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INTRODUCTORY NOTE TO SEA WATCH V. MINISTERO DELLE INFRASTRUTTURE E DEI TRANSPORTI (C.J.E.U.)
BY GARRETT GIFFIN*
[August 1, 2022]

Introduction

On August 1, 2022, the Grand Chamber of the Court of Justice of the European Union (Court of Justice) published its judgment on the joined cases of Sea Watch eV against the Italian Ministero delle Infrastrutture e dei Transporti, the Capitaneria (Harbor Master's Office) di Porto di Palermo, and the Capitaneria di Porto di Porto Empedocle.[1] The Court of Justice's judgment clarifies EU law regarding the additional inspection and detention of a private humanitarian assistance ship. A port state must make a reasonable and justified decision to conduct additional inspections or to detain a ship. The port state must base its decision on serious indications of dangerous operation. However, interpreting the EU law alongside the United Nations Convention on the Law of the Sea (UNCLOS) and the International Convention for Safety of Life at Sea (SOLAS), the Court of Justice held that a port state cannot justify such additional inspections solely based on an excess of passengers beyond a ship's classification or certifications when that ship is rendering assistance to rescued individuals.

Background

Sea Watch is a non-profit, humanitarian organization registered in Germany. It owns and operates a number of ships, including the *Sea Watch 3* and *Sea Watch 4*, to rescue people in danger or distress at sea. The *Sea Watch 3* and *Sea Watch 4* fly the German flag, and a German classification and certification body certified these ships as general cargo/multipurpose ships.

In Summer 2020, pursuant to Sea Watch's mission, the ships conducted operations out of the port of Burriana, Spain, rescuing hundreds of people in danger or distress in the international waters of the Mediterranean Sea. The *Sea Watch 3* and *Sea Watch 4* received instructions from the Italian Maritime Rescue Coordination Centre to proceed to the ports of Palermo and Porto Empedocle, Italy, respectively, to transfer the rescued individuals. Following the transfer and COVID-19-related quarantine, cleaning, and health certification of the ships, the harbor master's offices of the respective ports carried out on-board inspections of the ships. The harbor master's offices proceeded to detain the *Sea Watch 3* and *Sea Watch 4* due to those ships "engag[ing] in assisting migrants at sea . . . while not certified for the intended service" and for more than twenty "technical and operational deficiencies," nine of which were "clearly hazardous to safety, health or [the] environment."[2]

Sea Watch brought two actions in the Regional Administrative Court, Sicily, to annul the detention orders and preceding inspection reports against *Sea Watch 3* and *Sea Watch 4*. Sea Watch argued that: (1) the Italian authorities' inspections exceeded their authority because they failed to accept German authorities' classification and certification of the ships; (2) the conditions under which additional inspections would be permissible were not satisfied; (3) the inspections were a pretext to frustrate Sea Watch's search and rescue operations in the Mediterranean Sea; and (4) the deficiencies cited by the harbor master's offices did not justify the ships' detention.

The Judgment of the Court of Justice

The Regional Administrative Court requested a preliminary ruling from the Court of Justice on five questions. In its first question, the Regional Administrative Court asked whether European Union law on port-state control of shipping, namely Directive 2009/16,[3] applies to a private humanitarian assistance ship—a ship certified and classified as a cargo ship, but that practically operates as a non-commercial search and rescue ship. The Directive applies to any ship "located in a port, in an anchorage or in waters within the jurisdiction of a Member State and is flying the flag of another [state]," unless otherwise excluded by the Directive.[4] The Court of Justice found that a private humanitarian assistance ship was not one of the categories exhaustively excluded by the Directive. It found that a discrepancy between a flag state's classification and certification and a ship's actual activities, whether commercial or

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non-commercial, whether transporting passengers or rescued individuals, has no bearing on whether the Directive applies.[5] It further ruled the Directive does apply to a private humanitarian assistance ship.[6]

In its second question, the Regional Administrative Court asked whether a port state could subject a private humanitarian assistance ship to additional inspection under the Directive, specifically for transporting a greater number of people than a ship's capacity based on its classification and certifications. A port state will subject a ship to additional inspection for an *overriding factor* or an *unexpected factor*.[7] A port state may only rely on an unexpected factor if "a ship has been operated in a manner posing a danger to persons, property, or the environment."[8]

The Court of Justice found that no enumerated overriding factor applied to the *Sea Watch 3* or *Sea Watch 4*.[9] Additionally, it held that considering the transportation of rescued individuals beyond a ship's classification and certification capacity as an unexpected factor would contradict the duty to render assistance under Article 98 of the UNCLOS.[10] Article 98 provides that a state must require a master of a ship flying that state's flag "to render assistance to any person found at sea in danger of being lost" so long as they can do so without "serious danger to the ship, the crew or the passengers."[11] Additionally, Article IV(b) of the SOLAS Convention provides that an individual brought aboard by the master of a ship in rendering assistance at sea does not count with regard to compliance with the SOLAS Convention.[12] The Court of Justice ruled that the Directive does not, however, preclude a port state from subjecting a private humanitarian assistance ship to additional inspection if the port state makes a reasonable and justified decision based on "serious indications capable of proving that there is a danger to health, safety, on-board working conditions or the environment."[13]

On the third question, the Court of Justice ruled that a port state may take all elements, including the ship's activity beyond its classification, into account to assess through additional inspection whether a ship has operated as a danger to persons, property, or the environment.[14] On the fourth question, the Court of Justice ruled that a port state could not demand proof of certification or compliance with some other classification beyond those issued by the flag state. Such a demand would otherwise intrude into the flag state's authority to confer nationality on its ships and to classify and certify them.[15]

In its fifth question, the Regional Administrative Court asked whether a port state could detain a ship based on the port state's demand for a certification or for any additional requirements of certification beyond those issued by the flag state. A port state may detain a ship where it establishes that the ship "operated in a manner posing a danger to persons, property, or the environment," that the "danger or future risk is a clear hazard," and that "the deficiencies giving rise to that danger or risk . . . make the ship concerned unseaworthy."[16] Corrective measures must be "suitable, necessary, and proportionate."[17] However, a port state can impose predetermined, justifiable corrective measures for deficiencies that are clearly hazardous to safety, health, or the environment, and that make it impossible for a ship to sail under conditions capable of ensuring safety at sea.[18]

Conclusion

The Court of Justice's judgement provides legal clarification to both port state authorities and to private humanitarian assistance ships. For a port state, it: (1) may conduct additional inspections based on a reasonable and justified decision based on serious indications of dangerous operation; (2) may consider in its additional inspections activity beyond a ship's classification to determine whether the ship operated dangerously; (3) may *not* demand proof of certification or compliance beyond a flag state's requirements; and (4) may only detain a ship while it takes justifiable corrective measures, not including a demand for any additional certifications or requirements beyond the ship's flag state's certifications. For an owner or operator of a private humanitarian assistance ship, it: (1) must comply with the Directive; and (2) may be required by a port state to rectify deficiencies based on a ship's practical use, here search and rescue operations, not just its classification and certifications as a cargo ship.

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ENDNOTES

1 Joined Cases C-14/21 and C-15/21, Sea Watch eV v. Ministero dele Infrastrutture e dei Transporti ECLI:EU:C:2022:604 (Aug. 1, 2022) [hereinafter Sea Watch].

2 *Id.* ¶ 48.

3 2009 O.J. (L 131) 57 [hereinafter Directive].

4 Sea Watch at ¶ 77.

5 *Id.* ¶ 74.

6 *Id.* ¶ 86.

7 Sea Watch at ¶ 112; Directive, annex I, part II, points 2A & 2B.

8 Sea Watch at ¶ 116.

9 *Id.* ¶¶ 114, 117.

10 Sea Watch at ¶¶ 105, 124.

11 U.N. Convention on the Law of the Sea art. 98, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397.

12 International Convention for the Safety of Life at Sea art. IV(b), Sept. 7, 1978, 32 U.S.T. 47 ("Persons 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."); Sea Watch at ¶¶ 107, 124.

13 *Id.* ¶ 126.

14 *Id.* ¶ 133.

15 *Id.* ¶ 138.

16 *Id.* ¶ 147.

17 *Id.* ¶ 159.

18 *Id.*

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SEA WATCH V. MINISTERO DELLE INFRASTRUTTURE E DEI TRANSPORTI (C.J.E.U.)*
[August 1, 2022]

JUDGMENT OF THE COURT (Grand Chamber) 1 August 2022**

(Reference for a preliminary ruling – Activities relating to the search for and rescue of persons in danger or distress at sea carried out by a humanitarian non-governmental organisation (NGO) – Regime applicable to ships – Directive 2009/16/EC – United Nations Convention on the Law of the Sea – International Convention for the Safety of Life at Sea – Respective competences and powers of the flag State and the port State – Inspection and detention of ships)

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

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily, Italy), made by decisions of 23 December 2020, received at the Court on 8 January 2021, in the proceedings

Sea Watch eV

v

Ministero delle Infrastrutture e dei Trasporti (C-14/21 and C-15/21),

Capitaneria di Porto di Palermo (C-14/21),

Capitaneria di Porto di Porto Empedocle (C-15/21),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, A. Prechal, E. Regan, Jarukaitis, N. Jääskinen, I. Ziemele and J. Passer (Rapporteur), Presidents of Chambers, F. Biltgen, P.G. Xuereb, N. Piçarra, L.S. Rossi, N. Wahl and D. Gratsias, Judges,

Advocate General: A. Rantos,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 30 November 2021, after considering the observations submitted on behalf of:

- Sea Watch eV, by C.L. Cecchini, G. Crescini, L. Gennari, E. Mordiglia and A. Mozzati, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by L. D'Ascia and A. Jacoangeli, avvocati dello Stato,
- the Spanish Government, by L. Aguilera Ruiz, acting as Agent,
- the Norwegian Government, by V. Hauan, L.-M. Moen Jünge and K. Moe Winther, acting as Agents,
- the European Commission, by A. Bouquet, C. Cattabriga and S.L. Kalėda, acting as Agents after hearing the Opinion of the Advocate General at the sitting on 22 February 2022, gives the following

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**Language of the case: Italian.

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Judgment

1 These requests for a preliminary ruling concern the interpretation of Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (OJ 2009 L 131, p. 57, and corrigenda OJ 2013 L 32, p. 23, and OJ 2014 L 360, p. 111), as amended 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'), and 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').

2 The requests have been made in two sets of proceedings between Sea Watch eV and (i) 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), (ii) that ministry and the Capitaneria di Porto di Porto Empedocle (Port of Porto Empedocle Harbour Master's Office, Italy), 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*'.

Legal context

International law

The Convention on the Law of the Sea

3 The United Nations Convention on the Law of the Sea, which was 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'), 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).

4 Part II of the Convention on the Law of the Sea, entitled 'Territorial sea and contiguous zone', comprises Articles 2 to 33 of that convention.

5 Article 2 of the convention, entitled 'Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil', states, in paragraph 1 thereof:

> 'The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.'

6 Article 17 of that convention, entitled 'Right of innocent passage', stipulates:

> 'Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.'

7 Article 18 of that convention, entitled 'Meaning of passage', provides:

> '1. Passage means navigation through the territorial sea for the purpose of:
>
> (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
>
> (b) proceeding to or from internal waters or a call at such roadstead or port facility.
>
> 2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.'

