

JUDGMENT OF THE COURT

30 September 2003 \*

In Case C-47/02,

REFERENCE to the Court under Article 234 EC by the Schleswig-Holsteinisches Oberverwaltungsgericht (Germany) for a preliminary ruling in the proceedings pending before that court between

Albert Anker,

Klaas Ras,

Albertus Snoek

and

Bundesrepublik Deutschland, represented by the Wasser- und Schifffahrtsdirektion Nord,

on the interpretation of Article 39(4) EC,

\* Language of the case: German.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet (Rapporteur), R. Schintgen and C.W.A. Timmermans (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and A. Rosas, Judges,

Advocate General: C. Stix-Hackl,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

- the appellants in the main proceedings, by P. Slabschi, Rechtsanwalt,
- the respondent in the main proceedings and the German Government, by W.-D. Plessing and M. Lumma, acting as Agents,
- the Danish Government, by J. Molde and J. Bering Liisberg, acting as Agents,
- the French Government, by G. de Bergues and C. Bergeot-Nunes, acting as Agents,
- the Commission of the European Communities, by D. Martin and H. Kreppel, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the appellants in the main proceedings, represented by P. Slabschi; of the respondent in the main proceedings, represented by B. Karsten, Regierungsrätin; of the German Government, represented by M. Lumma; of the French Government, represented by G. de Bergues and C. Bergeot-Nunes; and of the Commission, represented by I. Martínez del Peral, acting as Agent, and H. Kreppel, at the hearing on 21 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 12 June 2003,

gives the following

### Judgment

1 By order of 31 January 2002, received at the Court on 19 February 2002, the Schleswig-Holsteinisches Obergericht (Higher Administrative Court, Schleswig-Holstein) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 39(4) EC.

2 That question has been raised in the course of proceedings between Messrs Anker, Ras and Snoek, who are Dutch nationals, and the Wasser- und Schifffahrtsdirektion Nord (Northern Authority for Waterways and Shipping) regarding access to employment as master of a fishing vessel flying the German flag.

## Legal background

### *Community legislation*

3 Under Article 39 EC:

‘1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

- (b) to move freely within the territory of Member States for this purpose;
  
- (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
  
- (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.'

*International provisions*

4 The United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982, contains, in Part VII entitled 'High Seas', Section I entitled 'General Provisions', which contains Articles 86 to 115 of the general provisions relating to navigation on the high seas.

- 5 Articles 91(1), 92(1), 94(1) to (3) and 97(1) and (2) of that Convention provide, in particular:

‘Article 91

*Nationality of ships*

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

...

Article 92

*Status of ships*

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas....

...

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Article 94

*Duties of the flag State*

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular every State shall:

...

(b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea,...

...

## Article 97

### *Penal jurisdiction in matters of collision or any other incident of navigation*

1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent... to pronounce the withdrawal of such certificates, even if the holder is not a national of [that] State.

...'

### *National legislation*

- 6 Paragraph 2(2) of the *Schiffsbesetzungsverordnung* (Ships' Crews Regulation) of 26 August 1998 (BGBl. I, p. 2577), as amended by the *Verordnung* of 29 October 2001 (BGBl. I, p. 2785), provides:

'Irrespective of the gross registered tonnage, the master must be a German national within the meaning of the Grundgesetz [Basic Law] and hold a German certificate of competence.'

- 7 The training of ships' officers and the issue of certificates of professional competence are governed by the Schiffsoffizier-Ausbildungsverordnung (Ships' Officers Training Regulation) of 11 February 1985 (BGBl. I, p. 323), as last amended by the aforementioned Verordnung of 29 October 2001, (hereinafter 'the SchOffzAusbV').
- 8 Certificates of competence obtained in another Member State or in a Member State of the European Economic Area by nationals of one of those States are recognised as equivalent to German certificates by virtue of Paragraph 21a(1) of the SchOffzAusbV, subject to compliance with the conditions laid down by Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16) or by Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48 (OJ 1992 L 209, p. 25). In particular, in relation to a position of command, Paragraph 21a(2) of the SchOffzAusbV requires proof that the person concerned has passed the aptitude test provided for by Article 4(1)(b) of Directive 89/48 or by Article 4(1)(b) of Directive 92/51. Under Paragraph 21c of the SchOffzAusbV, the Wasser- und Schifffahrtdirektion Nord is required, on application, to issue a certificate of validity of the qualifications recognised as equivalent in accordance with Paragraph 21a(1) of the SchOffzAusbV.
- 9 However, qualifications recognised as equivalent under Paragraph 21a of the SchOffzAusbV do not confer on persons who are not German nationals within

the meaning of the Grundgesetz the right to command vessels flying the German flag. Paragraph 24 of the SchOffzAusbV provides as follows:

