

JUDGMENT OF THE COURT

30 September 2003 \*

In Case C-405/01,

REFERENCE to the Court under Article 234 EC by the Tribunal Supremo (Spain) for a preliminary ruling in the proceedings pending before that court between

Colegio de Oficiales de la Marina Mercante Española

and

Administración del Estado,

intervener:

Asociación de Navieros Españoles (ANAVE),

\* Language of the case: Spanish.

on the interpretation of Article 39 EC and Articles 1 and 4 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475),

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 Spanish Government, by N. Díaz Abad, acting as Agent,

— the Danish Government, by J. Molde and J. Bering Liisberg, acting as Agents,

— the German Government, by W.-D. Plessing and R. Stüwe, acting as Agents,

- the Greek Government, by E.-M. Mamouna and S. Chala, acting as Agents,
- the French Government, by G. de Bergues, A. Colomb and C. Bergeot-Nunes, acting as Agents,
- the Italian Government, by U. Leanza, acting as Agent, assisted by G. Fiengo, avvocato dello Stato,
- the Norwegian Government, by H. Seland, acting as Agent,
- the Commission of the European Communities, by I. Martínez del Peral and D. Martin, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the defendant in the main proceedings, and of the Spanish Government, represented by N. Díaz Abad, of the German Government, represented by M. Lumma, acting as Agent, of the Greek Government, represented by E.-M. Mamouna, of the French Government,

represented by G. de Bergues and C. Bergeot-Nunes, and of the Commission, represented by I. Martínez del Peral and H. Kreppel, acting as Agent, 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 4 October 2001, received at the Court on 15 October 2001, the Tribunal Supremo (Supreme Court) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 39 EC and Articles 1 and 4 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).
- 2 Those questions were raised in the course of an action for annulment brought by the Colegio de Oficiales de la Marina Mercante Española (Spanish Merchant Navy Officers' Association, hereinafter 'the Officers' Association') against Real Decreto 2062/1999, por el que se regula el nivel mínimo de formación en profesiones marítimas (Royal Decree No 2062/1999 on the minimum level of training of seafarers) of 30 December 1999 (BOE of 21 January 2000, hereinafter 'Royal Decree No 2062/1999').

## 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.'

4 In addition, Article 1 of Regulation No 1612/68 provides:

'1. Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.'

5 Article 4 of that regulation provides:

'1. Provisions laid down by law, regulation or administrative action of the Member States which restrict by number or percentage the employment of foreign nationals in any undertaking, branch of activity or region, or at a national level, shall not apply to nationals of the other Member States.

2. When in a Member State the granting of any benefit to undertakings is subject to a minimum percentage of national workers being employed, nationals of the other Member States shall be counted as national workers, subject to the provisions of the Council Directive of 15 October 1963...'

### *International provisions*

6 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.

- 7 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....

...



## 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 relation to collision or in 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 the State which issued them.'

### *National legislation*

- 8 Ley 27/1992, de Puertos del Estado y de la Marina Mercante (Law No 27/1992 on National Ports and the Merchant Navy), of 24 November 1992 (BOE, 25 November 1992, hereinafter 'Law No 27/1992'), provides in Article 77, entitled 'Ships' Crews':

'1. The number of crew-members and their professional qualifications must be adequate to ensure at all times the safety of navigation and of the ship, having

regard to its technical and operational characteristics, in accordance with conditions which shall be laid down by regulations.

2. The conditions as to the nationality of ships' crews shall also be determined by regulation, although, from the entry into force of this Law, citizens of Member States of the European Economic Community shall be eligible for employment as ships' crew, provided that such employment does not involve even on an occasional basis, the performance of public duties, which is reserved to Spanish citizens.'

9 It is apparent from the 15th Additional Provision to Law No 27/1992 entitled 'Special register of ships and shipowners', that the master and the chief mate of ships entered on the special register established by that provision must have Spanish nationality. That register concerns only ships of owners whose control centre for the operation of the ships is in the Canaries or, if it is situated elsewhere in Spain or abroad, who have in the Canaries a permanent establishment or representation enabling them to exercise the rights and to perform the obligations provided for by the legalisation in force. Only civilian vessels of not less than 100 tonnes, employed in navigation for commercial purposes, excluding fishing vessels, may be entered on that register.

