For want of a better word, let's call them cargo ships and let them work!

Raucea, Chiara

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For want of a better word, let's call them cargo ships and let them work! The Sea Watch case and its three lessons on EU law
Chiara Raucea [1]

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*577 Abstract

*EU law does not regulate sea search and rescue operations carried out by private ships. However, it harmonises some aspects of the power that Member States may exercise as port States when inspecting and detaining ships stopping at their ports. What happens when an Italian court asks the Court of Justice of the European Union (*CJEU*) to interpret EU law obligations and their potential conflict with domestic detention orders that blocked, in Italian ports, two civilian rescue ships not considered fit for their (real) navigation purpose? In the* Sea Watch *case, the* CJEU *affirmed that EU law constrains Member States' power to challenge navigation certificates issued by another Member State. The Court explained how EU law lends its teeth (primacy) to enforcing international law norms and, simultaneously, tames national obstructive practices, which may jeopardise international cooperation in areas not (yet) regulated by EU law.*

Introduction

On 1 August 2022, the Grand Chamber of the Court of Justice of the European Union (CJEU) delivered its judgment on the Sea Watch case.[1] In this ruling, the CJEU clarified the constraints imposed by Directive 2009/16 Recast on port State control[2] (hereinafter PSC Directive) on the power that EU Member States have, when acting as port States, to inspect and detain ships operated by humanitarian non-governmental organisations and systematically used in civil search and rescue (SAR) operations.

The most tangible effect of this judgment is that it leaves open the possibility for civil sea rescuers to continue operating in the Mediterranean. At the same time, the CJEU acknowledges that EU law constrains the power of Member States to review the compliance with maritime safety standards by ships entering their ports. Therefore, civil sea rescuers can now rely on EU law in national courts to challenge domestic obstructive rules and practices which could block their activities, through inspections and detention orders.

In addition to this practical impact on civil SAR operations, the Sea Watch case also calls for a broader and critical reconsideration of the functioning and development of EU law. This commentary will examine three lessons that we can learn from the Sea Watch case on general EU law, namely on: (1) the interaction between EU law and international law; (2) the ability of EU law to defuse States' obstructive practices in cases of disagreement and absence of supranationally agreed standards thanks to the capacity of EU ***578** principles to impact areas not (yet) covered by EU law; (3) the transformative force that EU law may exert, especially through direct effect and primacy, on domestic law.

The factual background as presented in the Sea Watch case

Sea Watch 3 and Sea Watch 4 were two ships operated by Sea Watch, a private non-profit organisation. During the summer of 2020, these two ships conducted several SAR operations in the international waters of the Mediterranean Sea, rescuing several hundreds of persons.[3] The flag state of both ships was Germany. After the rescues, Italy instructed the Sea Watch ships to disembark the rescued migrants in two Sicilian ports (Palermo and Porto Empedocle). At the end of the disembarkation and after sanitary procedures, the two ships were inspected by Italian port authorities to verify their seaworthiness. Following the inspections, the Italian authorities concluded that the two Sea Watch ships could not leave the Sicilian ports to engage in new operations.

The detention was justified based on several deficiencies that, in the view of the Italian authorities, made the further navigation of the two Sea Watch ships too hazardous according to international and EU standards relating to sea safety, passengers' health, and pollution prevention. More specifically, one of the grounds invoked by the Italian authorities to detain the Sea Watch ships related to the categorisation used by the flag State (Germany) to register these vessels. Both ships were registered as "*general cargo/multipurpose ships*" while, in practice, they were systematically used to rescue persons in distress at sea. The Italian authorities argued that such misclassification led to hazardous situations, since the Sea Watch ships had been usually navigating without respecting the maximum number of passengers permitted on ships registered as cargo ships.[4]

Sea Watch challenged the legality of the detention orders issued by the Italian authorities. The regional administrative court that was requested to review—and, eventually, annul—the detention orders initiated the preliminary reference procedure asking the CJEU to clarify the conditions and limits imposed by EU law on the exercise of the power that EU Member States have to conduct inspections and detain any ship stopping at their ports.[5]

Applicable laws

A preliminary remark on civil SAR operations in the Mediterranean

The Sea Watch case is not about interpreting EU rules for SAR operations in the Mediterranean conducted by private actors. The case did not deal either with rules on the disembarkation of migrants rescued at sea. This is because, up to now, there are no EU law rules on such issues[6] and there are very few explicit norms in international law regulating how private actors (like Sea Watch) should or could engage in civil SAR operations. ***579** [7]

In 2018, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions urged States to refrain from criminalising or otherwise deterring activities of individuals and humanitarian organisations that provide assistance to migrants (including by conducting civil SAR operations at sea).[8] By criminalising acts of solidarity and obstructing life-saving operations conducted by privates, States fail to prevent and eliminate arbitrary killings and the deprivation of life and, therefore, violate core norms of international human rights law.

