Opinion of Advocate General Stix-Hackl delivered on 12 June 2003

Colegio de Oficiales de la Marina Mercante Española v Administración del Estado

Reference for a preliminary ruling: Tribunal Supremo - Spain

Freedom of movement for workers - Article 39(4) EC - Employment in the public service - Masters and chief mates of merchant navy ships - Conferment of powers of public authority on board - Posts reserved for nationals of the flag State - Posts open to nationals of other Member States on condition of reciprocity

Case C-405/01

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I — Introduction

1. In this action, the Spanish Tribunal Supremo (Supreme Court) (Sala Tercera de lo Contencioso-Administrativo — Third Chamber for Contentious-Administrative Proceedings) essentially seeks to ascertain whether the posts of captain and first officer in the merchant navy are covered by the exclusion relating to employment in the public service contained in Article 39(4) EC, and, accordingly, whether a Member State may reserve such posts to its own nationals.

2. Up to that point, the legal issues raised in this case coincide with those in Case C-47/02 (*Anker and Others* v *Germany*), which concerns the lawfulness of a reservation of nationality applicable to ships' captains in small marine shipping and in which I am also delivering my Opinion today.

3. However, the Spanish Tribunal Supremo goes on to ask whether, in certain cases at least, access to the abovementioned posts in the merchant navy by nationals of other Member States may be made subject to a condition of reciprocity.

II — Legal background

A — Community law

4. Article 39 EC, which guarantees freedom of movement for workers within the Community, does not apply to employment in the public service, by virtue of paragraph 4 thereof.

5. Article 1 of Regulation (EEC) No 1612/68 (2) contains the following provisions regarding eligibility for employment:

(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.

6. In accordance with Article 4 of Regulation No 1612/68, 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.

B — International law

7. The United Nations Convention on the Law of the Sea of 10 December 1982 (Convention on the Law of the Sea) sets out, inter alia, the following general provisions regarding navigation on the high seas: 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...

Under Article 94(5), in taking the measures concerned, each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.Article 97 stipulates, inter alia, that, in the event of a collision or any other incident of navigation concerning a ship on the high seas, no penal or disciplinary proceedings may be instituted against [the master or any other person in the service of the ship] except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national. 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.

C — National law

1. Provisions governing the requirements relating to ships' crews

(a) Law No 27/1992 of 24 November on National Ports and the merchant navy (Ley de Puertos del Estado y de la Marina Mercante) (Law No 27/1992)
8. As regards ships' crews, Article 77 of Law No 27/1992 provides as follows:
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 the terms established by law.
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 the exercise, even on an occasional basis, of public duties, which is reserved to Spanish citizens.
9. The 15th Additional Provision of the aforementioned law provides, inter alia, the following:
The crews of ships entered in the Special Register must have the following characteristics:Nationality: The Captain and First Officer of the ships must, in any event, possess Spanish nationality.At least 50% of the remainder of the crew must be either Spanish or nationals of another Member State of the European Community....

(b) Royal Decree No 2062/1999 of 30 December 1999 governing the minimum level of training in maritime professions (Royal Decree No 2062/1999)
10. Article 8 of Royal Decree No 2062/1999 provides:
(1) The Dirección General de la Marina Mercante (Directorate-General of the merchant navy) may expressly 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, formalised by the issue of a merchant navy professional ticket, will be required for direct access to employment as part of jobs on the crew of Spanish merchant ships, except for posts which involve or may involve the exercise of public duties allocated by law to Spaniards, such as those of captain, master or first bridge officer, which shall remain reserved to Spanish citizens.
(3) Notwithstanding the provisions of the previous paragraph, citizens of the European Union who hold a diploma issued by a Member State may have command of merchant ships with a gross tonnage of less than 100 GT, which carry cargo or fewer than 100 passengers and operate exclusively between ports or points situated in areas in which Spain has sovereignty, sovereign rights or jurisdiction, if the person concerned is able to prove that a reciprocal right in respect of Spanish citizens exists in the State of which he is a national.

2. Rules conferring certain duties and powers on ships' captains in the merchant navy

(a) Rules relating to safety and policing duties
11. The provisions concerning safety and policing duties which are outlined below are worthy of note:Under Articles 100, 116(3)(f), and 127 of Law No 27/1992, captains may, on an exceptional basis, take such policing measures as they deem necessary for the proper running of the ship in the event of danger. Failure to comply with those and other measures, and with different types of order, constitutes a very serious infringement. Captains must record infringements of the Law in the logbook.According to Article 610 of the Commercial Code (Código de Comercio), the office of captain includes the power to impose penalties on those who fail to carry out orders or maintain discipline. The captain must conduct the appropriate preliminary criminal proceedings in relation to any offences committed on board while at sea and must hand over the file to the competent authorities at the first port where the ship puts in.Pursuant to Article 700 of the Commercial Code, passengers shall, without any distinction, comply with the instructions given by the captain in all matters concerning the maintenance of law and order on board.