8 Article 19 of the Convention on the Law of the Sea, entitled 'Meaning of innocent passage', states, in paragraphs 1 and 2 thereof, that the passage of a foreign ship is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State and that such passage is to be considered to be prejudicial to one of those aspects if, in the territorial sea, that ship engages in a series of specific activities. Under paragraph 2(g) of

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that article, those activities include those relating to the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

9 Article 21 of that convention, entitled 'Laws and regulations of the coastal State relating to innocent passage', provides:

> '1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:
>
> (a) the safety of navigation ...
>
> ...
>
> (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.
>
> 2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.
>
> ...
>
> 4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations ...'

10 Article 24 of that convention, entitled 'Duties of the coastal State', stipulates, in paragraph 1 thereof:

> 'The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not:
>
> (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or
>
> (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.'

11 Part VII of the Convention on the Law of the Sea, entitled 'High seas', comprises Articles 86 to 120 of that convention.

12 Under Article 86 of the convention, entitled 'Application of the provisions of this Part':

> 'The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. ...'

13 Article 91 of that convention, entitled 'Nationality of ships', stipulates:

> '1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. ...
>
> 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.'

14 Article 92 of that convention, entitled 'Status of ships', states, in paragraph 1 thereof:

> 'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. ...'

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15 Article 94 of the Convention on the Law of the Sea, entitled 'Duties of the flag State', provides:

'1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular every State shall:

(a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and

(b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:

(a) the construction, equipment and seaworthiness of ships;

(b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;

. . .

4. Such measures shall include those necessary to ensure:

(a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships . . .;

. . .

(a) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea . . .

5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

6. A 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. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

. . .'

16 Article 98 of that convention, entitled 'Duty to render assistance', stipulates:

'1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

. . .

2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.'

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The SOLAS Convention

17 The SOLAS Convention entered into force on 25 May 1980. The European Union is not a party to that convention, but all the Member States are.

18 Article I of the SOLAS Convention, entitled 'General obligations under the Convention', provides:

(a) The Contracting Governments undertake to give effect to the provisions of the present Convention and the Annex thereto, which shall constitute an integral part of the present Convention. Every reference to the present Convention constitutes at the same time a reference to the Annex.

(b) 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.'

19 Article II of that convention, entitled 'Application', states:

'The present Convention shall apply to ships entitled to fly the flag of States the Governments of which are Contracting Governments.'

20 Article IV of that convention, entitled 'Cases of "*force majeure*"', provides, in paragraph (b) thereof:

'Persons 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.'

21 The parties to the SOLAS Convention concluded in London, on 11 November 1988, a Protocol relating to that convention, which constitutes an integral part of it. That protocol, which entered into force on 3 February 2000, itself contains an annex which constitutes an integral part of it and which comprises 14 chapters laying down an extensive set of regulations concerning the construction, equipment and operation of ships to which the SOLAS Convention applies.

22 Part B of Chapter 1 of that annex contains, inter alia, the following regulations: 'Regulation 11

Maintenance of conditions after survey

(a) The condition of the ship and its equipment shall be maintained to conform with the provisions of the present regulations to ensure that the ship in all respects will remain fit to proceed to sea without danger to the ship or persons on board.

...

Regulation 17

Acceptance of certificates

Certificates issued under the authority of a Contracting Government shall be accepted by the other Contracting Governments for all purposes covered by the present Convention. They shall be regarded by the other Contracting Governments as having the same force as certificates issued by them.

...

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Regulation 19 Control

(a) Every ship when in a port of another Contracting Government is subject to control by officers duly authorised by such Government in so far as this control is directed towards verifying that . . . certificates . . . are valid.

(b) Such certificates, if valid, shall 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).

(c) In the circumstances given in paragraph (b) . . ., the officer carrying out the control shall take steps to ensure that the ship shall not sail until it can proceed to sea or leave the port for the purpose of proceeding to the appropriate repair yard without danger to the ship or persons on board.

. . .'

The SAR Convention

23 The International Convention on Maritime Search and Rescue, which was concluded in Hamburg on 27 April 1979 (*United Nations Treaty Series*, Vol. 1405, No 23489, p. 133) ('the SAR Convention'), entered into force on 22 June 1985. The European Union is not a party to that convention. Only some of the Member States, including the Federal Republic of Germany and the Italian Republic, are.

The IMO resolution on port State control

24 On 4 December 2019, the Assembly of the International Maritime Organisation (IMO) adopted Resolution A.1138(31), entitled 'Procedures for port State control, 2019' ('the IMO resolution on port State control'), to which is appended an annex with the same title.

25 Chapter 1 of that annex, entitled 'General', contains Section 1.3, entitled 'Introduction', which provides:

'1.3.1 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.

1.3.3 The following control procedures should be regarded as complementary to national measures taken by flag State Administrations in their countries and abroad and are intended to provide a common and consistent approach to the performance of port State control inspections and control measures taken as a consequence of the detection of serious deficiencies. These Procedures are also intended to provide assistance to flag State Administrations in securing compliance with convention provisions in safeguarding the safety of crew, passengers and ships, and ensuring the prevention of pollution.'

European Union law

Directive 2009/16

26 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.

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27 Recitals 2 to 4, 6, 7, 11, 23 and 34 of Directive 2009/16 are worded as follows:

’(2) The Community is seriously concerned about shipping casualties and pollution of the seas and coastlines of Member States.

(3) The Community is equally concerned about on-board living and working conditions.

(4) Safety, pollution prevention and on-board living and working conditions may be effectively enhanced through a drastic reduction of substandard ships from Community waters, by strictly applying Conventions, international codes and resolutions.

. . .

(6) 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.

(7) A harmonised approach to the effective enforcement of these international standards by Member States in respect of ships sailing in the waters under their jurisdiction and using their ports should avoid distortions of competition.

. . .

(11) An efficient port State control system should seek to ensure that all ships calling at ports and anchorages within the Community are regularly inspected.

. . .

(23) Non-compliance with the provisions of the relevant Conventions should be rectified. Ships which need to be the subject of corrective action should, where the observed deficiencies are clearly hazardous to safety, health or the environment, be detained until the shortcomings are rectified.

. . .

(34) Since the objectives of this Directive, namely to reduce substandard shipping in waters under Member States’ jurisdiction through improvement of the Community’s inspection system for seagoing ships and the development of the means of taking preventive action in the field of pollution of the seas, cannot be sufficiently achieved by the Member States and can, therefore, by reason of its scale and effects, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity . . .’

28 Under Article 1 of Directive 2009/16, entitled ‘Purpose’:

‘The purpose of this Directive is to help to drastically reduce substandard shipping in the waters under the jurisdiction of Member States by:

(a) increasing compliance with international and relevant Community legislation on maritime safety, maritime security, protection of the marine environment and on-board living and working conditions of ships of all flags;

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(b) establishing common criteria for control of ships by the port State and harmonising procedures on inspection and detention . . .;

(c) implementing within the Community a port State control system based on the inspections performed within the Community . . ., aiming at the inspection of all ships with a frequency depending on their risk profile, with ships posing a higher risk being subject to a more detailed inspection carried out at more frequent intervals.'

29 Article 2 of that directive provides:

'For the purposes of this Directive the following definitions shall apply:

1. "Conventions" means the following Conventions, with the Protocols and amendments thereto, and related codes of mandatory status, in their up-to-date version:
   . . .
   (b) [the SOLAS Convention];
   . . .
5. "Ship" means any seagoing vessel to which one or more of the Conventions apply, flying a flag other than that of the port State.
6. "Ship/port interface" means 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.
7. "Ship at anchorage" means a ship in a port or another area within the jurisdiction of a port, but not at berth, carrying out a ship/port interface.

. . .

12. "More detailed inspection" means an inspection where the ship, its equipment and crew as a whole or, as appropriate, parts thereof are subjected, in the circumstances specified in Article 13(3), to an in-depth examination covering the ship's construction, equipment, manning, living and working conditions and compliance with on-board operational procedures.

. . .

15. "Detention" means the formal prohibition for a ship to proceed to sea due to established deficiencies which, individually or together, make the ship unseaworthy.

. . .

20. "Statutory certificate" means a certificate issued by or on behalf of a flag State in accordance with Conventions.
21. "Classification certificate" means a document confirming compliance with [the SOLAS Convention];

. . .'

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30 Article 3 of the 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.
>
> . . .
>
> If a Member State performs an inspection of a ship in waters within its jurisdiction, other than at a port, it shall be considered as an inspection for the purposes of this Directive.
>
> . . .
>
> 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.
>
> . . .'

31 Article 4 of that directive, entitled 'Inspection powers', states, in paragraph 1 thereof, that 'Member States shall take all necessary measures, in order to be legally entitled to carry out the inspections referred to in this Directive on board foreign ships, in accordance with international law'.

32 Article 11 of Directive 2009/16, entitled 'Frequency of inspections', provides:

> 'Ships calling at ports or anchorages within the Community 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.'

33 Under Article 12 of that directive, entitled 'Selection of ships for inspection':

> 'The competent authority shall ensure that ships are selected for inspection on the basis of their risk profile . . . and when overriding or unexpected factors arise in accordance with Annex I, Part II 2A and 2B. . . .
>
> . . .'

34 Article 13 of the directive, entitled 'Initial and more detailed inspections', provides:

> 'Member States shall ensure that ships which are selected for inspection in accordance with Article 12 . . . are subject to an initial inspection or a more detailed inspection as follows:
>
> 1. On each initial inspection of a ship, the competent authority shall ensure that the inspector, as a minimum:
>
> (a) checks the certificates . . . required to be kept on board in accordance with Community maritime legislation and Conventions relating to safety and security;
>
> . . .

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(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.'

35 Article 19 of that 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.

3. When exercising his professional judgement as to whether a ship is to be detained, the inspector shall apply the criteria set out in Annex X.

. . .

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. . . .

. . .'

36 Article 21 of Directive 2009/16, entitled 'Follow-up to inspections and detentions', provides:

'1. Where deficiencies referred to in Article 19(2) cannot be rectified in the port of inspection, the competent authority of that Member State may allow the ship concerned to proceed without undue delay to the appropriate repair yard nearest to the port of detention, as chosen by the master and the authorities concerned, where follow-up action can be taken, provided that the conditions determined by the competent authority of the flag State and agreed by that Member State are complied with. Such conditions shall ensure that the ship can proceed 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.

. . .

3. In the circumstances referred to in paragraph 1, the competent authority of the Member State in the port of inspection shall notify the competent authority of the State where the repair yard is situated, the parties mentioned in Article 19(6) and any other authority as appropriate of all the conditions for the voyage.

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The competent authority of a Member State receiving such notification shall inform the notifying authority of the action taken.

4. Member States shall take measures to ensure that access to any port or anchorage within the Community is refused to ships referred to in paragraph 1 which proceed to sea:

(a) without complying with the conditions determined by the competent authority of any Member State in the port of inspection; or

(b) which refuse to comply with the applicable requirements of the Conventions by not calling into the indicated repair yard.

Such refusal shall be maintained until the owner or operator provides evidence to the satisfaction of the competent authority of the Member State where the ship was found defective, demonstrating that the ship fully complies with all applicable requirements of the Conventions.