In a report[9] covering the period between January 2019 and December 2020, the UN High Commissioner for Human Rights commented on the deficiencies of SAR operations conducted by States and on the lack of protection for migrants on the central Mediterranean route, stating that these phenomena are not "a tragic anomaly, but rather a consequence of concrete policy decisions and practices" by several actors, including the EU, its institutions, and its Member States who have contributed to "create an environment where the dignity and human rights of migrants are at risk".[10]

Over the years, the practice of humanitarian ships operating in the Mediterranean has been based mainly on the customary duty, derived from the Law of the Sea, to render assistance to persons in danger and distress at sea. This duty is acknowledged by the EU legislator in the EU Sea Border Regulation 656/2014,[11] which also defines factors determining when vessels and persons are to be considered in distress and in danger at sea. However, this regulation only applies in operations coordinated by the European Border and Coast Guard Agency (Frontex).

The regulatory lacuna[12] concerning SAR activities conducted by private ships generates, as acknowledged also by the AG Rantos in his Opinion[13] on the Sea Watch case, the emergence of "ambiguous situations". In practice, the private actors undertaking SAR operations (try to) cooperate with the authorities of the EU Member States, but, at the end of the day, national authorities are the ones that remain responsible for conducting and coordinating SAR operations and arranging the safe disembarkation of persons rescued by private ships. As noted by the AG Rantos, EU law has so far produced only a soft law instrument[14] that urges national authorities to cooperate in operations involving civil rescuers at sea.

Even though the Sea Watch case does not deal directly with the interpretation of norms applicable to SAR operations conducted by private humanitarian ships in international waters, it is still evident that the rules that the CJEU interpreted in this case are determinant for civil SAR operations to continue to occur in future. More specifically, the EU rules interpreted by the CJEU in the Sea Watch case relate to the power of control that the port State can exercise on private ships, which have rescued migrants at sea, once that SAR operations are concluded and the ships are present in a Member State's ports. ***580**

The power of the port State to inspect and detain those private ships can, in practice, prevent the further navigation of vessels used for SAR conducted by no-profit private organisations. For this reason, understanding whether and how EU law regulates the exercise of the port State's power means also understanding whether EU law, in the absence of supranational standards regulating civil SAR operations, can put constrains on the emergence of restrictive domestic practices (relating to ships' inspections and detention), which could potentially allow a single Member State, acting as a port State, to unilaterally halt the SAR activities conducted by private ships in the Mediterranean.

Since 2018,[15] the European Union Agency for Fundamental Rights (FRA) issues periodical reports monitoring criminal investigations and other type of legal actions and sanctions taken by some Member States against non-governmental organisations that conduct SAR operations in the Mediterranean. From these reports,[16] it emerges that States' recourse to criminal and administrative proceedings to target civil sea rescuers has blocked several humanitarian ships at some Member States' ports and has significantly reduced the SAR activities by civil rescuers in the Mediterranean.

The Recast Directive 2009/16

In the Sea Watch case, the CJEU interpreted the rules included in Directive 2009/16 (recast),[17] also known as the port State Control Directive (PSC Directive). This directive does not set harmonised EU standards on navigation safety. Standards for the safety of navigation and prevention of pollution, as well as rules on conditions for living and working on ships, are in fact set in international law sources.[18]

For instance, the UN Convention on the Law of the Sea[19] (to which all EU Member States are parties, as well as the EU[20]) includes, among other obligations, the duty to render assistance at sea, rules on the right of innocent passage and on the flag State's responsibility to secure compliance with safety standards.[21] Another international Convention (of which, however, the EU is not party) that is relevant to establish maritime safety standards is the International Convention for the Safety of Life at Sea (SOLAS[22]). Among other obligations, for instance, SOLAS requires its contracting parties to monitor that the only ships that are permitted to operate are those resulting fit for the service for which they are intended. SOLAS also prescribes that if a ship is obliged to rescue persons in distress at sea, then the rescued persons shall not count as passengers when ascertaining the application to the rescuing ship of any provision of SOLAS.[23]

The purpose of the PSC Directive is limited to regulating the control that EU Member States can exercise on ships (and their crew) when ships stop at their ports. The regime set out by the PSC Directive relies ***581** on a system of differentiated responsibilities, which is moulded on the obligations and responsibilities established by international law.[24] According to this system, the flag State remains mainly responsible for securing that ships registered under its flag comply with the international standards for safety of navigation. The flag State is also responsible for registering a ship and issuing certificates of seaworthiness, after having checked that the ship is fit to navigate for the intended purpose reported in the certificate. The ship company is instead responsible for securing over time that its equipment, crew, and activities comply with the international safety standards applicable to the ship (which might vary depending on the purpose of navigation for which the ship obtained its certificate). Lastly, the port State has solely the responsibility to act as an extra layer of control in preventing substandard shipping. The PSC Directive regulates the frequency and intensity of the port State's inspections on ships that call at a port in its territory.[25] It also sets the conditions under which a port State can order the detention of a ship and the consequences of such detention.[26]

