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**CASE LAW COMMENTARY**

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ECJ, judgment of 1 August 2022, *Sea Watch eV v. Ministero delle infrastrutture e dei trasporti*, and Others, C-14/21 and C-15/21

***The Sea Watch case before the European Court of Justice:  
Is there a difference between occasional and systematic SAR activities?***

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***Parole chiave***

*Sea Watch – Preliminary ruling – Article 267 TFEU – Search and Rescue – maritime safety*

***Abstract***

*The article examines the decision of the ECJ, contextualising it within a systemic policy adopted by EU Member States – and in particular Italy – to curb migration flows in the Mediterranean. It explains that the ECJ introduced a distinction between occasional and systematic SAR activities, although the legal instruments employed by the Court in its decision do not contain such a distinction. Finally, it argues that the absence of an international and European legal framework on privatized SAR operations is causing substantial uncertainties and legal dilemmas and should be redressed by EU Member States through a new agreement aimed at filling the legal lacuna.*

## A. FACTS OF THE CASE AND DECISION

### 1. *The Sea Watch cases before the ECJ*

On the 1st of August 2022, the Court of Justice of the European Union (ECJ) delivered its much-awaited judgment in joined cases [C-14/21](#) and [C-15/21](#). The cases centered on two requests for a preliminary ruling under Article 267 TFEU submitted by the Regional Administrative Court of Sicily (TAR). They concerned the legality of two detention orders issued by the Italian authorities *vis-à-vis* the *Sea Watch 3* and the *Sea Watch 4*, rescue vessels owned by the NGO Sea Watch eV, a humanitarian NGO registered in Berlin.

### 2. *Sea Watch SAR activities and the Harbour Master's Offices' detention orders*

During the summer of 2020, *Sea Watch 3* and *Sea Watch 4* rescued several hundred persons in distress in the Mediterranean Sea, whose disembarkation was authorized by the Italian Ministry of the Interior in Porto Empedocle and in the Port of Palermo. After disembarkation, on board inspections were carried out by the port authority of both ports (based on Italian Legislative Decree No 53/2011, transposing Directive 2009/16 in Italian law).

The Harbour Master's Offices considered, in the first place, that the ships were engaged in assisting migrants at sea while not being certified for the intended service. In addition, they noted some "technical and operational deficiencies" in relation to the applicable EU legislation and international conventions. The vessels had embarked far more people than those they were authorized to. Finally, the Harbour Master's Offices issued detention orders, considering that the two ships were unequipped for SAR activities, although they had been systematically and exclusively employed for such a purpose.

Sea Watch brought two actions for annulment of the confiscation before the Regional Administrative Court of Sicily. The NGO alleged, *inter alia*, that the inspections constituted a means to frustrate SAR activities conducted by Sea Watch in the Mediterranean.

### 3. *The content of the request for a preliminary ruling under Article 267 TFEU*

The TAR filed two preliminary ruling requests to the ECJ, demanding clarifications on the interpretation of [Directive 2009/16 on Port State Control](#), containing rules on maritime safety, and protection of the maritime environment, along with procedures on inspection and detention of vessels. The requests were aimed at ascertaining whether the Directive is to be interpreted as applying to ships that, although classified and certified as cargo ships by the flag State, are systematically used by a humanitarian organization for non-commercial activities relating to the search and rescue of persons in distress at sea. In addition, the Italian Administrative Court asked the ECJ to clarify the conditions for implementing the monitoring,

inspection, and detention mechanism provided for in Articles 11 to 13 and 19 of Directive 2009/16 with regard to humanitarian assistance ships subject to the jurisdiction of the port State. It also requested clarifications as to the consequences (if any) envisaged by the Directive in case of a SAR vessel carrying a higher number of persons that indicated in the safety certificate of the ship.

#### ***4. The decision of the Court***

Preliminarily, the ECJ explained that the Convention on the Law of the Sea ([UNCLOS](#)) is binding on the European Union and its provisions form an integral part of the EU legal order, enjoying primacy over acts of EU secondary legislation. The Court also recalled that Article 18(2) UNCLOS enables a ship that has rendered assistance to shipwrecked individuals to transit, stop, or anchor in the territorial sea of a coastal State.

