Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 22 February 2022 [1]

Joined Cases C-14/21 and C-15/21

Sea Watch eV
v
Ministero delle Infrastrutture e dei Trasporti and
Capitaneria di Porto di Palermo (C-14/21)
Ministero delle Infrastrutture e dei Trasporti and
Capitaneria di Porto di Porto Empedocle (C-15/21)

(Requests for a preliminary ruling from the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily, Italy))

(Reference for a preliminary ruling – Maritime transport – Activities relating to search and rescue at sea – Regime applicable to ships – Directive 2009/16/EC – Control powers of the port State – Article 3 – Scope – Article 11 – Conditions for an additional inspection – Article 13 – More detailed inspection – Extent of control powers – Article 19 – Detention of ships)

I. Introduction

1. These requests for a preliminary ruling have been made by the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily, Italy) in two sets of proceedings between Sea Watch eV and the Ministero delle Infrastrutture e dei Trasporti (Ministry of Infrastructure and Transport, Italy) and the Capitaneria di Porto di Palermo (Port of Palermo Harbour Master's Office, Italy), in the first case, and the Capitaneria di Porto di Porto Empedocle (Port of Porto Empedocle Harbour Master's Office, Italy), in the second case, concerning two detention orders issued by each of those harbour master's offices with regard to, respectively, the ships known as *Sea Watch 4* and *Sea Watch 3* ('the ships at issue').

2. The questions referred concern, in essence, the extent of the control powers of the port State, pursuant to Directive 2009/16/EC [2] and the other applicable international rules, over private ships which systematically and exclusively carry out activities relating to the search for and rescue of

[1] Original language: French.

[2] Directive of the European Parliament and of the Council of 23 April 2009 on port State control (OJ 2009 L 131, p. 57, and corrigendum OJ 2013 L 32, p. 23), as amended by Directive 2013/38/EU of the European Parliament and of the Council of 12 August 2013 (OJ 2013 L 218, p. 1, and corrigendum OJ 2014 L 360, p. 111), by Regulations (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 (OJ 2013 L 330, p. 1) and 2015/757 of the European Parliament and of the Council of 29 April 2015 (OJ 2015 L 23, p. 55), and by Directive (EU) 2017/2110 of the European Parliament and of the Council of 15 November 2017 (OJ 2017 L 315, p. 61) ('Directive 2009/16').

persons in danger or distress at sea ('maritime search and rescue activities'). The Court is called upon, more specifically, to clarify the scope of Directive 2009/16 and the frequency and intensity of controls, as well as the basis for detention measures.

3. The main difficulty posed in these cases is the absence of international or European legislation regulating the systematic engagement in maritime search and rescue activities by private entities; [3] activities which have increased significantly in recent years, in light of the failure of State and international organisations to confront the increasingly serious situation relating to the safety of persons crossing the Mediterranean Sea on makeshift vessels.

4. To date, the international and European legislatures have refrained from filling that lacuna and thus directly adopting a position with regard to that phenomenon, [4] the current importance of which is demonstrated by the fact that private ships which systematically carry out maritime search and rescue activities cooperate, in reality, with the State systems concerning maritime search and rescue. [5] The absence of specific rules concerning that practice is, however, conducive to the emergence of ambiguous situations, in which the presence of private ships regularly carrying out maritime search and rescue activities may lead to a circumvention of the rules for entering Union territory and may even encourage that type of activity. Nevertheless, I should point out, first of all, that the present cases do not concern search and rescue activities themselves; instead they concern a different, subsequent stage, namely the inspection of ships after the disembarking of 'shipwrecked persons'.

[3] The only legislation concerning private vessels and therefore their operators is Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 17) (see, in that regard, Dumas, P., 'L'obligation de prêter assistance aux personnes en détresse en mer au prisme du droit de l'Union', *Revue des affaires européennes*, 12/2019, pp. 305 to 327). In contrast, the rules relating to maritime search and rescue activities in the context of border surveillance operations carried out by Member States at their external sea borders are laid down by Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2014 L 189, p. 93). Moreover, the only existing treaties refer to maritime rescue in situations which contain essential elements, namely the 'accidental' and 'exceptional' nature of that rescue. Those provisions must nevertheless be interpreted and applied as broadly as their wording and their legal context allows, but not beyond.

[4] The only EU 'legislation' dealing expressly with that issue is, to my knowledge, Commission Recommendation (EU) 2020/1365 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 (OJ 2020 L 317, p. 23), which is not, by its very nature, binding and therefore merely states an obligation for cooperation between the competent authorities of the Member States concerned.

[5] For example, the organisations which manage those ships must cooperate with the maritime rescue coordination centres of the coastal Member States, which give them directions regarding the possibilities for the disembarking and transhipment of rescued persons in the Member State in question.

II. Legal framework

A. European Union law

5. Directive 2009/16[6] concerns port State control of shipping. Recital 6 of that directive is worded as follows:

'Responsibility for monitoring the compliance of ships with the international standards for safety, pollution prevention and on-board living and working conditions lies primarily with the flag State. Relying, as appropriate, on recognised organisations, the flag State fully guarantees the completeness and efficiency of the inspections and surveys undertaken to issue the relevant certificates. Responsibility for maintenance of the condition of the ship and its equipment after survey to comply with the requirements of Conventions applicable to the ship lies with the ship company. However, there has been a serious failure on the part of a number of flag States to implement and enforce international standards. Henceforth, as a second line of defence against substandard shipping, the monitoring of compliance with the international standards for safety, pollution prevention and on-board living and working conditions should also be ensured by the port State, while recognising that port State control inspection is not a survey and the relevant inspection forms are not seaworthiness certificates.'

6. Article 3 of that directive, entitled 'Scope', states:

'1. This Directive 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.

…

Nothing in this Article shall affect the rights of intervention available to a Member State under the relevant Conventions.

…

4. 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 shall be excluded from the scope of this Directive.

…'

[6] Directive 2009/16 was adopted on the basis of Article 80(2) EC (now Article 100(2) TFEU) with the aim of recasting Council Directive 95/21/EC of 19 June 1995 on port State control of shipping (OJ 1995 L 157, p. 1), which had been subject to numerous amendments since its adoption, and of strengthening the mechanisms established by that directive. Directive 2009/16 is part of a body of EU secondary legislation adopted on the same day, which also includes Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on compliance with flag State requirements (OJ 2009 L 131, p. 132), Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations (OJ 2009 L 131, p. 47), and Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations (OJ 2009 L 131, p. 11).

7. Article 11 of the directive, entitled 'Frequency of inspections', provides:

'Ships calling at ports or anchorages within the [European Union] shall be subject to periodic inspections or to additional inspections as follows:

(a) Ships shall be subject to periodic inspections at predetermined intervals depending on their risk profile …;

(b) Ships shall be subject to additional inspections regardless of the period since their last periodic inspection as follows:

– the competent authority shall ensure that ships to which overriding factors listed in Annex I, Part II 2A, apply are inspected,

– ships to which unexpected factors listed in Annex I, Part II 2B, apply may be inspected. The decision to undertake such an additional inspection is left to the professional judgement of the competent authority.'