(b) Rules relating to the authority to attest documents and the registration of facts establishing personal civil status and governing steps to be taken in the event of a death on board
Under Articles 52, 722 and 729 of the Civil Code, the captain or commander of a ship may, in certain circumstances, solemnise marriages and legalise wills. The captain or commander must keep any wills in safekeeping and hand them to the local maritime authority.In accordance with Article 19 of the Law on Civil Registration (Ley de Registro Civil), births, marriages and deaths which occur, inter alia, during a sea voyage may be recorded by the authorities and officials stipulated in the regulations. Declarations made in such birth certificates have the same force as those recorded in the register.Under Article 71 of the Civil Registration Regulations (Reglamento del Registro Civil), where a birth, marriage or death occurs during a sea voyage, the certificate pursuant to which such an event is registered shall be legalised by the commander, captain or master. Article 72 of the Civil Registration Regulations provides that the aforementioned persons have the same duties and powers as a registrar in relation to recording births, deaths and miscarriages, to determining family

relationships, and to authorising burials.In accordance with Article 705 of the Commercial Code, where a passenger dies during a voyage, the captain must issue a death certificate and, after twenty-four hours have passed, he is entitled to take such measures concerning the corpse as are necessary in the circumstances.Under Article 627 of the Commercial Code, in the event that the captain is incapacitated, the first officer shall deputise for the captain and assume all his powers, duties and responsibilities.

III — The main proceedings and the questions referred for a preliminary ruling

12. Under Spanish law, the Third Chamber of the Tribunal Supremo — the referring court — hears actions for nullity brought, under specified conditions, by natural or legal persons against general provisions adopted by the Consejo de Ministros (Council of Ministers), including Royal Decrees. In this type of proceedings, the court considers whether the disputed general provision has formal or substantive defects which render it contrary to the law and, if so, declares the provision void.
13. In the main proceedings, the Colegio de Oficiales de la Marina Mercante Española (Spanish merchant navy Officers Association; Colegio de Oficiales) brought an action for annulment against certain provisions of Royal Decree No 2062/1999, in particular Article 8(3) thereof.
14. The Colegio de Oficiales is of the opinion that the provision concerned, under which citizens of other Member States are entitled to command certain types of merchant ships, prejudices the interests of the Colegio and the collective interests of Spanish merchant navy officers, and also infringes higher legislation, in particular Article 77 of Law No 27/1992.
15. As the referring court observes in the order for reference, an important feature of the law governing access to the posts of captain and first officer on Spanish merchant ships is the absolute reservation of such posts to Spanish nationals in Article 77(2) of Law No 27/1992 — which refers to the exercise, even on an occasional basis, of public duties — and in Article 8(2) of Royal Decree No 2062/1999. In that regard, the referring court makes the presumption — which is not disputed by the parties to the main proceedings — that captains and first officers on merchant ships occasionally carry out public duties connected with safety and policing powers or duties which, in Spain, are usually restricted to civil servants.
16. In addition, Article 8(3) of Royal Decree No 2062/1999 provides, in some measure by way of derogation from the general nationality restriction, that, in the case of certain merchant navy ships, nationals of other Member States may be eligible to take up such posts under certain conditions.
17. In that regard, the referring court points out that such a system appears to be based on a relativised concept of the exercise of public duties by the captains of merchant ships. The limitation of the reservation is justified because it may be assumed that a captain's powers are diminished in such circumstances and that the public duties which are generally assigned to captains are exercised on rare or almost hypothetical occasions. The referring court also points out that when the measure was being drawn up, it initially contained a provision under which the command of merchant ships shall not be regarded as the exercise of public duties. However, the Colegio de Oficiales objected and that wording was not included in the final draft.
18. In that connection, the referring court enquires whether, in the light of Article 39 EC and the relevant case-law of the Court of Justice, it is compatible with Community law for a Member State to reserve to its own nationals the posts of captain and first officer on merchant ships, and, if the answer is in the affirmative, whether such a reservation is lawful in relation to all types of merchant ships or only in relation to certain types, where there is a presumption that the holders of those posts may occasionally carry out duties on board which are connected with safety and policing powers or duties which, in Spain, are usually restricted to civil servants.
19. As regards the relevance of that question to the outcome of the main proceedings, the referring court observes that, should an absolute nationality restriction be held to be lawful, Article 8(2) of Royal Decree No 2062/1999 and Article 77(2) of Law No 27/1992 (and the 15th Additional Provision thereof), which provide for the reservation of posts to Spanish nationals, must be regarded as compatible with Community law, which would mean that the limited nationality restriction contained in Article 8(3) of Royal Decree No 2062/1999 would comply fully with Community law.
20. The referring court adds that a possible conflict with Article 77(2) of Law No 27/1992 would not of itself render Article 8(3) of Royal Decree No 2062/1999 unlawful, provided that the actual scope of that provision is based on a requirement of Community law.
21. As regards the condition of reciprocity set out in Article 8(3) of Royal Decree No 2062/1999, the referring court states that, in its view, it is not possible to restrict access to the posts of captain or first officer on certain merchant ships by means of a such a condition if Member States must guarantee access to nationals of other Member States.
22. In those circumstances, the Spanish Tribunal Supremo (Third Chamber) stayed the proceedings and, by order dated 4 October 2001, referred the following questions to the Court of Justice for a preliminary ruling under Article 234 EC:
(1) Do Article 39 EC (formerly Article 48 of the EC Treaty) and Articles 1 and 4 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community permit a Member State to reserve the posts of captain and first officer 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 captains and first officers 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 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?