That being said, the Court deemed that the ships subject to Directive 2009/16/EC on Port State Control include those which, although being classified and certified as cargo ships by the flag State (Germany classified the two *Sea Watch* vessels as general cargo/cargo multipurpose), are *systematically* used by a humanitarian organisation for non-commercial activities relating to the search and rescue of persons in danger at sea.

Put differently, the Court established a distinction between occasional and systematic SAR activities. As a result, provisions such as Article 4(b) of the SOLAS Convention, containing exceptions to the general rules on safety of navigation for ships *exceptionally* engaged in SaR operations, are not applicable to ships *systematically* engaged in SaR activities (see section B.3).

Nonetheless, the Court considered some exceptions to be applicable in the event of port State controls carried out on humanitarian vessels. In particular, it explained that Article IV of the [SOLAS Convention](#) (Safety of Life at Sea Convention) should be considered when interpreting the EU Directive. This provision prescribes that “[p]ersons who are on board a ship by reason of *force majeure* or in consequence of the obligation laid upon the master to carry shipwrecked or other persons shall not be taken into account for the purpose of ascertaining the application to a ship of any provisions of the present Convention”. Thus, the ECJ concluded that the mere overcrowding – due to a SAR operation – does not constitute a permitted ground for a confiscation under EU law.

In addition, the Court clarified that the port State may subject NGO ships to inspections, pursuant to the Directive, *only as far as* 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.

Furthermore, the ECJ explained that, where it is established that NGOs' vessels classified as cargo ships may pose such a danger, the port State may not make the non-detention of such vessels or the lifting of the seizure subject to the condition that the ships hold certificates appropriate to SAR activities. On the contrary, the port State may impose corrective measures aimed at avoiding the detected threats. Such corrective measures must, pursuant to the decision of the Court, be suitable, necessary, and proportionate.

## **B. COMMENT**

### ***1. The criminalization of humanitarian sea rescue***

As of spring 2020, many NGOs' vessels have been [subject to inspections](#) by the Italian Coast Guard. The inspections are systematically followed by the administrative detention of the ships, justified by alleged violations of the international legal framework on the safety of navigation, the protection of marine environment and maritime labour. For example, *Aita Mari*, *Ocean Viking*, *Open Arms* and *Sea Watch 4* were inspected and detained once, and *Alan Kurdi* and *Sea Watch 3* were [detained twice](#). NGOs have claimed that the detention of their vessels generates a [humanitarian lacuna at sea](#), with more migrants losing their lives on the migratory route. Accordingly, administrative detention of NGOs rescue ships is to be understood in the context of a systemic policy adopted by EU States – and in particular Italy – to curb migration flows.

As underlined by [law of the sea scholars](#), EU Member States' approach toward NGOs engaged in SaR operations has long been ambiguous. On the one hand, the crucial lifesaving role of such organizations is generally acknowledged and praised. On the other hand, commentators and legal scholars are witnessing a progressive criminalization of these activities.

Notably, in her [speech of 19<sup>th</sup> of January](#), EU Commissioner Johansson acknowledged the crucial role of NGOs in rescuing human lives at sea, underlining that effective search and rescue in the Mediterranean is essential. The Commissioner forcefully stated that humanitarian assistance should not be criminalized and regretted that only nine EU Member States make explicit exception from punishment in case of humanitarian assistance.

### ***2. The absence of an international and European legal framework on privatized SAR activities***

Under a different perspective, the judgment reveals the difficulties caused by the absence of a European or international legal framework regulating SAR activities carried out by private entities – such as NGOs – despite, as acknowledged by the EU Commission in its [Recommendation on privately-operated SAR activities](#), since 2015 “[a] new form of search and rescue operations in the European maritime landscape has emerged whereby vessels operated by NGOs in the Central Mediterranean Sea have been engaged, as their predominant activity, in search and rescue operations”. This legal lacuna entails the need, for State authorities, to

refer to the framework on safety at sea and marine protection generally applicable to any seagoing vessel, such as Directive 2009/16, with foreseeable uncertainties, doubts and inconsistencies caused by an interpretation by analogy.

The absence of a legal framework governing humanitarian SAR activities also entails, as underlined by [Advocate General Rantos](#) in his conclusions, that neither EU law nor international law provides a formal classification of ships carrying out SAR activities at sea. Thus, civil society ships are today classified under different vessel categories. For example, the *Mare Jonio* is classified as a towboat, the *Sea Watch* as a cargo ship, and the *Aita Mari* as a fishing vessel.