8. Under Article 13 of Directive 2009/16, entitled 'Initial and more detailed inspections':

'Member States shall ensure that ships which are selected for inspection in accordance with Article 12 or Article 14a 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 [EU] 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.

"Clear grounds" shall exist when the inspector finds evidence which in his professional judgement warrants a more detailed inspection of the ship, its equipment or its crew.

Examples of "clear grounds" are set out in Annex V.'

9. Article 19 of the directive, entitled 'Rectification and detention', provides:

'1. The competent authority shall be satisfied that any deficiencies confirmed or revealed by the inspection are, or will be, rectified in accordance with the Conventions.

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 or stoppage of an operation shall not be lifted until the hazard is removed or until such authority 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.

…

6. In the event of detention, the competent authority shall immediately inform, in writing and including the report of inspection, the flag State administration or, when this is not possible, the Consul or, in his absence, the nearest diplomatic representative of that State, of all the circumstances in which intervention was deemed necessary. In addition, nominated surveyors or recognised organisations responsible for the issue of classification certificates or statutory certificates in accordance with Conventions shall also be notified where relevant. …

…'

10. Annex I to that directive, entitled 'Elements of the Community port State inspection system', contains a Part II, Section 2 of which, entitled 'Additional inspections', includes a point 2B, entitled 'Unexpected factors', which is worded as follows:

'Ships to which the following unexpected factors apply may be subject to inspection regardless of the period since their last periodic inspection. The decision to undertake such an additional inspection is left to the professional judgement of the competent authority.

…

– Ships which have been operated in a manner posing a danger to persons, property or the environment.

– …'

11. Annex V to the directive, entitled 'Examples of "clear grounds"', indicates in the list of 'examples of clear grounds for a more detailed inspection' (Part A), the following examples:

'1. Ships identified in Annex I, Part II 2A and 2B

…

3. During examination of the certificates and other documentation, inaccuracies have been revealed.

…'

B. Italian law

12. Directive 2009/16 was transposed into Italian law by decreto legislativo n. 53 – Attuazione della [direttiva 2009/16] recante le norme internazionali per la sicurezza delle navi, la prevenzione dell'inquinamento e le condizioni di vita e di lavoro a bordo per le navi che approdano nei porti comunitari e che navigano nelle acque sotto la giurisdizione degli Stati membri (Legislative Decree No 53 implementing [Directive 2009/16] laying down international standards for ship safety, pollution prevention and on-board living and working conditions for ships calling at Community ports and sailing in waters under the jurisdiction of Member States) of 24 March 2011.[7]

III. The disputes in the main proceedings and the questions referred for a preliminary ruling

13. Sea Watch is a humanitarian non-profit organisation registered in Berlin (Germany) whose purpose, according to its statutes, is, in particular, maritime search and rescue activities, and which engages in those activities in the international waters of the Mediterranean Sea, using ships in respect of which it is both the owner and the operator. Those ships include, in particular, the ships at issue, which fly the German flag and which have been certified by an authorised certification and classification body in Germany ('the certification body') as 'general cargo/ multipurpose' ships.[8]

14. During the summer of 2020, after carrying out rescue operations in the international waters of the Mediterranean Sea and having disembarked the persons rescued at sea in the ports of Palermo (Italy) and Porto Empedocle (Italy), in accordance with the authorisation and directions given by the Italian authorities, the ships at issue underwent cleaning and sanitation procedures followed by on-board inspections by the respective harbour master's offices of those two towns and, in particular, more detailed inspections as referred to in Article 13 of Directive 2009/16.[9]

15. Those more detailed inspections were based on the existence of an 'overriding factor' as referred to in Article 11 of Directive 2009/16,[10] consisting in the fact that the ships at issue were engaged in maritime search and rescue activities although they were not certified in respect of that service and had taken on board persons in much greater numbers than that which corresponded to the safety certificates for those ships.

16. According to the Italian authorities those more detailed inspections identified a number of technical and operational deficiencies in respect of the provisions of EU legislation and of the applicable international conventions,[11] some of which fell to be considered, individually or together, as giving rise to a clear risk to safety, health or the environment and as being sufficiently serious to warrant the detention of those ships, in accordance with Article 19 of

7 GURI No 96 of 27 April 2011, p. 1; 'Legislative Decree No 53/2011'.

8 As was confirmed at the hearing, the ships at issue flew the Netherlands flag until the end of 2019 and, since the competent Netherlands authorities intended to alter their classification at the request of the Italian authorities, they were subsequently registered in Germany.

9 As transposed by Article 16 of Legislative Decree No 53/2011.

10 As transposed by Article 8 of Legislative Decree No 53/2011.

11 The referring court mentions, in particular, Article I(b) of the International Convention for the Safety of Life at Sea, concluded in London on 1 November 1974 (*United Nations Treaty Series*, Vol. 1185, No 18961, p. 3; 'the SOLAS Convention') and to Section 1.3.1 of the annex to Resolution A.1138(31), entitled 'Procedures for port State control, 2019', of the International Maritime Organisation (IMO) ('the IMO resolution on port State control').

Directive 2009/16.[12] The two harbour master's offices concerned therefore ordered that those ships be detained. Since then, Sea Watch has rectified some of those irregularities, but considers that the remaining irregularities ('the irregularities at issue')[13] have not been established.

17. Following the detention of the ships at issue, Sea Watch brought two actions before the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily) – the referring court – for annulment of the detention orders adopted in respect of those ships, the inspection reports which preceded those orders and of 'any other preceding, related or subsequent act'. In support of those actions, it claimed, in essence, that the harbour master's offices responsible for those measures had exceeded the powers attributed to the port State, as derived from Directive 2009/16, interpreted in the light of the applicable international customary and conventional law.

18. The referring court observes, generally, that there is disagreement as to the existence of the irregularities at issue, not only between the parties in the main proceedings, but also between the relevant authorities of the port State (Italy) and the flag State (Germany),[14] and that the disputes in the main proceedings raise complex questions of law which are new and particularly important and which, concern, inter alia, the legal framework and regime applicable to ships operated by humanitarian non-governmental organisations in order to carry out, intentionally and not simply accidentally, maritime search and rescue activities. That said, the referring court questions, in essence, whether Directive 2009/16 is applicable to the ships at issue and questions the conditions and bases of the control and detention powers of the port State.

19. In those circumstances, the Tribunale amministrativo regionale per la Sicilia (Regional administrative Court, Sicily) decided, in each of the two disputes in the main proceedings, to stay the proceedings and to refer the following questions, which are worded identically in the two cases, to the Court of Justice for a preliminary ruling:

'(1) (a) Does the scope of [Directive 2009/16] include – and if so, can port State control (PSC) be exercised against – a ship which has been classified as a cargo ship by the classification society of the flag State but which in practice routinely engages only in non-commercial activities such as search and rescue (SAR) (as in the case of [Sea Watch] and [the ships at issue] on the basis of its statute)?

