

## Briefing Note [Update 1]

### Protocol between the Government of the Italian Republic and the Council of Ministers of the Albanian Republic on strengthening cooperation on migration matters (the so-called Italy-Albania migration deal)

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## 1. Introduction

The present note focuses on providing information on the new agreement signed by Italy and Albania on 7<sup>th</sup> November 2023 (officially referred to as the “*Protocol between the Government of the Italian Republic and the Council of Ministers of the Albanian Republic on strengthening cooperation on migration matters*”, thereafter the “Protocol”) which aims at fostering bilateral cooperation in the management of migration flows coming from third countries<sup>1</sup>. It should be noted that almost three weeks after the initiative was announced there is still limited information available about the exact scope of the agreement and how it will be effectively implemented, in particular in relation to specific procedures that will be applied in Albania and which categories of people will be covered by it. The note therefore provides preliminary comments on the deal and its potential impact on Frontex activities, but given the limited information available at this stage the analysis may change once new developments are made public.

The Italian-Albanian deal is the first of its kind in the European Union, and raises different and novel legal issues. The Italian Prime Minister considered the agreement “historic” and further claimed that it could serve as a blueprint for deals between the EU and the non-EU countries.

At the political level, the agreement is intended as an attempt to control migration figures that have almost doubled in the year since the Italian Prime Minister took office (the right-wing Brothers of Italy party which Meloni heads, has long promised to crack down on undocumented migrants, including by building processing facilities outside the EU). This is in exchange for supporting Albania in the enlargement negotiations.

This briefing note was drafted based on the information included in the protocol, available media reports and statements made by different high-ranked Italian officials as well as commentaries published by external stakeholders.

<sup>1</sup> Text of the agreement in IT: [link](#), EN unofficial translation - [link](#).

## 2. Italy-Albania migration agreement: general outline and current state of play

In practice, the aforementioned Protocol mainly aims at constructing two facilities in Albania to temporarily accommodate migrants rescued at sea. Albania will put two areas (where the facilities will be built) at the disposal of Italy, free of charge: an disembarkation point at the port of Shengjin, on the northern coast of the country; and a military base in Gjader about 30 kilometres from the port.

According to media reports and Minister of Foreign Affairs' oral statement made to the Parliament (on 22 November)<sup>2</sup>, in the port there will be a structure dedicated to disembarkation, first aid and identification/screening procedures (including fingerprinting). In the second structure, located in the inland area, the application for international protection will be examined (reception center) and, for those who do not meet the requirements, the return procedures will be carried out (pre-removal detention center - CPR).

The Protocol further focuses on regulating certain conditions for the stay of the migrants in Albania, as follows:

- **Procedures carried out in the centers:** The Protocol states that border procedures and return procedures will be carried out in the centres (Article 4). This would be however done in accordance with Italian and European law (Articles 2, 4, and 9). As stated by the Minister of Foreign Affairs, all the procedures will be carried out exclusively by the Italian administrative and judicial authorities<sup>3</sup>.
- **Categories of migrants transferred to Albania and held in centers:** The Protocol does not contain any provisions on the categories of migrants who may be subjected to a transfer to Albania upon their rescue / interception at sea. However, according to the information provided by Italian public officials,<sup>4</sup> third country nationals accommodated in centers built in Albania will fall under one of the two categories: 1) persons who applied for international protection and are subject to accelerated border procedures either because the migrants are coming from safe countries or origin<sup>5</sup> or the migrants have already submitted an application for international protection and received a negative decision (the so-called subsequent application<sup>6</sup>); 2) people awaiting return whose application for international protection was rejected.

Pregnant women, children, and other vulnerable groups would not be transferred to these centres but disembarked in Italy.

Protocol specifies that only Italian authorities would be allowed to enter territorial waters of Albania and disembark migrants there (Article 4). People rescued by NGOs would therefore be disembarked in Italy according to the Statement made by the Italian Foreign Minister Antonio Tajani<sup>7</sup> (currently less than 4% of all the arrivals to Italy are rescued by NGOs, whereas 28% constitute the so-called autonomous arrivals<sup>8</sup>).

<sup>2</sup> See: [Tajani annuncia ddl di ratifica sull'intesa Italia-Albania - Notizie - Ansa.it](#) and [XIX Legislatura - Lavori - Resoconti Assemblea - Dettaglio sedute \(camera.it\)](#) (accessed 01 December 2023).

<sup>3</sup> See: [XIX Legislatura - Lavori - Resoconti Assemblea - Dettaglio sedute \(camera.it\)](#) (accessed 01 December 2023).

<sup>4</sup> Idem.

<sup>5</sup> The concept of safe country of origin as described in the Article 36 of the recast Asylum Procedure Directive (APD) and applied in Italian legislation on asylum. In such cases, applications are examined on the merit through an accelerated procedure after an individual assessment to allow the applicant to rebut the presumption of safety. Currently binding legal provisions on asylum in Italy legislative (decree 20/2023 converted into [law no. 50/2023](#)) provide for a possibility of detaining asylum seekers from so-called safe countries of origin subject to border procedure for a period of up to 4 weeks. Detention is not ordered if an applicant: 1. has submitted his/her passport or other valid equivalent document, or 2. has paid a guarantee of approx. 5,000 euros).