‘The issue of certificates of competence to persons who are not German nationals within the meaning of the Grundgesetz but who fulfil the conditions for the grant of certificates of competence (Paragraph 7) may be permitted. In that case, a certificate of seafaring competence shall not entitle the holder to command vessels sailing under the German flag. The certificate of competence shall bear an endorsement to that effect....’

- 10 In addition, under Paragraph 106 of the Seemannsgesetz (Law on Seafarers) of 26 July 1957 (BGBl. II, p. 713), as amended on several occasions, (hereinafter ‘the SeemG’):

‘1. The master shall be in command of all crew members (Paragraph 3) and of all other persons serving on board (Paragraph 7). Supreme authority shall be vested in him.

2. The master shall be responsible for the maintenance of order and safety on board and may take the measures necessary for that purpose under the following provisions and the legislation in force.

3. In case of direct danger to persons or the vessel, the master may enforce orders given to avert such danger, if need be by any necessary force, and temporary detention may be lawful. The fundamental rights under sentences 1 and 2 of Paragraph 2(2) and Paragraph 13(1) and (2) of the Grundgesetz may be curtailed. Where various means are available, those which involve the least prejudice to the persons concerned shall, as far as possible, be selected.

4. Physical force and temporary detention shall be lawful only where other means appear, from the outset, to be insufficient or have been shown to be so. Such measures shall be applied only so far as and to the extent that the performance of the master's duties under subparagraphs 2 and 3 requires them.

5. If the master is not in a position to exercise them himself, he may delegate his powers under subparagraphs 1 to 4 to the chief mate or chief engineer in the course of their duties....

...'

- 11 Under Paragraph 115 of the SeemG, failure to obey the master's orders is punishable by criminal sanctions where such orders are given to combat dangers threatening persons, vessels or their cargo, to avoid disproportionate losses, to prevent serious disruption to the operation of the vessel, to comply with the provisions of public law on safety at sea and to maintain order and safety on board. The misuse of such power is itself punishable by criminal sanctions, under Paragraph 117, in conjunction with Paragraph 115(4), of the SeemG.
- 12 Several provisions of German law confer on masters of vessels flying the German flag duties in relation to the registration of births, marriages and deaths.
- 13 Thus, under Paragraph 45(1) of the Verordnung zur Ausführung des Personenstandsgesetzes (Regulation implementing the Law on personal status) of 12 August 1957 (BGBl. I, p. 1139), as last amended by the Verordnung of 17 December 2001 (BGBl. I, p. 3752, hereinafter 'the PersStdGAV'), the birth or

death of a person on board a German vessel must be certified by a Registrar of births, marriages and deaths in the Registry of Berlin I. Under Paragraph 45(2), the birth or death must be notified to the master on the day after the event at the latest. If the person responsible for making the declaration terminates his passage prior to the expiry of that period, such notification must take place while that person is still on board the vessel in question. Under Paragraph 45(3), the master must draw up a formal report of the declaration of birth or death which he must then transmit to the first office for maritime registrations to which he can do so.

### The dispute in the main proceedings and the question referred

- 14 The appellants in the main proceedings are employed as seamen on board fishing vessels flying the German flag and engaged in small-scale deep-sea fishing. They are holders of a 'diploma voor Zeevisvaart SW V' (Netherlands Diploma in Seafaring on Fishing Vessels) which, under Netherlands law, entitles them to command vessels of the category of those on which they are currently working.
  