The interpretative questions posed to the CJEU and the Court's responses

The first question[27] posed to the CJEU was whether the PSC Directive was applicable to the Sea Watch ships. The referring court enquired whether it could rely on the said directive to review the legality of the inspections conducted by Italian authorities on the two Sea Watch ships, and to review the legality of the detention orders blocking these ships. Regarding this first question, the Italian authorities had argued that, based on national law (Decree No.53/2011),[28] such types of ships are excluded from the application of the PSC Directive.

The CJEU ruled that the PSC Directive applies to private humanitarian assistance ships like Sea Watch.[29] The Court in fact presented the PSC Directive as an instrument of maximum harmonisation and concluded that no discretion is left to EU Member States regarding its scope of application. Following the AG's Opinion,[30] the Court indicates that the only categories of ships excluded from the application of the PSC Directive are those belonging to the exhaustive list of exceptions provided in art.3(4) of the PSC Directive.

The other questions[31] posed to the CJEU required it to clarify mainly three aspects of the control that a port State may exercise on ships calling at a port on its territory. The first aspect related to the conditions under which the PSC Directive allows Member States to conduct ship inspections, which are additional to the periodical ones based on the ship's risk profile.[32] Article 11(b) of the PSC Directive establishes that the presence of "overriding factors", which are listed in point 2A Pt II of Annex I to that directive, triggers the Member States' obligation to conduct additional inspections on ships calling at a port in their territory. Such overriding factors include, for instance, cases where a ship is suspected of having discharged harmful substance into the sea. When instead a ship presents one of the "unexpected factors" listed in point 2B Pt II Annex 1 of the PSC Directive, Member States may discretionarily decide whether to carry out additional ship inspections. The list of unexpected factors includes, for instance, cases where the ship has been operated in a manner posing a danger to persons, property, or the environment. ***582**

The second aspect relates to the scope of such inspections. The CJEU had to clarify what elements a port State should consider in assessing when a ship has been operated in a risky manner, and for what ship deficiencies a port State may legitimately request rectification. The third aspect relates to the grounds that justify a port State to issue (and to lift) ship detention orders. In other words, the CJEU had to clarify what factors a port State should consider when assessing if ships are fit for (further) safe navigation. In practice, the port State's power to detain a ship flagged by another Member State could be used by the former to refuse to acknowledge the safety assessment made by the latter. The CJEU had to shed light on the principles regulating the distribution of the responsibility to guarantee maritime safety between the flag State and the port State.

One of the most contentious issues in the Sea Watch case concerned the mismatch between the intended purpose of navigation of the Sea Watch ships, as resulting from their navigation certificates issued by the flag State, and their activities in practice.[33] Both ships were registered as multi-purpose cargo ships but systematically engaged in SAR operations. However, since there are no agreed standards and no rules at the international or European level on SAR operations carried by private ships, another legal classification, which could better mirror the reality of the intended purpose of navigation of the two Sea Watch ships and their activities, was not available to them.[34]

As regards the interpretation and application of the PSC Directive, Italy had argued for a formalistic approach. It had considered the mismatch between the activities conducted in practice by the Sea Watch ships and the ships' intended purpose of navigation, as resulting from the certificate issued by the flag State, as a severe deficiency that would lead to hazardous situations. Firstly, Italy argued that, since the Sea Watch ships had systematically engaged in SAR operations without holding certificates appropriate for these activities, they had been operated in a manner posing a danger to persons, property or the environment. These hazardous situations constituted one of the "unexpected factors" that, based on the PSC Directive, grant a port State the discretion to conduct additional inspections.[35] Secondly, Italy argued that the ship detention orders could only be lifted once the two Sea Watch ships obtained a navigation certificate that would reflect their true navigation purpose,[36] that is: civil sea rescue activities. However, Germany (the flag State) considered the navigation certificates issued to the Sea Watch ships still appropriate, and it was satisfied that the two ships, after having enacted some rectifications to their safety conditions, were fit for future navigation.[37]

