POLICY INSIGHTS
Thinking ahead for Europe

No 2019-14 / October 2019

The Malta declaration on SAR and relocation: A predictable EU solidarity mechanism?

Sergio Carrera and Roberto Cortinovis

Abstract

The joint declaration of intent signed at the informal summit between the interior ministers of Italy, Malta, France and Germany in La Valletta on 23 September 2019 (the 'Malta declaration') has been presented as a milestone in addressing controversies over Search and Rescue (SAR) and disembarkation of asylum seekers and migrants in the Mediterranean. This Policy Insight provides a critical analysis of the declaration, questioning its added value in ensuring a predictable EU solidarity mechanism in the Mediterranean. It underlines how the intergovernmental and extra-EU Treaty character of this initiative raises a number of concerns regarding its compliance with EU Treaties and principles such as the one of *equal solidarity* and fair responsibility sharing for asylum seekers among all member states.

ReSOMA
RESEARCH SOCIAL PLATFORM ON MIGRATION AND ASYLUM

This research has been conducted under the ReSOMA project. ReSOMA receives funding from the European Union's Horizon 2020 research and innovation programme under the grant agreement 770730. The opinions expressed in this paper are attributable solely to the authors in a personal capacity and not to any institution with which they are associated, nor can they be taken in any way to reflect the views of the European Commission'.

Sergio Carrera is Senior Research Fellow and Head of the Justice and Home Affairs unit at CEPS and part-time Professor at the Migration Policy Centre, European University Institute in Florence. He is also Visiting Professor at the Paris School of International Affairs (PSIA) at Sciences Po (France). Roberto Cortinovis is a Researcher in the Justice and Home Affairs Unit at CEPS.

978-94-6138-749-3

1. Introduction

The informal summit between the interior ministers of Italy, Malta, France, Germany held in La Valletta on 23 September 2019 has been presented as a milestone in breaking a long-standing controversy over Search and Rescue (SAR) and disembarkation of asylum seekers and migrants in the Mediterranean. The disembarkation of people rescued by civil society actors became a thorny political issue during the summer of 2018 with the paranoid and unilateral decision by the former radical-right Italian Interior Minister, Matteo Salvini, to close Italian ports to people rescued at sea.

The outcome of the informal summit in Malta was the adoption of a joint declaration of intent on a Controlled Emergency Procedure – Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism. The objective was to come up with an early contribution to be discussed at the Justice and Home Affairs (JHA) Council meeting of 7 and 8 October 2019, with a view to broadening participation in the mechanism to other EU member states.

Media sources covering this JHA Council meeting reported however that the mechanism failed to gain the necessary support, with some interior ministers even disagreeing among each other in the aftermath of the meeting on exactly how many EU governments could be expected to join the initiative. While the German Interior Minister, Seehofer, stated that a total of 12 governments would be ready to join the initiative (including the four launching it), according to the Luxembourg Interior Minister Asselborn only three additional Member States (Portugal, Ireland and Luxembourg) had expressed a clear interest in supporting it.

The cold reception of the joint declaration initiative so far contrasts with the high political attention it raised as a possible "shift" in EU asylum policy in line with the expectations of the newly formed Italian government. The current Italian Interior Minister, Luciana Lamorgese, welcomed the agreement as "a first, concrete step towards real common European action", adding that "as of today, Italy and Malta are no longer alone". Some NGOs and civil society actors have welcomed the mechanism as a step forward in the protection of the rights of migrants and refugees.

A closer look at the declaration reveals however a number of outstanding questions and doubts about its actual added value, and the effects that it can be expected to have in ensuring a predictable, fundamental rights and EU rule of law-compliant solidarity mechanism in the Mediterranean moving beyond the current EU Dublin Regulation.

2. What's in the Malta declaration?

The 'mechanism' put forward by the small group of interior ministers during the informal summit in La Valletta took the shape of a 'joint declaration of intent'. This is not an EU legal act, nor an international agreement. It is used in international relations when parties aim at concluding non-legally binding instruments. In the case of this declaration, ministers taking part

in the initiative have "jointly committed" to undertake a number of measures on a non-compulsory or voluntary basis.

This voluntarism applies for instance to what is perhaps one of its most relevant components, outlined in Paragraph 1: the possibility to propose an alternative place or port of safety for disembarking rescued migrants, different from the member state that would otherwise be responsible. This alternative would be reserved for situations where Italy or Malta would be facing a "disproportionate migratory pressure" calculated on the basis of "limitation in reception capacities, or a high number of applications for international protection".

The declaration aims in this way at breaking up the set of criteria currently envisaged in the much criticised EU Dublin Regulation, according to which responsibility for the reception and assessment of asylum seekers' applications lies most often disproportionally with the first country of irregular entry into Schengen territory, including for those persons rescued in the Mediterranean Sea.