10 Article 8 of Royal Decree No 2062/1999 entitled 'Specific rules on the recognition of professional qualifications of citizens of the European Union with diplomas issued by one of the Member States', provides:

'1. The Directorate General of the Merchant Navy may directly recognise the professional diplomas or specialisation certificates of citizens of the European Union issued by one of those States, in accordance with the applicable national provisions.

2. Recognition of a professional diploma, authenticated by the issue of a Merchant Navy professional ticket, will be required for direct access to employment as a crew-member on board Spanish merchant ships, except for posts which involve or may involve the performance of public duties assigned by law to Spaniards, such as those of master, skipper or chief mate, which shall continue to be reserved for Spanish citizens.

3. Notwithstanding the provisions of the preceding paragraph, citizens of the European Union who hold a diploma issued by a Member State may have command of merchant ships of less than 100 gross register tonnes, which carry cargo or fewer than 100 passengers and operate exclusively between ports or points situated in areas where Spain has sovereignty, sovereign rights or jurisdiction, provided that the person concerned can prove that Spanish citizens have reciprocal rights in the State of which he is a national.’

<sup>11</sup> Several provisions of Spanish law confer on masters of Spanish merchant navy ships public duties such as those relating to safety and public order, the notarising of documents and returns of births, marriages and deaths.

<sup>12</sup> Thus, in relation to safety and law-enforcement duties, Articles 110, 116(3)(f) and 127 of the Law No 27/1992 empower masters, in exceptional circumstances, to take, in dangerous situations on board, all the public-order measures which they consider necessary for the safe progress of the vessel. Failure to comply with such measures and instructions is a serious offence. The master is responsible for recording infringements of that provision in the ship’s log.

- 13 Under Article 610 of the Código de Comercio (Commercial Code), the master may, by virtue of the powers vested in his office, impose penalties on board on those who disobey his orders or commit breaches of discipline. The offences and the measures taken must be recorded and the file transmitted to the competent authorities at the ship's first subsequent port of call.
- 14 Under Article 700 of the Commercial Code, all passengers must comply with the master's orders in relation to the maintenance of order on board.
- 15 In addition, in relation to the official certification or the registration of births, marriages and deaths, it is clear from Article 52 of the Código Civil (Civil Code) that the master may, in certain circumstances, solemnise marriages and, from Articles 722 and 729 of that code, that he may receive wills and, if the testator dies on board, that he is responsible for ensuring the safekeeping of the will and its dispatch to the competent authorities.
- 16 Pursuant to Article 19 of the Ley de Registro Civil (Law on the registration of births, marriages and deaths), the authorities and officials designated by the implementing regulation may register births, marriages and deaths occurring, in among other circumstances, on a sea voyage. The facts stated in such birth certificates have the same probative value as those recorded in entries in registers of births, marriages and deaths.
- 17 Under Article 71 of the Reglamento del Registro Civil (Regulations on the register of births, marriages and deaths), the document by virtue of which births, marriages and deaths are registered may be drawn up by the ship's master when

those events occur during a sea voyage. Article 72 of those regulations provides that the master has the same rights and obligations as a registrar to certify births, deaths and stillbirths and to establish affiliation, as well as to issue burial permits.

- 18 In accordance with Article 705 of the Commercial Code, the master must draw up the death certificate if a person dies on board and he is empowered, after a period of 24 hours, to take the necessary steps in relation to the body.
- 19 Under Article 627 of the Commercial Code, the chief mate assumes the master's rights, obligations and responsibilities in the event of the incapacity of the master.

### The dispute in the main proceedings

- 20 The Officers' Association brought an action before the Tribunal Supremo for the annulment of certain provisions of the Royal Decree No 2062/1999.
- 21 According to the Officers' Association, that decree, in particular Article 8(3) thereof, damages the collective interests of the officers of the Spanish merchant navy and is contrary to Article 77 of Law No 27/1992 and to the 15th Additional Provision to that law in so far as it allows nationals of other Member States to have command of certain Spanish vessels.