(b) If the Court … should find … that the scope of [Directive 2009/16] also includes ships [that are not actually engaged in trade], does the national legislation enshrined in Article 3 of [Legislative Decree] No 53/2011, which transposed Article 3 of [that directive] but in Article [3(1) of that legislative decree] instead expressly limits the scope of PSC to ships used for commercial purposes, excluding not only pleasure craft but also cargo ships that are not actually engaged in – and so are not used for – trade, represent an obstacle to the directive interpreted thus?

[12] As transposed by Article 22 of Legislative Decree No 53/2011.

[13] Those irregularities relate, in essence, to the fact that, first, the ships at issue are not certified to take on board and transport several hundred persons, as they systematically did during the summer of 2020; next, those ships do not have the proper technical equipment for carrying out such activities, even though they are in fact intended – and actually exclusively used – for those activities (in particular, the sewage treatment facilities on board those ships have capacity for 22 or 30 persons, respectively, and not for several hundred persons, and additional toilets and showers discharging wastewater directly into the sea have been installed on the decks); lastly, the rescue operations carried out by the crew members have not been included in their working hours.

[14] However, at the hearing, the Italian Government stated that, following subsequent exchanges between the Italian and German authorities, the German authorities required Sea Watch, as the shipowner, to carry out the repairs necessary to rectify those irregularities. Sea Watch stated that it carried out alterations in order to comply with those instructions, although they were given without any regulatory framework, in order to avoid risks of subsequent detention.

(c) Lastly, can the Court reasonably consider that cargo ships which routinely carry out [search and rescue] activities … fall within the scope of [Directive 2009/16], in so far as it includes passenger ships, following the amendments made in 2017, thereby equating the carriage of persons rescued at sea because their lives are in danger with passenger transport?

(2) Does the fact that the ship transported a far greater number of people than the number indicated in the safety equipment certificate, albeit as a result of [search and rescue] activities, or otherwise holds a safety equipment certificate covering far fewer persons than the number actually carried, mean that the overriding factors listed in Annex I, Part II 2A or the unexpected factors listed in Annex I, Part II 2B, as referred to in Article 11 of [Directive 2009/16], can duly apply to it?

(3) Can and/or should the power to conduct a more detailed PSC inspection under Article 13 of [Directive 2009/16] of ships flying the flag of Member States also include the power to ascertain which activities are carried out in practice by the ship, irrespective of those for which the class certificate and the consequent safety certificates were issued by the flag State and the relevant classification society, and therefore the power to ascertain that the ship is in possession of the certificates and, in general, fulfils the criteria and/or requirements laid down in international standards on safety, pollution prevention and on-board living and working conditions and, if so, may that power also be exercised against a ship which in practice routinely engages in [search and rescue] activities?

(4) (a) How is [Article I(b)] of the SOLAS Convention – which is specifically referred to in Article 2 of [Directive 2009/16] and for which a consistent … interpretation [in the European Union] is, therefore, necessary for the purposes of and in the context of PSC – to be interpreted in so far as it provides that "the Contracting Governments undertake to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary to give the present Convention full and complete effect, so as to ensure that, from the point of view of safety of life, a ship is fit for the service for which it is intended"? More specifically, regarding the ship's fitness for the service for which it is intended, which the port States are required to assess by means of PSC inspections, are the requirements imposed in the light of the classification and the relevant safety certificates held, which were obtained on the basis of the theoretical activity declared, to be used as the sole assessment criterion, or may regard also be had to the service that the ship actually provides?

(b) Accordingly, with regard to the abovementioned international criterion, do the administrative authorities of port States have the power not only to ascertain the compliance of the equipment and appliances on board with the requirements of the certificates issued by the flag State, based on the theoretical classification of the ship, but also to assess the conformity of the ship's certificates and the related equipment and appliances on board in the light of the activity carried out in practice, which is different from the one stated in the classification certificate?

(c) The same points must be made for [Section] 1.3.1 of [the annex to the IMO resolution on port State control], in so far as it provides that "under the provisions of the relevant conventions set out in section 1.2 above, the Administration (i.e. the Government of the flag State) is responsible for promulgating laws and regulations and for taking all other steps which may be necessary to give the relevant conventions full and complete effect so

as to ensure that, from the point of view of safety of life and pollution prevention, a ship is fit for the service for which it is intended and seafarers are qualified and fit for their duties."

(5) (a) [Were] it to be confirmed that the port State has the power to ascertain the possession of the certificates and the fulfilment of the criteria and/or requirements on the basis of the activity for which the ship is specifically intended[,] can the port State that carried out the PSC inspection require the possession of certificates and the fulfilment of criteria and/or requirements for safety and the prevention of marine pollution other than those already held and fulfilled, in relation to the activities carried out in practice, particularly in the event that [search and rescue] activities are as in the present case carried out, so as to avoid the detention of the ship?

(b) If [point (a)] is answered in the affirmative, can the requirement for certificates to be held and criteria and/or requirements to be fulfilled other than those already held and fulfilled, in relation to the activities carried out in practice, particularly in the event that [search and rescue] activities are as in the present case carried out, be imposed, so as to avoid the detention of the ship, only if there is a clear and reliable international and/or [EU] legal framework regarding the classification of [search and rescue] activities and related certificates and criteria and/or requirements for safety and the prevention of marine pollution?

(c) If [point (b)] is answered in the negative, is the requirement for the possession of certificates and the fulfilment of criteria and/or requirements other than those already held and fulfilled, in relation to the activities carried out in practice, particularly in the event that [search and rescue] activities are as in [the] present case carried out, to be imposed on the basis of the national legislation of the flag State and/or that of the port State, and to that end, is primary legislation necessary, or is secondary legislation or even only a general administrative measure sufficient?

(d) If [point (c)] is answered in the affirmative, is it the responsibility of the port State to indicate during the PSC inspection, in a precise and specific manner, on the basis of which national legislation, regulation or general administrative measure (identified pursuant to [point (c)]) the criteria and/or technical requirements for safety and the prevention of marine pollution are to be identified – which the ship undergoing the PSC inspection must meet in order to carry out [search and rescue] activities – and exactly which corrective/remedial actions are required to ensure compliance with [that] legislation, regulation or administrative measures?

(e) In the absence of any legislation, regulation or general administrative measure of the port State and/or of the flag State, can the port State authority indicate, for the case at issue, the criteria and/or technical requirements for safety, the prevention of marine pollution and the protection of life and work on board, which the ship undergoing the PSC inspection must comply with in order to carry out [search and rescue] activities?