IV — The first question

23. It is apparent from the order for reference that, by its first question, the referring court essentially seeks to ascertain whether the system for relaxing the nationality restriction, set out in Article 8(3) of Royal Decree No 2062/1999, meets a requirement of Community law.

24. In the context of Article 234 EC, the Court has no jurisdiction to decide either as to the interpretation of the provisions of national laws or regulations or their conformity with Community law. It may however supply the national court with a ruling on the interpretation of Community law to enable that court to resolve the legal problem before it. (3) In addition, the Court may, where appropriate, reformulate the questions referred to it. (4)

25. In the light of the information contained in the order for reference, it is appropriate to summarise and reformulate the first question as follows:Must Article 39 EC and Articles 1 and 4 of Regulation No 1612/68 be construed as authorising Member States to reserve to their own nationals the posts of captain and first officer, as envisaged in Article 8(3) of Royal Decree No 2062/1999?

A — Main arguments of the parties

26. Written observations in these proceedings were submitted by the *Spanish*, *German*, *French*, *Greek*, *Danish*, *Italian* and *Norwegian* Governments and by the Commission.

27. With the exception of the Norwegian Government, all the parties essentially take the view that reservation by a Member State to its own nationals of the posts of captain and first officer in the merchant navy is compatible with Article 39 EC.

28. In support of that view they rely in the main on the derogation relating to employment in the public service, contained in Article 39(4) EC, and point out that, in accordance with settled case-law — and with the Commission Notice — (5), that derogation should be regarded as extending to posts which involve direct or indirect participation in the exercise of powers conferred by public law, whose purpose is to safeguard the general interests of the State or of other public authorities, and which, for that reason, involve a special relationship of allegiance to the State on the part of persons occupying them, and the reciprocity of rights and duties which form the foundation of the bond of nationality. The governments concerned and the Commission submit that, on those grounds, as employees in the public service, captains in the merchant navy (and first officers who deputise for them) are covered by the derogation in Article 39(4) EC by reason of the powers and duties conferred by public law which are connected to their posts.

29. Referring specifically to those powers and duties, the *Spanish Government* observes that a feature of the post of captain in the merchant navy is its dual legal status. On the one hand, as a member of senior management, the captain has a special employment relationship with the shipping company. As such, he has extensive managerial and representational powers on board the ship, which is regarded as an independent workplace. On the other hand, the Spanish Government cites a number of statutory provisions under which captains are required to carry out safety and policing duties, and duties relating to the attestation of documents and civil registration. In that sense, captains carry out public duties and, in doing so, resemble the civil servants who usually perform such tasks (police officers, judges, registry officials, etc.).

30. The *other parties* put forward similar arguments and observe that, in most Member States, captains have been granted powers under public law, particularly in regard to policing, and that, unlike the rest of a ship's crew, they exercise special public duties. The parties concerned base that view on the particular demands of the voyage, resulting from the heightened level of risk on the high seas and, above all, from the fact that the ship may not be within the reach of the national authorities. Accordingly, as the Greek Government notes, since a ship is a floating city, it needs a representative of the State and the public interest, or, as the Commission puts it, an on-board public authority in the person of the captain.

31. By contrast, the *Norwegian Government* claims that the official authority traditionally vested in ships' captains is very restricted and of little objective importance in relation to the application of the derogation in Article 39(4) EC. The Norwegian Government points out that present-day technical capabilities mean that there is less need to invoke such authority than in the past when voyages were longer in duration and it was more difficult to obtain instructions from national authorities. Moreover, nowadays more than half of all ships fly flags of convenience, and no major difficulties have resulted from the fact that neither the crew nor the captain of such ships hold the nationality of the flag State.

32. Conversely, the *Spanish* and *GermanGovernments* argue that modern methods of communication are no substitute for the physical presence of a representative of the State who is empowered to take decisions.

33. For its part, in support of the lawfulness of a nationality restriction applying to the posts of captain and first officer, the *Commission* relies on the official authority with which those posts are imbued under the Convention on the Law of the Sea. In accordance with the Convention, every State must effectively exercise its jurisdiction — which is exclusive on the high seas — over each ship flying its flag, and its master, officers and crew. Since ships possess the nationality of the flag State, a genuine link must be established between the State and the ship. For those reasons, States have conferred on captains, and those who deputise for them, wide powers which they exercise in the name of those States.

34. The *German* and *SpanishGovernments* also cite the specific responsibilities of the flag State deriving from international law, in particular the Convention on the Law of the Sea, which require on the part of captains a special loyalty that arises only in the context of a bond of nationality.

35. *Several parties* have also expressed views as to whether the post of a captain who is employed by a private shipping company also comes under the derogation in Article 39(4) EC in the light of the judgments of the Court in Cases C-283/99 (6) and C-114/97, (7) in which it was held that the concept of employment in the public service does not encompass employment by a private natural or legal person.