- 15 On 30 September 1998, the Wasser- und Schifffahrtsdirektion Nord granted Mr Ras authorisation to serve as chief mate or chief engineer on fishing vessels flying the German flag. By letter of 30 October 1998, Mr Ras applied on the basis of Paragraph 21c of the SchOffzAusbV for a certificate of wider competence allowing him to serve also as master on fishing vessels flying the German flag. The Wasser- und Schifffahrtsdirektion Nord rejected that application, which it treated as an objection, by decision of 14 December 1998.
  
- 16 The similar applications made on 16 March 1999 by Messrs Anker and Snoek for authorisation to serve as master, chief mate or chief engineer on fishing vessels

flying the German flag were also rejected by the Wasser- und Schifffahrtsdirektion Nord by decisions of 30 July 1999 in so far as they related to the position of master. The objections lodged by Messrs Anker and Snoek against those decisions were rejected by decision of 6 September 1999.

- 17 The Wasser- und Schifffahrtsdirektion Nord based its decision, in particular, on Paragraph 106(2) and (3) of the SeemG and on Paragraph 24, second sentence, of the SchOffzAusbV.
- 18 The actions brought against the Wasser- und Schifffahrtsdirektion Nord's rejections were dismissed, on the same grounds, by decisions of the Verwaltungsgericht (Administrative Court) of 14 November 2000. That court held that the position of ship's master involved the exercise of rights under powers conferred by public law for the purposes of Article 39(4) EC.
- 19 The Schleswig-Holsteinisches Obergerverwaltungsgericht, by decision of 30 July 2001, gave the appellants in the main proceedings leave to appeal against the Verwaltungsgericht's decisions.
- 20 Before the Obergerverwaltungsgericht, the appellants in the main proceedings challenged the application, with regard to them, of Article 39(4) EC, which, as an exception, is to be strictly construed. That provision, they argued, applies only where the post concerned presupposes a special relationship of allegiance to the State on the part of the person occupying it, which the bond of nationality seeks to safeguard. Such allegiance exists only if the post typically involves the exercise of rights under powers conferred by public law and if the holder is entrusted with responsibility for the general interests of the State. Those requirements are concurrent. The case of a master of a fishing vessel does not meet those

requirements. Even if there are cases in which masters have made use of their rights under powers conferred by public law, these are of such secondary importance that they cannot in any event constitute the core of their activity.

- 21 Moreover, even though there is no restriction based on nationality in the field of air transport, Paragraph 3 of the Luftverkehrs-Ordnung (Air Transport Regulation) of 10 August 1963 (BGBl. I, p. 652), as amended on several occasions, confers wide responsibilities and powers on aircraft captains, which are even more extensive than those of ships' masters.
- 22 According to the respondent in the main proceedings, the powers conferred on a master by Paragraph 106 of the SeemG belong to the public service and constitute the expression of the 'genuine link' established by the flag State between the vessel and the State. It refers, in that regard, to Article 94 of the United Nations Convention on the Law of the Sea.
- 23 The master's public-law powers are not, it argues, derived from general principles of private law. The master is responsible not only for guaranteeing order and safety on board for his own needs but also for the safeguarding of legally protected interests, if necessary by putting aside his own interests.
- 24 The respondent in the main proceedings also relies on the duties performed by the master as a registrar of births, marriages and deaths in the event of a birth or death on board, as provided for by Paragraph 45(3) of the PersStdGAV.

- 25 The Oberverwaltungsgericht doubts whether Paragraph 24, second sentence, of the SchOffzAusbV is compatible with Article 39 EC, particularly with regard to vessels engaged in small-scale deep-sea fishing.
- 26 It points out that, according to the Court's case-law, an employment belonging to the public service requires a special relationship of allegiance to the State on the part of the person occupying it, which the bond of nationality seeks specifically to safeguard (Case 149/79 *Commission v Belgium* [1980] ECR 3881). According to the Oberverwaltungsgericht, that is not the case for activities within the sea and air transport sectors, which are far removed from the specific activities of the public service and do not involve any participation, direct or indirect, in the exercise of powers conferred by public law and in duties whose object is to safeguard the general interests of the State or other public authorities.
- 27 However, the Oberverwaltungsgericht considers that there is still doubt as to whether the powers granted by Paragraph 106 of the SeemG are such as to involve generally the exercise of rights under public law or whether, on the contrary, they derive in essence from the general obligations arising in that respect on occasions from civil law — since the master is the representative on board of the shipowner, on whose behalf he exercises the rights arising from the employment contracts of seamen — and on occasions from criminal law — since the master is in the position of a person who is required to take action should a situation of danger arise.
- 28 It observes that, in any event, Paragraph 106 of the SeemG covers a very small part of a master's activities. The master's principal duty is the navigation of the vessel, as well as the management of the crew. In that respect he performs duties governed by civil law and employment law which are normally vested in chief executives or factory managers.