According to the [Ministerial Decree](#) of 17 March 2023, Italy considers safe the following countries of origin: Albania, Algeria, Bosnia and Herzegovina, Cape Verde, Gambia, Georgia, Ghana, Ivory Coast, Kosovo, Nigeria, North Macedonia, Montenegro, Morocco, Senegal, Serbia, Tunisia. The first detention center for applicants from so-called 'safe countries of origin' was set up in Pozzallo at the end of September 2023.

<sup>6</sup> According to the Decree Law 113/2018, implemented by L 132/2018, an asylum application is considered a subsequent application where it is made after:

- A final decision has been taken on the previous application;
- The previous application has been explicitly withdrawn;
- The previous application has been terminated or rejected after the expiry of 12 months from suspension on the basis that the applicant was unreachable (*irreperibile*).
- The previous application was rejected because the applicant was privately accommodated and became unreachable (*irreperibile*) without providing, within 10 days after having become aware of the appointment for the personal interview, the justified reasons for not having known about it.

<sup>7</sup> See: [Tajani annuncia ddl di ratifica sull'intesa Italia-Albania - Notizie - Ansa.it](#) (accessed 01 December 2023) and: <https://www.infomigrants.net/en/post/53392/italy-parliament-to-ratify-albania-deal-to-process-asylum-seekers>

<sup>8</sup> See: [Migranti, accordo Italia Albania: quante persone sarebbero trasferite ogni anno | Sky TG24](#) (accessed on 4 December 2023).

As clarified by the Minister of the Interior, the implementation of the agreement would most likely apply only to those interceptions / rescues which take place outside territorial waters.<sup>9</sup> However, the Protocol does not contain any provision in that connection.

- **Typology of centers and their capacity:** Migrants will not be able to leave the facilities. In case of unauthorized exits, the Protocol requires the Albanian authorities to bring back the migrants to the facilities (Article 6). In order to “ensure the right to a fair trial”, Italy and Albania will allow access to the centres “for lawyers, their representatives, as well as to international organisations and the EU’s agencies, who will provide advice and assistance to asylum applicants to the extent foreseen by the applicable Italian, European and Albanian legislation” (Article 9).

Both facilities can hold up to 3,000 people and with a goal to process up to 36,000-39,000 applications per year.

- **Duration of stay in the centers:** The Protocol states that the period of stay of migrants in Albania cannot exceed the maximum period of detention allowed by the Italian legislation) - Article 9. According to the national law, migrants awaiting their asylum applications being examined under the so-called border procedure can be detained for not more than 28 days, whereas people held in a structure used as pre-removal detention centers, can be detained for up to 18 months (maximum initial period of 6 months, with possibility of 3-month extensions if necessary, up to 18 months in total).<sup>10</sup>

People who are granted international protection during their stay in the centres in Albania would be sent back to Italy. If Italy is unable to carry out the return of people hosted by Albania, it will also have to take them back (Article 4).<sup>11</sup>

- **Management of centers and services provided:** As announced by the Minister of Foreign Affairs, both centres will be constructed and managed at Italy’s expense. They will be entirely staffed by Italian personnel, be governed under Italian and European legislation (Article 4)<sup>12</sup>. In addition, the Protocol stipulates that all the controversies which might arise from the Italian authorities competent for managing the centers and the migrants held in the facilities are subject exclusively to Italian jurisdiction (Article 4).

Italy will provide the services inside the centers, including health care, will be responsible for maintaining order and security inside as well as will cover the cost of any hospital visit. Albania will provide security outside and around the perimeters of the centres. The Albanian authorities can only enter in case of emergency e.g. fire or so on (Article 6).

Italian staff working in the centres will have certain immunities and will be subject to Albanian criminal law only in the event of committing crimes against Albanian citizens or the Albanian State (Article 7).

The Protocol contains a number of provisions about Italy’s responsibilities and liabilities vis-a-vis Albania. For instance, the Italian authorities will not need to request planning permission for the structures and in case a “migrant” dies, Italy has up to 15 days to remove the body.

- **Ratification procedures and timeline for setting-up centers:** The agreement will remain in force for 5 years and is renewable for another 5. It has to now undergo ratification by both Albanian and Italian Parliaments<sup>13</sup> (according to the policy analysts, having ratification bills approved in both countries is highly probable<sup>14</sup>).

<sup>9</sup> See: [Pena fino a 6 anni per le rivolte nei Cpr. L'annuncio di Piantedosi \(agi.it\)](#), published on 16 November 2023.

<sup>10</sup> See: <https://www.lidentita.it/centri-per-i-migranti-in-albania-tajani-spiega-come-saranno-opposizioni-divise/> (accessed on 5 December 2023).

<sup>11</sup> See: <https://www.lidentita.it/centri-per-i-migranti-in-albania-tajani-spiega-come-saranno-opposizioni-divise/> (accessed on 4 December 2023).