36. In that regard, the *Commission* considers that, although the Court was seeking to give a general interpretation, that case-law is not necessarily transposable to the particular situation of captains. In fact, the present case differs from the cases on which the Court has ruled so far, in that ships may leave the jurisdiction of the public authorities, where the latter are defined in the strict sense. In those circumstances, there would appear to be grounds for regarding an individual as a public service employee, even if he has no institutional link to the administration, where he has been granted the powers required for the exercise of official authority in the general interests of the State.
37. The *French*, *Danish*, *Greek* and *GermanGovernments* broadly share that position.
38. The French Government observes that the security firm employees with whom the cases cited were concerned did not exercise official authority and carried out their activity, which is ancillary to official authority, exclusively for a private employer, whereas merchant navy captains are granted powers under public law which they exercise on behalf of the State rather than the shipping company.
39. The Greek Government adds that a captain's contract of employment with the merchant navy includes elements of both private and public law. Although the contract is clearly concluded between the captain and the shipping company, there is also involvement on the part of the public authorities because they verify a captain's qualifications and enter the contract in the public register. If it were solely a private relationship and captains were not invested with official authority, the State would be obliged to send a civil servant on board each ship to safeguard general public interests.
40. The German Government is also of the view that, while captains are not, strictly speaking, public service employees, they are, indirectly, authorised agents (*beliehenes Organ*) of the State administration. That accords with the functional concept of administration, which is the basis for settled case-law of the Court.
41. Accordingly, as concerns the question whether the nationality restriction is lawful only in cases in which it is foreseeable and reasonable that it may be necessary for captains and first officers actually to carry out certain public duties, the *Spanish Government* proposes that the answer should be in the affirmative. The Spanish Government goes on to state that it derogated from the general nationality restriction in favour of Spanish captains in the cases referred to in Article 8(3) of Royal Decree No 2062/1999, where the likelihood of having to exercise public authority is very remote. At the hearing, the Spanish Government pointed out that the ships referred to in that provision are smaller ships with a limited operational range which sail within Spanish territorial waters, which means that it is possible to delay slightly the adoption of acts involving the exercise of powers conferred by public law. The ships concerned are involved in the leisure and tourism sector and, for example, operate excursions around the Canary Islands or the Balearic Islands.
42. By contrast, the *other parties* submit that, where a Member State has granted captains powers under public law and entrusted them with official powers to represent the State, factors such as the size of the ship or the likelihood that such powers will be exercised cannot be conclusive. The public duty of State representation is, in fact, permanent in nature, and the only relevant factor is whether or not a captain may exercise the powers and duties concerned. The fact that those powers and duties may be of marginal importance or give a public stamp to the post is immaterial.
43. Finally, the *Spanish*, *French*, *Greek* and *Italian Governments* rely, in the alternative, — or, in the case of the Italian Government, in the main — on the derogation on grounds of public policy, public security or public health, referred to in Article 39(3) EC.
44. In support of that view, the Spanish and French Governments cite the reply of the Commission to Written Question No 2710/96 from Mr Klaus Rehder in regard to the Spanish Shipping Register. (8)
45. However, the *Commission* contends that those grounds cannot be relied on in this case. It is clear from the case-law of the Court (9) and from Directive 64/221/EEC (10) that those grounds apply only to national measures relating to the private conduct of individuals, and, accordingly, the derogation may not be relied upon to exclude a whole field or profession from the application of the principle of freedom of movement by claiming that a captain must maintain public order and safety on board.

B — Assessment
46. The referring court states that captains and first officers in the Spanish merchant navy are employed by shipping companies. Accordingly, access to such posts is, in general, subject to the provisions of Community law governing freedom of movement for workers.
47. In particular, under Article 39(2) EC, freedom of movement for workers also entails a prohibition of discrimination as regards access to employment. Given that a nationality restriction relating to the posts of captain or first officer on a merchant ship is clearly a discriminatory limitation on access to employment, it can only be compatible with the principles that workers should enjoy freedom of movement and not be discriminated against on the basis of the derogations in Article 39(3) and (4) EC.
48. The same may be said of Articles 1 and 4 of Regulation No 1612/98, which are cited in the question referred for a preliminary ruling, since these measures only clarify and give effect to certain aspects of the right to take up employment conferred by Article 39 EC. (11)
49. Accordingly, it is appropriate to examine next whether a nationality restriction attaching to the posts of captain and first officer on Spanish merchant navy ships is lawful on the basis of the derogations referred to in Article 39(3) and (4) EC. Since Article 39(3) EC may only apply to the extent that the derogation relating to employment in the public service under Article 39(4) EC does not apply, (12) I shall examine the latter provision first.

1. The derogation relating to employment in the public service under Article 39(4) EC
50. Article 39(4) EC excludes employment in the public service from the application of the rules governing freedom of movement for workers, thereby allowing Member States to exclude nationals of other Member States from access to posts in that sphere. (13)

51. The referring court also points out that the Court has already ruled on the admissibility of a nationality condition attaching to posts in shipping, specifically in the merchant navy, in regard to the application of the principle of freedom of movement for workers.
52. In *Commission* v *Belgium*, the Court ruled that there had been a failure to comply with the Treaty in that certain posts in shipping were reserved to Belgian nationals. However, in accordance with the application submitted by the Commission, the posts of captain and first officer were not part of the subject-matter of the dispute in those proceedings and, therefore, they were not referred to in the operative part of the judgment. (14)
53. In *Commission* v *Greece*, the Court held that a general nationality condition applicable (inter alia) to all posts in shipping was not covered by the derogation in Article 39(4) EC.
54. In support of its ruling, the Court stated that the majority of posts in the area of (inter alia) sea transport are remote from the specific activities of the public service. (15)
55. However, in *Commission* v *Greece*, the Court did not rule out the possibility that certain posts in that field might be covered by the derogation in Article 39(4) EC.
56. Before undertaking a closer examination of each of the legal issues raised in these proceedings, I will summarise briefly the main elements of the interpretation of Article 39(4) EC given by the Court.