- 22 The Tribunal Supremo, finding that masters and chief mates of merchant ships occasionally perform public order duties or duties which, in Spain, are usually entrusted to public officials, enquires whether the fact that a Member State reserves such employment for its nationals is compatible with Article 39 EC and the Court's case-law.
- 23 According to that court, if such a measure should be regarded as complying with Community law, Article 77(2) of Law No 27/1992, the 15th Additional Provision thereto and Article 8(2) of Royal Decree No 2062/1994, which reserve to Spanish nationals the posts of master and chief mate of merchant ships flying the Spanish flag, should be deemed lawful. The same would be true, a fortiori, of Article 8(3) of Royal Decree No 2062/1999, which gives nationals of other Member States access to the posts of master and chief mate on certain conditions and for certain vessels of the Spanish merchant navy.
- 24 The Tribunal Supremo observes, in that regard, that an exception to the measure reserving the posts of master and chief mate to the nationals of the flag State such as that provided for by Article 8(3) of Royal Decree No 2062/1999 can be justified by the fact that masters and chief mates exercise only rarely their powers of official authority while they are posted on board small vessels engaged on near-coastal navigation.
- 25 In addition, in the event that the Member States cannot maintain a measure reserving the posts of master and chief mate of ships flying their flag to their nationals and are required to offer the possibility for nationals of the other Member States to obtain access, in certain circumstances, to those posts, the Tribunal Supremo seeks to ascertain whether it is compatible with Community

law to make that possibility subject to a condition of reciprocity, as laid down by Article 8(3) of the Royal Decree No 2062/1999.

26 It is in those circumstances that the Tribunal Supremo decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

- ‘1. Do Article 39 EC... and Articles 1 and 4 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community permit a Member State to reserve the posts of master and chief mate of its merchant ships to its own nationals? If the reply is in the affirmative, may that reservation be formulated in absolute terms (for all types of merchant ships) or is it valid only in cases in which it is foreseeable and reasonable that it may be necessary for masters and chief mates on board actually to carry out certain public duties?
2. If the national provisions of a Member State exclude from the reservation of those posts to its nationals certain commercial shipping situations (defined on the basis of factors such as the gross register tonnage of the ship, the cargo or number of passengers and the characteristics of its voyages) and, in those situations, allow citizens of other Member States of the European Union to have access to the posts in question, may that access be made subject to the condition of reciprocity?’

27 It should be borne in mind, as a preliminary point, that Articles 1 and 4 of Regulation No 1612/68 merely clarify and give effect to the rights already conferred by Article 39 EC. Accordingly, the latter article contains the only rules relevant in this case (see, to that effect, Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 6).



## The first question

28 By its first question, the referring court is asking, in essence, whether Article 39(4) EC is to be interpreted as meaning that it allows a Member State to reserve for its nationals the posts of master and chief mate of merchant ships flying its flag and whether, in that regard, account must be taken of the fact that, for certain types of shipping, the performance by the master or chief mate of public-service duties within the meaning of Article 39(4) EC is limited and occasional.

### *Observations submitted to the Court*

29 The Spanish, Danish, German, Greek, French and Italian Governments and the Commission agree that the posts of master and chief mate of merchant ships flying a Member State's flag 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, by virtue of the domestic law of that State and 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 public certification and the drawing-up of certificates of births, marriages and deaths.

30 Those governments support their views by pointing to the increased potential risks on the high seas and the fact that ships there are beyond the reach of the public authorities, which necessitates the presence on board of a representative of the State, with decision-making power, in the person of the master.

- 31 Case C-114/97 *Commission v Spain* [1998] ECR I-6717, paragraph 33, and Case C-283/99 *Commission v Italy* [2001] ECR I-4363, paragraph 25, from which it is clear that the concept of ‘employment in the public service’ does not encompass employment by a private natural or legal person, are not relevant, notwithstanding the fact that the master of a merchantman is employed by a private shipowner. According to the Danish, Greek, and French Governments and the Commission, what is important is that, even where there is no organic relationship with the administrative authorities, the master has powers conferred by public law for the purposes of the general interests of the State, which, as the German Government also submits, accords with the functional view of the public service underlying the Court’s case-law.
- 32 However, the Spanish Government submits that reserving the posts of master and chief mate of ships flying the flag of a Member State for nationals of that State is compatible with Article 39(4) EC only if the actual exercise of public duties is foreseeable and reasonable. That is the basis for Article 8(3) of Royal Decree No 2062/1999, which allows nationals of other Member States to have command of small and medium-sized Spanish ships the range of which is limited and which sail within Spanish territorial waters, so that acts in exercise of public law powers can easily be put off. Such is the case of vessels used mainly for leisure and tourism.
- 33 On the other hand, the Danish, Greek, French and Italian Governments and the Commission maintain that where the master of a vessel is entrusted by a Member State with powers under public law, the derogation provided for by Article 39(4) EC may validly be invoked irrespective of the vessel’s size, the number of passengers, its itinerary, its proximity to national territory or whether the master will actually perform the public duties in question, such as may be performed on vessels of any type at any time, whenever the situation on board so requires.