The solidarity mechanism envisaged by the joint declaration is however limited in scope to people disembarked following SAR operations conducted in the high seas, and falling under the responsibility of the Italian and Maltese governments. Its limited focus on the Central Mediterranean has caused other EU member states that also maintain the common EU external sea border, such as Spain and Greece, to reject and express discontent with the Malta declaration.

The governments of Greece, Cyprus and Bulgaria even issued a joint statement calling on other member states to extend the relocation mechanism to asylum seekers arriving by sea in their countries. Unlike the situation during 2016 and 2017, only 14% of the 67,000 migrants and asylum seekers who arrived in the EU by sea in 2019 landed in Italy or Malta. Most of them in fact entered via Greece (56% of the total) and Spain (29%).

In Paragraphs 2, 4 and 5, the Malta declaration envisages a rather loose relocation distribution system of asylum seekers disembarked in Italy and Malta among participating member states – so far mainly France and Germany, which will then take responsibility for assessing the asylum claims of relocated applicants.

The 'mechanism' states that participating states "shall contribute" to the swift relocation (no longer than 4 weeks) of rescued asylum seekers based on pre-declared pledges before disembarkation. No further detail is provided in the text regarding the specific procedures through which these pledges will be made, or about the exact percentages, distribution key and selection criteria that will be used.

It is not clear if the authorities of participating states will be allowed to pre-select and unlawfully discriminate among profiles of potential beneficiaries based on their own political preferences – e.g. specific nationalities, only families, etc. The declaration only makes reference to the intention of "building on and improving existing practices by streamlining procedures". This can be seen as a reference to the 'ad hoc disembarkation and relocation arrangements' implemented since the summer of 2018. These arrangements have involved a small group of

member states willing to accept a share of asylum seekers disembarked in Italy and Malta on a voluntary basis and following an *ad hoc* or 'ship by ship' approach.

These ad hoc arrangements were of a predominantly intergovernmental nature, falling outside any meaningful EU framework. Since early 2019, the Commission started playing the role of 'facilitator' or 'deal broker' among member states involved in the pledging exercises. EU agencies, chiefly the European Asylum Support Office (EASO) and Frontex, were mobilised and deployed in Italy and Malta to provide 'support' to participating member state authorities dealing with specific procedural steps following the disembarkation of rescued persons by NGOs. This has included support in the identification and fingerprinting of disembarked people, registration of asylum applications and in the pre-selection phases of relocation procedures (including the development and application of relocation matching criteria).

The Commission argued that the ad hoc disembarkation and relocation arrangements fell within the remits of the discretionary clause envisaged in Article 17.2 of the EU Dublin Regulation, which allows EU member states to take responsibility for asylum applicants irrespective of the EU Dublin Regulation criteria.

Yet, the indirect involvement of EU actors has not helped in overcoming the overriding intergovernmental nature of these arrangements, or in bringing legal certainty and ensuring full compliance with EU asylum procedures standards during their operationalisation. They have continued to present a disproportionate level of informality, secrecy and lack of accountability. The Malta deal brings these very same concerns into sharp focus.

Besides sketching out a relocation mechanism for migrants rescued at sea with the purported aim of strengthening solidarity among a group of 'willing' member states, the declaration includes a number of worrying provisions dealing with civil society, the Libyan coast guard and cooperation with North African countries in the field of SAR and disembarkation.

The document adopts a 'compulsory tone' in paragraph 9. It calls on SAR vessels, chiefly those owned by NGOs and private actors, "to comply with instructions given by the competent rescue coordination centre" and not to obstruct search and rescue activities conducted by the Libyan Coast Guard. This provision blatantly disregards the wealth of evidence showing the criminalisation policies towards SAR NGOs and the threat that these constitute for the respect of the rule of law principle enshrined in Article 2 TEU, mainly the independence of civil society organisations providing humanitarian assistance to those in need. It also disregards the fact that many of the civil society ships are currently confiscated or blocked by state authorities.

The reference to SAR operations conducted by the Libyan coast guard is equally striking. This should be taken in conjunction with declarations from the new Italian Interior Minister in the aftermath of the summit, according to which the current cooperation framework with Libya based on the 2017 Italy-Libya Memorandum of Understanding (MoU) will be preserved because the Libyan coastguard is doing a "good job". The EU has indirectly financially supported the Libyan coastguard through the EU Trust Fund for Africa.

There is widespread evidence of unlawful conduct and acts of violence perpetrated by the Libyan coastguard towards rescued migrants in the context of 'pullbacks' to unsafe Libyan ports leading to a direct violation of the principle of *non-refoulement*. The Malta declaration disregards widespread and well-founded criticism concerning the complicity of Italian and EU actors in international wrongful acts and crimes against humanity regarding migrants and asylum seekers in Libya. Those intercepted by Libyan Coast guard actors have been sent to arbitrary detention, enslavement, torture, and other inhuman treatments in detention camps.