(a) Interpretation of the concept of employment in the public service according to general case-law
57. Recent case-law and the fact that, as the referring court and the Spanish Government point out, captains and first officers on Spanish merchant navy ships are employees of private shipping companies have led the parties to revive the old debate concerning whether the interpretation of the notion of employment in the public service referred to in Article 39(4) EC should be functional or institutional.
58. It should be noted at the outset that, since Article 39(4) EC is a derogation from the general principle that workers should enjoy freedom of movement and not be discriminated against, the concept of public service must be interpreted restrictively. (16)
59. Furthermore, the concept of public service within the meaning of Article 39(4) EC requires uniform interpretation and application throughout the Community, in order to ensure that the effectiveness and scope of the provisions of the Treaty on freedom of movement of workers and equality of treatment of nationals of all Member States shall not be restricted by interpretations of the concept of public service which are based on domestic law alone and which would obstruct the application of Community rules. (17)
60. As the Court has held, the demarcation of that concept cannot be left entirely to the discretion of the Member States. (18)
61. Therefore, the nature of the legal relationship between an employee and the administration which employs him must not be regarded as conclusive, because the legal designations concerned can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of Community law. (19)
62. In any event, the interpretation of Article 39(4) EC must be functional, meaning that it must take account of the nature of the tasks and responsibilities inherent in the post. (20)
63. Only those posts which are typical of the specific activities of the public service may fall within the cope of Article 39(4) EC. (21)
64. It is settled case-law of the Court that such posts must include those 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. (22) The Court has held that such activities include those which presume on the part of those occupying them the existence of a special relationship of allegiance to the State and the reciprocity of rights and duties which form the foundation of the bond of nationality. (23)
65. However, the functional interpretation given by the Court notwithstanding, posts which, from an institutional standpoint, are not capable of belonging to the public service are clearly excluded from the scope of the derogation in Article 39(4) EC, irrespective of the duties they involve.
66. That follows from the most recent-case law on Article 39(4) EC, to which the Commission has referred in particular. In Case C-114/97, the Court in fact held that Article 39(4) EC did not apply — unlike the derogation contained in Article 45 EC —, and did not analyse the powers and duties concerned but simply stated that private security firms do not form part of the public service. (24)
67. Finally, in the judgment in Case C-283/99, the Court specifically distinguished the derogation in Article 39(4) EC from the provisions of the Treaty relating to freedom of establishment and freedom to provide services, which contain derogations in respect of activities connected with the exercise of official authority, declaring that the concept of employment in the public service does not encompass employment by a private natural or legal person, *whatever the duties of the employee*. (25)
68. That declaration by the Court is clear and unambiguous. There is no question but that the Court excluded the security guards concerned from the scope of Article 39(4) EC for the sole reason that they were employed by a private-law body.
69. Furthermore, that criterion for interpretation which, in principle, relates to the organisational or institutional nature of the post, does not necessarily conflict with the earlier case-law of the Court.
70. It can be deduced from that earlier case-law that the aim of the functional criterion is to ensure that the derogation laid down in Article 39(4) EC does not apply to posts which, whilst coming under the State or other organisations governed by public law, still do not involve any association with tasks belonging to the public service properly so called. (26) Moreover, that is the case despite the fact that authorities acting under powers conferred by public law have assumed responsibilities of an economic and social nature or are involved in activities which are not identifiable with the functions which are typical of the public service. (27)
71. Accordingly, prior to the judgment in Case C-283/99, the Court rejected a purely institutional interpretation only in the sense that the exception derogation under Article 39(4) EC would cover all posts having a (merely) organisational link to the institutions of the State.

72. The functional and institutional criteria for determining whether posts belong to the public service are not mutually exclusive. Instead, they complement one another to form the sort of restrictive criterion for interpretation which should be applied in cases where, as in Article 39(4) EC, there is a derogation from the principle that workers should enjoy freedom of movement and not be discriminated against. Accordingly, the question whether or not that derogation is applicable must be examined both from an institutional and a functional perspective.

(b) The specific points of law raised in this dispute

73. Consequently, although, according to case-law, the presumption should be that, in principle, employment by a private-law body is not covered by the derogation in Article 39(4) EC, some of the parties have claimed — rightly, in my opinion — that employment on board a ship differs from typical posts on dry land to the extent that it is appropriate to question whether a purely institutional criterion should be applied to captains.

74. In that connection, the specific feature of this case is not so much the fact that there is an increased risk during sea crossings but rather that ships are able to leave the territory of jurisdiction of the flag State, meaning that they are out of reach of the national authorities through which the flag State exercises its sovereignty.