(f) If [points (d) and (e)] are answered in the negative, can [search and rescue] activities, in the absence of specific guidance from the flag State to that effect, be considered authorised in the meantime and thus unable to be hindered by a detention order if the ship undergoing the PSC inspection fulfils the above criteria and/or requirements for a different category (particularly cargo ships), which the flag State has confirmed actually exist?'

IV. Procedure before the Court

20. In its orders for reference, the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily) requested that the Court determine the present cases under the expedited procedure provided for in Article 105 of the Rules of Procedure of the Court of Justice.

21. By decision of the President of the Court of 2 February 2021, those cases were joined for the purposes of the written and oral parts of the procedure and the President of the Court, by order of 25 February 2021, dismissed the request for an expedited procedure, while recognising that the particular circumstances of those cases justified the Court considering them as a priority, pursuant to Article 53(3) of the Rules of Procedure.

22. Written observations were submitted by Sea Watch, the Italian, Spanish and Norwegian Governments, and by the European Commission. Those parties also presented oral observations at the hearing which was held on 30 November 2021.

V. Analysis

23. The questions posed by the referring court concern the scope of Directive 2009/16 (A) and the extent of the control powers of the port State, as regards, first, the conditions required for an additional more detailed inspection pursuant to Article 11 of that directive (B), next, the extent of inspection powers under both Article 13 of that directive and the SOLAS Convention and the IMO resolution on port State control (C) and, lastly, the conditions for detaining a ship under Article 19 of the same directive (D).

A. Question 1 (scope of Directive 2009/16)

24. By its first question, the referring court seeks to ascertain, in essence, whether Directive 2009/16 applies to ships which, although classified and certified as cargo ships, are being systematically used exclusively for maritime search and rescue activities (point (a)), and as the case may be, whether the activities of those ships may fall within the scope of that directive as activities equated with passenger transport (point (c)). If so, that court asks whether Article 3 of Legislative Decree No 53/2011, which transposes Article 3 of the directive but limits its scope to ships used for commercial purposes, is compatible with that directive (point (b)).

25. That court considers that Directive 2009/16 is to be understood as not applying to ships such as the ships at issue, meaning that they cannot be subject to an inspection conducted on the basis of that directive.

26. In the first place, I consider, unlike the referring court, that Directive 2009/16 applies to ships such as the ships at issue which, although registered as 'general cargo/multipurpose' ships, engage in maritime search and rescue activities.

27. Article 3(1) of Directive 2009/16 provides that that directive applies to any *ship* and its crew calling at a port or anchorage of a Member State to engage *in a ship/port interface*. The ships at issue are registered as 'ships'.[15] Moreover, it is clear, in my view, that those ships are engaged in activities involving, inter alia, the movement of persons from the ship and to the port and that, therefore, they are engaging in a 'ship/port interface',[16] and the fact that those activities are not carried out at regular or foreseeable intervals does not affect the definition in question.

28. In addition, Article 3(4) of Directive 2009/16 provides that *government ships used for non-commercial purposes* and *pleasure yachts not engaged in trade* are among the vessels excluded from the scope of that directive. However, while it is true that the ships at issue are used for non-commercial purposes, like the two categories of ships referred to above, they cannot be equated, for that reason alone, to 'government ships' or to 'pleasure yachts'.

29. In that regard, I would point out, first of all, that even though those ships contribute, de facto, to carrying out maritime search and rescue activities which in principle are the responsibility of the public authorities of the coastal State, and are, to a certain extent, required to cooperate with the system for coordinating maritime search and rescue activities,[17] they are not 'government' ships for the purposes of Article 3(4) of Directive 2009/16. Furthermore, it seems to me that that derogation is linked not to the public interest nature of the activities carried out, but rather to complete immunity from jurisdiction with regard to any State other than the flag State, guaranteed in particular by Article 96 of the Convention on the Law of the Sea[18] to 'ships owned or operated by a State and used only on government non-commercial service'.

30. Next, the ships at issue cannot be 'pleasure yachts', given that they are registered as general cargo/multipurpose ships and are assigned to activities which may be laudable but are not recreational or sporting activities (or activities of a similar type).

31. Lastly, I consider that the express exclusion of those two categories of ships engaged in non-commercial activities cannot constitute an additional indication of the fact that the EU legislature intended to exclude from the scope of Directive 2009/16 the whole category of ships which do not carry out commercial activities. On the contrary, it seems to me that the mention of two very specific derogations concerning ships used for non-commercial purposes (namely government ships and pleasure yachts) rather confirms that that legislature intended to limit the exception in question to those two categories.

[15] In that regard, Article 2(5) of Directive 2009/16 states that, for the purposes of that directive, the concept of 'ship' encompasses 'any seagoing vessel to which one or more of the Conventions apply, flying a flag other than that of the port State'.

[16] In that regard, Article 2(5) and (6) of Directive 2009/16 states that the concept of 'ship/port interface' concerns 'the interactions that occur when a ship is directly and immediately affected by actions involving the movement of persons or goods or the provision of port services to or from the ship'.

[17] I note that, in accordance with established practice in recent years, disembarkments carried out following rescue operations have primarily been authorised by the Ministero degli Interni (Ministry of the Interior, Italy) and coordinated by the Italian Maritime Rescue Coordination Centre.

[18] United Nations Convention on the Law of the Sea, concluded in Montego Bay on 10 December 1982 (*United Nations Treaty Series*, Vols 1833, 1834 and 1835, p. 3; 'the Convention on the Law of the Sea'). That convention entered into force on 16 November 1994. Its conclusion was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1).

32. Consequently, in the light of the wording of Article 3(1) and (4) of that directive, it must be held that ships used for non-commercial purposes fall within the material scope of the directive, with the exception of the two aforementioned categories.

33. This is confirmed, in my view, by the teleological interpretation of Directive 2009/16, which, according to Article 1 and recital 4 thereof, is intended to help to drastically reduce shipping performed by substandard ships in waters under the jurisdiction of Member States, in order, inter alia, to *enhance safety, pollution prevention and on-board living and working conditions*. The fact that the ships at issue systematically engage in maritime search and rescue activities for non-commercial purposes, cannot, on its own, shield those ships from the powers of the port State, particularly as regards monitoring compliance with the international rules relating to safety, pollution prevention and on-board living and working conditions. It cannot be ruled out in principle, for example, that those ships may give rise to problems linked to safety, pollution and on-board living and working conditions, in view of the way in which they are used.[19] Furthermore, such a derogation would be contrary to the declared objective of that directive, since ships engaged in identical or similar activities for profit which by their nature pose the same risk to safety, pollution and on-board living and working conditions, are subject to the obligations laid down in the directive.

34. Moreover, contrary to Sea Watch's assertions, I do not consider that maritime search and rescue activities cannot, as non-commercial activities, be covered by an EU legislative measure, such as Directive 2009/16, adopted on the basis of Article 80(2) EC (now Article 100(2) TFEU). Indeed, that provision states, in essence, that the EU legislature may lay down appropriate provisions for sea and air transport, and does not draw any distinction between commercial and non-commercial activities. Moreover, Directive 2009/16, adopted on the basis of that provision, does not directly concern the activities of the ships to which it applies, but conditions for shipping and, more specifically, the control powers of the port State in that regard.