The CJEU opted for prioritising substance over form. It concluded that a ship's seaworthiness ought to be assessed based on the existence of real risks for the safety of navigation and excluded that the port State can presume that such risks exist merely on the basis of the (eventually inaccurate) categorisation assigned to the ships in their navigation certificates.[38] As regards the interpretation of what counts as an "unexpected factor" that justifies the port State's recourse to additional inspections, the CJEU indicates that SAR activities conducted by private ships cannot be considered automatically risky activities and in violation of rules on maritime safety. The danger to persons, sea safety, and the environment is to be established on a case-by-case basis, after examining the ships' specific conduct and the rescue's particular circumstances.[39]

On the one hand, the CJEU acknowledges that the competent national authorities enjoy broad discretion in exercising their professional judgement when assessing the risks that a ship poses and its compliance ***583** with sea safety standards.[40] On the other hand, however, the Court also requires national authorities to provide always reasons to ground their decisions in law and in fact.[41] In rejecting a formalistic approach to the legality of the two Sea Watch ships' activities, the CJEU referred to international law norms that warrant civil sea rescuers' activities. First and foremost, the Court mentioned the customary duty to render assistance at sea that is also codified in the UN Convention on the Law of the Sea.[42] The Court argues that such a duty would be utterly ineffective if cargo ships could not engage in SAR operations that compel them to take on board a number of passengers that exceeds the one foreseen in their navigation certificates.[43] However, the CJEU also cites SOLAS to emphasise that the duty to render assistance at sea is not unconditional. This duty should only be discharged if the rescue does not create serious danger to the ship, crew, and passengers.[44]

Based on a joint reading of the PSC Directive and international law norms, the CJEU rejects the view that civil rescue ships pose, in themselves, a general risk to sea safety. However, it reaffirms that civil rescue ships are not exempted from the duty to comply with safety standards on navigation (including rules on adequate equipment), which are to be determined based on the ships' actual navigation purpose, as it results from the systematic practices in which the ships engage. The port State's authorities could, therefore, order additional inspections only when there are "clear grounds for believing" that civil rescue ships have operated in a negligent and hazardous manner.[45]

The CJEU made clear that the power of the port State to control the seaworthiness of the civil rescue ships should not interfere with the primary responsibility, which falls on the flag State, to issue navigation certificates to these ships and classify them. A port State may only call into question the conditions on which the civil rescue ships operate when there are clear grounds to believe that, with their activities, these ships pose risks to human lives and sea safety.[46] In general, however, a port State lacks any power "to demand proof that those ships hold certificates other than those issued by the flag State or that they comply with all requirements applicable to another classification".[47] Such demands would actually be contrary to the system of differentiated responsibility set by the PSC Directive and, so, would be contrary to the relevant rules of international law that the said directive aims to execute.

Sea Watch's three lessons on general EU law

In addition to its impact in preventing a single EU Member State from obstructing and interdicting the navigation of civil sea rescue ships in the Mediterranean, the Sea Watch case also offers points of reflection, which are significant for other areas of law, and which relate to the force of EU law, and to the interplay of EU norms and principles with domestic legal systems and with the international legal order. This section of the commentary considers the three lessons that we can draw from the Sea Watch case by discussing in particular: (1) the interaction between EU law and international law; (2) the ability of EU law to defuse States' obstructive practices in cases of disagreements and of lack of internationally agreed standards thanks to the capacity of EU principles to impact areas not (yet) covered by EU law; and (3) the transformative force that EU law may exert (especially through direct effect and primacy) on domestic law. ***584**

First lesson: on how EU law co-opts international law standards

The first lesson we may learn from the Sea Watch judgment on general EU law concerns the expansive force of EU law, which lends its teeth to enforce standards exogenous to EU law,[48] such as norms of the Law of the Sea.[49] In several passages of the Sea Watch judgement, the Court seems to suggest that EU law works as a custodian of how Member States should interpret international law norms and comply with them.[50] The specific EU legal act that the CJEU had to interpret in the Sea Watch case offered an easy prompt to the Court to support this view. In fact, the purpose of the PSC Directive is to increase compliance of EU Member States with international law rules relating to maritime safety, marine environment, and living and working conditions on board of all ships subject to their jurisdiction.[51]

What then the CJEU interprets, under the guise of the purpose of the PSC Directive, is how Member States shall behave to conform to international law standards. In this regard, it is interesting to trace the reasoning used by the Court to back up its authority to put forward a uniform interpretation of international law standards, which all EU Member States should follow as a matter of EU law primacy.[52] The Court argues that the PSC Directive aims at harmonising procedures, conditions, and criteria regarding how EU port States can inspect and detain ships calling at a port in their territory in order to monitor compliance with standards derived both from Conventions to which the EU is a party (like the UN Convention on the Law of the Sea[53]) and from Conventions to which the EU Member States are parties but not the EU (like SOLAS[54]). This means that the Court is obliged

to interpret the PSC Directive in the light of the relevant instruments of international law. Since the CJEU's interpretation of the PSC Directive is binding on national courts, national courts are then expected to take in, in their domestic systems, the reading on international law rules that the CJEU incorporates in its judgment.[55]