75. It is clear, inter alia, from Article 94 of the Convention on the Law of the Sea that ships are subject at all times to the jurisdiction and control of the flag State, even when they are outside that State's territorial jurisdiction.

76. Accordingly, it would be appropriate to regard a ship as a floating part of the territory of the flag State.

77. Realistically, official authority in relation to such a part may only be administered via the crew who are on board the ship. Accordingly, should the flag State wish to exercise its official power of administration and have a representative of the State on board, the only way to do so would be to make use of the authorities who are present on the ship, such as the captain or the first officer.

78. In those circumstances, I do not consider it correct that, as a general principle, the post of ship's captain should be excluded from the public service merely on the ground that, formally speaking, the post involves an employment relationship with a private undertaking rather than with the State.

79. Accordingly, it must be stated by way of a provisional conclusion that it is not possible to exclude Article 39(4) EC from applying to ships' captains and their representatives merely on the ground that they are employees of private natural or legal persons.

80. However, as regards the posts at issue in these proceedings, the referring court and the Spanish Government state that the merchant navy ships referred to in Article 8(3) of Royal Decree No 2062/1999, the provision which is the subject of the dispute in the main proceedings, operate exclusively within the territorial waters of the flag State or between ports or territories over which the flag State exercises its jurisdiction.

81. Thus, the premiss on which the above considerations relating to the applicability of Article 39(4) EC are based — that the ship may leave the jurisdictional territory of the State and not be subject to the control of the competent national authorities — does not appear to arise in relation to the disputed posts.

82. One must then consider, however, whether, from a functional point of view — in other words, by reference to the nature of the duties inherent in them —, the posts referred to in the first question are covered by the concept of public service for the purposes of Article 39(4) EC.

83. There is no doubt that, as regards the actual (corporate and technical) management of a ship, the activity of a captain or first officer on a merchant navy ship is not by nature a public service activity. However, it has been claimed that such posts also entail duties of State representation.

84. According to case-law, the question whether the activity of captain entails duties belonging to the public service must, as I have already indicated, be examined in the light of the criteria relating to the exercise of powers conferred by public law and the need to safeguard the general interests of the State, the specific definition of which the Court has yet to rule on.

85. That approach is not without difficulties, since those concepts cannot be defined by reference to the appropriate rules of national law either, because Article 39(4) EC must be interpreted uniformly.

86. In any event, it is appropriate to assume that the expression powers conferred by public law must refer to powers which exceed the powers exercisable by any individual and particularly — as an expression of the essence of State sovereignty — those powers relating to the exercise of the power of constraint. (28)

87. At the same time, the Court routinely refers to the need to safeguard the general interests of the State. In view of the fact that the Court generally uses the conjunction and to link the criterion of participation in the exercise of powers conferred by public law with that of safeguarding the general interests of the State, and since the concept of the public service must be interpreted restrictively, it has also been noted on several occasions that the two requirements must be fulfilled cumulatively. (29)

88. With regard to the powers vested in the posts of captain and first officer in the Spanish merchant navy, I should first of all like to point out that the duties of captains relating to the application and fulfilment of public law obligations, at national, international or Community level, — or instructions, as the German Government calls them — relating to safety during a voyage and the protection of the environment are not akin to the exercise of official authority.

89. It should also be noted, as the referring court and the parties observe, that captains and first officers in the Spanish merchant navy are assigned, as a matter of course, policing duties in relation to persons on board, and in the fulfilment of those duties they are also authorised to impose penalties. That certainly amounts to more than merely making a contribution to the maintenance of public security, which any individual may be called upon or empowered to do. (30)

90. Moreover, under the applicable Spanish provisions, merchant navy captains and the officers who deputise for them are authorised to perform duties relating to civil status and the notarial authority to attest documents, which are based on the general public interest rather than solely on the needs inherent in commanding a ship.

91. On the whole, therefore, I would not dispute that the duties and powers laid down in Spanish law constitute official powers and authority aimed at protecting the general interests of the State, within the meaning of the case-law of the Court.

92. At the same time, however, I would dispute the view put forward by the Commission and some of the other parties who argue that the fact that such powers and duties are *laid down* in the national law of the Member State in question is a sufficient basis for automatically classing an activity as administrative.
93. Rather, in my opinion, it is necessary to adopt a global view based on the duties which are *actually* connected to the post.
94. Otherwise, owing to the powers which unquestionably fall to each Member State to organise its administration as it deems necessary and to imbue certain posts with official authority, there would be a risk that the existence of such official authority, which, in practice, has no relevance or (no longer has) any practical importance, might be used to justify derogations from the scope of the principle of freedom of movement for workers. In that way, each Member State would theoretically be able to prohibit workers from taking up certain types of activity, and that does not appear to be compatible with the requirement that the derogation relating to posts in the public service must be applied restrictively and uniformly.
95. Bearing in mind, therefore, that Article 39(4) EC is a derogation from the principle of free movement and that its scope must be restricted to what is strictly necessary, (31) I do not consider that excluding a post from the principle of freedom of movement for workers on the ground that it constitutes employment in the public service, because of the powers conferred by public law and the duties normally vested in it, amounts to a correct application of the derogation.
96. The information provided by the referring court and the Spanish Government shows that the posts of captain and first officer in the Spanish merchant navy, referred to in the disputed provisions in the main proceedings, are posts in which the exercise of official authority is of little or no practical importance.
97. Having examined all the powers and duties actually connected to the posts of captain and first officer in the Spanish merchant navy, in accordance with Article 8(3) of Royal Decree No 2062/1999, I therefore conclude that such posts do not meet the very strict conditions required for application of the derogation from the principle of freedom of movement for workers under Article 39(4) EC.