35. Regarding, lastly, the possibility, raised by the referring court, of applying Directive 2009/16 to the ships at issue on the ground that their activities may be equated to passenger transport, I consider that, in view of the fact that that directive concerns those ships irrespective of their classification under the law of the flag State, equating those activities to passenger transport is neither necessary nor relevant in order to be able to apply the directive to the ships in question.[20]

36. In the second place, as regards the compatibility of Article 3 of Legislative Decree No 53/2011 with EU law, since that provision seems to limit the application of Directive 2009/16 to ships engaged in commercial activities, I would point out that that directive adopts a harmonised approach intended to ensure effective compliance with the international standards for safety, pollution prevention and on-board living and working conditions by ships operating in the waters under the jurisdiction of Member States and using their ports,[21] in order to help to

[19] Moreover, as has been noted by the Italian Government in its written observations, the categories excluded from the scope of Directive 2009/16 are not excluded because they involve fewer risks than the ships to which that directive applies. Each of the excluded categories finds in specific sources of the EU and international legal orders the specific reasons for the non-application to them of the legislation at issue.

[20] In any event, I would add that any question relating to the classification of those ships, as carried out by the certification body, falls within the jurisdiction of the flag State and is not relevant as regards the powers of the port State under Directive 2009/16. Moreover, as has been noted by the Spanish Government, it is doubtful that maritime search and rescue activities may be equated to passenger transport, in view of the latter's different characteristics, such as, inter alia, the absolute foreseeability of the service (provided to a number of clearly identified persons according to pre-established itineraries and conditions) and its contractual nature.

[21] See, inter alia, recital 7 of Directive 2009/16, and recital 12 of Recommendation 2020/1365, which refers to vessels being 'properly equipped'.

drastically reduce shipping performed by substandard ships sailing in those waters.[22] It seems to me, therefore, that the directive leaves Member States no discretion to limit its scope to ships engaging in commercial activities.

37. That being said, it is for the referring court to verify whether Article 3 of Legislative Decree No 53/2011 limits, in principle, the scope of Directive 2009/16 and, if so, to assess whether it is possible to give that provision an interpretation which is consistent with Article 3 of that directive, or, if not, to draw conclusions from the partial incompatibility of that provision with EU law, disapplying it if necessary.[23]

38. I therefore propose that the answer to the first question referred for a preliminary ruling should be that Directive 2009/16 applies to ships which, while classified and certified as 'cargo/ multipurpose' ships by the flag State, exclusively and systematically engage in maritime search and rescue activities and that it is for the referring court to draw the necessary conclusions as regards the interpretation and application of the national legislation transposing that directive.

B. Question 2 (conditions for an additional inspection pursuant to Article 11 of Directive 2009/16)

39. By its second question, the referring court seeks to ascertain, in essence, whether the fact of having transported, during the rescue operations which led to the measures at issue in the main proceedings, persons in numbers greater than the maximum number of persons which can be carried by the ships at issue in view of their safety certificates may constitute an 'overriding factor' or an 'unexpected factor' within the meaning of points 2A and 2B of Part II of Annex I to Directive 2009/16, and, more specifically, the unexpected factor consisting in the fact that '[the ships at issue] [have] been operated in a manner posing a danger to persons, property or the environment',[24] which justifies those ships being subject to an additional inspection on the basis of Article 11 of that directive.

40. That court considers that, although the rescue of persons at sea and the possibility that the safety certificates issued by the flag State may not be suitable in relation to the number of persons actually on board constitute neither 'overriding factors' nor 'unexpected factors' within the meaning of the aforementioned provisions, the obvious discrepancy between the number of persons who may be transported according to the certificates and the persons actually transported during rescue operations and the obvious unsuitability of those certificates may, on the other hand, be classified as an 'unexpected factor'.

41. In that regard, I note that it is apparent from recital 6 of Directive 2009/16 that, although responsibility for monitoring the compliance of ships with the international standards for safety, pollution prevention and on-board living and working conditions lies primarily with the flag State, the monitoring of compliance with those standards should also be ensured by the port

22 See, inter alia, Article 1 of Directive 2009/16.

23 Judgment of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626, paragraph 77 and the case-law cited).

24 That court states that although, in the forms relating to the inspection reports, the Italian administration classified that fact as an 'overriding factor' within the meaning of point 2A of Part II of Annex I to Directive 2009/16 and not as an 'unexpected factor' within the meaning of point 2B of Part II of Annex I thereto, this is due to the fact that those forms do not include a section specifically designed to indicate unexpected factors and it must therefore be considered that, in the section in which those forms indicate the 'overriding factor', they are referring in a generic way to the necessary conditions for carrying out the additional inspection referred to in Article 11 of Directive 2009/16.

State as a second line of defence against substandard shipping, while recognising that port State control inspection is not a survey (in order to issue certificates) and that the relevant inspection forms are not seaworthiness certificates. [25]

42. Under Article 11 of that directive, ships are to be subject to additional inspections, by the port State, only if there are 'overriding factors' or 'unexpected factors' as listed, respectively and exhaustively, in points 2A and 2B of Part II of Annex I thereto. [26] Unexpected factors include that, mentioned by the referring court, of 'ships which have been operated in a manner posing a danger to persons, property or the environment', in respect of which that court is having interpretation problems.

43. In that regard, it seems clear to me that a ship systematically transporting persons in numbers greater than the maximum number of persons which may be transported according to its certificates may, in certain circumstances, pose a danger to persons, property or the environment. That fact may, in principle, constitute an 'unexpected factor', within the meaning of point 2B of Part II of Annex I to Directive 2009/16, and justify an 'additional inspection' as referred to in Article 11 of that directive.

44. However, a fact check should be carried out, on a case-by-case basis. This is a matter for the national court, which cannot simply make a formal statement of the difference between the number of persons transported and the number of persons whose transportation is authorised according to the certificates [27] but must specifically assess the risks of such conduct. [28]

45. Moreover, it should be pointed out that that situation may sometimes, as in this instance, be the direct necessary consequence of transportation carried out in order to comply with the duty of the vessel master to render assistance at sea under international customary law as enshrined in particular in Article 98 of the Convention on the Law of the Sea [29] ('the duty to render assistance at sea'). Indeed, the customary law of the sea exempts ships, in so far as they fulfil that duty, from

[25] The EU legislature takes into account, in that regard, the Paris Memorandum of Understanding on Port State Control, signed in Paris on 26 January 1982, which states, in its fourth and fifth recitals, that the principal responsibility for the effective application of standards laid down in international instruments rests upon the authorities of the flag State, while adding that effective action by port States is required to prevent the operation of substandard ships.