<sup>12</sup> See: [Italy: Parliament to ratify Albania deal to process asylum seekers - InfoMigrants](#), published on 22 November 2023.

<sup>13</sup> The Italian government's initial position was that no parliamentary scrutiny was necessary due to the fact that this Protocol would constitute the implementation of the Treaty of Friendship and Collaboration of 1995 and of the Protocol between the Ministry of the Interior of the Italian Republic and the Ministry of the Interior of the Republic of Albania for the strengthening of bilateral collaboration in the fight against terrorism and human trafficking humans of 2017. On 21<sup>st</sup> November, Italian Minister of Foreign Affairs however announced that the government will present a bill authorizing the ratification of the agreement (implementing decree). The Minister expressed hopes it can be approved in a timeframe "consistent with the urgency of tackling the management of growing migration flows" (See: [Italy: Parliament to ratify Albania deal to process asylum seekers - InfoMigrants](#), published 22 November 2023).

<sup>14</sup> In Albania, a minimum of 71 out of 140 votes is necessary for the bill to be approved and the agreement to be ratified. The ruling Socialist Party currently holds 74 votes and can rely on the support of its allies, including the Social Democratic Party, in case of urgent need (see: <https://www.euractiv.com/section/politics/news/albania-italy-migration-deal-takes-next-step-towards-parliamentary-vote/>, published on 16 November 2023). In the case of Italy, following the 2022 elections, the center-right coalition has secured a commanding majority in both chambers, with 236 out of 400 seats in the Chamber of Deputies and 115 out of 200 seats in the Senate.

As explained by the Minister of the Interior, the biggest challenge will be to extend the Italian jurisdiction on Albanian territory for which a regulatory framework is needed.<sup>15</sup>

The Italian Prime Minister announced that centers should be open in spring 2024.

- **Similarities with different migration agreements:** The Protocol does not outsource international protection responsibilities to a third country, insofar as Italy would remain fully responsible for the examination of the applications. This therefore distinguishes the current agreement from the UK, the Danish or Austrian attempts to carry out external processing in Rwanda, as in those cases the Rwandan authorities would carry out the processing themselves. This set-up is similar to the “Australian model”.

So far, the German Chancellor has indicated a willingness to follow the agreement closely and is thinking about similar models for his country.

- **Impact assessment of the agreement:** According to the estimates / simulation performed by one of the journals reporting on the matter, only approx. 10% of all migrants disembarked in Italy would be, in practice, eligible for transfers to Albania.<sup>16</sup>

### 3. Reactions from external stakeholders

The decision to conclude the agreement has sparked controversy in both Albania and Italy, including complaints over a lack of political consensus and parliamentary vote. Human rights issues and risks over inadequate oversight have also been raised considering that similar deals with other countries have been rejected or challenged in court. The table below offers an overview of mixed reactions stirred by the deal with the aim to highlight the key issues raised by various stakeholders.

European bodies	
<b>European Commission (COM)</b>	<p>According to the preliminary assessment by the European Commission’s legal service, the agreement is not violating the EU law as it is outside the EU law. EU law is not applicable outside EU territory. <a href="#">link</a></p> <p>During a discussion broadcasted by the EU debate, COM’s representatives further clarified that “<i>what is important is to have the location of the vessel. If migrants are rescued in the international waters, it is then not incompatible with the EU law to have that persons transferred to Albania</i>”. <a href="#">link</a></p> <p>According to the note produced by the COM in June 2018 on the legal and practical feasibility of disembarkation options, ‘<i>cooperation on disembarkation in a third country is possible if the search and rescue is carried out in the territorial sea of that country by its coast guard or by other third country vessels. If the search and rescue occurs in international waters and involves an EU State’s flag vessel (including in the context of European Border and Coast Guard sea operations) disembarkation can still take place in a third country, provided that the principle of non-refoulement is respected</i>’. <a href="#">link</a></p> <p>At the same time, the note states that ‘<i>when outside the EU, there is no right to claim asylum. The only means of getting refugee status from outside the EU is therefore resettlement. To allow individuals to «apply» for asylum outside the EU would require the extraterritorial application of EU law which is currently neither possible nor desirable. The only way this could function would be by establishing an EU asylum system and EU courts to process claims accompanied by an EU-level appeal structure</i>’.</p> <p><u>Note:</u> The legal assessment is preliminary and has not yet been made public.</p>

<sup>15</sup> See: [Pacchetto sicurezza e riforma fiscale, c’è l’ok del Cdm \(corrieredellacalabria.it\)](#), published on 17 November 2023.

<sup>16</sup> See: [Migranti, accordo Italia Albania: quante persone sarebbero trasferite ogni anno | Sky TG24](#), published on 8th November 2023.

