

## **Italy's attempt to restrict search and rescue, in line with EU legal frameworks?**

This note aims to first outline the new regulatory framework applicable for NGO vessels carrying out search and rescue operations at Sea, by the Italian authorities, secondly look at violations of EU law, and third, it provides concrete recommendations. Regarding the violation of EU law, there are subchapters focussing on the following topics:

1. Restrictions on (multiple) rescue operations and reaching the closest safe ports
2. Inspections by the Italian authorities
3. Compatibility of the Legislation with European Standards and Best Practices pertaining to Civil Society Space and ability of civil society to carry out its activities
4. Obligation to immediately carry out all initiatives aimed at informing the rescued persons of the possibility to claim international protection and to share all data collected with the relevant authorities

This note is drafted by the ASGI, with support of DRC Italy. ASGI is a membership-based association focusing on all legal aspects of immigration. As a pool of lawyers, academics consultant's and civil society representatives, ASGI's expertise relates to various areas of migration, including International Maritime Law, European Law and Human right's Law.

### **Decree Law No. 1/2023**

Decree Law No. 1/2023, amended by Law No. 15 of 24 February 2023, increases the requirements on vessels carrying out rescue missions to enter or transit through Italian territory<sup>1</sup>. The new regulatory framework confirms the power of the Minister of the Interior, in agreement with the Minister of Defence and the Minister of Infrastructure and Transport, after informing the President of the Council of Ministers, to restrict or prohibit the transit and stationing of ships (other than military or on non-commercial government service) in the Italian territorial sea. The power to restrict entry and transit can be excluded only if:

- The ship systematically carrying out search and rescue activities operates in accordance with authorisations issued by the competent authorities of the flag State and is in possession of the requirements of technical-nautical suitability for the safety of navigation;
- Specific initiatives were promptly taken to inform the rescued persons of the possibility of requesting international protection, and the vessel personnel are required to collect relevant data to be made available to the authorities. Information must also be provided for the purpose of acquiring elements relating to the rescue operation carried out';
- Immediately after the event (the rescue) the vessel must request the assignment of a port of disembarkation, and must proceed to that port without delay.

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<sup>1</sup> The decree amends Art. 1, para. 2 of Law Decree No. 130 of 21 October 2020, converted with amendments into Law No. 173 of 18 December 2020.

- The methods of search and rescue at sea by the ship should not have contributed to creating dangerous situations on board or prevented the timely arrival at the port of disembarkation designated by the authorities

In the event of violation of the prohibition, the master of the ship shall be held liable for administrative offences, together with the owner and the shipowner of the ship and shall incur specific penalties (payment of 10,000 – 50,000 euros; administrative detention of the vessel for a period of two months). The Decree Law also provides for the confiscation of the vessel in case of reiterated violations of the provisions with the same vessel.

## Violation of International and EU Framework

### 1) Restrictions on (multiple) rescue operations and reaching the closest safe port

NGOs are now obliged to immediately reach the allocated port after the rescue operation. In a [Joint statement](#), 20 aid organisations active in search and rescue “express their gravest concerns regarding the latest attempt by a European government to obstruct assistance to people in distress at sea” and denounce that “Among other rules, the Italian government requests civilian rescue ships to immediately head to Italy after each rescue. This delays further life saving operations, as ships usually carry out multiple rescues over the course of several days. Instructing SAR NGOs to proceed immediately to a port, while other people are in distress at sea, contradicts the captain’s obligation to render immediate assistance to people in distress, as enshrined in the UNCLOS”.

International law (Article 98 of the [United Nations Convention on the Law of the Sea](#) and Chapter V, Rules 7 and 33 of [The International Convention for the Safety of Life at Sea \(SOLAS\)](#)) clearly establish a legal obligation on relevant authorities and actors to provide assistance to those who are in distress and carry out multiple rescues if necessary. This legal obligation is also recalled by EU law (art 9 [REGULATION \(EU\) No 656/2014](#)).

On Tuesday, January 24, the [Geo Barents vessel](#) belonging to Doctors Without Borders (MSF) rescued 61 people following a distress warning. As the vessel was heading toward La Spezia on a journey of about 1,200 km - the place of safety instructed by the Government - it received a report of a new vessel in distress nearby. The boat thus headed toward this second vessel running into a third one in distress. The boat thus proceeded with a double additional rescue operation, gathering 237 people on board, including 73 UAMs. The vessel then headed for La Spezia, which was reached on Saturday, January 28, where the rescued were disembarked. The minors involved were assigned throughout Italy in the provinces of La Spezia, Livorno and Alessandria. On Wednesday, February 1, [the ship was given permission to leave port again headed for the central Mediterranean](#).

On 13 February, the Geo Barents carried out another rescue in international waters. The Italian authorities ordered the vessel to reach the port of Ancona, five days' journey away. On 24 February, the Ancona Port Authority ordered the administrative detention of the Geo Barents for 20 days, contesting the failure to share the Voyage Data Recorder. According to MSF, Voyage Data Recorder (VdR) information should only be used in an investigation following a maritime accident. The rescue of shipwrecked persons does not fall into this category and that is why the captain did not activate

this procedure but shared, as usual, all other information related to the mission. In addition to the administrative detention, the ship was fined an amount to be determined by the Prefect of Ancona, ranging from 2,000 to 10,000 euros.

## **2) Inspections by the Italian authorities**

On the basis of the new Decree, the ship systematically carrying out search and rescue activities has to operate in accordance with authorisations issued by the competent authorities of the flag State and to be in possession of the requirements of technical-nautical suitability for the safety of navigation. The introduction of this new provision could lead to an increase in inspections and the risk of new sanctions, in particular the captain or/and the owner of the vessel.