- 34 The Norwegian Government, after pointing out that, according to the Court's case-law, Article 39(4) EC, as an exception to the principle of freedom of movement of workers, must be strictly interpreted (see, among others, Case 152/73 *Sotgiu* [1974] ECR 153), wonders whether the public duties traditionally devolved on ships' masters enable it to be stated that a master nowadays participates, directly or indirectly, in the exercise of powers conferred by public law. The Norwegian Government observes that, because of current technology, the need to make use of such authority is less than it formerly was, when ships were in general much longer at sea and when it was much more difficult to obtain instructions from national authorities. Moreover, more than half of the world's fleet is these days registered under flags of convenience and the fact that neither the master nor the crews of such vessels possess the nationality of the flag State does not, in general, cause any particular problem.
- 35 The Spanish, Greek, French and Italian Governments submit, in the alternative, that a Member State is entitled to reserve the posts of master and chief mate for its own nationals on the basis of Article 39(3) EC.
- 36 In that regard, the Commission contends that Article 39(3) EC applies only to individuals whose personal conduct endangers public order or public safety. Furthermore, it is inappropriate to invoke it in order to exclude an entire profession from the application of the principle of freedom of movement for persons on the ground that its members are responsible for ensuring public order or safety on board (see, to that effect, *Commission v Spain*, cited above, paragraph 42). That view is borne out by Article 3(1) of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public safety or public health (OJ, English Special Edition, Series I, 1963-1964, p. 117).

*Reply of the Court*

- 37 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 provides, however, that the provisions of that article are not to apply to employment in the public service.
- 38 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, *Sotgiu*, cited above, paragraph 5, and Case 149/79 *Commission v Belgium* [1980] ECR 3881, paragraphs 12 and 18).
- 39 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*, cited above, paragraph 10, and Case C-290/94 *Commission v Greece* [1996] ECR I-3285, paragraph 2).
- 40 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*, paragraph 33, and *Commission v Italy*, paragraph 25).

41 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* [1987] ECR 2625, paragraph 7).

42 In this case, Spanish law confers on masters and chief mates of merchant ships flying the Spanish flag, first, 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, and, secondly, authority in respect of notarial matters and the registration of births, marriages and deaths, which cannot be explained solely by the requirements entailed in commanding the vessel. Such duties 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.

43 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, at the service of the general interests of the flag State.

44 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 still 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 41 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 cannot be imperilled if rights under powers conferred by public law are exercised only sporadically, even exceptionally, by nationals of other Member States.

- 45 It is clear from the statements of the referring court and the Spanish Government that the posts of master and chief mate in the Spanish merchant navy are posts in which exercise of the duty of representing the flag State is, in practice, only occasional.
- 46 Further, it should be noted that 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.
- 47 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.
- 48 In that regard, it is sufficient to recall that the right of Member States to restrict freedom of movement for persons on grounds of public policy, public security or public health is not intended to exclude economic sectors such as that of merchant shipping, or occupations, such as that of master or chief mate of merchantmen 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).

49 Thus, a general exclusion from access to the posts of master and chief mate in the merchant navy cannot be justified on the grounds mentioned in Article 39(3) EC.

50 In view of the foregoing, the answer to the first question must be that Article 39(4) EC is to be construed as allowing a Member State to reserve for its nationals the posts of master and chief mate of merchant ships flying its flag only if the rights under powers conferred by public law on masters and chief mates of such ships are actually exercised on a regular basis and do not represent a very minor part of their activities.

## The second question

51 By the second question, the referring court is asking, in essence, whether Article 39 EC must be interpreted as precluding a Member State making access by nationals of the other Member States to the posts of master and chief mate of merchant ships flying its flag such as those covered by Article 8(3) of the Royal Decree No 2062/1999 subject to a condition of reciprocity.