Second lesson: on how EU law preserves and manages Member States' disagreements on international law standards

The second lesson we may learn from the Sea Watch judgment on general EU law is that the law's silence is never really silent for EU law since EU principles still have something to say to prevent Member States from acting uncooperatively when facing a vacuum of international law rules.[56] The silence of international law on how to classify and operate private ships used for civilian SAR operations makes it worthwhile for EU law to protect, at present, the coexistence of divergent plural voices; so that these voices can together, in future, contribute to the formation of new international standards on which there is not yet an agreement. In the case at hand, there was the risk that the interpretation of international norms and the administrative practices adopted by a single Member State regarding the duty to render assistance at sea and regarding the safety standards for civilian SAR operations would, in practice, stop the activities of ***585** private humanitarian ships in the Mediterranean; even though such activities are not prohibited and are not yet regulated explicitly by international or EU law norms.[57]

We learnt from the Sea Watch case that, even when EU law has not yet produced harmonised binding rules (as it is, currently, the case for civilian SAR operations), it can still prevent (or at least try to limit) the emergence of conflicting domestic practices, which could potentially harm further international cooperation. The Court concluded[58] that, unless there are clear grounds to believe that a private ship used for civil SAR operations operates hazardously, the navigation certificate issued by the flag State, as well as the flag State's evaluation on seaworthiness and ship's compliance with safety standards, cannot be called into question by the port State.

In other words, an EU Member State shall trust (within certain limits, which are delineated by EU law[59]) the legality standards accepted and endorsed by another Member State.[60] This conclusion is not surprising and is, indeed, an adage of EU law, which resonates under different tones in various areas of EU law.[61] It is, for example, a recurrent theme that appears in cases concerning the internal market (in the guise of the principle of mutual recognition[62]) and in cases concerning the area of freedom of security and justice (where it appears in the guise of the principle of mutual trust[63]).

In support of the argument that, as a general rule, an EU Member State, acting as port State, shall not call into question navigation certificates issued by another Member State, the Court, in the Sea Watch case, invoked the principle of sincere cooperation enshrined in art.4(3) TEU.[64] This principle establishes the obligation for EU Member States to sincerely cooperate and "assist each other in carrying out *tasks which flow from the Treaties*" (emphasis added). However, since, at present, there are no harmonised rules at the EU level on civil rescues at sea, the Court treats the principle of sincere cooperation as an obligation for EU Member States to cooperate constructively in interpreting and applying norms of international law.[65] Thus, EU law principles can be invoked to foster intergovernmental cooperation in areas not yet covered by EU law, and to prepare the ground for further integration.

This extended reach of the principle of sincere cooperation, which goes beyond obligations deriving strictly from EU law sources, is introduced by the Court, in the case of civil SAR operations, to compel EU Member States not to interfere negatively with the system of distribution of powers between the flag ***586** State and the port State, as it results from the Law of the Sea which, in its turn, is interpreted by the Court as the regime inspiring the PSC Directive.

Third lesson: doubts on how the Court is thinning out direct effect in the Sea Watch case

Lastly, the third lesson to be learned from the Sea Watch case is the one that, in my view, is the most critical for the general development of EU law. It relates to passages of the Sea Watch judgment where the Court comments on the effect of PSC Directive on domestic law.[66] It is worth quoting these key passages in full:

[83]

"… 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, …, Popławski, …).

[84]

However, the principle has certain limits. In particular, it cannot serve as the basis for an interpretation of national law contra legem (see, … Popławski,)."

The formulation of these passages, together with the case law[67] reported by the CJEU as relevant precedent, are problematic because they suggest that the Court is blurring the distinction between direct effect and indirect effect of EU law. A disorientating element emerging in the quoted passages is the CJEU's choice to explain how an EU directive (in this case, the PSC Directive) is binding for national courts by referring to its holding in Popławski. However, as clearly argued by Miasik and Szwarc[68] in their analysis on Popławski, that judgment did not concern the interpretation of provisions included in an EU directive but provisions included in a framework decision, in particular, in the European Arrest Warrant Framework Decision.[69] Framework decisions were a specific type of EU legal acts (no longer in use after the Treaty of Lisbon), which, under the Treaty of Amsterdam,[70] could be adopted in the area of police and judicial cooperation in criminal matters. Similarly, to directives, framework decisions are not directly applicable, but they set binding objectives for Member States, which were obliged to implement framework decisions in their domestic systems. Differently from directives, however, the Treaty of Amsterdam explicitly excluded that framework decisions could entail direct effect.