Similarly, Paragraph 14 of the declaration "encouraging UNHCR and IOM to support disembarkation modalities in full respect of human rights" in North African countries echoes proposals discussed during the Austrian EU presidency in the second half of 2018 to set in place "regional disembarkation platforms" in third countries, which have spurred widespread criticism from stakeholders (including the African Union) and academics due to their political, legal and practical unfeasibility.

The Malta declaration also frames as a suitable policy option an enhanced EU-led aerial surveillance in the southern Mediterranean, instead of a fully-fledged EU SAR operation across the Mediterranean. The focus on 'aerial surveillance' is in line with the revised mandate of the EUNAVFOR-Med Operation Sophia. Since March 2019, this military operation does not foresee any further deployment of naval assets, but is only focused on aerial surveillance and reinforced support to the Libyan Coast Guard. EUNAVFOR-Med has also engaged in the sharing of information on sightings of vessels with Libyan Coast Guard actors, a form of cooperation which raises similar serious concerns about its incompatibility with international and EU law.

3. Solidarity à la carte is no solidarity

The extra-EU Treaty nature of the 'mechanism' foreseen by the Malta deal opens up fundamental questions concerning its relationship and compatibility with EU rule of law as enshrined in the Treaties. A 'pick and choose' approach by some EU interior ministries in asylum policies is simply incompatible with the principles laid down in the Lisbon Treaty and the well-advanced stage of Europeanisation characterising EU asylum and border policies.

Proposals for 'flexible integration' or 'solidarity à la carte' run the risk of turning the clock back three decades in European integration and re-injecting nationalism and intergovernmentalism into fields that – after the entry into force of the Lisbon Treaty in 2009 – are under clear EU competence and scrutiny remits. This includes SAR and disembarkation activities, for instance when these fall within the scope of joint operations at sea conducted by the European Border and Coast Guard (EBCG or Frontex Agency), or in the case of member state border surveillance actions, as these are subject to the Schengen Borders Code (SBC).

The EU principle of solidarity in the field of asylum enshrined in Article 80 of the Treaty on the Functioning of the European Union (TFEU) should not be understood as an 'anything goes' option for national governments and their interior ministries. This principle implies equality among all EU member states. Equal membership rights entail the expectation of equal

responsibilities. It should not be only for the governments of France and Germany to take up a responsibility which must be shared among all EU Schengen countries.

This has been confirmed by the Luxembourg Court in the 2017 ruling dealing with the temporary relocation quotas Decisions against Hungary and Slovakia. In that circumstance, the Court made it clear that EU responses "must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States". The Court ruling was however not properly followed up and duly enforced by EU institutions. This might have left governments such as the one in Hungary to wrongly believe that they can easily get away with their legal obligations as EU and Schengen members.

During the previous legislature, moreover, the European Council gave preference to a logic of consensus and de facto unanimity among EU member states during negotiations on the CEAS reform files. This is in direct violation of the Lisbon Treaty and the application of the Qualified Majority Voting (QMV) rule under the ordinary legislative procedure for asylum-related legislative initiatives. This political choice should be abandoned as it has undermined the chances for any moving forward in the reform of the EU asylum system, as recommended by the previous European Parliament.

4. Conclusion

The Malta declaration does not provide a basis for a predictable EU solidarity mechanism. A common EU response based on equal solidarity and clear legally-binding commitments for all EU member states in line with Treaty-decision making procedures should be prioritised instead. This is the key recipe for strengthening the Union's legitimacy and credibility in asylum and migration policies, both internally and in its relations with third countries.

ABOUT CEPS

Founded in Brussels in 1983, CEPS is widely recognised as the most experienced and authoritative think tank operating in the European Union today. CEPS acts as a leading forum for debate on EU affairs, distinguished by its strong in-house research capacity and complemented by an extensive network of partner institutes throughout the world.

Goals

- Carry out state-of-the-art policy research leading to innovative solutions to the challenges facing Europe today
- Maintain the highest standards of academic excellence and unqualified independence
- Act as a forum for discussion among all stakeholders in the European policy process
- Provide a regular flow of authoritative publications offering policy analysis and recommendations

Assets

- Multidisciplinary, multinational & multicultural research team of knowledgeable analysts
- Participation in several research networks, comprising other highly reputable research institutes from throughout Europe, to complement and consolidate CEPS' research expertise and to extend its outreach
- An extensive membership base of some 132 Corporate Members and 118 Institutional Members, which provide expertise and practical experience and act as a sounding board for the feasibility of CEPS policy proposals

Programme Structure

In-house Research Programmes

Economic and Finance
Regulation
Rights
Europe in the World
Energy and Climate Change
Institutions

Independent Research Institutes managed by CEPS

European Capital Markets Institute (ECMI)
European Credit Research Institute (ECRI)
Energy Climate House (ECH)

Research Networks organised by CEPS

European Network of Economic Policy Research Institutes (ENEPRI)
European Policy Institutes Network (EPIN)