<b>European Parliament (EP)</b>	<p>On 22<sup>nd</sup> November 2023, a group of six MPs submitted question for a written answer to the European Commission, in which they inquire COM to assess the agreement, indicate possible actions to be taken against Italy and Albania.</p> <p>Note: As a general rule, the questions shall be answered by the addressee within six weeks of being forwarded to it.</p>	<a href="#">link</a>
<b>Council of Europe Commissioner for Human Rights</b>	<p>In a press release, the Commissioner stated that the Memorandum of Understanding raises several human rights concerns and adds to a worrying European trend towards the externalisation of asylum responsibilities. Concerns and legal ambiguities relate to issues such as:</p> <ul style="list-style-type: none"> <li>• timely disembarkation,</li> <li>• impact on search and rescue operations,</li> <li>• fairness of asylum procedures,</li> <li>• identification of vulnerable persons,</li> <li>• possibility of automatic detention without an adequate judicial review and detention conditions,</li> <li>• access to legal aid, and effective remedies.</li> </ul> <p>The Commissioner raised that, in practice, it will result in differential treatment between those whose asylum applications will be examined in Albania and those for whom this will happen in Italy.</p> <p>Agreement also incentivises other States to do the same, which risks creating a domino effect that could undermine the European and global system of international protection.</p> <p>The focus should be put instead on improving the efficiency and effectiveness of their domestic asylum and reception systems as well as on creation of safe and legal pathways to seek protection in Europe.</p> <p><u>Note:</u> By mid-December, the Commissioner is expected to publish the country visit report on Italy. The report will include a brief assessment of the MoU with Albania, which largely overlaps with the content of the already published statement.</p>	<a href="#">link</a>
<b>International organisations</b>		
<b>UNHCR</b>	<p>UNHCR distanced itself from the agreement stating that it is not party to the Protocol and was not informed about or consulted on the content.</p> <p>Nevertheless, it stated that UNHCR's <a href="#">longstanding position</a> is that returns or transfers to safe third countries may only be considered appropriate if certain standards are met - in particular, that those countries fully respect the rights arising from the Refugee Convention and human rights obligations, and if the agreement helps share the responsibility for refugees equitably among nations, rather than shifting it. While legal transfer arrangements on asylum cooperation may be made between States, such measures must ensure and enhance refugee protection.</p> <p><u>Note:</u> They are currently seeking further information from the relevant authorities.</p>	<a href="#">link</a>
<b>Civil society organisations / national human rights institutions</b>		



<b>Asylum and Immigration Roundtable<sup>17</sup></b>	<p>According to the statement released and presented to the government and the parliament, the agreement should be revoked due to following critical issues:</p> <ul style="list-style-type: none"> <li>• The extraterritorial application of EU acquis is not permitted under the European law. European rules on asylum cannot be applied outside the European Union."</li> <li>• The argument that Italian jurisdiction can apply in the area identified by the Albanian government is inconsistent, because European legislation refers to the territory of the State with regard to the application of screening, asylum and return procedures. And there is no doubt that the territory on which the centers should be built belongs to Albania. Furthermore, international law does not provide for the transfer of jurisdiction over the territory by one State to another.</li> <li>• Possible violation of the principle of non-refoulement.</li> <li>• Bringing migrants rescued in in SAR operations to Albania fails to comply with the IMO sea rescue guidelines<sup>18</sup> which refer to the "minimum possible deviation from the place where the rescue was carried out".</li> <li>• Automatic assignment of a distant port will further limit rescue capabilities at sea and will have repercussions on the physical and mental health of the rescued people, forced to spend several days at sea, violating the rules requiring disembarkation in the port safe closer.</li> <li>• Regarding excluding vulnerable people from being transferred to Albania, ship personnel cannot make assessments for the purpose of authorizing selective landings.</li> <li>• Introducing a regime of automatic and prolonged detention, without a clear legal basis.</li> <li>• Compromising the right of defence, right to an effective remedy as well as a possibility of judicial oversight as it is not clear how the jurisdiction of the judge who will have to validate the detention will be determined, nor how it will be possible for those detained, in the event of a denial of an application for international protection, to promptly appeal.</li> <li>• Lack of proper access to legal aid and adequate judicial review.</li> <li>• The provision exempting Italian personnel from Albanian jurisdiction creates grey area in terms of applicable jurisdiction.</li> <li>• Rendering more complex the monitoring of internal activities by independent bodies, but also parliamentarians.</li> <li>• Disproportionate costs incurred by the agreement.</li> </ul>	<a href="#">link</a>
<b>ECRE</b>	<p>In a preliminary commentary, ECRE pointed out the potential legal and practical problems, including in relation to the files included in the Pact</p>	<a href="#">link</a>

<sup>17</sup> Organisations associated in the roundtable are the following: A Buon Diritto, ACAT, ACLI, ActionAid, Amnesty International Italia, ARCI, ASGI, Casa dei Diritti Sociali, Centro Astalli, CGIL, CIES, CNCA, Commissione Migranti, GPIC Missionari Comboniani Italia, DRC Italia, Emergency, Europasilo, Fondazione Migrantes, Forum per Cambiare l'Ordine delle Cose, International Rescue Committee Italia, Intersos, Medici del Mondo, Medici per i Diritti Umani, Medici Senza Frontiere, Movimento Italiani Senza Cittadinanza, Oxfam Italia, Refugees Welcome Italia, Save the Children Italia, Senza Confine, Società Italiana Medicina delle Migrazioni, UIL, UNIRE. The statement published by the Roundtable was also joined by: AOI, Mediterraneana, Open Arms and Sea Watch.

