

Sea Watch Case: CJEU rules in favor of limiting Italian Port Authorities' powers of inspection and detention

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On August 2, 2022, the Court of Justice of the European Union issued an important judgment on several preliminary questions concerning the implementation of the port State inspection and detention system provided for in Directive 2009/16/EC¹ with respect to vessels engaged in search and rescue of persons at sea.

The decision concerns two proceedings brought before the Regional Administrative Court of Sicily by the NGO Sea Watch, a humanitarian non-profit organization operating in the central Mediterranean, in order to request the annulment of the detention orders issued by the Port Authorities of Palermo and Porto Empedocle, respectively against the ships "Sea Watch 4" and "Sea Watch 3," owned by the organization.

In the summer of 2020, the two German-flagged vessels, after rescuing several hundred people in the international waters of the Mediterranean Sea, had received instructions from the Italian authorities to head to the ports of Palermo and Porto Empedocle and proceed with their disembarking and transfer to ships located in the same ports. Once such operations, as well as the disinfection procedures for the prevention of COVID-19, had been carried out, the respective Harbour Masters'

offices had ordered the detention of both vessels under Legislative Decree 53/11², invoking the lack of certification for search and rescue activities at sea, the vessels being instead certified by a German body as "general-purpose cargo" vessels, as well as the lack of a certificate authorizing the transport of such a large number of people. There were also allegations of "technical and operational deficiencies" that were regarded as hazardous to safety, health, or the environment.

Questioned by the referring Court, the Court of Justice first confirmed the inclusion in the scope of Directive 2009/16 also of ships which *"although classified and certified as cargo ships by the flag State, are in practice being systematically used by a humanitarian organisation for non-commercial activities relating to the search for and rescue of persons in danger or distress at sea"*, resulting in the applicability of the inspection and detention mechanism provided for in Articles 11 to 13 and 19 thereof³. These provisions, the Court states, and thus the contents and limits of the powers they confer on the port State, must be interpreted in light of the 1982 Montego Bay Convention (UNCLOS) and the 1974 International Convention for the Safety of Life at Sea (SOLAS). In particular, the former expressly

1. Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control. [LINK](#)

2. Implementing Directive 2009/16/EC

3. Article 3 of the Directive provides that the same "shall apply to any ship and its crew calling at a port or anchorage of a Member State to engage in a ship/port interface" with the exception of "Fishing vessels, warships, naval auxiliaries, wooden ships of a primitive build, government ships used for

non-commercial purposes and pleasure yachts not engaged in trade." According to the Court, said exceptions shall not include by analogy, ships which, like those at issue, are in practice used for non-commercial purposes without being government ships or pleasure yachts. Moreover, by virtue of the principle of primacy of Union law, Article 3 Legislative Decree No. 53/2011, which limits the scope of application of the directive to vessels used for commercial purposes, does not preclude its applica-

lays down a "duty to render assistance at sea" pursuant to which *"every State must require any master of a ship flying its flag to render assistance to persons in danger or distress at sea, in so far as he or she can do so without serious danger to his or her ship, the crew or the passengers, and in so far as such action may reasonably be expected of him or her."* The latter, on the other hand, includes that the people who are on board by reason of force majeure or in consequence of the obligation laid upon the master to carry shipwrecked or other persons must not be taken into account for the purpose of ascertaining the application to that ship of the provisions of that convention.

Under the same principles, the Court continues, the port State may subject ships systematically carrying out search and rescue activities and which are located in one of its ports or in waters falling within its jurisdiction to an additional inspection⁴, if that State has established, on the basis of detailed legal and factual evidence, that there are serious indications capable of proving that there is a danger to health, safety, on-board working conditions or the environment. In particular, in the case at hand, the number of persons on board, although higher than allowed by the certification in place, did not appear to be sufficient to meet the "unexpected factor" requirement of the directive⁵, thus not being able to justify in itself a control by the port state authorities. Moreover, a different interpretation would have hindered the effective implementation of the obligation to rescue at sea under the Montego Bay Convention and would not have been in accordance with the

provision of the Convention on the Safety of Life at Sea mentioned above.

Regarding the extension of inspection powers, the European court, providing a restrictive interpretation of the relevant provision of the Directive⁶, holds that the port State does not have the power to demand ships that, although certified by the authorities of the flag state as cargo ships, are systematically used for activities relating to the search for and rescue of persons in danger or distress at sea, to hold certificates other than those issued by the flag state or that they comply with the requirements applicable to a different certification. This is also by virtue of the rules of international law governing the division of powers between the port state and the flag state.

It follows that the port state may not order the detention of the ship merely because of the lack of certificates suitable for the activity actually carried out, nor make the revocation of the same measure conditional on the possession of such certificates⁷. A measure that, the Court states, can be ordered if the port State finds that a ship had been operated in a manner posing a danger to persons, property or the environment and that such a danger or future risk is a clear hazard and that the deficiencies giving rise to that danger or risk, either individually or together, make the ship concerned unseaworthy.

Finally, the Court specifies that the corrective measures that the port state is authorized to impose if the inspection reveals deficiencies having the

tion.

4. Article 11(b) of Directive 2009/16, read in conjunction with Article 12 requires port States to subject such ships both to periodic inspections, which must be organised at predetermined intervals depending on the risk profile of those ships, and to additional inspections regardless of the period since their last periodic inspection, in respect of ships displaying "overriding factors" (All.I, pt II, 2A). They also have the option to subject ships to additional inspection in case of "unexpected factors" (All.I, pt II, 2B).

5. See note 4

6. Article 13 of Directive 2009/16 provides that "Member States shall ensure that ships which are selected for inspection in accordance with Article 12 (...) are subject to an initial inspection or a more detailed inspection as follows:

1. On each initial inspection of a ship, the competent authority shall ensure that the inspector, as a minimum:
 - (a) checks the certificates (...)required to be kept on board in

accordance with Community maritime legislation and Conventions relating to safety and security; (c) satisfies himself of the overall condition of the ship, including the hygiene of the ship, including engine room and accommodation. (...)

3. A more detailed inspection shall be carried out, including further checking of compliance with on-board operational requirements, whenever there are clear grounds for believing, after the inspection referred to in point 1, that the condition of a ship or of its equipment or crew does not substantially meet the relevant requirements of a Convention(...)

7. Art.19 of Directive 2009/16 provides that: "(...) 2.In the case of deficiencies which are clearly hazardous to safety, health or the environment, the competent authority of the port State where the ship is being inspected shall ensure that the ship is detained or that the operation in the course of which the deficiencies are revealed is stopped. The detention order (...)shall not be lifted until the hazard is removed or until such authority

above characteristics must be suitable, necessary, and proportionate, and thus appropriate for the elimination of the danger to the safety and health of passengers or crew, other ships, and the marine environment

establishes that the ship can, subject to any necessary conditions, proceed to sea or the operation be resumed without risk to the safety and health of passengers or crew, or risk to other ships, or without there being an unreasonable threat of harm to the marine environment.

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