- 29 It was in those circumstances that the Schleswig-Holsteinisches Obergericht decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Are provisions of national law which require the nationality of the flag State — in this instance German nationality — for the exercise of the activity of master (captain) of a vessel used in small-scale maritime shipping and flying the flag of that Member State compatible with Article 39 EC?’

### The question referred

- 30 By its question, the referring court is asking, in essence, whether Article 39(4) EC is to be interpreted as allowing a Member State to reserve for its nationals employment as the master of vessels which fly its flag and are engaged in ‘small-scale maritime shipping’ (‘Kleine Seeschiffahrt’).

### *Observations submitted to the Court*

- 31 The appellants in the main proceedings submit that the question referred should be answered in the negative.
- 32 As a preliminary point, they stress that Messrs Anker and Snoek have the status of workers for the purposes of Article 39 EC. If such status is questionable in relation to Mr Ras, who is a minority shareholder in Zeevisserijbedrijf RAS BV,

which is the sole shareholder of the company Seefischereibetrieb SC-25 GmbH which operates the fishing vessel on which Mr Ras sails, the latter may, if he is not to be regarded as an employee, be treated as a self-employed worker. In that case, it would be appropriate to apply Article 43 EC and to ask whether the activity of master of a vessel such as that on which he sails can validly be covered by the exception in the first paragraph of Article 45 EC. In that connection, the appellants in the main proceedings maintain that, having regard to its wording, the meaning of ‘official authority’, for the purposes of the first paragraph of Article 45 EC, is more limited than that of ‘public service’ within the meaning of Article 39(4) EC.

- 33 According to the appellants in the main proceedings, the activity of master of a fishing vessel does not come within Article 39(4) EC. The Community meaning of ‘public service’ must, according to the Court’s case-law, be interpreted strictly as being a derogation from a fundamental principle of Community law and be limited to what is strictly necessary for safeguarding the interests which Article 39(4) EC allows the Member States to protect (see, inter alia, Case 225/85 *Commission v Italy* [1987] ECR 2625, paragraph 7). It is to be understood in a functional way: what is important is that the activity is typically associated with rights exercised under powers conferred by public law, while at the same time responsibility for safeguarding the general interests of the State is vested in the person holding the post (see *Commission v Belgium*, cited above, paragraph 12).
- 34 The appellants in the main proceedings add that it is not enough that the holder of the post occasionally exercises rights under powers conferred by public law: the exercise of such rights must constitute the core of the activity (see, to that effect, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 26 to 28, and Case C-4/91 *Bleis* [1991] ECR I-5627, paragraph 7).
- 35 In this case, the German national legislation does not confer on a master any rights under powers conferred by public law. The master’s powers under Paragraph 106 of the SeemG are an expression of general obligations of civil and criminal law adapted to the circumstances of a vessel at sea. In addition, the

circumstances in which vessels are confronted with dangerous situations have been considerably reduced by, among other things, modernisation of the means of communication and the reduction in time spent at sea, which is restricted to working days in regard to small fishing vessels, which, moreover, always fish close to the coast.

- 36 The core of a master's duties consists in the command of the vessel and the management of its crew. These are duties under civil law and employment law, which are normally those of chief executives or factory managers. Moreover, the master is himself employed to a considerable extent in the catching and processing of the fish.
- 37 Finally, the appellants in the main proceedings claim that, at paragraphs 34 and 35 of its judgment in Case C-290/94 *Commission v Greece* [1996] ECR I-3285, the Court held that the sea and air transport sectors are not among those areas in which specific activities of the public service are performed. This means that those sectors are in principle covered by the right of freedom of movement for workers and that it is for the national authorities to establish, for certain posts, that the conditions of Article 39(4) EC are in fact being complied with (see paragraphs 110 to 112 of the Opinion of Advocate General Léger in Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207). The respondent in the main proceedings has failed to demonstrate this in relation to the post of master of a fishing vessel.
- 38 The German, Danish and French Governments, and the Commission, agree in their view that the post of master of vessels flying a Member State's flag engaged in small-scale maritime shipping may, in accordance with Article 39(4) EC, be reserved for nationals of that Member State in so far as those holding such a post may, in accordance with the domestic legislation of that State and with several international instruments, such as the United Nations Convention on the Law of the Sea, perform duties belonging to the 'public service' within the meaning of that provision as interpreted by the Court, concerning the maintenance of safety