<sup>18</sup> [MSC.167 \(78\).pdf \(imo.org\)](#)

on Migration and Asylum, which are currently in the last stage of negotiations:

- According to the current versions of the reform proposals, the envisaged screening process and asylum border procedures take place on the territory;
- Respect for procedural guarantees is very likely not possible outside the state's territory;
- Automatic use of detention is not lawful (conditions for the lawful use of detention, e.g. individual assessment are unlikely to be in place);
- Conditions in the centres are likely to be in breach of EU law and international human rights law, in particular questions arise as to access to rights, including rights to healthcare, dignity, justice, a fair hearing, etc.;
- The diversion of SAR operations to Albania may breach of International Law of the Sea (ILOS), in terms of assigning Albania as a place of safety and Albania being the nearest place of safety.
- Legal challenges could be brought under Albanian law which will still applies;
- Legal and practical problems arising from the need to identify the vulnerable people directly on the Italian ships.

They also highlighted several shortcomings from the political perspective, e.g. difficult position the European Commission finds itself in as Italy is the most important country when it comes to the EU asylum law reforms.

**ASGI (Italian Association for Juridical Studies on Immigration)**

According to the ASGI's press release, it is unconstitutional to skip Parliament scrutiny on the agreement in line with what the Italian Constitution prescribes (article 80). Should this Protocol not be subjected to a law of authorization for its ratification, it will not be possible to execute it, nor will it be possible to consider it binding for the Italian legal system, as an international obligation.

[link](#)

#### Academia / Think tanks

**Andreina De Leo (Maastricht University)**

In her analysis, she shares her views on the compatibility of the Protocol with EU asylum law. According to it, both currently applicable EU law as well as new EU rules on asylum currently under negotiation, does not seem to allow for the external asylum processing envisaged by the Protocol (in view of granting a permit for international protection in accordance with the Qualification Directive (QD)<sup>19</sup>. Therefore, the issuing by Italian authorities of permits for international protection after an extraterritorial processing not allowed under the APD would arguably constitute a violation of Article 3 (2) TFEU for altering the scope of common EU rules, and most specifically the CEAS.

[link](#)

**Istituto Affari Internazionali in Italy**

In the interview with the Atlantic Council, the Director of the Institute speaks about the political and social implications of the agreement.

[link](#)

#### Other stakeholders

**Italian Episcopal Conference**

General concern emphasizing that externalization cannot be the solution for migrants.

[link](#)

<sup>19</sup> See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>.

## 4. Possible impact of the Italy-Albania migration agreement on Frontex activities

So far, no information is available on the intention of the Italian authorities to request Frontex assistance in implementing the Protocol. This section therefore presents a preliminary assessment of possible implications of the Italy-Albania agreement on Frontex activities conducted in Italy under JO Themis. In practice, and having regard to the scope of the agreement, the Protocol may affect activities of the Frontex aerial and maritime assets deployed under JO Themis. For this purpose, various scenarios are reflected upon as well as some important fundamental rights considerations that are expected to arise under those scenarios.

### (i) Rescue or interception of migrants at sea, and carrying out disembarkation in Albania

Operational area

As part of the activities envisaged under JO Themis, Frontex deploys **aerial and maritime assets on border surveillance and provides support to Search and Rescue (SAR) activities**. Those activities are performed within the operational area of JO Themis, which covers [REDACTED]. Furthermore, most of the incidents related to illegal border-crossing reported under JO Themis occurred [REDACTED] (see: figure 1).<sup>20</sup>

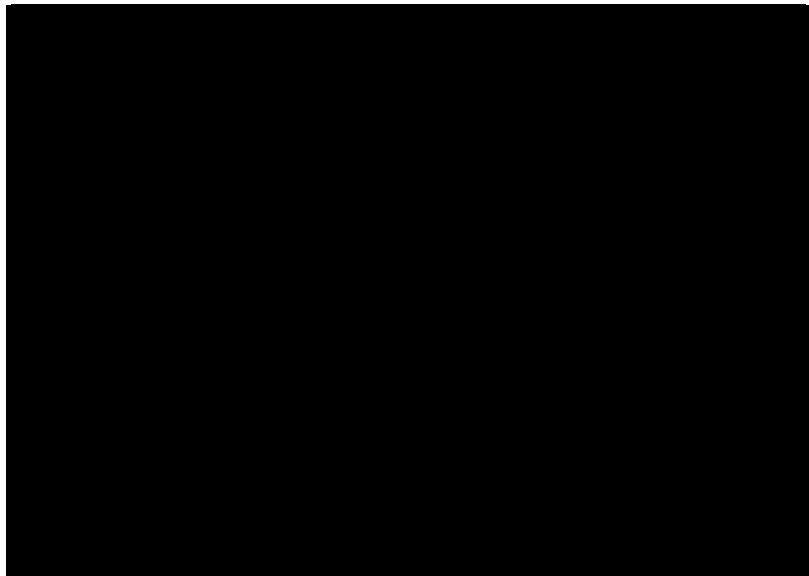


Figure 1: Incidents reported within JO Themis from 01 Jan-31 Jul 2023 by last departure country. Source: Frontex; Draft SAP for 2024

The Italian high-level officials<sup>21</sup> announced that Italy would bring to Albania only those migrants rescued in international waters. Therefore, it seems apparent that Frontex could be potentially affected by the implementation of the agreement, either directly or indirectly, particularly when Frontex assets are requested to provide assistance in interceptions or SAR operations at sea.