*Observations submitted to the Court*

- 52 The Spanish Government submits that the possibility of reserving the posts of master and chief mate of their merchant navy vessels for their nationals derives from a right conferred on the Member States by Article 39(4) EC, which they may exercise or restrict according to conditions laid down by their domestic legislation.
- 53 The French Government observes that, in so far as it excludes the employment which it refers to from the scope of the Treaty, Article 39(4) EC constitutes a reservation of powers to the Member States and differs, in that regard, from the exceptions to the freedoms of movement provided for, in particular, by Articles 30 EC, 39(3) EC and 46 EC (see, to that effect, *Commission v Belgium*, cited above, paragraph 10). Moreover, contrary to what the Court has held in relation to recourse to the exceptions provided for by Article 30 EC, Member States cannot be required to justify the measures which they adopt in respect of such employment. A Member State is free to give access to certain such employment to nationals of certain Member States, on the conditions which it considers appropriate, such as on condition of reciprocity.
- 54 Admittedly, the Court has held, in particular in *Sotgiu*, cited above, that once a Member State has admitted workers who are nationals of other Member States into its public service, Article 39(4) EC cannot justify discriminatory measures against them with regard to remuneration or other conditions of work.



- 55 However, the present case concerns the detailed rules themselves for access to employment in the public service, so that such case-law does not apply in the present case. Indeed, by confining themselves to laying down, for employment falling within the scope of Article 39(4) EC, an exception to the nationality condition for the nationals of only certain Member States with which, for example, there is reciprocity, the Spanish authorities have not abandoned the principle that such employment is reserved for Spanish nationals and have therefore not given general access to that employment.
- 56 The Commission maintains that the Member States may always decline to apply the exception laid down by Article 39(4) EC for employment covered by that provision and give complete or partial access to such employment to the nationals of other Member States. However, where access is partial, it must be made subject to conditions which are objective and comply with Community law.
- 57 The requirement of reciprocity is incompatible with the principle of equal treatment (Case 1/72 *Frilli* [1972] ECR 457, paragraph 19, and Case 186/87 *Cowan* [1989] ECR 195, paragraph 20).
- 58 Similarly, the Norwegian Government argues that, where a State allows workers from other Member States to occupy posts covered by Article 39(4) EC, no discrimination can be allowed with regard to such workers. Giving such access shows, of itself, that the interests which justify the exception to the principle of non-discrimination permitted by Article 39(4) EC are not at issue (see, to that effect, *Sotgiu*, paragraph 4).

*The Court's reply*

- <sup>59</sup> It is clear from the reply to the first question that the posts of master and chief mate in the merchant navy as referred to in Article 8(3) of Royal Decree No 2062/1999 cannot come within the scope of the exception provided for by Article 39(4) EC.
- <sup>60</sup> Consequently, in accordance with Article 39(2) EC, any national of a Member State is entitled to access to such posts free from any discrimination based on nationality.
- <sup>61</sup> Furthermore, it is evident from settled case-law that implementation of the obligations imposed on Member States by the Treaty or secondary legislation cannot be made subject to a condition of reciprocity (see, among others, Case C-163/99 *Portugal v Commission* [2001] ECR I-2613, paragraph 22, and Case C-142/01 *Commission v Italy* [2002] ECR I-4541, paragraph 7).
- <sup>62</sup> Therefore, the answer to the second question must be that Article 39 EC is to be construed as precluding a Member State making access by nationals of the other Member States to the posts of master and chief mate of merchant ships flying its flag, such as those covered by Article 8(3) of Royal Decree No 2062/1999, subject to a condition of reciprocity.

## Costs

63

The costs incurred by the Danish, German, Greek, French, Italian and Norwegian 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 proceedings, 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 questions referred to it by the Tribunal Supremo by order of 4 October 2001, hereby rules:

1. Article 39(4) EC is to be construed as allowing a Member State to reserve for its nationals the posts of master and chief mate of merchant ships flying its flag only if the rights under powers conferred by public law on masters and chief mates of such ships are actually exercised on a regular basis and do not represent a very minor part of their activities.

2. Article 39 EC is to be construed as precluding a Member State making access by nationals of the other Member States to the posts of master and chief mate of merchant ships flying its flag, such as those covered by Article 8(3) of Royal Decree No 2062/1999 por el que se regula el nivel mínimo de formación en profesiones marítimas of 30 December 1999, subject to a condition of reciprocity.

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