[26] As regards the differences between the two factors, 'unexpected factors' are generally less serious or less obviously serious, linked to problems of a similar nature, such as infringements of the rules in force, deficiencies, complaints and previous detentions (see Pimm, M., 'VIII. Commentary on Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on Port State Control', *EU Maritime Transport Law*, 03/2016, p. 872). Moreover, it is apparent from Article 11(b) of Directive 2009/16 that, when there are overriding factors, the additional inspection seems to be mandatory, whereas, in the case of unexpected factors, the decision to undertake such an inspection lies within the discretionary power of the competent authority.

[27] Compliance with the conditions laid down by a ship's safety certificates, and, more specifically, with the condition relating to the number of persons transported on board, falls within the competence of the flag State. The same applies as regards the adequacy, *in abstracto*, of the certificate issued in respect of the performance of the activities for which the ships are intended, a matter which remains within the competence of the flag State.

[28] It seems to me, particularly difficult to establish that a ship authorised to transport for example 100 people may constitute a danger to persons, property or the environment if it transports a few more people. The situation is different if a ship which is not, in principle, intended to transport people and in respect of which the safety certificates provide for a maximum of 30 persons on board as crew members, as in the present case, takes on, let us say, about 400 persons.

[29] That provision, entitled 'Duty to render assistance', has a paragraph 1 which is worded as follows: '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; …'

the requirements imposed on the basis of the ship's classification.[30] In such circumstances, the mere fact that the ship has transported a number of persons which is simply greater than its maximum capacity cannot be regarded, on its own, as an 'unexpected factor' for the purposes of Article 11 of Directive 2009/16 and point 2B of Part II of Annex I thereto.[31]

46. That being so, it is possible, in principle, that, while observing the duty to render assistance at sea, ships may be operated, in a particular situation, in a manner posing a danger to persons, property or the environment, which may constitute an 'unexpected factor' for the purposes of Article 11 of Directive 2009/16 and point 2B of Part II of Annex I thereto. That may be so inter alia where it is established that a ship is systematically acting in breach, through its predominant activities, of the rules concerning the safety of ships, irrespective of the rules relating to their classification.[32] Ultimately, it falls to the competent national authorities to establish that, in this instance, the ships at issue were operated in a manner posing a danger to persons, property or the environment, apart from the activities strictly necessary for fulfilling the duty to render assistance at sea.

47. I therefore propose that the answer to the second question referred for a preliminary ruling should be that Article 11 of Directive 2009/16 and points 2A and 2B of Part II of Annex I thereto, read in the light of the duty to render assistance at sea reproduced in, inter alia, Article 98 of the Convention on the Law of the Sea, must be interpreted as meaning that the mere fact that a ship has transported, following rescue operations at sea, persons in numbers greater than the maximum capacity, as indicated in the ship safety equipment certificate, cannot in itself be regarded as an 'overriding factor' or an 'unexpected factor' requiring or justifying, respectively, additional inspections for the purposes of those provisions. However, it cannot be ruled out, in principle, that the systematic transport of persons in numbers far in excess of the ship's capacity may affect the ship in such a way as to entail a danger to persons, property or the environment, which would constitute an 'unexpected factor' for the purposes of those provisions, which is a matter for the referring court to determine.

C. Questions 3 and 4 (extent of inspection powers under Article 13 of Directive 2009/16, under Article I(b) of the SOLAS Convention and under Section 1.3.1 of the annex to the IMO resolution on port State control)

48. By its third and fourth questions, which it is appropriate to deal with together, the referring court seeks to ascertain, in essence, whether Article 13 of Directive 2009/16, on the one hand, or Article I(b) of the SOLAS Convention and Section 1.3.1 of the annex to the IMO resolution on port State control, on the other, enable a port State to verify that a ship has the necessary certificates and observes the international rules in respect of safety, pollution prevention and

30 In that regard, I note, first, that Article IV(b) of the SOLAS Convention, referred to in Article 2(1)(b) of Directive 2009/16, provides that persons who are on board a ship inter alia in consequence of the obligation laid upon the master to carry shipwrecked persons are not to be taken into account for the purpose of ascertaining the application to a ship of any provisions of that convention, second, that the annexes to the International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978, also referred to in Article 2(1)(c) of that directive, provide for exceptions to the rules concerning spills at sea if they are necessary for the safety of life at sea and, lastly, that the Maritime Labour Convention, 2006, also referred to in Article 2(1)(i) of the directive, provides that the master has the right to require seafarers to extend their working time beyond the normal working hours when this is necessary in order to render assistance to other ships or persons in distress at sea.

31 The referring court has rightly refused to accept that the justifications provided by the competent national authorities may constitute 'overriding factors' for the purposes of Article 11 of Directive 2009/16 and point 2A of Part II of Annex I thereto. Indeed, none of the reasons put forward by those authorities correspond to the examples exhaustively listed as 'overriding factors'.

32 As regards the irregularities at issue, this may be the case, for example, for the infringements relating to additional facilities discharging wastewater directly into the sea.

on-board living and working conditions which relate to the activities actually carried out by that ship, in this instance maritime search and rescue activities, irrespective of the activities in respect of which it was classified. [33]

49. That court considers that the control exercised by the port State cannot call in question the control exercised and the decisions taken in the flag State and finds that neither the international conventions, nor EU law or Italian or German law lay down specific conditions for private ships which systematically engage in maritime search and rescue activities, [34] and that the international conventions expressly derogate from the requirements imposed, in some circumstances, depending on the classification of the ship, in the light of the objective of rescue at sea. [35]

50. Under Article 13(3) of Directive 2009/16, a more detailed inspection, such as those which are the subject of the cases in the main proceedings, includes 'further checking of compliance with on-board operational requirements' and is to be carried out whenever, following an initial inspection, there are 'clear grounds' for believing that the condition of a ship or of its equipment or crew does not substantially meet the relevant requirements of a Convention. [36] Annex V to that directive provides examples of 'clear grounds'. [37]

51. As regards relevance to these cases, the more detailed inspections under Article 13(3) of Directive 2009/16 were based, according to the orders for reference, on the 'clear ground' mentioned in point 3 of Part A of Annex V to that directive, namely the fact that 'during examination of the certificates and other documentation, inaccuracies have been revealed', in this instance during examination of the safety certificate provided for in regulation 9 of Chapter

[33] More specifically, it seems to me that the fourth question, concerning the application of the conventions cited, is ancillary to the third question, concerning the application of Article 13(3) of Directive 2009/16, in the sense that, by its fourth question, the referring court seeks to ascertain, in essence, whether, if the port State cannot monitor compliance with the applicable requirements in view of the actual activities of that ship within the meaning of that directive, that power may nevertheless be based on one of the conventions referred to.

[34] The absence, in international law or EU law, of such conditions is confirmed by Recommendation 2020/1365, when it states, in recital 12, that it is essential, as a matter of 'public policy', including safety, that those ships be suitably registered and properly equipped to meet the relevant safety and health requirements associated with those activities, so as not to pose a danger to the crew or persons rescued. Otherwise, according to that court, there would be no reason to invoke public policy for that purpose.

