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**According to Advocate General Rantos, the compliance with international standards of private ships engaged in regular sea search and rescue activities may be monitored by the port State**

*Under EU law, the port State may adopt detention measures where the inaccuracies found pose a manifest risk to safety, health or the environment*

Sea Watch is a non-profit humanitarian organisation with its registered office in Berlin (Germany). Its purpose is, in particular, search and rescue at sea and it carries out that activity in international waters of the Mediterranean Sea using ships of which it is both the owner and operator. Those ships include Sea Watch 3 and Sea Watch 4, which fly the German flag and have been certified as 'general cargo/multipurpose ships'. During the summer of 2020, after carrying out rescue operations and disembarking those rescued at sea at the ports of Palermo (Italy) and Port Empedocles (Italy), the ships were subject to more detailed on-board inspections by the port authorities of those two cities on the ground that they had engaged in search and rescue at sea while they were not certified for that service and had recovered on board a considerably greater number of persons than the number certified. The inspections identified a number of technical and operational deficiencies, some of which were considered as clearly hazardous to safety, health or environment, and therefore both port authorities ordered that the ships be detained.

Following the detention of the ships, Sea Watch brought before the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily, Italy) two actions for annulment, *inter alia*, of the detention notices and the inspection reports which preceded those notices. In support of its actions, Sea Watch claimed, in essence, that the port authorities from which those measures emanate had exceeded the powers conferred on the port State under Directive 2009/16,<sup>1</sup> interpreted in the light of applicable customary and treaty-based international law.

Consequently, the Tribunale amministrativo regionale per la Sicilia referred questions to the Court of Justice for a preliminary ruling in order to ascertain whether Directive 2009/16 applies to the ships concerned but also to clarify the conditions and extent of the port State's powers of control and the conditions for detaining a ship.

In his Opinion delivered today, Advocate General Athanasios Rantos considers **that Directive 2009/16 applies to ships**, such as those at issue, which, while being **registered as 'multipurpose ships', carry out search and rescue at sea. Directive 2009/16 applies to any ship** and its crew calling at a port or anchorage of a Member State to engage in a ship/port interface. Among ships used for non-commercial purposes, only specific categories of ship – to which the legislature wanted to limit the exception – are excluded from the scope of that directive.<sup>2</sup>

He takes the view that that finding is confirmed by the objectives of **Directive 2009/16**, consisting in **helping to drastically reduce substandard shipping** in the waters under the jurisdiction of

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<sup>1</sup> Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (OJ 2009 L 131, p. 57), as amended.

<sup>2</sup> Namely, government ships used for non-commercial purposes and pleasure yachts not engaged in trade (Article 3(4) of Directive 2009/16).

Member States in order, inter alia, **to enhance safety, pollution prevention and on-board living and working conditions.**

As regards the **conditions justifying an additional inspection by the port State**, the Advocate General takes the view that it is clear that **a ship systematically carrying a greater number of persons** than the maximum number that can be carried according to its certificates **may, in certain circumstances, pose a danger to persons, property or the environment.** Such a circumstance is, in principle, capable of constituting an **'unexpected factor'** and **justifying an 'additional inspection'** within the meaning of Directive 2009/16.<sup>3</sup> **However, this is a factual assessment to be made on a case-by-case basis by the national court**, which cannot confine itself to a strict finding of the difference between the number of persons carried and the number of persons whose carriage is authorised, but is required specifically to assess the risks of such action, taking into account **the duty to rescue at sea** laid down by customary international law.<sup>4</sup>

So far as concerns **the extent of port State control**, the Advocate General points out that **a more detailed inspection is to be carried out where, after an initial inspection, there are 'clear grounds' for believing that the condition of a ship does not meet the requirements of an applicable international convention.** In the present case, the 'clear ground' is the fact that inaccuracies were found during examination of the certificates and other documentation. Such monitoring is not limited to the formal requirements prescribed by the certificates relating to the classification of the ship, but instead concerns the ship's compliance with all applicable rules of international conventions on safety, pollution prevention and on-board living and working conditions, taking into account the actual condition of the ship and its equipment as well as the activities in which the ship is actually engaged and the activities for which it has been classified. The Advocate General, while explaining that, to date, there has been no classification under EU or international law of ships engaged in sea search and rescue activities, states that the fact that a ship is not operated in accordance with its certificates may constitute a breach of the requirements relating to on-board operational procedures and may in particular pose a danger to persons, property or environment.

Consequently, the Advocate General concludes that the port State can ensure compliance with applicable international conventions and EU legislation on maritime safety and security, protection of the marine environment and on-board living and working conditions, taking into account the activities in which the ship is actually engaged, provided that such monitoring does not impinge upon the powers of the flag State as regards the classification of the ship or compliance with the duty to rescue at sea. **The mere fact that a ship systematically engages in search and rescue at sea does not exempt that ship from complying with the requirements applicable to it under international or EU law** and does not preclude that ship from being subject to detention measures under Article 19 of that directive where it infringes those rules.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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<sup>3</sup> Under Annex I, Part II 2B and Article 11 of Directive 2009/16, ships are to be subject to additional inspections by the port State only where 'overriding factors' or 'unexpected factors', set out in an exhaustive list, apply. Unexpected factors include 'ships which have been operated in a manner posing a danger to persons, property or the environment'.

<sup>4</sup> The duty to rescue at sea which falls on the master of a ship under customary international law is enshrined, inter alia, in Article 98 of the Convention on the Law of the Sea. That provision, which is headed 'Duty to render assistance', states in paragraph 1: 'Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him ...'

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