5. In the circumstances referred to in paragraph 4(a), the competent authority of the Member State where the ship was found defective shall immediately alert the competent authorities of all the other Member States.

In the circumstances referred to in paragraph 4(b), the competent authority of the Member State in which the repair yard lies shall immediately alert the competent authorities of all the other Member States.

Before denying entry, the Member State may request consultations with the flag administration of the ship concerned.

6. By way of derogation from the provisions of paragraph 4, access to a specific port or anchorage may be permitted by the relevant authority of that port State in the event of *force majeure* or overriding safety considerations, or to reduce or minimise the risk of pollution or to have deficiencies rectified, provided that adequate measures to the satisfaction of the competent authority of such Member State have been implemented by the owner, the operator or the master of the ship to ensure safe entry.'

37 Annex I to that directive, entitled 'Elements of the Community port State inspection system', includes the following provisions:

'. . .

I. Inspection of ships

1. Periodic inspections

. . .

2. Additional inspections

Ships, to which the following overriding or unexpected factors apply, are subject to an inspection regardless of the period since their last periodic inspection. However, the need to undertake an additional inspection on the basis of unexpected factors is left to the professional judgement of the inspector.

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2A. Overriding factors

Ships to which the following overriding factors apply shall be inspected regardless of the period since their last periodic inspection:

- Ships which have been suspended or withdrawn from their class for safety reasons since the last inspection in the Community . . .
- Ships which have been the subject of a report or notification by another Member State.
- Ships which cannot be identified in the inspection database.
- Ships which:
  - have been involved in a collision, grounding or stranding on their way to the port,
  - have been accused of an alleged violation of the provisions on discharge of harmful substances or effluents, or
  - have manoeuvred in an erratic or unsafe manner whereby routing measures, adopted by the IMO, or safe navigation practices and procedures have not been followed.

2B. Unexpected factors

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 carrying certificates issued by a formerly recognised organisation whose recognition has been withdrawn since the last inspection in the Community . . .
- Ships which have been reported by pilots or port authorities or bodies as having apparent anomalies which may prejudice their safe navigation or pose a threat of harm to the environment . . .
- Ships which have failed to comply with the relevant notification requirements . . .
- Ships which have been the subject of a report or complaint, including an onshore complaint, by the master, a crew member, or any person or organisation with a legitimate interest in the safe operation of the ship, on-board living and working conditions or the prevention of pollution, unless the Member State concerned deems the report or complaint to be manifestly unfounded.
- Ships which have been previously detained more than three months ago.
- Ships which have been reported with outstanding deficiencies . . .
- Ships which have been reported with problems concerning their cargo, in particular noxious and dangerous cargoes.
- Ships which have been operated in a manner posing a danger to persons, property or the environment.
- Ships where information from a reliable source became known, to the effect that their risk parameters differ from those recorded and the risk level is thereby increased.

. . .’

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38 Annex V to the directive, entitled 'Examples of "clear grounds"', provides, in point A.1 thereof, that 'examples of clear grounds for a more detailed inspection' include 'ships identified in Annex I, Part II 2A and 2B'.

39 Annex X to that directive, entitled 'Criteria for detention of a ship', is worded as follows:

> 'Before determining whether deficiencies found during an inspection warrant detention of the ship involved, the inspector must apply the criteria mentioned below in points 1 and 2.
>
> Point 3 includes examples of deficiencies that may for themselves warrant detention of the ship involved (see Article 19(3)).
>
> . . .
>
> 1. Main criteria
>
> When exercising his professional judgement as to whether or not a ship should be detained the inspector must apply the following criteria:
>
> . . .
>
> The ship is detained if its deficiencies are sufficiently serious to merit an inspector returning to satisfy himself that they have been rectified before the ship sails.
>
> The need for the inspector to return to the ship is a measure of the seriousness of the deficiencies. However, it does not impose such an obligation for every case. It implies that the authority must verify one way or another, preferably by a further visit, that the deficiencies have been rectified before departure.
>
> 2. Application of main criteria
>
> When deciding whether the deficiencies found in a ship are sufficiently serious to merit detention the inspector must assess whether:
>
> . . .
>
> During inspection the inspector must further assess whether the ship and/or crew is able to:
>
> 3. navigate safely throughout the forthcoming voyage;
>
> . . .
>
> 8. abandon ship speedily and safely and effect rescue if necessary during the forthcoming voyage;
> 9. prevent pollution of the environment throughout the forthcoming voyage;
>
> . . .
>
> 13. provide safe and healthy conditions on board throughout the forthcoming voyage;
>
> . . .

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If the answer to any of these assessments is negative, taking into account all deficiencies found, the ship must be strongly considered for detention. A combination of deficiencies of a less serious nature may also warrant the detention of the ship.

3. To assist the inspector in the use of these guidelines, there follows a list of deficiencies, grouped under relevant Conventions and/or codes, which are considered of such a serious nature that they may warrant the detention of the ship involved. This list is not intended to be exhaustive.

. . .

3.2. Areas under [the SOLAS Convention]

. . .

5. Absence, insufficient capacity or serious deterioration of personal life-saving appliances, survival craft and launching arrangements.

. . .

3.10. Areas under [the Maritime Labour Convention, 2006]

. . .

8. The conditions on board are clearly hazardous to the safety, health or security of seafarers.

9. The non-conformity constitutes a serious or repeated breach of the requirements of [the Maritime Labour Convention, 2006] (including seafarer's rights) relating to the living and working conditions of seafarers on the ship, as stipulated in the ship's maritime labour certificate and declaration of maritime labour compliance.

. . .'

The recommendation of 23 September 2020

40 On 23 September 2020 the European Commission adopted Recommendation (EU) 2020/1365 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) ('the recommendation of 23 September 2020').

41 Recitals 1 to 8, 11, 12, 15, 16 and 18 of that recommendation set out the reasons leading to its adoption. In the first place, the Commission indicates that the context of the migratory crisis, which the European Union has been experiencing since 2014, and, more specifically, the very sharp increase in the number of persons attempting to cross the Mediterranean Sea in unseaworthy vessels in order to escape their State of origin and find refuge in Europe, has led several non-governmental organisations (NGOs) operating ships to engage in complex activities relating to the search for and rescue of persons in danger or distress at sea in order to render assistance to those persons. In the second place, it explains, in essence, that those activities, while they can be understood in the light of the duty laid down by international customary and conventional law for Member States to render assistance to such persons, call for enhanced coordination and cooperation, both between those NGOs and the Member States and between the Member States themselves, whether in their capacity as the flag State of the ships used, the port State in which the persons who have been rescued are or may be disembarked, or the host State for those persons. In the third and last place, the Commission considers, in essence, that it is necessary, without prejudice to obligations stemming from international and Union law, to create a framework suited to those activities, inter alia to ensure the safety at sea of rescued persons as well as the crews rescuing them, and that that project involves establishing a contact group facilitating cooperation and coordination between Member States, as well as the development of good practices by those Member States, liaising with all the stakeholders.

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42 In the light of those elements, that recommendation invites the Member States, in essence, to work together increasingly as regards private activities relating to the search for and rescue of persons in danger or distress at sea, inter alia by establishing, with the Commission and liaising with the stakeholders, a contact group in that area.

Italian law

43 Directive 2009/16 was transposed into Italian law by decreto legislativo n. 53 – Attuazione della direttiva 2009/16/CE recante le norme internazionali per la sicurezza delle navi, la prevenzione dell'inquinamento e le condizione 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/EC 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 (GURI No 96 of 27 April 2011, p. 1) ('Legislative Decree No 53/2011').

44 Article 3 of Legislative Decree No 53/2011 is worded as follows:

> '1. This Decree shall apply to any ship or pleasure yacht used for commercial purposes and not flying an Italian flag and its crew calling at a national port or anchorage to engage in a ship/port interface. The inspection of a ship in waters under national jurisdiction shall be considered equivalent to one carried out in a port for the purposes of this Decree.
>
> . . .
>
> 5. This Decree shall not apply to 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.'

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

45 Sea Watch is a humanitarian non-profit organisation registered in Berlin (Germany). Its statutes stipulate that the purpose of that organisation is, in particular, the rescue of persons in danger or distress at sea, as well as the maintenance and operation of ships and aircraft for that purpose. In accordance with that purpose, Sea Watch carries out activities relating to the search for and rescue of persons 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 two ships known as '*Sea Watch 3*' and '*Sea Watch 4*', which fly the German flag and which have been certified by a classification and certification body established in Germany as 'general cargo/multipurpose' ships.

46 During the summer of 2020, *Sea Watch 3* and *Sea Watch 4* took turns leaving the port of Burriana (Spain) and rescuing several hundred persons in danger or distress in the international waters of the Mediterranean Sea. The respective masters of those ships were then informed by the Italian Maritime Rescue Coordination Centre, located in Rome (Italy), that the Ministero degli Interni (Ministry of the Interior, Italy) had authorised the disembarking of the persons concerned and their transfer to ships in the port of Palermo (in the case of *Sea Watch 4*) and the port of Porto Empedocle (in the case of *Sea Watch 3*). They were thus instructed to direct their ships towards those ports and to carry out those operations.

47 Once those operations had been carried out, the Ministro della Salute (Minister for Health, Italy) ordered that *Sea Watch 4* and *Sea Watch 3* anchor near the ports in question so that, initially, the crews of those ships could be quarantined in order to prevent the spread of the COVID-19 pandemic and, subsequently, cleaning, sanitation and health certification could be carried out.

48 At the end of the cleaning and sanitation procedures, the Port of Palermo Harbour Master's Office and the Port of Porto Empedocle Harbour Master's Office carried out on-board inspections on the basis of Legislative Decree No 53/2011, before ordering that *Sea Watch 4* and *Sea Watch 3*, respectively, be detained. As is apparent from the reports resulting from those inspections and the detention orders which were subsequently adopted, those harbour master's offices considered, in the first place, that those ships were 'engaged in assisting migrants at sea

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while . . . not certified for the intended service'. In the second place, they noted more than 20 'technical and operational deficiencies' in relation to the applicable EU legislation and international conventions. Nine of those deficiencies fell to be regarded, 'individually or together, [as] clearly hazardous to safety, health or [the] environment' and as being sufficiently serious to warrant the detention of those ships in accordance with Article 19 of Directive 2009/16.

49 Since then, Sea Watch has rectified some of those irregularities. However, it maintains that the remaining irregularities have not been established. Those irregularities relate, in essence, first of all, to the fact that, according to the Port of Palermo Harbour Master's Office and the Port of Porto Empedocle Harbour Master's Office, *Sea Watch 4* and *Sea Watch 3* are not certified to take on board and transport several hundred persons, as they did during the summer of 2020. Next, those two ships do not have the proper technical equipment for carrying out such activities, although they are in fact intended and actually exclusively used for those activities. In particular, the sewage treatment facilities and the rescue equipment on board those ships are designed for 22 or 30 persons, respectively, and not for several hundred persons, and additional toilets and showers discharging directly into the sea have been installed on the decks. Lastly, the rescue operations carried out by crew members have not been included in their working hours.