2. Whether the nationality restriction can be justified under Article 39(3) EC
98. As regards the derogation contained in Article 39(3) EC, the case-law of the Court of Justice is clear that an exclusion of access to cetain occuptions — in this case those of captain and first officer in the merchant navy — as general as a nationality requirement cannot be justified on the grounds of public policy, public security or public health within the meaning of that article, even if that requirement applies only to certain categories of such posts. (32)
99. The right of Member States to restrict freedom of movement for persons on those grounds is not intended to exclude certain economic sectors or professions from the application of that principle. (33)
100. Accordingly, it does not follow from Article 39(3) EC that it is lawful to lay down a total or partial nationality restriction applicable to posts such as those of captain and first officer in the Spanish merchant navy.
101. In the light of all the above, the answer to the first question must be that Article 39 EC and Articles 1 and 4 of Regulation No 1612/68 must be construed as meaning that a Member State is not entitled to reserve, in a provision such as Article 8(3) of Royal Decree No 2062/1999, the posts of captain and first officer on merchant ships to its own nationals.

V — The second question

A — Main arguments of the parties
102. The parties generally agree that, while Member States definitely have the right to reserve the disputed posts to their own nationals under Article 39(4) EC, they are also entitled to waive that right in whole or in part. The parties disagree, however, over whether, if that right is waived and if there is a total or partial lifting of the restriction on access to those posts, it is necessary to comply with certain rules of Community law which might preclude, for example, the imposition of a condition of reciprocity.
103. The Spanish Government contends that the nationality restriction constitutes a right which the Member States are entitled to exercise or restrict under their own conditions. The Greek and Danish Governments are of the view that, if the unlimited nationality restriction is ruled to be lawful, then the same reply must automatically be given to the second question.
104. Citing Case 149/79, (34) the French Government argues that it is for the Member States alone to lay down rules governing the posts which fall within the scope of Article 39(4) EC, from which it follows that they are free to permit nationals of other States to have access to those posts and to lay down the conditions which they consider to be suitable, including the condition of reciprocity.
105. By contrast, the Commission considers that if there is a partial lifting of the nationality restriction, there must be compliance with the provisions of Community law. Relying on the case-law of the Court, (35) the Commission submits that the condition of reciprocity in the context of access to the disputed posts is incompatible with the principle of equal treatment.
106. The Norwegian Government cites Case 152/73 (36) in support of its contention that the very fact that nationals of other Member States are admitted to the posts in question shows that those interests which justify the exceptions to the principle of equal treatment are not at issue. The French Government counters that, unlike that case, these proceedings are not concerned with working conditions but with access to employment.

B — Assessment
107. By its second question, the referring court essentially seeks to ascertain whether making access to the posts of captain and first officer subject to a condition of reciprocity, such as laid down in Article 8(3) of Royal Decree No 2062/1999, is compatible with the principle of freedom of movement for workers enshrined in Article 39 EC.

108. As I have already pointed out in relation to the first question, posts such as those referred to in Article 8(3) of Royal Decree No 2062/1999 are not covered by the derogation concerning employment in the public service contained in Article 39(4) EC, from which it follows that, under Article 39 EC, a Member State is obliged to guarantee nationals of other Member States access to such posts which is free from any discrimination.
109. It is clear from the settled case-law of the Court that such access may not be made subject to a condition of reciprocity. According to the case-law concerned, implementation of the obligations imposed on Member States by the EC Treaty or secondary legislation cannot be made subject to a condition of reciprocity. (37)
110. Accordingly, the answer to the second question must be that access to posts such as those at issue in the main proceedings may not be made subject to a condition of reciprocity.

VI — Conclusion

111. In the light of the foregoing considerations, I propose that the Court should give the following replies to the questions referred for a preliminary ruling:
(1) Article 39 EC and Articles 1 and 4 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community must be construed as meaning that a Member State is not entitled to reserve, in a provision such as Article 8(3) of Royal Decree No 2062/1999, the posts of captain and first officer on merchant ships to its own nationals.
(2) Access to such posts by nationals of other Member States may not be made subject to a condition of reciprocity.

1 – Original language: German.

2 – Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

3 – See the judgments in Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 33, and Case C-17/92 *Distribuidores Cinematográficos* [1993] ECR I-2239, paragraph 8.

4 – See the judgment in Case C-334/95 *Krüger* [1997] ECR I-4517, paragraph 23.

5 – Commission Notice 88/C 72/02, Freedom of movement of workers and access to employment in the public service of the Member States — Commission action in respect of the application of Article 48(4) of the EEC Treaty (OJ 1988 C 72, p. 2).

6 – .*Commission* v *Italy* [2001] ECR I-4363, paragraph 25.

7 – .*Commission* v *Spain* [1998] ECR I-6717.

8 – OJ 1997 C 83, p. 53.