[35] In addition, according to that court, when the conventions referred to provide that the contracting governments undertake, in essence, to take all the steps necessary to ensure that from the point of view of safety of life, a ship is 'fit for the service for which it is intended', the ship's fitness for the service for which it is intended must be understood in an abstract sense, having regard to the type of ship, according to its classification, and not in a specific sense, in the light of the specific type of activities actually carried out, since, otherwise, a term such as 'used' or a similar term would have been employed. It recognises, however, that use of the term 'intended' also lends itself to an interpretation according to which the intended purpose may refer not to the intrinsic characteristics of the ship or to the purpose they serve but also to the objective in pursuit which the ship's owner actually intends to use it.

[36] That provision states that there are 'clear grounds' when, in the inspector's professional judgement, such an inspection is justified.

[37] Moreover, it seems to me that since Article 13(3) of Directive 2009/16 refers to the relevant requirements of a *Convention*, including the SOLAS Convention, referred to in Article 2 thereof, it must be interpreted, inter alia, in the light of Article I(b) of that convention. Indeed, even though the European Union is not a contracting party to that convention (all the Member States, on the other hand, are signatories thereto), the Court may take its provisions into account when interpreting a legal instrument of secondary law (see, to that effect, judgment of 3 June 2008, *Intertanko and Others* (C-308/06, EU:C:2008:312, paragraphs 47 to 52)).

XI-2 of the SOLAS Convention.[38] Moreover, the Italian Government notes, in its written observations, that, in the main proceedings, the power to carry out the more detailed inspections was based in particular on regulation 19 of Chapter I of the annex to that convention.[39]

52. However, although Article 13(3) of Directive 2009/16 establishes the framework within which a more detailed inspection is allowed, it does not clearly set out the limits of that inspection. The question is therefore whether 'further checking of compliance with on-board operational requirements' is restricted only to the requirements applicable on the basis of the ship's classification or whether it also concerns the requirements applicable to the activities specifically carried out by the ship.

53. In order to determine the extent of port State control for the purposes of that provision, I think it is important to point out that the provision grants a power of control which inevitably exceeds that of the 'initial inspection' provided for in Article 13(1) of that directive, which concerns, in essence, the ship's certificates and overall condition, and that the purpose of that control is to verify compliance with the 'relevant requirements of a Convention'. Such a control cannot therefore be limited only to the formal requirements laid down by the certificates relating to the ship's classification by the certification body but rather concerns that ship's compliance with all the international convention-based standards on safety, pollution prevention and on-board living and working conditions, taking into account the actual condition of the ship and of its equipment and the activities actually carried out, especially if they differ from those connected with its classification.[40]

54. It is therefore possible to conclude, in principle, as the Italian Government argues, that the fact that a ship is not operated in accordance with its certificates may constitute an infringement of the on-board operational requirements of that ship and pose inter alia a danger to persons, property or the environment, which it is for the competent authority to establish, on the basis of the rules applicable to the activities to which that ship is actually assigned.

55. That having been established, it must nevertheless be stated, as the referring court remarks, that there is no classification, either in EU law or in international law, of ships carrying out maritime search and rescue activities.[41] Consequently, in the absence of such a classification, it cannot be concluded that the mere classification of the ships at issue as 'general cargo/

[38] Regulation 9 of Chapter XI-2 of the SOLAS Convention provides for a limited control relating to the validity of the certificates referred to in paragraph 1.1 of that regulation and, in particular, of the International Ship Security Certificate. In this instance, it is apparent from the orders for reference that the more detailed inspections had been ordered on the ground that the forms providing security information prior to the ships' entry into the port had been incorrectly completed, since they lacked, inter alia, the company number, the location of the ships at the time the declaration had been drawn up, the administration which had issued the International Safety Certificates and the date of expiry of those certificates. Moreover, it was stated that the results of the ships' safety plans had been approved, whereas that was not yet the case.

[39] Regulation 19 of Chapter I of the SOLAS Convention, which relates to review of the ship's certificates, states, in paragraph (b) thereof, that such certificates, if valid, are to be accepted unless there are clear grounds for believing that the condition of the ship or of its equipment does not correspond substantially with the particulars of any of the certificates or that the ship and its equipment are not in compliance with the provisions of regulation 11(a) and (b) of that chapter. According to regulation 11(a) of the same chapter, the condition of the ship and its equipment must be maintained in accordance with the requirements of the convention to ensure that the ship can proceed to sea without danger to the ship or persons on board. By contrast, regulation 11(b) of Chapter I of the SOLAS Convention is not relevant in this instance, since it concerns the ban against making changes following an inspection carried out under regulations 7 to 10 of that chapter.

[40] Moreover, it seems to me that that conclusion is not called into question by the interpretation of Article 13(1) of Directive 2009/16 read in the light of Article I(b) of the SOLAS Convention, and of Section 1.3.1 of the annex to the IMO resolution on port State control. Those provisions, when they provide for the possibility of verifying that the ship is 'fit for the service for which it is intended', may be interpreted as meaning that any assessment concerning the fitness of the ship must be made taking into account the service it actually provides, and the relevant regulations.

[41] Furthermore, there seems to be no such classification in German law or Italian law either.

multipurpose' ships constitutes in itself a 'clear ground' for believing that the condition of the ship or of its equipment or crew does not substantially meet the 'relevant requirements of a Convention', in accordance with Article 13(3) of Directive 2009/16, unless the systematic use of that ship infringes the rules relating to its classification. [42]

56. I therefore propose that the answer to the third question referred for a preliminary ruling should be that the power of the port State to conduct a more detailed inspection, in accordance with Article 13 of Directive 2009/16, of a ship flying the flag of a Member State includes the power to verify that that ship complies with the requirements relating to safety, pollution prevention and on-board living and working conditions applicable to the activities to which the ship is actually assigned, while taking into account the activities in respect of which it was classified.

D. Question 5 (possibility of detaining a ship pursuant to Article 19 of Directive 2009/16 due to its engagement in activities other than those corresponding to the certification)

57. By its fifth question, first of all, the referring court seeks to ascertain, in essence, whether the authorities of the port State are entitled to require the possession of certificates and the fulfilment of criteria or requirements for safety and the prevention of marine pollution in relation to the activities carried out in practice by a ship, in this instance maritime search and rescue activities, so as to avoid the detention of the ship (point (a)) and, if so, whether those certificates and the criteria or requirements may be required only if there is a clear and reliable international or EU legal framework regarding the classification of maritime search and rescue activities as well as the related certificates, requirements and criteria (point (b)) or, on the contrary, whether these must be required on the basis of the national law of the flag State or of the port State and, to that end, whether primary legislation or secondary legislation is necessary or whether a general administrative measure is sufficient (point (c)).