50 Sea Watch brought two actions before the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily, Italy) for annulment of (i) the detention orders adopted in respect of *Sea Watch 4* and *Sea Watch 3*, (ii) the inspection reports which preceded those orders and (iii) 'any other preceding, related or subsequent act' ('the measures at issue in the main proceedings'). In support of its claims, it submits, first, that the harbour master's offices responsible for those measures have exceeded the powers of the port State, as derived from Directive 2009/16, interpreted in the light of the applicable international customary and conventional law, and in particular in the light of the rule of mutual acceptance between States of certificates issued by flag States, by carrying out inspections the object or effect of which was to call into question the classification and certification of the ships *Sea Watch 4* and *Sea Watch 3* carried out by the competent German authorities. Secondly, those inspections were carried out although the procedural and substantive conditions under which this would have been permissible, as laid down by Directive 2009/16, were not satisfied. Thirdly, those inspections in fact constituted a roundabout means of attaining an objective of frustrating the search and rescue operations organised by Sea Watch in the Mediterranean Sea. Fourthly and in any event, the deficiencies alleged – in very general terms – by the harbour master's offices in question are not such as to justify ordering that the two ships concerned be detained.

51 In addition, when bringing its actions Sea Watch submitted applications for interim relief in order to have precautionary measures adopted; it reasoned that there was a need for such measures by arguing that there was a risk of serious and irreparable damage within the meaning of the provisions of Italian law applicable in that regard.

52 In its requests for a preliminary ruling, made in the dispute concerning *Sea Watch 4* (Case C-14/21) and the dispute concerning *Sea Watch 3* (Case C-15/21), the referring court indicates, inter alia, that it is apparent from the evidence included in the respective case files for those disputes that the existence of the remaining irregularities, at issue in the main proceedings, is the subject of diverging positions adopted not only by the parties to those disputes, but also by the authorities concerned in Italy, the port State, and Germany, the flag State. According to the referring court, the Italian authorities consider, in essence, that those irregularities are established and that they must be rectified, whereas the German authorities consider that it must be concluded, on the basis of a fair interpretation of the relevant provisions of EU law and international public law, that there is no irregularity and, accordingly, that the situation does not call for Sea Watch to take any action to rectify it.

53 In light of that situation, the referring court is of the view that it is necessary for it, in order to resolve the disputes in the main proceedings, to make a reference to the Court of Justice for a preliminary ruling, so that that court may clarify the legal regime applicable to ships which are operated by humanitarian non- governmental organisations, such as Sea Watch, in order systematically to carry out activities relating to the search for and rescue of persons in danger or distress at sea.

54 In particular, the referring court questions, in the first place, the scope of Directive 2009/16 and, more specifically, whether Article 3 thereof is to be interpreted, in view of its wording, the scheme of that directive and the

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objectives which it pursues, as including – or not including – ships which, while having been officially classified and certified by a body authorised to do so by the flag State and recognised at EU level as 'cargo' ships intended for use for commercial or trade purposes, are, in practice, exclusively and systematically intended for and assigned to activities relating to the search for and rescue of persons in danger or distress at sea.

55 In that regard, that court indicates that it is inclined to consider that Directive 2009/16 is to be interpreted, in view of Article 3(4) and recitals 2 to 4 and 6 thereof, as well as the context of that provision and those recitals, as not applying to ships which, like *Sea Watch 4* and *Sea Watch 3*, are used for non-commercial or non-trade activities, such as activities relating to the search for and rescue of persons in danger or distress at sea, unless those ships can be regarded as passenger ships. According to that interpretation, those ships cannot be the subject of an inspection conducted on the basis of Articles 11 to 13 of that directive. The referring court believes, however, that it is possible to interpret that directive in the opposite way, having regard, in particular, to Article 3(1) thereof. If this were to be the case, that court notes that it would nonetheless be necessary to question the compatibility of Legislative Decree No 53/2011, which was adopted by the Italian Republic in order to transpose Directive 2009/16 into its domestic law, with that directive.

56 In the second place, the referring court questions, in essence, whether the clear discrepancy between the maximum number of persons that may be transported by the ships *Sea Watch 4* and *Sea Watch 3* according to their respective certificates – 22 and 30 persons, respectively – and the hundreds of persons actually transported by those ships during the rescue operations giving rise to the measures at issue in the main proceedings may constitute an 'overriding factor' or an 'unexpected factor' for the purposes of points 2A and 2B of Part II of Annex I to Directive 2009/16 sufficient to justify those ships being subject to an additional inspection based on Article 11 of that directive.

57 The referring court considers that that clear discrepancy constitutes an 'unexpected factor' and, more specifically, a situation in which ships are operated 'posing a danger to persons, property or the environment'. In that regard, it notes, first of all, that the duty of masters of ships to render assistance to anyone in danger or distress at sea, as set out in Article 98 of the Convention on the Law of the Sea and recalled by the SAR Convention, is not imperative, according to those international conventions, unless it can be performed without serious danger to the ship, the crew, or the passengers concerned. It infers from this, next, that the taking on board a given ship of persons in numbers which appear manifestly out of proportion to the numbers for which that ship has capacity and equipment, as indicated in or reflected by its various certificates, and to the size of its crew, may entail such risks. The referring court concludes from this, lastly, that, in the event that this taking on board is the result of systematic activities exclusively relating to the search for and rescue of persons in danger or distress at sea, carried out using ships whose certificates state that they are not suited to those activities, it may be considered that there is a situation of dangerous operation which warrants the organisation of an additional inspection pursuant to Article 11 of Directive 2009/16.

58 In the third place, the referring court seeks to ascertain, in general, the extent and scope of the powers that may be exercised by the port State in connection with the more detailed inspection, conducted on the basis of Article 13 of Directive 2009/16, of a ship for which it is not the flag State. More specifically, it questions whether those powers include the ability to ensure that, regardless of the activities in respect of which the ship was classified and certified by the competent authorities of the flag State, that ship complies, where it carries out in practice different activities consisting exclusively and systematically in the search for and rescue of persons in danger or distress at sea, with the applicable requirements concerning safety, pollution prevention and on-board living and working conditions stemming from EU secondary legislation and/or international customary and conventional maritime law.

59 In that regard, the referring court states, first of all, that, in its view, Article 13 of Directive 2009/16 is to be understood, in view of its wording, as permitting the port State to undertake inspections which are not limited to formally verifying whether all the required certificates are present on board, but also include a substantive review of the actual condition of the ship concerned. Next, it emphasises that that substantive review must nonetheless be conducted, in view of the wording of that article and the scheme of Directive 2009/16 as clarified by, inter alia, recital 6 of that directive and the international conventions applicable, by reference to the classification and certification carried out by the flag State, and must therefore seek to verify only that the actual condition of the ship

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concerned corresponds to the requirements applicable to the activities in respect of which it was classified and certified by that State. Such a review is to take place only 'subsequently' and cannot therefore call into question, by its object or its effects, the review carried out and the decisions made 'initially' in the flag State, which would be the case if the port State were to be permitted to detain a ship on the ground that that ship does not comply with requirements other than those corresponding to the activities in respect of which it was certified. Lastly, while acknowledging that such an interpretation of EU secondary legislation may facilitate fraud, the referring court observes, in essence, that the activities relating to the search for and rescue of persons at issue in the main proceedings are not fraudulent in nature in so far as they are (i) in line with the objective pursued by Sea Watch, (ii) known to the competent German and Italian authorities, and (iii) recognised in principle, as evidenced by the recommendation of 23 September 2020.

60 In the fourth place, the referring court seeks to ascertain whether, if there is no possibility for the port State to conduct, on the basis of Directive 2009/16, a review of whether a particular ship has complied with the applicable requirements relating to safety, pollution prevention and on-board living and working conditions in the light of the actual activities of that ship, such a power may be based either on Article I(b) of the SOLAS Convention, referred to in Article 2 of that directive, which requires contracting governments to take the necessary steps to 'ensure that, from the point of view of safety of life, a ship is fit for the service for which it is intended', or on Section 1.3.1 of the annex to the IMO resolution on port State control.

61 In the fifth and last place, the referring court questions the extent to which and the conditions under which the authorities of the port State are entitled to demand that a ship which has been certified by the flag State as a cargo ship be, in addition, certified to carry out activities relating to the search for and rescue of persons in danger or distress at sea, and that it comply with the requirements applicable to those activities or permitting engagement in those activities under conditions suitable for ensuring safety at sea. It also questions whether those authorities are empowered to detain such a ship under Article 19 of Directive 2009/16 until it has been brought into line with those requirements.

62 In connection with all those questions, the referring court observes, first, that the recommendation of 23 September 2020 emphasises the importance ascribed by the European Union to compliance, by ships engaging in activities relating to the search for and rescue of persons in danger or distress in the Mediterranean Sea, with the applicable requirements in the area of safety. Secondly, it considers that there is, however, no international or EU legislation which is clearly applicable and genuinely suited to ships exclusively and systematically engaging in those activities. Thirdly, it considers, in essence, that, in the absence of appropriate classification and certification, the port State cannot demand either that such ships hold certificates other than those issued to them by the flag State or that they comply with requirements other than those corresponding to those certificates.

63 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, apart from referring, in Case C-14/21, to the ship *Sea Watch 4* and, in Case C-15/21, to the ship *Sea Watch 3*, to the Court of Justice for a preliminary ruling:

(1) (a) Does the scope of [Directive 2009/16] include – and if so, can [an inspection by the port State] 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 Sea Watch 4 and Sea Watch 3] 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 [an inspection by the port State] 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?

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(c) Lastly, can the Court reasonably consider that cargo ships which routinely carry out SAR activities . . . fall within the scope of [Directive 2009/16], in so far as it includes passenger ships, following the amendments made [to that directive] 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 SAR 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 [of the port State] to conduct a more detailed . . . 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 SAR 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 [of EU law] is, therefore, necessary for the purposes of and in the context of [an inspection by the port State] – 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 . . . 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) Lastly, 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 . . . 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

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relation to the activities carried out in practice, particularly in the event that SAR 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 SAR 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 SAR 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 SAR 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 . . . 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 . . . inspection must meet in order to carry out SAR activities – and exactly which corrective/remedial actions are required to ensure compliance with [that] legislation, regulation or administrative measure?

(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 inspection carried out by that State] must comply with in order to carry out SAR activities?

(f) If [points (d) and (e)] are answered in the negative, can SAR 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 inspection carried out by the port State] fulfils the above criteria and/or requirements for a different category (particularly cargo ships), which the flag State has confirmed actually exist?'

Procedure before the Court

64 By decision of the President of the Court of 2 February 2021, Cases C-14/21 and C-15/21 were joined for the purposes of the written and oral parts of the procedure and of the decision of the Court.

65 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. In support of that request, it referred to (i) the particular importance, especially during the summer months, of activities relating to the search for and rescue of persons in danger or distress in the Mediterranean Sea carried out by humanitarian organisations using ships such as those at issue in the main proceedings, (ii) the fact that several of those ships were subject, on the date when the requests for a preliminary ruling giving rise to the present cases were made, to detention measures in Italian ports, and (iii) the existence of actions pending before the Italian administrative courts against some of those measures.

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66 By order of 25 February 2021, *Sea Watch* (C-14/21 and C-15/21, EU:C:2021:149), the President of the Court dismissed those requests on the ground that the circumstances relied on in support thereof did not in themselves justify determining the present cases under that expedited procedure, without prejudice to the possibility for the referring court to adopt, as necessary, the interim measures necessary to ensure the full effectiveness of the decisions which it is called upon to deliver in the disputes in the main proceedings.