and the exercise of police powers, as well as the drawing up of birth, marriage and death certificates.

- 39 According to the German Government, the fact that, in the normal course of sea-fishing, there is not always occasion to exercise rights under powers conferred by public law does not mean that the measures which masters are entitled, where necessary, to take are not of such a character. Furthermore, a vessel engaged in small-scale deep-sea fishing is not, in principle, subject to restrictions on its passage, with the result that it may well carry on its activities outside the territorial waters of the flag State or the immediate vicinity of that State's coasts.
- 40 The Danish Government submits that, if the post of ship's master involves the exercise on board of rights under powers conferred by public law, which, on dry land, are vested in the police authorities, particularly those of detaining suspects in custody and of taking statements, he participates directly in the exercise of powers conferred by public law. The maintenance of order and safety are the type of duties, the performance of which supposes, on the part of those responsible, the existence of a special relationship of allegiance to the State, covered by Article 39(4) EC.
- 41 The fact that the case in the main proceedings involves small vessels does not, in the view of the Danish Government, imply any restriction on the Member State's right to reserve for its own nationals employment as the master on vessels flying its flag. Indeed, the circumstances in which the exercise by ships' masters of rights under powers conferred by public law may become necessary may occur on any type of vessel and at any moment.
- 42 The Danish Government adds that the fact that the Member State concerned has not made use of the possibility of reserving for its own nationals similar posts in

the field of air transport is irrelevant, since Article 39(4) EC confers on the Member States merely an option to reserve the posts which it covers.

- 43 According to the French Government, ships' masters clearly perform duties associated with the exercise of official authority which cannot be confused with the obligations of every citizen, chief executive or factory manager, and also of every aircraft captain. This remains the position even where the employment is carried on in private undertakings, since the specific activities of the public service are performed, by delegation, on behalf of the State and not on behalf of the employer.
- 44 The French Government refers, by analogy, to certain provisions of the French Civil Code and of the Disciplinary and Penal Code of the French merchant navy which confer on the master on occasion duties of a 'registrar of births, marriages and deaths' and on occasion genuine police powers which confer on him a role in the public administration of justice. It observes that those rights go well beyond those conferred on everyone by Article 73 of the French Code of Criminal Procedure in the event of crime or offence in the course of commission. Indeed, it follows from that provision that, while any person is entitled to apprehend the perpetrator of such a crime or offence, he must bring him before the nearest police officer, in whom alone are vested the powers of arrest and detention.
- 45 The French Government also challenges the comparison drawn between the rights of ships' masters and the obligations of chief executives and factory managers to take the measures necessary to ensure the safety and health of their employees. Thus, in contrast to a ship's master, a chief executive of an undertaking has no power to arrest or detain any of his employees, since he is in a position to call upon the public authorities.
- 46 Similarly, according to the French Government, the powers conferred on aircraft captains cannot be compared to the rights of ships' masters, since an

aircraft captain has powers comparable to those of any citizen faced with a threat.

47 Finally, the French Government submits that the fact that ships' masters exercise only rarely their powers of official authority is irrelevant to the inclusion of their post within the scope Article 39(4) EC. Indeed, according to the Court's case-law, that provision applies only to 'posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities' (*Commission v Belgium*, paragraph 10). Thus the mere fact that the post 'involves' attributes of public authority is sufficient to bring it within Article 39(4) EC. In addition, whenever circumstances so require, the exercise of the attributes of public authority is a concrete necessity and cannot be delegated to another member of the crew without depriving the master of much of his authority.