As a consequence, it could be argued that the absence of specific rules entails that there are no prohibitions or legal obstacles to carrying out SAR activities, which are in line with precise international obligations. Certainly, such an interpretation would greatly facilitate the mission of NGOs conducting SAR activities at sea.

However, it is useful to recall that the lack of a dedicated international legal framework is motivated by the fact that, before 2015, SAR operations carried out by private entities were perceived as an accidental and exceptional event, as such contemplated by the SOLAS Convention in Article 4(b), by the IMO guidelines (Section 4 of the appendix to Resolution MSC.167 (78)), and by the [MARPOL Convention](#). Therefore, in the event of the (much needed) adoption of a specific legal discipline on NGOs' SAR activities, it will be necessary to decide whether the respect of the duty to rescue at sea justifies a "standing" exception to the safety standards contained in the relevant legislation, or whether specific safety standards should be applied in the case of privatized SAR operations.

Furthermore, the SAR and disembarkation activities carried out within the SAR regions of EU Member States are [not covered by a common EU legal framework](#) because, as the EU Commission has consistently [emphasised](#), SAR is not an EU competence, although the Commission has been repeatedly trying to find a [harmonised approach](#) on the matter. Therefore, it will be up to the Member States to reach a compromise on this subject matter, with a view to achieving a common approach and, hopefully, a political agreement on a set of guidelines on search and rescue at sea (and on the safety standards applicable to NGOs' vessels operating SAR).

### ***3. Is there a difference between occasional and systematic SAR activities?***

One last point to address is linked to the distinction between occasional and systematic SAR activities. In fact, the ECJ introduced a differentiation between vessels conducting SAR operations incidentally, that is, as an exceptional event in the course of their navigation, and those systematically involved in humanitarian sea rescue. On the one hand, ships *exceptionally*

involved in a rescue operation are deemed to fall within the exception to the standards of safety in navigation provided by the SOLAS Convention in Article 4(b), by the IMO guidelines (Section 4 of the appendix to Resolution MSC.167 (78)) and by the MARPOL Convention. On the other hand, the Court affirms that vessels *systematically* carrying out SAR operations fall outside the scope of application of the above-mentioned derogation. As a result, it may be argued that the Court introduced a distinction, for the purpose of the application of derogations to the standards on safety in navigation, between a so-called “occasional” SAR activity and an institutional and systematic activity aimed at protecting human life at sea.

Remarkably, the decision of the Court embraces the Italian approach, explained in the [letters](#) that Italian authorities sent in January 2020 to the flag States’ of the impounded vessels. In the letters, Italian coastal authorities explain that the derogation contained in the SOLAS and MARPOL Conventions is not applicable to NGOs’ vessels *“since the ship is providing a regular service [therefore Italian authorities] consider the provision on “force majeure” and “exceptions” contained in SOLAS and MARPOL Conventions respectively to not be applicable”*.

A strictly literal interpretation of the SOLAS Convention, the IMO guidelines and the MARPOL Convention, however, demonstrates that these legal instruments do not envisage any difference between an occasional SAR activity and a systematic one, giving absolute priority to the fulfilment of the obligation to provide assistance to persons in distress at sea. In addition, the exemption from the application of certain conventional rules in case a ship is engaged in SAR activities is explicitly mentioned in the IMO Guidelines on the Treatment of persons rescued at sea. As a matter of fact, such a derogation responds to the [need to strike a balance](#) between the safety of navigation, health, on-board working conditions or the environment, on the one hand, and the protection of human life in the high seas. Therefore, if the aim of such an exemption is represented by the need to facilitate the provision of assistance to persons shipwrecked at sea, the mentioned derogation should be applied regardless of the circumstance that a vessel carries out life-saving activities on a systematic or exceptional basis.

Further, although the Court explicitly required that port authorities demonstrate the existence of “serious indications of a danger to health, safety, on-board working conditions or the environment” before carrying out a thorough inspection on board of a SAR vessel, it failed to specify what could be considered as a serious indicator of such dangers. Thus, the judgment leaves a door open to numerous possible interpretations on the part of different port authorities and States. Who will oversee the “seriousness” of the indications invoked by State authorities? The potential for new litigation is immense. In fact, as explicitly provided by Directive 2009/16, the owner of a ship that is detained on the basis of such a Directive has the right to challenge the detention order and the remedy must be guaranteed by the law of the port State.