67 The President of the Court nevertheless held 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.

Consideration of the questions referred

Question 1

68 By its first question, which concerns the scope of Directive 2009/16, the referring court asks, in essence, whether that directive is to be interpreted as applying to ships which, although classified and certified as cargo ships by the flag State, are in practice being systematically used by a humanitarian organisation for non-commercial activities relating to the search for and rescue of persons in danger or distress at sea ('private humanitarian assistance ships'). If so, that court also questions whether that directive is to be interpreted as precluding national legislation ensuring its transposition into domestic law from limiting its applicability only to ships which are used for commercial activities.

69 In that regard, it should be noted, in the first place, that Article 3 of Directive 2009/16 outlines the scope of that directive, generally and without prejudice to specific provisions relating to certain categories of ships, by reference to two cumulative sets of criteria concerning (i) ships to which that directive applies and (ii) situations in which it applies to them.

70 Regarding, first, the ships falling within the scope of Directive 2009/16, the first subparagraph of Article 3(1) of that directive states that it applies to 'any ship', the term 'ship' itself being defined in Article 2(5) of the directive as any seagoing vessel which (i) is subject to one or more of the international conventions referred to in Article 2(1) of that directive and (ii) flies a flag other than that of the port State.

71 Article 3(4) of Directive 2009/16 provides, however, that 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 are excluded from the scope of that directive.

72 Given that the various categories of ships thus excluded constitute as many exceptions to the general rule set out in the first subparagraph of Article 3(1) of Directive 2009/16, they must be regarded as exhaustive and must be interpreted strictly.

73 It follows, in particular, that the expressions 'government ships used for non-commercial purposes' and 'pleasure yachts not engaged in trade' used in Article 3(4) of Directive 2009/16 may not be understood as including, by analogy, ships which, like those at issue in the main proceedings, are in practice used for 'non-commercial' or 'non-trade' purposes without, however, being 'government ships' or 'pleasure yachts' for the purposes of that provision.

74 Unless the ship concerned falls within one of the categories exhaustively excluded, under Article 3(4) of Directive 2009/16, from the scope of that directive, the fact that the activities carried out by that ship do not coincide with those in respect of which it was classified and certified in the State whose flag it flies has no bearing on the applicability of the directive, as the Advocate General noted, in essence, in point 35 of his Opinion. It is also irrelevant whether the activities actually carried out by such a ship are commercial or non-commercial in nature. Lastly, it is irrelevant whether the transport of persons to whom assistance at sea has been rendered, such as that entailed by the systematic search and rescue activities at issue in the main proceedings is – or is not – comparable to the transport of passengers.

75 As regards, second, the situations falling within the scope of Directive 2009/16, the first subparagraph of Article 3(1) of that directive states that it applies, in particular, to any ship and its crew 'calling at a port or anchorage of a Member State to engage in a ship/port interface'. As can be seen from Article 2(6) of that directive, this

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encompasses any interaction that occurs when such a ship is directly and immediately affected by actions involving the movement of persons, the movement of goods, or the provision of port services.

76 However, Directive 2009/16 does not apply only in that situation, as can be seen from the third subparagraph of Article 3(1) thereof, which refers to the possibility, for a Member State, to perform an inspection of a ship located in waters within its jurisdiction.

77 It is thus apparent from paragraphs 69 to 76 of the present judgment that Directive 2009/16 must be interpreted as applying to any ship which, like those at issue in the main proceedings, is located in a port, in an anchorage or in waters within the jurisdiction of a Member State and is flying the flag of another Member State or of a non-Member State, without being covered by one of the exceptions listed in Article 3(4) of that directive ('ships subject to the jurisdiction of the port Member State').

78 That interpretation of the wording of Directive 2009/16 is consistent with the objective pursued by that directive, which consists, as is apparent from Article 1 thereof, of increasing compliance with the rules of international law and EU legislation relating to maritime safety and security, protection of the marine environment and on-board living and working conditions by means of a monitoring, inspection and detention mechanism based on common criteria and a harmonised procedure applicable – subject to the exceptions which are expressly provided for by the EU legislature – to all ships subject to the jurisdiction of the port Member State.

79 This interpretation is, moreover, in line with Article 80(2) EC, now Article 100(2) TFEU, which constitutes the legal basis of Directive 2009/16. That provision permits the EU legislature to adopt general provisions to improve transport safety and, accordingly, maritime transport safety (see, to that effect, judgment of 23 October 2007, *Commission* v *Council*, C-440/05, EU:C:2007:625, paragraphs 58 and 59 and the case-law cited), without requiring that those provisions be limited only to ships which are intended, or used in practice, for commercial or trade activities.

80 Having regard to all those factors, it must be held that, where the conditions referred to in paragraph 77 of the present judgment are satisfied, Directive 2009/16 is applicable to private humanitarian assistance ships.

81 In the second place, it clearly follows from Directive 2009/16 that all the ships referred to in Article 3(1) of that directive are covered by the monitoring, inspection and detention mechanism provided for in Articles 11 to 13 and 19 thereof.

82 Consequently, the laws, regulations and administrative provisions which the Member States are required to adopt under Directive 2009/16 in order to bring their domestic law into line with that directive must ensure that the scope of that mechanism encompasses all those ships, including those referred to in paragraph 80 of the present judgment, since the directive precludes such provisions from limiting their applicability only to ships which are used for commercial activities.

83 Having regard to the questions of the referring court as set out in paragraphs 55 and 68 of the present judgment, it should be added that, as can be seen from the settled case-law of the Court of Justice, the principle of the primacy of EU law requires all Member State bodies to give full effect to that law and, more specifically, requires the national courts to interpret, to the greatest extent possible, their national law in a manner consistent with EU law. That principle requires that the whole body of domestic law be taken into consideration and that the interpretative methods recognised by that law be applied, with a view to ensuring that the act of the Union concerned in a given case is fully effective and to achieving an outcome consistent with the objective pursued by that act (see, to that effect, judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraphs 53, 54, 57 and 77).

84 However, the principle has certain limits. In particular, it cannot serve as the basis for an interpretation of national law *contra legem* (see, to that effect, judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraphs 74 and 76 and the case-law cited).

85 In this instance, it is for the referring court to interpret, to the greatest extent possible, the national legislation which ensures the transposition of the provisions determining the scope of Directive 2009/16 and, in particular, the monitoring, inspection and detention mechanism provided for in Articles 11 to 13 and 19 of that directive in a manner consistent with those provisions, taking into account the whole body of domestic law and applying the

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methods of interpretation recognised by that law, which some of the interested parties who have participated in the proceedings before the Court of Justice have argued is possible.

86 Having regard to all of the foregoing, the answer to the first question is that Directive 2009/16 must be interpreted as:

- applying to ships which, although classified and certified as cargo ships by the flag State, are in practice being systematically used by a humanitarian organisation for non-commercial activities relating to the search for and rescue of persons in danger or distress at sea; and
- precluding national legislation ensuring its transposition into domestic law from limiting its applicability only to ships which are used for commercial activities.

Questions 2, 3, 4 and 5

Preliminary observations

87 The second, third, fourth and fifth questions concern 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 ships subject to the jurisdiction of the port Member State and, more specifically, private humanitarian assistance ships.

88 The objective of that directive is, as has been noted in paragraph 78 of the present judgment, to increase compliance with the rules of international law and EU legislation relating to maritime safety and security, protection of the marine environment and on-board living and working conditions.

89 To that end, that directive is designed, more specifically, to enable the European Union and the Member States to ensure that ships subject to the jurisdiction of the port Member State comply with the provisions of the international conventions which are listed in Article 2(1) thereof. These include the SOLAS Convention, to which all the Member States of the European Union – but not the European Union itself – are parties, as is indicated in paragraph 17 of the present judgment.

90 In that regard, it should be borne in mind that, even if the European Union is not a party to an international convention and that convention is thus not binding on the European Union, it follows from the settled case- law of the Court that account may be taken of that convention, in connection with the interpretation of provisions of EU secondary legislation which fall within its scope, if all the Member States are parties thereto (judgments of 3 June 2008, *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraphs 47 to 52; of 23 January 2014, *Manzi and Compagnia Naviera Orchestra*, C-537/11, EU:C:2014:19, paragraph 45; and of 11 July 2018, *Bosphorus Queen Shipping*, C-15/17, EU:C:2018:557, paragraph 45).

91 In this instance, it is necessary to take account of the SOLAS Convention, to which all the Member States are parties, when interpreting Directive 2009/16. That directive is an expression of the choice made by the EU legislature to increase compliance with the provisions of that convention within the European Union, although the European Union itself is not a party thereto. Furthermore, the objective, recalled in paragraph 89 of the present judgment, which the EU legislature pursued by adopting that directive is reflected in the reproduction, in essence, in some of the annexes thereto, of a part of the rules set out in the protocol accompanying that convention.

92 In addition, it follows from the settled case-law of the Court that provisions of EU secondary legislation must be interpreted, to the greatest extent possible, in conformity both with the international conventions which are binding on the European Union and with the relevant rules and principles of general international law, observance of which is required of the European Union in the exercise of its powers when adopting such provisions (see, to that effect, judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 291, and of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, EU:C:2018:118, paragraphs 43 to 47).

93 In this instance, Directive 2009/16 must be interpreted, having regard to its objective and its content, by taking account not only of the SOLAS Convention but also of the Convention on the Law of the Sea.

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94 As has been indicated in paragraph 3 of the present judgment, the Convention on the Law of the Sea was concluded by the European Union, with the result that it is binding on the European Union and its provisions form an integral part of the EU legal order. Furthermore, it has primacy, within that legal order, over acts of EU secondary legislation, which means that those acts must be interpreted, as far as possible, in conformity with the provisions of that convention (see, to that effect, judgments of 30 May 2006, *Commission* v *Ireland*, C-459/03, EU:C:2006:345, paragraph 82; of 3 June 2008, *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraphs 42 and 53; and of 11 July 2018, *Bosphorus Queen Shipping*, C-15/17, EU:C:2018:557, paragraph 44).

95 In that regard, two sets of considerations are relevant for the purposes of the answers to be given to the second, third, fourth and fifth questions referred.

96 In the first place, the main objective of the Convention on the Law of the Sea is to codify and develop the rules of general international law relating to the peaceful cooperation of the international community when exploring, using and exploiting marine areas. To that end, it determines the legal regime applicable to the various marine areas identified therein (which include, inter alia, the territorial sea and the high seas), establishing the substantive and territorial limits of the sovereign rights and the jurisdiction of the States in those various marine areas (see, to that effect, judgment of 3 June 2008, *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraphs 55, 57 and 58).

97 That legal regime seeks to strike a fair balance between the respective and potentially conflicting interests of States as coastal States and flag States (see, inter alia, judgments of 3 June 2008, *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraph 58, and of 11 July 2018, *Bosphorus Queen Shipping*, C-15/17, EU:C:2018:557, paragraph 63).

98 That fair balance is characterised by the exclusive power which every State is recognised as having, under Article 91 of the Convention on the Law of the Sea, to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. The exercise of that power is given material expression, inter alia, through the act, by the flag State, of classifying and certifying the ships which fly its flag, or of having those ships classified and certified by a body authorised to do so, having verified whether those ships have complied with all the requirements laid down by the applicable international conventions (see, to that effect, judgments of 3 June 2008, *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraph 59, and of 7 May 2020, *Rina*, C-641/18, EU:C:2020:349, paragraphs 43, 44 and 46).