The Protocol stipulates that only vessels which belong to Italian state authorities (i.a. Guardia di Finanza, Coast Guard or Navy) would be authorised to enter territorial waters of Albania with a view to disembarking migrants there. It cannot be however excluded that Frontex assets may be directly or indirectly involved in disembarkations in Albania. [REDACTED]

Number and type of technical equipment, sensitive operational information

[REDACTED] There is also a possibility that Frontex assets may be considered to act on behalf of or exercise State authority ([REDACTED] which effectively performs the activities under the operational command of the national authorities) and therefore could be considered as State assets for the purposes of the implementation of the Protocol.

sensitive operational information; modus operandi

sensitive operational information x 5

<sup>20</sup> Based on Frontex Evaluation Report for JO Themis 2022, [REDACTED] of incidents were intercepted by Frontex deployed assets, [REDACTED] of them inside the operational area.

<sup>21</sup> Compare footnote no.9.

<sup>22</sup> See: [REDACTED] (accessed on 27<sup>th</sup> November 2023).



Accordingly, in the absence of further guidelines or regulation on how the Protocol will be implemented, it is reasonable to suggest that they could be potentially involved in disembarking migrants in Albania.

It is also important to note that, as it currently stands, **disembarking migrants in third countries** [REDACTED]

[REDACTED]<sup>23</sup>. [REDACTED]  
[REDACTED]  
[REDACTED] according to Regulation 656/2014 (Article 4) a **prior assessment of the situation in that third country** (in this case, Albania) should be conducted and included in the Operational Plan. It will be important to pay particular attention to this issue when the Fundamental Rights Office (FRO) is asked to provide Observations to the Operational Plan for 2024.

From a fundamental rights perspective, irrespective of where the interception or rescue happens (within or outside territorial waters), the Frontex vessel would exercise effective control over the migrants. Therefore, if the above conditions are fulfilled, and disembarkations in Albania are allowed following the implementation of the Protocol, before the intercepted or rescued persons are disembarked in third country, the Frontex asset concerned shall use all means to identify the intercepted or rescued persons, assess their personal circumstances, inform them of their destination in a way that those persons understand or may reasonably be presumed to understand and give them an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*.<sup>24</sup> A failure to do so may constitute a violation of the right to asylum and the prohibition against refoulement and may also constitute a collective expulsion<sup>25</sup>.

The same conclusion could be reached if (a) migrants initially intercepted by Frontex vessels are subsequently transhipped at sea to Italian authorities before transferring them to Albania, and (b) aerial assets contribute to the detention of migrant boats, subsequently intercepted or rescued by Italian vessels and disembarked in Albania. This particularly when the Frontex assets knew and should have known that the disembarkation in Albania would occur and the particular circumstances of the intercepted or rescued persons were not examined.

Additionally, it can be difficult to conduct in practice such an assessment of the particular circumstances of the intercepted or rescued persons onboard the vessel, with the **limited resources and limited time available between interception / rescue and the disembarkation**. The Protocol does not provide any information on how the personal circumstances of the intercepted or rescued persons may be conducted on board a vessel. This would generally require expert advice and additional resources such as cultural mediation. As those scenarios could pose severe fundamental rights risks, practical and legal feasibility of such an disembarkation options as well as its impact on Frontex activities should be further assessed.

Against this background, it also has to be highlighted that, in line with the recast Asylum Procedures Directive (APD)<sup>26</sup>, asylum seekers identified<sup>27</sup> on an Italian vessel in territorial waters would acquire a right to access the asylum procedure (Article 3 of the recast APD) and should be allowed to stay in the EU Member State until at least a first instance decision has been taken (Article 9)<sup>28</sup>. This would therefore prevent any transfer to Albania. Conversely, situation of asylum seekers identified on an Italian vessel on the high seas falls outside the scope recast APD, but EU Charter still does apply.

## (ii) Compliance of the Protocol with SAR regulations

Although the Protocol stressed that cooperation in the management of migration flows will be performed in conformity to international and European law, there are also a number of concerns relating to the compatibility

sensitive operational information

<sup>23</sup> According to the [REDACTED]

<sup>24</sup> See Regulation 656/2014 (Article 4).

<sup>25</sup> See, among other references, European Court of Human Rights (ECtHR), *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012.

<sup>26</sup> See: [EUR-Lex - 32013L0032 - EN - EUR-Lex \(europa.eu\)](#).

<sup>27</sup> Please note that, under the EU asylum acquis, for the asylum application to be considered submitted it is enough for the person to express in any way the intention to apply (making the application). Making of an application for international protection does not relate to the formal lodging and registration of application (Article 6 APD, as interpreted by *case law* of the EU Court of Justice (para. 83).