Since provisions included in a framework decision can never have direct effect, but are still binding upon Member States, starting from Pupino,[71] the CJEU requires national courts to rely on indirect effect to guarantee conformity of national law with EU law.[72] Relying on the indirect effect of EU law means that, when applying national law, national courts must interpret it "as far as possible to the wording and ***587** purpose of the framework decision in order to attain the result which it pursues".[73] Differently from direct effect, which allows national courts to adjudicate a case relying on EU law rules, indirect effect only demands national judges to adjudicate cases relying on domestic norms, which are to be interpreted consistently with EU law. The duty of conforming interpretation has its limits: indirect effect cannot lead to an interpretation of national law *contra legem*.[74]

In Popławski, the Court was called to clarify what national courts should do when conforming interpretation of national law is not possible.[75] More specifically, one of the referred questions in Popławski asked whether the principle of primacy could be invoked to set aside national laws incompatible with EU law, when the EU law provisions that are relevant for the domestic case cannot produce direct effect (like it is the case for provisions included in a framework directive). The CJEU affirmed that the principle of primacy cannot be invoked to eliminate a distinction, which is crucial to interpret and apply EU law, between EU provisions that are capable of direct effect and EU provisions that cannot have direct effect.[76] This distinction is crucial because EU law provisions that have direct effect create an obligation for national courts to disapply any provision of national law conflicting with EU law.[77] On the contrary, EU law provisions that lack direct effect may not be relied on in a case pending before a national court to disapply conflicting national law.[78]

In the Sea Watch case, however, the EU law act which was relevant for the referring court's adjudication (and, so, the EU legal act whose interpretation the CJEU had to clarify) was a directive: namely, the PSC Directive. Hence, it is puzzling to read that the CJEU instructs the referring court to mind the limit of *contra legem* interpretation of national law in the Sea Watch case. Reference to the duty of consistent interpretation and to the limits of its application may be justified only if we conclude that the provisions included in the PSC Directive, which the CJEU was requested to interpret in the Sea Watch case, could not be invoked with direct effect. However, even though in the Sea Watch case the CJEU did not explicitly examine whether the provisions of the PSC Directive relevant for the case at hand could be relied on with direct effect before the national court, it remains unclear why consistent interpretation rather direct effect was the way forward suggested to the referring court.

It is a well-established doctrine of EU law,[79] that provisions included in a directive can be invoked with direct effect against the State (vertical direct effect) when they are unconditional and sufficiently clear and precise, provided that the Member State has not transposed (or has incorrectly or incompletely transposed) the directive by the deadline.

The Sea Watch case is manifestly a case where the rules on ship inspection and detention set by the PSC Directive (whose deadline for transposition had already passed in 2010) apply in a vertical situation where the port State exercises its (alleged) power to control compliance with sea safety of private ships. Therefore, the provisions of the PSC Directive will pass the test for direct effect, provided that these rules can be considered as being unconditional, and sufficiently clear and precise. In several passages of the Sea Watch judgment, the CJEU ascribes a precise meaning to the rules of the said directive that warrant the exercise by the port State of its power to conduct additional inspections,[80] to detain a ship and to lift ***588** detention orders.[81] Therefore, there are no obstacles to conclude that the rules of the PSC Directive, as interpreted by the CJEU in the Sea Watch case, can have direct effect and, therefore, the referring court can rely on them to adjudicate on the case at hand.

The Court's interpretative move, which seems to blur the distinction between direct and indirect effect, must be resisted. It still matters, doctrinally and practically, which type of EU legal act is the source of reference, in a specific case, for a Member State's obligation and for individual rights.[82] The relevant EU law source in the Sea Watch case is a directive whose provisions may be relied upon with direct effect before the national court. Therefore, there is no need for the national court to resort only to conforming interpretation of national law, since direct effect and primacy trigger both the "obligation to apply" EU law and, at the same time, the "obligation to disapply" conflicting domestic rules.[83] The option to rely on consistent interpretation to prevent, as far as possible, the disapplication of national law potentially conflicting with EU law provisions capable of direct effect, might be the first but, definitively, not the sole step of a complex interpretative process that domestic courts are expected to undertake. Should Italian laws result contrary to the PSC Directive (as interpreted by the CJEU in the Sea Watch judgement), then the referring court is under the obligation to set aside conflicting national law, relying on the principle of primacy, and apply the rules of the PSC Directive, relying on direct effect.

Conclusions: accepting a misnomer … to warn us about another misnomer?

In August 2022, the CJEU delivered the Sea Watch case establishing that EU law limits the power of an EU Member State, when this acts as a port State to call into question the navigation certificates issued by another Member State acting as a flag state. This means that private ships regularly engaging in SAR operations cannot be detained solely because of their supposed mis-categorisation (as cargo ships) reported in their navigation certificates. To justify ships' detention, the EU port State shall reason in law and fact about substantial safety risks for further navigation.