48 In the alternative, the French Government submits that a Member State is entitled to reserve masters' posts for its own nationals on the basis of Article 39(3) EC. By their participation in the exercise of official authority, such posts come within the exceptions to the free movement of workers connected to public order or public safety.

49 The Commission states, first of all, that it is for the national court to determine whether all the appellants in the main proceedings satisfy the conditions necessary for them to be regarded as workers within the meaning of Article 39 EC.

50 It goes on to point out that a vessel flying a Member State's flag is clearly to be treated as forming part of the territory of that State, but that, once that vessel has

moved away from the coast, that State is not normally in a position to intervene with its own organs of official authority to safeguard its general interests or those of the general public. The flag State therefore confers on the master, as the representative of official authority, the power to perform various duties intended to safeguard those general interests, provided for by domestic legislation or international instruments. In such circumstances, Article 39(4) EC may be validly relied upon.

- 51 The judgment in Case C-283/99 *Commission v Italy* [2001] ECR I-4363, paragraph 25, which concerned sworn private security guards, does not call that analysis into question, since the rights under powers conferred by public law are specifically conferred on ships' masters in order to safeguard the general interests of the State.
- 52 However, a private individual is employed in the public service, for the purposes of Article 39(4) EC, only if the organs of public law which belong institutionally to the public service cannot intervene or can do so only with difficulty. The mere grant of powers of official authority is therefore not sufficient for Article 39(4) EC to be invoked. It requires, in addition, that no organ of public law can intervene to resolve a potential conflict.
- 53 Furthermore, according to the Commission, the question whether the powers conferred exceed those which, by virtue of civil and criminal law, any proprietor, employer or citizen must exercise falls to be determined in the light of domestic law and must be decided by the national court. If it is established that such powers come within the scope of public law, the Commission submits that recourse to the exception laid down in Article 39(4) EC cannot, in addition, depend on the degree of probability of the circumstances in which the ship's

master in question must actually exercise such powers of official authority or on the size of the vessel.

54 Finally, the comparison made with the situation existing in aviation is irrelevant, since Article 39(4) EC confines itself to leaving to the Member States the power of limiting the free movement of workers.

55 With regard, furthermore, to the application of Article 39(3) EC, the Commission submits that that provision applies only to individuals whose personal conduct constitutes a danger to public order or public safety. It is therefore not appropriate to invoke it in order to exclude from the application of the principle of the free movement of persons an entire profession on the ground that its members are responsible for guaranteeing public order or safety on board (see, to that effect, Case C-114/97 *Commission v Spain* [1998] ECR I-6717, paragraph 42).

### *Reply of the Court*

56 It is appropriate to observe, at the outset, that Article 39(1) to (3) EC lays down the principle of the free movement of workers and the abolition of all discrimination based on nationality between workers of the Member States. Article 39(4) EC, however, provides that the provisions of that article are not to apply to employment in the public service.

- 57 According to the Court's case-law, the concept of public service within the meaning of Article 39(4) EC must be given uniform interpretation and application throughout the Community and cannot therefore be left entirely to the discretion of the Member States (see, in particular, Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 5, and *Commission v Belgium*, paragraphs 12 and 18).
- 58 It covers posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities and thus presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality (*Commission v Belgium*, paragraph 10, and *Commission v Greece*, cited above, paragraph 2).
- 59 On the other hand, the Article 39(4) EC exception does not cover posts which, whilst coming under the State or other bodies governed by public law, still do not involve any association with tasks belonging to the public service properly so called (*Commission v Belgium*, paragraph 11, and *Commission v Greece*, paragraph 2), nor, *a fortiori*, to employment by a private natural or legal person, whatever the duties of the employee (*Commission v Spain*, cited above, paragraph 33, and Case C-283/99 *Commission v Italy*, cited above, paragraph 25).
- 60 It is also clear from the Court's case-law that, as a derogation from the fundamental principle that workers in the Community should enjoy freedom of movement and not suffer discrimination, Article 39(4) EC must be construed in such a way as to limit its scope to what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect (see, in particular, Case 225/85 *Commission v Italy*, cited above, paragraph 7).