58. Next, that court raises the issue of whether it is for the port State to indicate, during the inspection, on the basis of which national law (legislation, regulation or general administrative measure) the criteria or requirements imposed are to be determined and which corrections or rectifications are required to ensure compliance with that law (point (d)) and whether, in the absence of such law, the authorities of the port State may indicate, on a case-by-case basis, the criteria which the ship undergoing the inspection must satisfy (point (e)).

59. Lastly, that court seeks to ascertain whether, in the absence of such law and in the absence of specific guidance from the flag State, search and rescue activities can be considered as having been authorised (and therefore as unable to be hindered by the adoption of a detention measure) if the ship fulfils the criteria or requirements for a different category, which the flag State has confirmed are actually satisfied (point (f)).

[42] I admit that I find it difficult to accept that transporting persons in distress may be equated, to a certain extent, to transporting 'cargo', although I recognise the need to avoid calling into question the classification of the ships at issue, as carried out by the certification body of the flag State. Moreover, if the port State disagrees with the classification of a ship, the Convention on the Law of the Sea provides for a reporting procedure, by which any State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State, which is required to investigate the matter and, if appropriate, to take any action necessary to remedy the situation (see Article 94(6) of that convention). This approach is consistent with that followed in Section 1.3.3 of the annex to the IMO resolution on port State control.

60. As a preliminary point, it should be noted that, under Article 19(1) of Directive 2009/16, the competent authority is to be satisfied that any deficiencies confirmed or revealed by the inspections are, or will be, rectified in accordance with the Conventions, and, under Article 19(2) of that directive, if the deficiencies confirmed or revealed by the inspections are clearly hazardous to, inter alia, safety, the competent authority of the port State is to ensure that the ship is detained.

61. As is apparent from the answers proposed to the previous questions, the port State may, under Article 13(3) of Directive 2009/16, ensure compliance with the international conventions and EU legislation on maritime safety, maritime security, protection of the marine environment and on-board living and working conditions, taking account of the activities actually carried out by the ship, provided that such a control does not impinge on the competences of the flag State as regards classification of the ship, or on fulfilment of the duty to render assistance at sea.

62. Consequently, the mere fact that a ship systematically engages in maritime search and rescue activities does not exempt that ship from satisfying the criteria applicable to it under international law or EU law and does not prevent that ship from being subject to detention measures pursuant to Article 19 of that directive if it infringes those rules. In other words, although, as the referring court points out, ships are excluded from application of the international rules on the safety of shipping and the protection of the marine environment in so far as they carry out occasional sea rescue missions, they are not exempt from any other rules applicable to ships on the basis of the criteria of international law, in the light of the activities actually carried out.

63. I therefore propose that the answer to the fifth question should be, first of all, that Directive 2009/16 must be interpreted as meaning that the authorities of the port State are entitled to require possession of certificates and compliance with criteria or requirements on safety and prevention of maritime pollution with regard to the activities in respect of which the ship is classified, and any other certificate, criterion or requirement based on the international or EU legal framework. [43]

64. Next, I consider that that directive must be interpreted as meaning that it is for the port State to indicate, during the inspection, on the basis of which law the criteria or requirements in respect of which an infringement has been noted are to be determined and which corrections or rectifications are required to ensure compliance with that law.

65. Lastly, it seems to me that the directive must be interpreted as meaning that a ship systematically engaging in maritime search and rescue activities is not, as such, to be regarded as incapable of being subject to detention measures if it infringes the criteria applicable to it under international or EU law, without prejudice to the duty to render assistance at sea. [44]

[43] If, on the other hand, the ship does not satisfy the conditions required on the basis of the legislation of the flag State or of the port State or if the latter disagrees with the classification of the ship, it may (or even must) inform the flag State and cooperate with it in order to find a solution to the deficiencies found.

[44] I should like, at this point, to make a final observation. Human life and saving it is, of course, of overriding importance (above any other consideration). However, the 'duty of the good Samaritan' is not free of obligations. For example, in so far as this may be of interest, the Good Samaritan in the New Testament did indeed save the person in danger without hesitation. However, he took him to a safe place (an inn), at his own expense, by the safest means of transport (his own donkey); he took care of him without passing this burden on to others; and he gave the innkeeper his own money to take care of him in the meantime, promising that 'when I return, I will reimburse you for any extra expense you may have'. Comparisons are sometimes difficult …

VI. Conclusion

66. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily, Italy) as follows:

(1) Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control, as amended by Directive 2013/38/EU of the European Parliament and of the Council of 12 August 2013, by Regulations (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 and 2015/757 of the European Parliament and of the Council of 29 April 2015, and by Directive (EU) 2017/2110 of the European Parliament and of the Council of 15 November 2017, applies to ships which, while classified and certified as 'cargo/multipurpose' ships by the flag State, exclusively engage in maritime search and rescue activities. It is for the referring court to draw the necessary conclusions as regards the interpretation and application of the national law transposing that directive.

(2) Article 11 of Directive 2009/16 and points 2A and 2B of Part II of Annex I thereto, read in the light of the duty to render assistance at sea incumbent on the master of a ship under international customary law and reproduced in, inter alia, Article 98 of the Convention on the Law of the Sea, concluded in Montego Bay on 10 December 1982, must be interpreted as meaning that the fact that a ship has transported, following rescue operations at sea, persons in numbers greater than its maximum capacity, as indicated in the ship safety equipment certificate, cannot in itself be regarded as an 'overriding factor' or an 'unexpected factor' requiring or justifying, respectively, additional inspections for the purposes of those provisions. However, it cannot be ruled out, in principle, that the systematic transport of persons in numbers far in excess of the ship's capacity may affect the ship in such a way as to entail a danger to persons, property or the environment, which would constitute an 'unexpected factor' for the purposes of those provisions, which is a matter for the referring court to determine.

(3) The power of the port State to conduct a more detailed inspection, in accordance with Article 13 of Directive 2009/16, of a ship flying the flag of a Member State includes the power to verify that that ship complies with the requirements relating to safety, pollution prevention and on-board living and working conditions applicable to the activities to which the ship is actually assigned, while taking into account the activities in respect of which it was classified.

(4) (a) Directive 2009/16, as amended by Directive 2013/38, by Regulations No 1257/2013 and 2015/757, and by Directive 2017/2110, must be interpreted as meaning that the authorities of the port State are entitled to require possession of certificates and compliance with criteria or requirements on safety and prevention of maritime pollution with regard to the activities in respect of which the ship is classified, and any other certificate, criterion or requirement based on the international or EU legal framework.

(b) That directive must be interpreted as meaning that it is for the port State to indicate, during the inspection, on the basis of which law the criteria or requirements in respect of which an infringement has been noted are to be determined and which corrections or rectifications are required to ensure compliance with that law.

(c) The directive must be interpreted as meaning that a ship systematically engaging in maritime search and rescue activities is not, as such, to be regarded as incapable of being subject to detention measures if it infringes the criteria applicable to it under international or EU law, without prejudice to the duty to render assistance at sea.