99 Furthermore, every State, according to Article 92 of the Convention on the Law of the Sea, has exclusive jurisdiction over ships flying its flag on the high seas. This results in a certain number of obligations for the flag State which, as can be seen from Article 94(1) to (3) of that convention, include the obligation to exercise effectively its jurisdiction and control over those ships and the obligation to take all such measures as are necessary to ensure safety at sea with regard, inter alia, to equipment, seaworthiness, training, and labour conditions. In addition, the flag State must, under Article 94(4) of that convention, ensure, inter alia, that the master, officers and, to the extent appropriate, the crew are conversant with and observe the applicable international regulations concerning the safety of life at sea.

100 It follows, inter alia, that, on the high seas, a ship is subject to the exclusive jurisdiction of the flag State and is governed by the law of that State (judgments of 24 November 1992, *Poulsen and Diva Navigation*, C-286/90, EU:C:1992:453, paragraph 22, and of 25 February 2016, *Stroumpoulis and Others*, C-292/14, EU:C:2016:116, paragraph 59), in particular as regards safety at sea and the safety of life at sea. More generally, a ship in a marine area other than the high seas remains subject, in that area, to the jurisdiction of the flag State (see, to that effect, judgment of 13 June 2018, *Deutscher Naturschutzring*, C-683/16, EU:C:2018:433, paragraphs 53 and 54), although it may be subject to controls carried out by the State having sovereignty or jurisdiction over that area, within the limits of the competences and the powers of that State.

101 The fair balance between the respective interests of coastal States and flag States is also characterised by the fact that the sovereignty of a coastal State extends, as can be seen from Article 2(1) of the Convention on the Law of the Sea, beyond its land territory, including its ports, and beyond its internal waters (judgments of 24 November 1992, *Poulsen and Diva Navigation*, C-286/90, EU:C:1992:453, paragraph 28, and of 25 February 2016,

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Stroumpoulis and Others, C-292/14, EU:C:2016:116, paragraph 59), to the belt of sea adjacent to its territory, described as the 'territorial sea'.

102 The concept of 'coastal State' referred to in the Convention on the Law of the Sea partially overlaps with that of 'port State' referred to in Directive 2009/16 which, although it is not formally defined by that directive, refers, according to the first, fifth and sixth subparagraphs of Article 3(1) thereof, to any Member State of the European Union which has a seaport or a river port.

103 The sovereignty enjoyed by a coastal State over its territorial sea is, however, to be understood as being without prejudice to the obligation placed on that State by Article 24(1) of the Convention on the Law of the Sea not to obstruct, except in accordance with that convention, the right of foreign ships to innocent passage through its territorial sea, which should be understood, inter alia, under Articles 17 and 18 of that convention, as the right to navigate through that sea for the purpose of proceeding to the internal waters of the coastal State, calling at one of the ports of that State, or proceeding from that port, those waters or that sea (see, to that effect, judgment of 24 November 1992, *Poulsen and Diva Navigation*, C-286/90, EU:C:1992:453, paragraph 25).

104 That being the case, the coastal State has the power to adopt, under Article 21(1) and (4) of the Convention on the Law of the Sea, laws and regulations relating to the innocent passage of foreign ships through its territorial sea, and in particular to the safety of navigation, with which ships making such passage must comply. In addition, in order to be considered 'innocent' that passage must have the characteristics set out in Article 19 of that convention.

105 In the second place, in Part VII thereof, relating to the high seas, the Convention on the Law of the Sea lays down, in Article 98(1), a 'duty to render assistance' which is derived from the customary law of the sea, pursuant to which every State must require any master of a ship flying its flag to render assistance to persons in danger or distress at sea, in so far as he or she can do so without serious danger to his or her ship, the crew or the passengers, and in so far as such action may reasonably be expected of him or her ('the duty to render assistance at sea'). In addition, that convention specifies, in Article 18(2) thereof, that the fact that a ship has rendered assistance to such persons may entail the passage of that ship through the territorial sea of a coastal State, including stopping and anchoring in such an area if necessary.

106 Accordingly, the implementation of the duty to render assistance at sea has legal consequences for the respective powers of flag States and coastal States as regards ascertaining whether the rules on safety at sea, as specified in paragraphs 99, 100, 103 and 104 of the present judgment, have been complied with.

107 In that regard, it is necessary, in accordance with what has been noted in paragraphs 90 and 91 of the present judgment, to take account, for the purpose of interpreting the provisions of Directive 2009/16, of Article IV(b) of the SOLAS Convention, pursuant to which persons 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 must not be taken into account for the purpose of ascertaining the application to that ship of any provisions of that convention.

108 It follows that, in a situation where the master of a ship flying the flag of a State that is a party to the SOLAS Convention has implemented the duty to render assistance at sea referred to in paragraph 105 of the present judgment, neither the coastal State which is also a party to that convention nor the flag State can make use of their respective powers to ascertain whether the rules on safety at sea, as specified in paragraphs 99, 100, 103 and 104 of the present judgment, have been complied with in order to verify whether the presence of those persons on board may result in the ship in question infringing any of the provisions of that convention.

109 It is necessary to take those considerations into account when answering the second, third, fourth and fifth questions raised by the referring court.

Question 2

110 By its second question, the referring court seeks to ascertain, in essence, whether Article 11(b) of Directive 2009/16, read in conjunction with Part II of Annex I to that directive, is to be interpreted as meaning that the systematic use of cargo ships for activities relating to the search for and rescue of persons in danger or distress at sea may be regarded, on the ground that it results in those ships transporting persons in numbers out of proportion to their

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carrying capacity, as derived from their classification and their equipment certificates, as a factor justifying those ships being subject to an additional inspection.

111 As has been emphasised in paragraphs 78 and 81 of the present judgment, Article 11 of Directive 2009/16 constitutes an integral part of the general monitoring, inspection and detention mechanism which may be applied, with certain exceptions, to all ships subject to the jurisdiction of the port Member State, with the aim of increasing compliance with the rules of international law and EU legislation relating to maritime safety and security, protection of the marine environment and on-board living and working conditions.

112 To that end, that article, read in conjunction with Article 12 of Directive 2009/16, requires Member States which are port States to subject such ships both to periodic inspections, which must be organised at predetermined intervals depending on the risk profile of those ships, and to additional inspections regardless of the period since their last periodic inspection. Article 11 of that directive also specifies, in point (b) thereof, that those Member States are required to carry out additional inspections in respect of ships displaying one of the 'overriding factors' listed in point 2A of Part II of Annex I to that directive and that they have the option of making use of additional inspections in respect of ships corresponding to one of the 'unexpected factors' listed in point 2B of Part II of that annex.

113 In this instance, it is apparent from the grounds of the orders for reference, summarised in paragraphs 48, 56 and 57 of the present judgment, that, while considering that the ships at issue in the main proceedings were 'engaged in assisting migrants at sea while . . . not certified for the intended service', the competent authorities ultimately concluded that there were a number of deficiencies, some of which fell to be regarded, 'individually or together, [as] clearly hazardous to safety, health or [the] environment'. It is also apparent from those grounds that, according to the referring court, those deficiencies relate, as a whole, to the clear discrepancy between the number of persons that may be transported by those ships pursuant to their respective certificates and the number of persons actually transported by them in the course of the rescue operations giving rise to the disputes in the main proceedings.

114 In the absence of any indication, in the orders for reference, whereby that situation may be connected to an 'overriding factor' as referred to in point 2A of Part II of Annex I to Directive 2009/16, such as a measure suspending or withdrawing a classification for safety reasons, a report or notification, or an accusation of an alleged violation of the provisions on discharge of harmful substances or effluents, that situation can only be covered by an 'unexpected factor' as referred to in point 2B of Part II of that annex. In addition, it does not follow from the orders for reference that the Italian authorities adopted the measures at issue in the main proceedings (i) following an alert, a report or a complaint concerning safety of navigation, the marine environment, or on-board living and working conditions, (ii) as a result of the fact that Sea Watch's ships have previously been detained more than three months ago, or (iii) in the light of information from a reliable source indicating that the risk parameters of those ships differ from those recorded and that their risk level is thereby increased. In light of those circumstances, such a situation appears only to be capable, in this instance, of being examined in the light of the 'unexpected factor' consisting in the fact that those ships may 'have been operated in a manner posing a danger to persons, property or the environment' for the purposes of the ninth indent of point 2B of Part II of that annex, which is, moreover, the factor highlighted by the referring court in its orders for reference.

115 In order to determine whether this may be the case, it is necessary, according to the settled case-law of the Court, to interpret that provision by considering not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgments of 7 June 2005, *VEMW and Others*, C-17/03, EU:C:2005:362, paragraph 41, and of 21 January 2021, *Germany* v *Esso Raffinage*, C-471/18 P, EU:C:2021:48, paragraph 81).

116 In that regard, it should be noted, in the first place, that it follows from the very wording of the ninth indent of point 2B of Part II of Annex I to Directive 2009/16 that the unexpected factor referred to by that provision cannot be relied on, in a given case, unless it is established that a ship has been operated in a manner posing a danger to persons, property or the environment.

117 Having regard to the legal context of that provision, the systematic use of cargo ships for activities relating to the search for and rescue of persons in danger or distress at sea may not be regarded, solely on the ground that it results in those ships transporting persons in numbers which are out of all proportion to their capacity in that

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regard as derived from their classification and certification, and regardless of any other circumstance, as an unexpected factor for the purposes of that indent, permitting the port State to undertake an additional inspection.

118 Such an interpretation would be contrary to the provisions of the Convention on the Law of the Sea inasmuch as it would be such as to hamper the effective implementation of the duty to render assistance at sea laid down in Article 98 of that convention. In addition, it would not be compatible with Article IV(b) of the SOLAS Convention.

119 By contrast, the wording of Article 11(b) of Directive 2009/16, read in conjunction with the ninth indent of point 2B of Part II of Annex I to that directive, does not preclude, in view of the general nature of its wording, a finding, depending on the circumstances of the case, that ships which systematically carry out search and rescue activities and which are located in a port or in waters falling within the jurisdiction of a Member State after having entered those waters and after having completed all operations relating to the transhipment or disembarking of persons to whom their respective masters decided to render assistance when they were in danger or distress at sea have 'been operated in a manner posing a danger to persons, property or the environment', as the Advocate General noted in points 43 and 46 of his Opinion. In that regard, it should be noted that, in specifying that the decision to undertake an additional inspection 'is left to the professional judgement of the competent authority', Articles 11 and 13 of that directive, as well as Part II of Annex I thereto, confer on the competent authority of the Member State concerned a broad discretion to determine whether those circumstances are such as to constitute an 'unexpected factor' justifying such an inspection.

120 However, the decision taken by that authority must nevertheless still be reasoned and, as to the substance, justified both in law and in fact. In order for this to be the case, that decision must be based on serious indications capable of establishing that there is a danger to health, safety, on-board working conditions or the environment, in view of the relevant provisions of international and EU law, having regard to the conditions under which the operation in question took place. It is, in this instance, for the referring court to verify whether those requirements have been complied with. The factors which may be taken into account for the purposes of that verification include (i) the activities for which the ship in question is used in practice, (ii) any difference between those activities and the activities in respect of which the ship is certified and equipped, (iii) how frequently those activities are carried out and (iv) the equipment of that ship with regard to the expected (but also the actual) number of persons on board.