- 61 In this case, German law confers on masters of fishing vessels flying the German flag rights connected to the maintenance of safety and to the exercise of police powers, particularly in the case of danger on board, together with, in appropriate cases, powers of investigation, coercion and punishment, which go beyond the requirement merely to contribute to maintaining public safety by which any individual is bound. Furthermore, certain auxiliary duties in respect of the registration of births, marriages and deaths, which cannot be explained solely by the requirements entailed in commanding the vessel, are conferred on the master, in particular that of receiving notification of a person's birth or death during a voyage, even if it is the responsibility of a registrar of births, marriages and deaths, on land, to issue the official certificates. While certain doubts may persist, in respect of those duties relating to the registration of births, marriages and deaths, as to whether they involve direct or indirect participation in the exercise of powers conferred by public law, doubts which it is the responsibility of the referring court to resolve, it is clear, on the other hand, that the duties connected to the maintenance of safety and to the exercise of police powers constitute participation in the exercise of rights under powers conferred by public law for the purposes of safeguarding the general interests of the flag State.
- 62 The fact that masters are employed by a private natural or legal person is not, as such, sufficient to exclude the application of Article 39(4) EC since it is established that, in order to perform the public functions which are delegated to them, masters act as representatives of public authority in the service of the general interests of the flag State.
- 63 However, recourse to the derogation from the freedom of movement for workers provided for by Article 39(4) EC cannot be justified solely on the ground that rights under powers conferred by public law are granted by national law to holders of the posts in question. It is also necessary that such rights are in fact exercised on a regular basis by those holders and do not represent a very minor part of their activities. Indeed, as has been pointed out in paragraph 60 of this judgment, the scope of that derogation must be limited to what is strictly

necessary for safeguarding the general interests of the Member State concerned, which would not be imperilled if rights under powers conferred by public law were exercised only sporadically, indeed exceptionally, by nationals of other Member States.

- 64 It is clear from the statements of the referring Court that posts of master of small-scale deep-sea fishing vessels, which consist, essentially, in skippering small boats, with a small crew, and in participating directly in fishing and in the processing of the fish products, are posts in which the duty of representing the flag State is, in practice, insignificant.
- 65 Further, as the Advocate General correctly observed in paragraph 68 of her Opinion, the United Nations Convention on the Law of the Sea does not require that a ship's master be a national of the flag State.
- 66 It remains to be considered whether the nationality condition to which access to the categories of employment in issue is subject may be justified on the basis of Article 39(3) EC.
- 67 In this regard, it is sufficient to recall that the right of Member States to restrict the free movement of persons on grounds of public policy, public security or public health is not intended to exclude economic sectors such as fishing or occupations, such as master of fishing vessels, from the application of that principle as regards access to employment, but to allow Member States to refuse access to their territory or residence there to persons whose access or residence

would in itself constitute a danger for public policy, public security or public health (see, as far as public health is concerned, Case 131/85 *Gül* [1986] ECR 1573, paragraph 17, and, as far as private security is concerned, *Commission v Spain*, paragraph 42).

68 Thus, a general exclusion from access to the post of master of fishing vessels cannot be justified on the grounds mentioned in Article 39(3) EC.

69 In view of the foregoing, the answer to the question referred must be that Article 39(4) EC must be construed as allowing a Member State to reserve for its nationals the post of master of vessels flying its flag and engaged in 'small-scale maritime shipping' ('Kleine Seeschiffahrt') only if the rights under powers conferred by public law granted to masters of such vessels are in fact exercised on a regular basis and do not represent a very minor part of their activities.

## Costs

70 The costs incurred by the German, Danish and French Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Schleswig-Holsteinisches Oberverwaltungsgericht by order of 31 January 2002, hereby rules:

**Article 39(4) EC must be construed as allowing a Member State to reserve for its nationals the post of master of vessels flying its flag and engaged in ‘small-scale maritime shipping’ (‘Kleine Seeschifffahrt’) only if the rights under powers conferred by public law granted to masters of such vessels are in fact exercised on a regular basis and do not represent a very minor part of their activities.**

Rodríguez Iglesias	Puissochet	Wathelet
Schintgen	Timmermans	Gulmann
Edward	La Pergola	Jann
Skouris	Macken	Colneric
von Bahr	Cunha Rodrigues	Rosas

Delivered in open court in Luxembourg on 30 September 2003.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President

I - 10496