<sup>28</sup> The APD further clarifies that asylum applicants should be allowed to stay in the EU Member State - either in the territory or at the border, in transit zones, or in locations in proximity to those areas in the case of border procedures (Article 43) - where they have applied, unless a person makes a subsequent application or for extradition purposes.

of the Protocol with obligations stemming from International Law of the Sea (ILOS) and Search and Rescue Convention.

Under ILOS, there is a duty to rescue people in distress at sea and transporting them to and disembarking them in a place of safety. Accordingly, the potential impact of the Protocol may be in relation to: 1) whether Albania can be considered a place of safety for the intercepted and rescued persons; and most notably 2) whether the designated Albanian ports of disembarkations are the nearest place of safety. The interpretation of ILOS (which Italy accepts) based on the 2004 amendment to the SAR Convention is that people should be transported to the nearest place of safety. However, the application of the Protocol may result in disembarkations being conducted in Albania, irrespective of whether the Albanian port in question is the nearest place of safety in accordance with ILOS.

(iii) Vulnerability assessment of intercepted and rescued persons

Italian public officials have stated that pregnant women, children, and other vulnerable groups will not be transfer to Albania pursuant the Protocol but disembarked in Italy. However, both Protocol and public officials stay silent on how children, pregnant women and other vulnerable people<sup>29</sup> will be exempted from transfers to Albania.

If the intention is to assess vulnerability on Italian ships and then transfer identified vulnerable people by sea or air to Italy before the rescue is completed in Albania, this could generate several legal and practical problems. One of them is that timely identification could be hampered by lack of resources and the necessary skills among crew members to properly assess vulnerability indicators, in particular the age of migrants/asylum seekers (especially if no documentation is available and other information is inconsistent with the claimed age) as well as to identify less obvious vulnerabilities, e.g. needs related to trauma, psycho-social well-being and mental health. This could apply regardless of socio-medical personnel being present on board or not. Some “non-explicit or non-objective” vulnerabilities are also likely to emerge only during the course of reception, when specialised operators will have time to carry out in-depth visits and interviews that cannot be carried out upon the interception/rescue or even during disembarkation<sup>30</sup>.

Furthermore, on the basis of a note published on 5 January 2023<sup>31</sup> by the Association of Juridical Studies on Immigration (ASGI) regarding the Decree-Law no. 01/2023 on ‘Urgent provisions for the management of migration flows’ in Italy, captain of vessels *are obliged to perform only functions of a public officer, regarding acts of civil status (birth, death, marriage) and for the receipt of wills on the ship*.

If, on the other hand, ship commanders will be expected to carry out only a preliminary vulnerability screening which will be then continued upon disembarkation in Albania, it could negatively affect prompt specialised and qualified referral provided to persons in need as they would first need to be transferred to Italy. The Protocol does not contain any provision regulating what would happen to those persons who are only identified once transferred into Albania.

(iv) Other possible implications during border surveillance activities

If the Protocol comes into force, migrants intercepted or rescued by State vessels may be disembarked in Albania. However persons rescued by private vessels (including non-governmental organization’s search-and-rescue ships) in the Italian SAR area would be disembarked in Italy, even if those persons are rescued in the same event or were in the same boat. This may create double standards, since the final destination of the migrants would depend solely on the type of vessel conducting the interception / rescue.

(v) Situation of the intercepted or rescued persons in Albania

In the case that intercepted and rescued persons may be disembarked in Albania, a prior assessment of the situation of the persons concerned in that third country (even if Italian law applies to them while being held in

<sup>29</sup> A legal definition of vulnerable groups is provided in the Article 17(1) of the Reception Decree ([link](#)) and it includes in particular children, unaccompanied children, disabled persons, elderly people, pregnant women, single parents with minor children, persons who have been subjected to torture, rape or other forms of psychological, physical or sexual violence, victims of trafficking and genital mutilation, as well as persons affected by serious illness or mental disorders.

<sup>30</sup> According to the *Handbook for the identification, referral and care of persons living with vulnerabilities* which was adopted by the Italian Ministry of the Interior in June 2023, early identification of vulnerabilities is highly encouraged on board of the ship, but only if medical personnel is present. In addition, according to the document, identification is perceived as a continuous process; there is therefore no expectation of identifying all the vulnerabilities, as defined by the law, already at the early stage.

<sup>31</sup> [ASGI Contro la Costituzione, le organizzazioni umanitarie e i diritti umani: l’insostenibile fragilità del D.L. n.1/2023](#)

the designated detention facilities) should be conducted and included in the Operational Plan. Any possible involvement of Frontex in disembarkations in Albania would therefore call for an in-depth legal analysis, giving particular consideration to the issue of how the Italian law may apply in Albanian territory and the possible implications for the exercise of Italian jurisdiction. This assessment should include the safeguards that the system resulting from the Protocol affords in practice to those intercepted and rescued at sea. Even if both Italy and Albania are parties to the European Convention of Human Rights and Albania is an official EU candidate, it cannot be assumed that the persons concerned will be treated in conformity with international human rights standards<sup>32</sup>.