121 Regarding that last factor, it should be noted that the clearly inadequate amount of safety and rescue equipment on the ship concerned with regard to the number of persons which that ship may be used to rescue in the context of systematic search and rescue activities may in itself have decisive weight for the purpose of assessing whether that ship has been operated in a manner posing a danger to persons, property or the environment. By contrast, the weight to be given, individually and overall, to findings such as a finding that there are insufficient sewage treatment facilities, that there are additional toilets and showers discharging directly into the sea, or that rescue operations are not included in the working hours of the crew is likely to be greater or lesser in each individual case. It may vary depending on, inter alia, the frequency with which the activities are actually carried out by the ship in question, as well as the extent of the discrepancy between the number of persons actually transported during search and rescue operations at sea and the number of persons which that ship can accommodate according to the certifications issued by the flag State.

122 In the second place, it is apparent from the legal context of Article 11(b) of Directive 2009/16 and point 2B of Part II of Annex I thereto that the control of such an operation and the inspection of the ship concerned by the port State are, in a situation of this kind, such as to contribute to effective compliance with the requirements of the relevant rules of international law.

123 It follows from regulation 11(a) in Part B of Chapter I of the annex to the protocol accompanying the SOLAS Convention that after having been surveyed, classified and certified under the control of the flag State, a ship must be maintained, in all respects, under conditions such as to ensure that it will remain 'fit to proceed to sea without danger to the ship or persons on board'. Furthermore, it is apparent from regulation 19(a) and (b) of that chapter that that fitness is among the elements which the port State is entitled to check when a ship is in one of its ports, where there are clear grounds for believing that that fitness is not guaranteed. Lastly and more generally, Article I(b) of that

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convention requires the parties thereto to take all steps which may be necessary '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'.

124 In addition, as has been recalled in paragraph 107 of the present judgment, it follows from Article IV(b) of the SOLAS Convention that, as such, the presence of persons on board a ship by reason of *force majeure* or in consequence of the implementation, by the master of that ship, of his or her duty to render assistance at sea may not be taken into account for the purpose of ascertaining whether that ship complies with the provisions of that convention. However, the fact remains that, under Article 98(1) of the Convention on the Law of the Sea, that duty must, as has been emphasised in paragraph 105 of this judgment, be implemented 'in so far as [this can be done] without serious danger to the ship, the crew or the passengers'.

125 In the third and last place, the interpretation set out in paragraphs 119 to 124 of the present judgment is consistent with the objective pursued by Directive 2009/16 as specified in paragraphs 78, 88 and 89 of this judgment, in so far as it is precisely that objective which has led the EU legislature to entrust the Member States, acting as port States, with the responsibility for ensuring a 'second line of defence' against 'substandard shipping', which complements the 'primary' responsibility of flag States in this area, as can be seen from recital 6 of that directive.

126 Having regard to all of the foregoing, the answer to the second question is that Article 11(b) of Directive 2009/16, read in conjunction with Part II of Annex I to that directive, must be interpreted as meaning that the port State may subject ships which systematically carry out search and rescue activities and which are located in one of its ports or in waters falling within its jurisdiction, after they have entered those waters and after all the operations relating to the transhipment or disembarking of persons to whom their respective masters have decided to render assistance have been completed, to an additional inspection if that State has established, on the basis of detailed legal and factual evidence, that there are serious indications capable of proving that there is a danger to health, safety, on-board working conditions or the environment, having regard to the conditions under which those ships operate.

Questions 3 and 4

127 By its third and fourth questions, the referring court seeks to ascertain, in essence, whether Article 13 of Directive 2009/16 is to be interpreted as meaning that, during more detailed inspections organised pursuant to that article, the port State has the power, first, to take account of the fact that ships which have been classified and certified as cargo ships by the flag State are, in practice, being systematically used for activities relating to the search for and rescue of persons in danger or distress at sea and, second, to demand proof that those ships hold certificates other than those issued by the flag State or that they comply with the requirements applicable to another classification.

128 In that regard, Article 13 of Directive 2009/16 places Member States under an obligation to ensure that ships which are selected for inspection in accordance with Article 12 of that directive are subject to an initial inspection or a more detailed inspection. Article 13 of the directive specifies, in paragraph 1 thereof, that the initial inspection of a ship must, as a minimum, seek to check the certificates required to be kept on board in accordance with EU legislation and international conventions relating to safety and security, and to verify the overall condition of the ship in question. That article also provides, in paragraph 3 thereof, that a more detailed inspection, including further checking of whether the ship complies with on-board operational requirements, must be carried out whenever, following the initial inspection, 'there are clear grounds for believing . . . that the condition of [the] ship or of its equipment or crew does not substantially meet the relevant requirements of a Convention'. Lastly, that article refers, as regards examples of such clear grounds, to Annex V to that directive.

129 That annex includes, inter alia, in the list of examples of clear grounds for a more detailed inspection, 'ships identified in [points 2A and 2B of Part II of] Annex I' to Directive 2009/16, namely those which are characterised by the presence of one of the overriding or unexpected factors mentioned in point 2A and point 2B, respectively, of Part II of that annex.

130 Having regard to those provisions, it should be noted, in the first place, that the power to organise a more detailed inspection provided for in Article 13(3) of Directive 2009/16 gives material expression to the obligation or

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the option for Member States which are port States to undertake, pursuant to Articles 11 and 12 of that directive, an additional inspection of ships subject to their jurisdiction in the situations referred to in paragraph 112 of the present judgment. Like any additional inspection, a more detailed inspection of this kind can therefore be organised, as regards private humanitarian assistance ships systematically engaging in search and rescue activities, only at the end of the operations decided on by the master of the ship concerned, as indicated in paragraph 119 of this judgment.

131 In the second place, it follows from the clear wording of Article 13 of Directive 2009/16 that the implementation of that power of more detailed inspection presupposes, first, that the port State carried out an initial inspection pursuant to paragraph 1 of that article and, second, that, at the end of that inspection, it considered that there were 'clear grounds for believing ... that the condition of [the] ship or of its equipment or crew [did] not substantially meet the relevant requirements of a Convention'. As is apparent from paragraph 114 of the present judgment, such grounds include the fact that a ship has been operated in a manner posing a danger to persons, property or the environment.

132 Accordingly, the more detailed inspection of a ship is necessarily intended to enable the port State to carry out a control of that ship which is both more wide-ranging and more in-depth than the control which was carried out in connection with the initial inspection. That control may therefore concern, as is apparent from Article 13(3) of Directive 2009/16, read in conjunction with Article 2(12) of that directive, which defines a 'more detailed inspection', 'the ship's construction, equipment, manning, living and working conditions and compliance with on-board operational procedures'.

133 It follows that, in a situation where a more detailed inspection is organised because there are clear grounds for believing that a ship 'has been operated in a manner posing a danger to persons, property or the environment', all those elements may be taken into account by the port State in order to assess whether there is such a danger, having regard to the requirements of the applicable international conventions.

134 As has been noted in paragraphs 120 and 121 of the present judgment, those elements include the activities for which the ship concerned is used in practice, any difference between those activities and the activities in respect of which that ship was certified and equipped, how frequently those activities are carried out and the consequences of those activities as regards the conditions under which the ship operates in view, inter alia, of the equipment on board.

135 Consequently, account may be taken, inter alia, of the fact that certain ships are, in practice, being systematically used for activities relating to the search for and rescue of persons in danger or distress at sea, despite having been classified and certified as cargo ships by the flag State. It is, however, for the port State to report the detailed legal and factual elements capable of establishing the reasons why that fact gives rise, on its own or together with other elements, to a danger to health, safety, on-board working conditions or the environment.

136 In the third and last place, it is apparent from the elements of a contextual or a teleological nature set out in paragraphs 123 to 125 of the present judgment that such an interpretation is consistent with the rules of international law of which Directive 2009/16 forms part and whose effectiveness it is intended to increase.

137 The act of making the control which may be carried out by the port State conditional upon the existence of clear grounds for believing that a ship or its equipment does not comply with the rule that a ship must be maintained, in all respects, in conditions such as to ensure that it remains fit to proceed to sea without danger to itself or to the persons on board is consistent with the rules of international law governing the division of powers between that State and the flag State.

138 By contrast, a control which disregards that division of powers, such as the act, by the port State, of demanding that ships which are subject to a more detailed inspection hold certificates other than those with which they were issued by the flag State or that they comply with all the requirements applicable to ships covered by another classification, would be contrary not only to the relevant rules of international law, as is apparent from paragraphs 98 to 100 of the present judgment, but also to Directive 2009/16. Such a control would ultimately be tantamount to calling into question the way in which the flag State has exercised its powers in the area of conferring its nationality on ships, as well as the area of classifying and certifying those ships.

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139 Having regard to all of the foregoing, the answer to the third and fourth questions is that Article 13 of Directive 2009/16 must be interpreted as meaning that, during more detailed inspections organised pursuant to that article, the port State has the power to take account of the fact that ships which have been classified and certified as cargo ships by the flag State are, in practice, being systematically used for activities relating to the search for and rescue of persons in danger or distress at sea in the context of a control intended to assess, on the basis of detailed legal and factual evidence, whether there is a danger to persons, property or the environment, having regard to the conditions under which those ships operate. By contrast, the port State does not have the power to demand proof that those ships hold certificates other than those issued by the flag State or that they comply with all the requirements applicable to another classification.

Question 5

140 By its fifth question, the referring court asks, in essence, whether Article 19 of Directive 2009/16 is to be interpreted as meaning that, in the event that it is established that ships which are, in practice, being systematically used for activities relating to the search for and rescue of persons in danger or distress at sea, despite having been classified and certified as cargo ships by a Member State which is the flag State, have been operated in a manner posing a danger to persons, property or the environment, the Member State which is the port State may make the non-detention of those ships or the lifting of such a detention subject to the condition that those ships hold certificates appropriate to those activities and comply with the corresponding requirements or, if they fail to do so, to the requirement that they comply with predetermined corrective measures relating to safety, pollution prevention and on-board living and working conditions.

141 In that regard, it should, in the first place, be noted that Article 19 of Directive 2009/16 provides, in paragraph 1 thereof, that the competent authority of the port State is to satisfy itself that any deficiencies confirmed or revealed by the inspections which it has carried out are, or will be, rectified in accordance with international conventions.

142 That article also states, in paragraph 2 thereof, that, where such deficiencies are clearly hazardous to safety, health or the environment, that authority is to ensure that the ship is detained or that the operation in the course of which those deficiencies have been revealed is stopped, before adding that the detention order or stoppage of an operation is not to be lifted until the hazard is removed or until the authority establishes that that ship can, subject to any necessary conditions, proceed to sea or that the operation can be resumed without risk to the safety and health of passengers or crew, without risk to other ships, and without there being an unreasonable threat of harm to the marine environment.