9 – Judgment in *Commission* v *Spain* (cited in footnote 7), paragraph 42.

10 – 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 security or public health (OJ, English Special Edition 1963-1964, p. 117).

11 – In that connection, see the judgments in Case C-350/96 *Clean Car Autoservice* [1998] ECR I-2521, paragraph 17, and Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 6.

12 – See the judgment in Case 149/79 *Commission* v *Belgium* [1980] ECR 3881, paragraph 10.

13 – See, inter alia, the judgments in Case C-187/96 *Commission* v *Greece* [1998] ECR I-1095, paragraph 17; Case C-248/96 *Grahame and Hollanders* [1997] ECR I-6407, paragraph 32; *Commission* v *Belgium* (cited in footnote 12), paragraph 10; and Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 3.

14 – Judgment in Case C-37/93 *Commission* v *Belgium* [1993] ECR I-6295, paragraph 1 and operative part.

15 – Judgment in Case C-290/94 *Commission* v *Greece* [1996] ECR I-3285, paragraph 34.

16 – See, inter alia, the judgments in Case 225/85 *Commission* v *Italy* [1987] ECR 2625, paragraph 7, and Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 28.

17 – See, in particular, the judgment in *Commission* v *Belgium* (cited in footnote 12), paragraphs 12 and 19.

18 – Judgments in Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207, paragraph 26, and *Commission* v *Belgium* (cited in footnote 12), paragraph 18.

19 – See the judgments in *Sotgiu* (cited in footnote 13), paragraph 5, and Case 307/84 *Commission* v *France* [1986] ECR 1725, paragraph 11.

20 – See the judgments in *Commission* v *Luxembourg* (cited in footnote 18), paragraph 28, and *Commission* v *France* (cited in footnote 19), paragraph 12.

21 – See the judgments in *Commission* v *Luxembourg* (cited in footnote 18), paragraph 27, and, prior to that, *Commission* v *Belgium* (cited in footnote 12), paragraph 12.

22 – See, inter alia, the judgments in *Commission* v *Greece* (cited in footnote 15), paragraph 34, *Lawrie-Blum* (cited in footnote 16), paragraph 27, and *Commission* v *Belgium* (cited in footnote 12), paragraph 10.

23 – See, inter alia, the judgments in *Commission* v *Greece* (cited in footnote 15), paragraph 2, *Lawrie-Blum* (cited in footnote 16), paragraph 28, and *Commission* v *Belgium* (cited in footnote 12), paragraph 10.

24 – Judgment in *Commission* v *Spain* (cited in footnote 7), paragraphs 33 and 35 et seq.

25 – Judgment in *Commission* v *Italy* (cited in footnote 6), paragraph 25. Emphasis added. See also the observations of Advocate General Jacobs at paragraph 26 of his Opinion in that case, to which the Court refers in the passage concerned.

26 – See the judgments in *Commission* v *Luxembourg* (cited in footnote 18), paragraph 2, and *Commission* v *Belgium* (cited in footnote 12), paragraphs 10 and 11.

27 – Judgment in *Commission* v *Belgium* (cited in footnote 12), paragraph 11.

28 – See, in that connection, the definition of the concept of official authority provided by Advocate General Mayras in his Opinion in Case 2/74 *Reyners* [1974] ECR 631, in particular p. 665. See also the Opinion of Advocate General Mancini in *Commission* v *France* (judgment cited in footnote 19) from p. 1729.

29 – See, for example, the Opinion of Advocate General Léger in *Commission* v *Greece* (judgment cited in footnote 15), paragraph 23, and the Opinion of Advocate General Lenz in *Lawrie-Blum* (judgment cited in footnote 16) from p. 2135.

30 – See the findings of the Court in paragraphs 36 and 37 of the judgment in *Commission* v *Spain* (cited in footnote 7) in relation to the exercise of official authority under Article 45 EC, which can be applied in full to this case.

31 – See the judgments in *Commission* v *Italy* (cited in footnote 16), paragraph 7, and *Lawrie-Blum* (cited in footnote 16), paragraph 28. See also the Opinion of Advocate General Lenz in *Lawrie-Blum*, from p. 2136, which refers to the principle of proportionality in this context.

32 – See, inter alia, the judgments in *Commission* v *Spain* (cited in footnote 7), paragraphs 40 to 42, and Case 131/85 *Gül* [1986] ECR 1573, paragraph 17.

33 – Ibid.

34 – Judgment in *Commission* v *Belgium* (cited in footnote 12), paragraph 10.

35 – Judgments in Case 1/72 *Frilli* [1972] ECR 457, paragraph 19, and Case 186/87 *Cowan* [1989] ECR 195, paragraph 20.

36 – Judgment in *Sotgiu* (cited in footnote 13), paragraph 4.

37 – Judgment in Case C-142/01 *Commission* v *Italy* [2002] ECR I-4541, paragraph 7. See also the judgments in Case C-163/99 *Portugal* v *Commission* [2001] ECR I-2613, paragraph 22; Case C-101/94 *Commission* v *Italy* [1996] ECR I-2691, paragraph 27; Case 325/82 *Commission* v *Germany* [1984] ECR 777, paragraph 11; and Case 232/78 *Commission* v *France* [1979] ECR 2729, paragraph 9.