The reading of the PSC Directive put forward by the CJEU in the Sea Watch case insistently refers to international norms of the Law of the Sea, particularly to the duty to render assistance and to rescue persons in distress at sea. However, the lack of EU binding rules on civil SAR limits the scope of EU obligations solely to establishing a duty of cooperation between Member States and a duty for all Member States not to interfere unduly with the power of another Member State to flag private vessels as cargo ships and allow these ships to use such a misnomer to navigate in the Mediterranean to save lives.

By clarifying the constraints that EU Law imposes on EU Member States to inspect and detain civil rescue ships, the Sea Watch case may be read as one small first step on a long way forward to put an end to another misnomer. Mobilising administrative and criminal domestic law to create obstacles to civil rescue operations is a practice with a name, and, as the UN Special Rapporteur on extrajudicial, arbitrary or summary executions has already reminded the international community,[84] that name is arbitrary killings.

Chiara Raucea

Tilburg University

Footnotes

1 Assistant Professor in European Union Law.

1 Sea Watch eV v Ministero delle Infrastrutture e dei Trasporti (C-14/21 and C-15/21) EU:C:2022:604; [2023] 1 C.M.L.R. 25.

2 Directive 2009/16 on port State control (recast) [2009] OJ L131/57, and corrigenda [2013] OJ L32/23, and [2014] OJ L360/111, as amended by Directive 2017/2110 [2017] OJ L315/61.

3 Sea Watch (C-14/21 and C-15/21) EU:C:2022:604 at [46].

4 Sea Watch (C-14/21 and C-15/21) at [48]–[49].

5 Sea Watch (C-14/21 and C-15/21) at [54]–[63].

6 *European Union Agency for Fundamental Rights (FRA), Report June 2022 Update — Search and Rescue (SAR) operations in the Mediterranean and fundamental rights (20 June 2022)*, see section on *Legal Framework*, http://fra.europa.eu/en/publication/2022/june-2022-update-ngo-ships-sar-activities. See also, *European Union Agency for Fundamental Rights (FRA), note on Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations (1 October 2018)*, http://fra.europa.eu/en/content/fundamental-rights-considerations-ngo-ships-involved-search-and-rescue-mediterranean-and.

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13 Opinion of AG Rantos on Sea Watch (C-14/21 and C-15/21) EU:C:2022:104 at [4].

14 Commission Recommendation 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 [2020] OJ L317/23.

15 *European Union Agency for Fundamental Rights (FRA), note on Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations (1 October 2018)*, see in particular paras 8 and 10.

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25 Directive 2009/16 on port State control [2009] OJ L131/57, and corrigenda [2013] OJ L32/23, and [2014] OJ L360/111, as amended by Directive 2017/2110 [2017] OJ L315/61 arts 11 and 13.
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28 Sea Watch (C-14/21 and C-15/21) at [43]–[44].
29 Sea Watch (C-14/21 and C-15/21) at [80].
30 Opinion of AG Rantos on Sea Watch (C-14/21 and C-15/21) EU:C:2022:104 at [27]–[36].
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32 Sea Watch (C-14/21 and C-15/21) at [112].
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36 Sea Watch (C-14/21 and C-15/21) at [61].
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41 Sea Watch (C-14/21 and C-15/21) at [120].
42 Sea Watch (C-14/21 and C-15/21) at [16], [105]–[106], [108].
43 Sea Watch (C-14/21 and C-15/21) at [118].
44 Sea Watch (C-14/21 and C-15/21) at [124].
45 Sea Watch (C-14/21 and C-15/21) at [133].
46 Sea Watch (C-14/21 and C-15/21) at [137]–[138].
47 Sea Watch (C-14/21 and C-15/21) at [139].
48 For a similar analysis applied to different areas of international law, see I. Hadjiyianni, "The CJEU as the Gatekeeper of International Law: The Cases of WTO Law and the Aarhus Convention" (2021) 70 International and Comparative Law Quarterly 895–933.
49 The first paragraph of the Sea Watch judgment interestingly introduces the preliminary ruling proceedings stating that the requests of interpretation concerned both the PSC Directive (an act of EU law) and the UN Convention on the Law of the Sea, see Sea Watch (C-14/21 and C-15/21) EU:C:2022:604 at [1].
50 Sea Watch (C-14/21 and C-15/21) EU:C:2022:604 at [78]; [88]–[94]; [105]–[107], [118], [124], [136]–[138], [150].
51 Sea Watch (C-14/21 and C-15/21) at [17] and [89].
52 Sea Watch (C-14/21 and C-15/21) at [94].
53 Sea Watch (C-14/21 and C-15/21) at [93], [94], [96].
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55 Sea Watch (C-14/21 and C-15/21) at [92]–[94].
56 Sea Watch (C-14/21 and C-15/21) at [156].
57 Sea Watch (C-14/21 and C-15/21) EU:C:2022:604 at [157]–[158].
58 Sea Watch (C-14/21 and C-15/21) at [139].
59 About harmonised criteria that a Member State shall follow in determining when an "unexpected factor" occurs, and in determining when additional inspections on civilian ships used in SAR operations are justified see Sea Watch (C-14/21 and C-15/21) EU:C:2022:604 at [120]–[121]. About harmonised criteria that a Member State