#### ***4. The necessity of a homogeneous legal framework on privatized SAR activities***



The ECJ delivered a crucial judgment, not only because of its potential legal consequences and future applications, but also because it unveiled the uncertainties surrounding the issue of privatized SAR operations. Nonetheless, given the above-mentioned limits to EU competences, as well as the division of competences between EU institutions, it must be borne in mind that the ECJ cannot act as a legislator, autonomously filling the legal *lacunae* in the EU legal order. Rather, it is up to the Member States to reach a political agreement and enact specific legislation applicable to all the private vessels conducting SAR in the Mediterranean. However, as noted in the [academic literature](#), neither EU law nor State legislation providing for specific safety requirements applicable to NGOs' vessels could limit the shipmaster's obligation to render assistance to anyone in distress at sea.

### C. FURTHER READINGS

#### To read the text of the judgment:

ECJ, judgment of 1 August 2022, *Sea Watch eV v. Ministero delle infrastrutture e dei trasporti, and Others*, C-14/21 and C-15/21

#### Literature:

S. CARRERA ET AL., [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update](#), Study requested by the PETI committee, European Parliament, Brussels, December 2018

E. CUSUMANO, M. VILLA, [From 'Angels' to 'Vice Smugglers': The Criminalization of Sea Rescue NGOs in Italy](#), in *European Journal on Criminal Policy and Research*, 2021, pp. 23-40,

F. DE VITTOR, [Questioni di interpretazione e applicazione delle convenzioni internazionali sulla sicurezza in mare: Il fermo amministrativo della nave Sea Watch 4 al vaglio della giustizia amministrativa siciliana](#), in *Diritto & Questioni Pubbliche*, XXI, 2021, Special Issue (July), pp.103-115

F. DE VITTOR, [Il Port State Control sulle navi delle ONG che prestano soccorso in mare: tutela della sicurezza della navigazione o ostacolo alle attività di soccorso](#), in *Diritti umani e diritto internazionale*, 2021, pp.103-127

N. MADJIDAN, [Seenotrettung vor dem EuGH. Seenotrettungsorganisationen wehren sich gegen die Festsetzung ihrer Schiffe](#), in *Verfassungsblog*, August 2022

V. MORENO-LAX, [A New Common European Approach to Search and Rescue? Entrenching Proactive Containment](#), in *EU Immigration and Asylum Law and Policy*, Special series of posts on the New Migration Pact, February 2021

E. PAPASTAVRIDIS, [Sea Watch cases before the EU Court of Justice: An analysis of International Law of the Sea](#), in *EU Immigration and Asylum Law and Policy*, December 2022

E. ROSAFIO, [Port State Control e attività sistematica di ricerca e soccorso di persone nelle acque internazionali del Mar Mediterraneo](#), in *ADiM Blog*, November 2022

S. SCARPA, [Ships Involved in Search and Rescue Activities Shall Comply with Relevant International and EU Law...but States Have an Obligation to Guarantee Assistance to those in Distress at Sea!](#), in *EU Law Live*

F. VASSALLO PALEOLOGO, [Gli obblighi di soccorso in mare nel diritto sovranazionale e nell'ordinamento interno](#), in *Questione Giustizia*

**Other materials:**

[Commission Recommendation \(EU\) 2020/1356 of 23 September 2020](#) on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities

[Commissioner Johansson's speech at the Plenary debate on criminalisation of humanitarian assistance](#), 19 January 2023

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

European Parliamentary Research Service, *Search and Rescue in the Mediterranean*, January 2021

[International Convention for the Prevention of Pollution from Ships](#), London, 2 November 1973

[IMO Guidelines on the treatment of persons rescued at sea](#), Resolution MSC.167(78), London, 20 May 2004

[International Convention for the Safety of Life at Sea](#), London, 1 November 1974

[Opinion of Advocate General Rantos](#), delivered on 22 February 2022, in Joined Cases C-14/21 and C-15/2021

[United Nations Convention on the law of the Sea](#), Montego Bay, 10 December 1982,

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