of relevant case-law.

147. According to settled case-law, it is only exceptionally that the Court may be moved to restrict for any party concerned the opportunity of relying on a provision which it has interpreted. When the Court so limits the effects of a judgment, it does so in application of the principle of legal certainty inherent in the Community legal order. Two essential criteria must be fulfilled before such a limitation can be imposed: those on whose behalf a temporal limitation is sought must have acted in good faith and there must be a risk of serious difficulties. [112]

148. More specifically, the Court has imposed a temporal limitation 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 individuals and national authorities had been led to adopt practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or the Commission may even have contributed. The financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effects of that ruling. [113]

149. In the present case, whatever the merits of its other arguments, Belgium has not placed material before the Court that demonstrates that there is a risk of serious economic repercussions.

150. It is accordingly not appropriate for the Court, should it rule that Article 12 EC precludes national legislation such as the contested Decree, to limit the effects of that ruling in time.

112 — See, to this effect, Case C-138/07 *Cobelfret* [2009] ECR I-731, paragraph 68 and the case-law cited there.

113 — See Case C-313/05 *Brzeziński* [2007] ECR I-513, paragraphs 57 and 58 and the case-law referred to there.

Final remark

151. I have emphasised the importance, for the development of the Union, of freedom of movement for students based on equality. Equally, however, the EU must not ignore the very real problems that may arise for Member States that host many students from other Member States. [114]

152. The Protocol on the application of the principles of subsidiarity and proportionality [115] provides that action at Community level is justified where, 'the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community'. It also provides for the following guidelines to be used in examining whether that condition is fulfilled: (i) the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; (ii) actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty or would otherwise significantly damage Member States' interests; (iii) action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

153. I invite the Community legislator and the Member States to reflect upon the application of these criteria to the movement of students between Member States. [116]

154. Finally, I recall that one of the objectives of the Community listed in Article 2 EC is to promote solidarity among the Member States, and that the Member States have a mutual duty of loyal cooperation on the basis of Article 10 EC. [117] It seems to me that those provisions are very pertinent here. Where linguistic patterns and differing national policies on access to higher education encourage particularly high volumes of student mobility that cause real difficulties for the host Member State, it is surely incumbent on both the host Member State *and* the home Member State actively to seek a negotiated solution that complies with the Treaty.

114 — See, in that sense, M. Dougan, 'Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education Within the EU?', *Common Market Law Review* 2005, pp. 955 and 956.

115 — Protocol No 30 annexed to the EC Treaty.

116 — See also on subsidiarity my Opinion in *Gouvernement de la Communauté française and Gouvernement wallon*, cited in footnote 3, point 118, footnote 68, referring to N. MacCormick, *Questioning Sovereignty* (1999), p. 135.

117 — See, for an example relating to education: Case 235/87 *Matteucci* v *Communauté française de Belgique* [1988] ECR 5589, paragraph 19.

Conclusion

155. Accordingly, I am of the opinion that the questions referred by the Cour constitutionnelle (Belgium) should be answered as follows:

'Questions 1 and 2

The first paragraph of Article 12 and Article 18(1) EC, in conjunction with Article 149(1), the second indent of Article 149(2) and the third indent of Article 150(2) EC, should be interpreted as precluding measures such as those contained in the Décret régulant le nombre d'étudiants dans certains cursus de premier cycle de l'enseignement supérieur enacted by the French Community of Belgium.

Question 3

Consideration of the last part of Article 149(1) EC and Article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights does not affect the answer to the first two questions.'