shall follow in determining, in the course of a detailed inspection, what factors constitute a danger to further navigation, see Sea Watch (C-14/21 and C-15/21) at [138]–[139]. About the obligation for national authorities to take into account "future risks" rather than past conduct in determining the seaworthiness of civilian ships systematically used in SAR operations, see Sea Watch (C-14/21 and C-15/21) at [147]–[148].

60 Sea Watch (C-14/21 and C-15/21) EU:C:2022:604 at [137]–[138].

61 *C. Janssens, The Principle of Mutual Recognition in EU Law (Oxford: Oxford University Press, 2013)*, see in particular the discussion on the "duty to take into account", p.292.

62 Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein (120/78) EU:C:1979:42; [1979] 3 C.M.L.R. 494. For a discussion of Cassis as the founding myth of the EU internal market see *K. Nicolaïdes, "The Cassis Legacy" in F. Nicola and B. Davies (eds), EU Law Stories: Contextual and Critical Histories of European Jurisprudence (Cambridge: Cambridge University Press, 2017), p.284*.

63 See R. (on the application of NS) v Secretary of State for the Home Department (C-411/10 and C-493/10) EU:C:2011:865; [2012] 2 C.M.L.R. 9. Reported in *K. Nicolaïdes, "The Cassis Legacy" in F. Nicola and B. Davies (eds), EU Law Stories: Contextual and Critical Histories of European Jurisprudence (2017), p.298*. See also V. Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual" (2012) 31 Yearbook of European Law 319–372.

64 Sea Watch (C-14/21 and C-15/21) at [156].

65 Sea Watch (C-14/21 and C-15/21) at [155], [157]–[159].

66 Sea Watch (C-14/21 and C-15/21) EU:C:2022:604 at [83]–[85].

67 Criminal proceedings against Daniel Adam Popławski (C-573/17) EU:C:2019:530.

68 D. Miasik and M. Szwarc, "Primacy and Direct Effect-Still Together: Popławski II" (2021) 58 C.M.L. Rev. 571–590.

69 Council Framework Decision on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/01.

70 Treaty of Amsterdam art.34(2)(b).

71 Criminal Proceedings against Pupino (C-105/03) EU:C:2005:386; [2005] 2 C.M.L.R. 63.

72 M. Fletcher, "Extending 'Indirect Effect' to the Third Pillar: The Significance of Pupino?" (2005) 30 E.L. Rev. 862–877, 868. Miasik and Szwarc, "Primacy and Direct Effect-Still Together: Popławski II" (2021) 58 C.M.L. Rev. 571–590, 573.

73 Criminal Proceedings against Pupino (C-105/03) EU:C:2005:386 at [43].

74 Criminal Proceedings against Pupino (C-105/03) EU:C:2005:386 at [47].

75 Popławski (C-573/17) EU:C:2019:530 at [50].

76 Popławski (C-573/17) at [60].

77 Popławski (C-573/17) at [61].

78 Popławski (C-573/17) at [62].

79 Van Duyn v Home Office (41/74) EU:C:1974:133; [1975] 1 C.M.L.R. 1. *B. de Witte, "Direct Effect, Primacy, and the Nature of the Legal Order" in P. Craig and G. de Búrca (eds), The Evolution of EU Law, 3rd edn (Oxford: Oxford University Press, 2021), p.198*. C. Timmermans, "Directives: their Effect within the National Legal Systems" (1979) 16 C.M.L. Rev. 533–555.

80 Sea Watch (C-14/21 and C-15/21) EU:C:2022:604 at [114]–[126], [131]–[139].

81 Sea Watch (C-14/21 and C-15/21) EU:C:2022:604 at [146]–[149], [150]–[154].

82 K. Lenaerts and T. Corthaut, "Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law" (2006) 31 E.L. Rev. 287–315, 311.

83 *S. Prechal, "Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union" in C. Barnard (ed), The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate, (Oxford: Oxford University Press, 2007), pp.42–43*.

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