143 Furthermore, that article provides, in paragraph 3 thereof, that, when exercising its professional judgement as to whether or not a ship is to be detained, the competent authority of the port State is to apply the criteria set out in Annex X. That annex specifies, in point 2 thereof, that such an exercise calls for verification of, inter alia, whether it is possible to 'abandon ship speedily and safely and effect rescue if necessary during the forthcoming voyage', to 'prevent pollution of the environment throughout the forthcoming voyage' and to 'provide safe and healthy conditions on board throughout the forthcoming voyage'. In addition, that annex includes in the non-exhaustive list of deficiencies which may in themselves warrant the detention of the ship concerned, inter alia, the 'absence, insufficient capacity or serious deterioration of personal life- saving appliances, survival craft and launching arrangements', as well as a serious or repeated failure to respect the on-board living and working conditions of seafarers.

144 It follows clearly from the wording and the scheme of those various provisions that, while the port State is required to ensure that all the deficiencies which have been confirmed or revealed by an inspection conducted pursuant to Articles 11 to 13 of Directive 2009/16, in particular those relating to on-board safety equipment, have been or will be rectified in accordance with the international conventions whose effectiveness that directive is intended to increase, they may not, by contrast, detain a ship unless such deficiencies pose a clear threat to safety, health or the environment.

145 It also follows from that wording and that scheme that such a detention cannot be lifted until the hazard is removed or until the competent authority of the port State establishes either that the ship can proceed to sea, subject

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

146 That interpretation also follows from the concept of 'detention' as defined in Article 2(15) of Directive 2009/16, which specifies that that word is to be understood as meaning the formal prohibition for a ship to proceed to sea due to deficiencies which, individually or together, make the ship unseaworthy, and from recital 23 of that directive, according to which 'ships which need to be the subject of corrective action should, where the observed deficiencies are clearly hazardous to safety, health or the environment, be detained until the shortcomings are rectified'.

147 It follows that such a detention cannot be ordered merely on the ground that an inspection carried out under Articles 11 to 13 of Directive 2009/16 enabled the port State to establish, with precision, that a ship had been operated in a manner posing a danger to persons, property or the environment. It is also necessary for that State to establish in a given case, first, that such a danger or future risk is a clear hazard and, second, that the deficiencies giving rise to that danger or risk, either individually or together, make the ship concerned unseaworthy.

148 That last requirement must itself be interpreted in the light of the rule recalled in paragraphs 123, 124 and 137 of the present judgment, according to which, from the point of view of safety at sea, ships must be fit for the service for which they are intended, and must be fit to proceed to sea without danger to themselves or to the persons on board. It must therefore be understood as referring, not to a situation where it is completely impossible for the ship to sail, but, more broadly, to a situation where it is impossible for that ship, in view of, inter alia, its declared activities and its actual activities, to sail under conditions capable of ensuring safety at sea for persons, property and the environment. Moreover, that situation corresponds to the situation in which regulation 19(c) of Part B of Chapter I of the annex to the protocol accompanying the SOLAS Convention empowers the State in whose port a ship is present to take the necessary measures to ensure that that ship does not sail. Directive 2009/16 therefore reproduces, in essence, that rule.

149 In this instance, it is for the referring court to verify whether the competent authorities of the port State complied with the requirements referred to in the two preceding paragraphs when they ordered that the ships at issue in the main proceedings be detained.

150 Regarding, in the second place, the corrective measures which such authorities are empowered to impose where they have established the existence of deficiencies which are clearly hazardous to safety, health or the environment and which, individually or together, make the ship concerned unseaworthy, it must, first of all, be borne in mind that the rules of international law of which Directive 2009/16 forms part and whose effectiveness it seeks to ensure preclude the directive from being interpreted as meaning that the Member State which, pursuant to Article 3(1) of that directive, is the port State may demand that ships subject to its jurisdiction hold certificates other than those with which they were issued by the flag State or that they comply with all the requirements applicable to ships covered by a classification other than their own, as has been explained in paragraph 138 of the present judgment.

151 It follows that the port State may not make the non-detention of those ships or the lifting of such detention subject to such demands.

152 That being the case, it should, next, be noted that Article 19(2) of Directive 2009/16, read in the light of recital 23 of that directive, permits the port State to adopt such corrective measures as it deems necessary, compliance with which is a condition for the ship which has been detained to be able to proceed to sea or resume its operations. It also follows from that provision that those corrective measures must be intended to ensure that that ship may proceed to sea or resume its operations without constituting a risk to the safety and health of passengers or crew, a risk to other ships, or an unreasonable threat of harm to the marine environment.

153 The corrective measures which may thus be adopted in a given case necessarily depend on the factual circumstances and legal reasons which have been used to justify additional and more detailed inspections and the detention of the ship concerned. However, they must, in any event, be not only suitable and necessary to rectify the deficiencies which are clearly hazardous to safety, health or the environment and which make the ship unseaworthy on which that detention was based, but also proportionate to that end, which it is for the competent authority to

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establish, subject to review by the national court having jurisdiction, taking into account, inter alia, the considerations set out in paragraph 121 of the present judgment.

154 Lastly, it is apparent both from Article 19(6) of Directive 2009/16 and from Article 21(1), (3) and (5) of that directive and the rules of international law in the light of which those provisions must be interpreted that, before determining the corrective measures which it intends to impose, the port State must inform the flag State in writing of the circumstances and reasons which led to the inspection and the detention of a ship flying its flag, communicating to that State the report or reports drawn up following that inspection. That requirement applies regardless of the identity of the flag State and thus regardless of whether that State is another Member State or a non-Member State.

155 It is clear from Article 94(6) of the Convention on the Law of the Sea that a State which has clear grounds to believe that proper jurisdiction and control have not been exercised with respect to a ship may report the facts to the flag State, which must, upon receiving such a report and within the framework of its competences and powers, investigate the matter and, if appropriate, take any action necessary to remedy the situation. That provision means that the flag State is to take, with regard to ships which fly its flag, all such measures as are necessary to protect the interests of the coastal State which has made the report (see, to that effect, judgments of 3 June 2008, *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraph 62, and of 26 November 2014, *Parliament and Commission* v *Council*, C-103/12 and C-165/12, EU:C:2014:2400, paragraph 63).

156 In addition, in relations between Member States, account must be taken of the principle of sincere cooperation referred to in Article 4(3) TEU, which lays down an obligation for Member States, generally and thus, inter alia, in connection with situations governed by Directive 2009/16, to assist each other, in full mutual respect, in carrying out tasks which flow from the Treaties, to take any appropriate measure to ensure fulfilment of the obligations resulting from, inter alia, acts of the institutions of the Union, and to refrain from any measure which could jeopardise the attainment of the Union’s objectives.

157 In view of that principle, the Member States are required to consult each other and to cooperate sincerely in the exercise of their respective powers of control, so as to ensure that the obligations under Directive 2009/16 are fulfilled by the competent State while safeguarding their effectiveness. Thus it must be held that, in a situation where the ship which has been inspected and detained flies the flag of a Member State other than the port State, the latter State, which alone is competent, in the context of the mechanism implemented by Directive 2009/16, to adopt corrective measures under the conditions stated in paragraphs 150 to 153 of the present judgment, must, in so doing, respect the classification and certifications granted by the flag State. For its part, the flag State must take account of the reasons which led the port State to inspect and then detain that ship, and aid it in its search for the most appropriate corrective measures to rectify the deficiencies found and the clear dangers or risks arising therefrom. Those two Member States must also both strive to adopt a common position as regards the measures to be taken by each of them, within the framework of their respective powers, as well as in the implementation of those measures.

158 Those various requirements are all the more important given that, as EU law currently stands, there are no provisions specifically governing the systematic activities relating to the search for and rescue of persons in danger or distress at sea at issue in the main proceedings.

159 Having regard to all of the foregoing, the answer to the fifth question is that Article 19 of Directive 2009/16 must be interpreted as meaning that, in the event that it is established that ships which are, in practice, being systematically used for activities relating to the search for and rescue of persons in danger or distress at sea, despite having been classified and certified as cargo ships by a Member State which is the flag State, have been operated in a manner posing a danger to persons, property or the environment, the Member State which is the port State may not make the non-detention of those ships or the lifting of such a detention subject to the condition that those ships hold certificates appropriate to those activities and comply with all the corresponding requirements. By contrast, that State may impose predetermined corrective measures relating to safety, pollution prevention and on-board living and working conditions, provided that those corrective measures are justified by the presence of deficiencies which are clearly hazardous to safety, health or the environment and which make it impossible for a ship to sail under

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conditions capable of ensuring safety at sea. Such corrective measures must, in addition, be suitable, necessary, and proportionate to that end. Furthermore, the adoption and implementation of those measures by the port State must be the result of sincere cooperation between that State and the flag State, having due regard to the respective powers of those two States.

Costs

160 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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 (EU) 2017/2110 of the European Parliament and of the Council of 15 November 2017,**
   must be interpreted as:

   – **applying to ships which, although classified and certified as cargo ships by the flag State, are in practice being systematically used by a humanitarian organisation for non-commercial activities relating to the search for and rescue of persons in danger or distress at sea; and**

   – **precluding national legislation ensuring its transposition into domestic law from limiting its applicability only to ships which are used for commercial activities.**

2. **Article 11(b) of Directive 2009/16, as amended by Directive 2017/2110, read in conjunction with Part II of Annex I to that directive, as amended, must be interpreted as meaning that the port State may subject ships which systematically carry out search and rescue activities and which are located in one of its ports or in waters falling within its jurisdiction, having entered those waters and after all the operations relating to the transhipment or disembarking of persons to whom their respective masters have decided to render assistance have been completed, to an additional inspection if that State has established, on the basis of detailed legal and factual evidence, that there are serious indications capable of proving that there is a danger to health, safety, on-board working conditions or the environment, having regard to the conditions under which those ships operate.**

3. **Article 13 of Directive 2009/16, as amended by Directive 2017/2110, must be interpreted as meaning that, during more detailed inspections organised pursuant to that article, the port State has the power to take account of the fact that ships which have been classified and certified as cargo ships by the flag State are, in practice, being systematically used for activities relating to the search for and rescue of persons in danger or distress at sea in the context of a control intended to assess, on the basis of detailed legal and factual evidence, whether there is a danger to persons, property or the environment, having regard to the conditions under which those ships operate. By contrast, the port State does not have the power to demand proof that those ships hold certificates other than those issued by the flag State or that they comply with all the requirements applicable to another classification.**

4. **Article 19 of Directive 2009/16, as amended by Directive 2017/2110, must be interpreted as meaning that, in the event that it is established that ships which are, in practice, being systematically used for activities relating to the search for and rescue of persons in danger or distress at sea, despite having been classified and certified as cargo ships by a Member State which is the flag State, have been operated in a manner posing a danger to persons, property or the environment, the Member State which is the port State may not make the non-detention of those ships or the lifting of such a detention subject to the condition that those ships hold certificates appropriate to those activities and comply with all the corresponding requirements. By contrast, that State**

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may impose predetermined corrective measures relating to safety, pollution prevention and on-board living and working conditions, provided that those corrective measures are justified by the presence of deficiencies which are clearly hazardous to safety, health or the environment and which make it impossible for a ship to sail under conditions capable of ensuring safety at sea. Such corrective measures must, in addition, be suitable, necessary, and proportionate to that end. Furthermore, the adoption and implementation of those measures by the port State must be the result of sincere cooperation between that State and the flag State, having due regard to the respective powers of those two States.

[Signatures]

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