The European Court of Justice has already clarified the limits of the State's power of inspection and control. In particular, the Court stated that *“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 (...). 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”*.

Moreover, the Court affirmed 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 (...). 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”* ([European Court of Justice, Grand Chamber, Judgement 1 August 2022, Joined Cases C-14/21 e C-15/21, § 139 - 159](#)).

On the basis of this ruling, it is clear that the certifications that all NGO ships hold, and which are those issued by the flag state, allow them to sail and carry out rescue activities without the port state being able in any way to challenge the conformity of the latter activity with these certifications.

## **3) Compatibility of the Legislation with European Standards and Best Practices pertaining to Civil Society Space and ability of civil society to carry out its activities**

[The Expert Council on NGO Law of the Conference of INGOs of the Council of Europe has already observed](#) that the Decree Law n. 1/2023 raises both procedural and substantive difficulties with respect to freedom of association and the protection of civil society space.

In particular “The onerous, arbitrary and at times unlawful (in the sense that they may breach law of the sea requirements, place vulnerable people at heightened risk and result in violations of individuals’

privacy) requirements for NGOs carrying out search and rescue work give rise to problems of compliance with the rights in Articles 8 and 11 of the ECHR because of a lack of legality, legitimacy and proportionality. The provisions will have a significant chilling effect on the work of civil society on account of the unlawfulness of some of the provisions, and the concomitant increased risks that NGOs face as a result of continuing with search and rescue work. The reduction of civil society space in the areas of support to refugees and other migrants may produce a worrying humanitarian situation, given the significant needs of this very vulnerable population and already existing gaps in service provision by government and others. This new Decree reflects a continuation in the violence and judicial harassment that NGOs face, including criminalisation of aspects of their work”.

**4) Obligation to immediately carry out all initiatives aimed at informing the rescued persons of the possibility to claim international protection and to share all data collected with the relevant authorities**

As pointed out by the NGOs carrying out rescue activities, this obligation does not seem acceptable and not even applicable as *“It is the duty of states to initiate this process and a private vessel is not an appropriate place for this”*. [UNHCR](#) states that the efficient and fair assessment of asylum claims must be carried out on *“dry land”* after all the disembarkation procedures have been properly finalised and the rescued people are in a safe place. UNHCR also considers that *“The shipmaster of a commercial or other private vessel that has embarked rescued persons should not be tasked with assessing asylum claims, and a private vessel assisting in the rescue operation is not an appropriate place for determining a claim to asylum”*.

The ECtHR already noted that *“the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers”* and that *“the lack of access to information is a major obstacle in accessing asylum procedures”* (Hirsi and Jamaa v. Italy, Application no. [27765/09](#), § 185, 204). This statement must apply also to search and rescue vessels. It shall also be noted that a private vessel commander cannot for sure constitute a “competent authority” within the meaning of EU Directive 2013/32/EU. Even the possibility given by directive (par.4.2) to design other authorities -limited to border procedures- in fact anyway require the qualification as “public authority” of the designated subject, qualification that the commander of a private/commercial boat cannot have.

It should also be noted that if the intention, introducing this provision, was somehow to “transfer” the competence to the MS of the boat flag, that cannot work either as, on one side the commander will not be bound by Italian law before entering the Italian territorial water, on other side the power to be a “designed authority” for another MS can be established only by that MS.

## **Conclusions and recommendations**

We recall that people rescued at sea must be considered, first and foremost, survivors of a shipwreck. This stands true from a moral as well as from a legal perspective. The obligation to provide assistance at sea must be fulfilled 'without regard to the nationality or status' of the person in distress 'nor to the circumstances in which he or she was found' (point 2.1.10 SAR Convention). Their legal status can only legitimately be ascertained by the competent authorities after disembarkation, certainly not in the

immediacy of the rescue and certainly not by those who steer a vessel, even if it is dedicated to rescue at sea.

Taking into consideration this and the above mentioned critical aspects of the Decree Law 1/2023 ASGI and DRC put forth the following recommendations:

**1. To the JHA Council:**

- To ensure that future policy and regulatory initiatives promoted by the European institutions are fully consistent with customary and covenanted international maritime law, European law, and the jurisprudential interpretations outlined by the Court of Justice of the Union.
- When discussing a legislative initiative, to take into account the obligation for involved States to provide assistance to those who are in distress at sea and to carry out multiple rescues if necessary, in accordance with the relevant International Maritime Law conventions;
- To call on Italy, jointly with other EU Coastal Member States, to promote the development of a legal framework that adopts the concept of 'place of safety' as referred to in the Annex to the 1979 SAR Convention, paragraph 1.3.2, without exposing rescued people to long crossings and - as a consequence - to illogical and useless hassles and suffering.
- To call on Italy, jointly with other EU Coastal Member States, to include in its legislation clear provisions outlining the limits to the power of inspection of port States in relation to imposing administrative measures, in accordance with the principle set forth by the European Court of Justice (CGUE, 1.8.2022, C-14/21 e C-15/21).

**2. To the European Commission:**

- To monitor the developments in Italy (as the guardian of the EU asylum *acquis*, including fundamental rights) and to ensure that appropriate steps are taken, as the proposed decree violates EU law. The next steps should be: reaching out to Italian counterparts to push for a change in the legislation and starting an infringement procedure as the Law Decree is incompatible with EU law (CEAS directives and the Charter)
- To restart progress reports on Italy (and all EU MS) regarding the implementation of the EU's asylum *acquis* and compliance with fundamental rights.

**3. To the European Parliament:**

- To conduct a study aiming to assess the impact of this legal development in Italy on EU broader *acquis* and on how it violates EU law and other international human rights law frameworks.
- To call for a plenary hearing with the Commission and Italy present, to explain the legal and practical implications of D.L. 1/2023 in Italy.