Some of the additional elements to be considered as follows:

- Carrying out the procedure in a third country can lead to procedural guarantees not being respected, e.g. how to guarantee the right to effective judicial protection, especially when it comes to proper access to legal aid and adequate judicial review, regardless of the limited references in Article 6 to access to the centres.

The Protocol provides for allowing access to the centers “*by lawyers, their assistants, as well as to international organisations and the EU’s agencies, which provide advice and assistance to asylum applicants to the extent foreseen by the applicable Italian, European and Albanian legislation*”. It is however not clear how those persons transferred to Albania will have effective access to legal counsel.

- Neither currently applicable EU asylum law (recast APD) nor current versions of the reform proposals, does not seem to allow for the extraterritorial processing of EU asylum applications in view of granting a permit for international protection in accordance with the recast Qualification Directive<sup>33</sup>. The only means of getting refugee status or subsidiary protection from outside the EU is EU-sponsored resettlement and humanitarian admission scheme. Article 3(3) of the recast APD however specifies that the APD procedure can nonetheless be applied “*for any kind of protection falling outside of the scope of recast Qualification Directive*”. Italian authorities would be nonetheless allowed to use the procedure to grant a different permit with national validity, different from either EU refugee status or subsidiary protection, with migrants however retaining the right to apply for asylum in the EU. However, this does not seem to be the intention of the Italian Government, since the Protocol specifically refers to applicant for international protection (Article 9).
- The Protocol appears to envisage systematic and automatic use of detention in the facilities to be set up in Albania, without performing an individual assessment or considering possible alternatives to detention<sup>34</sup>.

<sup>32</sup> See ECtHR, *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019, paras. 139 et seq.

<sup>33</sup> See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>.

<sup>34</sup> The new legal provisions (legislative decree 20/2023 converted into law no. 50/2023) provide for a possibility of detaining asylum seekers from so-called safe countries of origin subject to border procedure for a period of up to 4 weeks. Detention is not ordered if an applicant: 1. has submitted his/her passport or other valid equivalent document, or 2. has paid a guarantee of approx. 5,000 euros). On 29 September and 8 October, for the first time court in Catania ordered the release of 11 Tunisian migrants from a detention center in Pozzallo, questioning a recent government decree on migration. The judge concerned claims that since then she has become a victim of a “persecution” campaign, at the hands of “some members of the media and politicians [who are part of] the government coalition.”

## Annex

### Protocol:

1. [Protocollo Italia-Albania \(IT version\)](#) and [Protocol Italy-Albania \(EN version\)](#)

### EU bodies and international organisations:

1. [European Parliament \(EP\): Agreement between Italy and Albania on migrant reception and processing facilities in Albania](#)
2. [European Commission \(COM\): Agreement between Italy and Albania is not illegal](#)
3. [UNHCR: Transfer arrangements of asylum seekers and refugees must respect international refugee law ECRE: Preliminary Comments on the Italy-Albania Deal](#)
4. [Council of Europe Commissioner for Human Rights: Italy-Albania agreement adds to worrying European trend towards externalising asylum procedures](#)

### National human rights Institutions / civil society organisations:

1. [ASGI \(Italian Association for Juridical Studies on Immigration\) Accordo Italia-Albania, ASGI: è incostituzionale non sottoporlo al Parlamento](#)
2. [Il Tavolo Asilo e Immigrazione, Il Protocollo Italia-Albania è illegittimo e va revocato](#)

### Academia / think-tanks:

1. [On the incompatibility of the Italy-Albania Protocol with EU asylum law | SIDIBlog](#)
2. [What's behind Italy-Albania immigration deal? Atlantic Council](#)
3. [Andreina De Leo, Maastricht University, On the incompatibility of the Italy-Albania Protocol with EU Asylum Law](#)

### Media:

1. [https://www.repubblica.it/politica/2023/11/09/news/migranti\\_albania\\_centri\\_rimpatri\\_fazzolari\\_piantedosi-419985365/](https://www.repubblica.it/politica/2023/11/09/news/migranti_albania_centri_rimpatri_fazzolari_piantedosi-419985365/)
2. [https://www.repubblica.it/politica/2023/11/21/news/albania\\_italia\\_centri\\_migranti\\_legge-420881689/](https://www.repubblica.it/politica/2023/11/21/news/albania_italia_centri_migranti_legge-420881689/)
3. [https://www.repubblica.it/solidarieta/profughi/2023/11/08/news/profughi\\_laccordo\\_italia-albania\\_le\\_misure\\_proposte\\_dal\\_governo\\_sono\\_illegali\\_disumane\\_e\\_impraticabili-419889693/](https://www.repubblica.it/solidarieta/profughi/2023/11/08/news/profughi_laccordo_italia-albania_le_misure_proposte_dal_governo_sono_illegali_disumane_e_impraticabili-419889693/)
4. <http://www.sidiblog.org/2023/11/09/sullilegittimita-del-protocollo-italia-albania-in-materia-migratoria/>
5. <https://www.agenzianova.com/en/news/Migrants-planted-The-Italy-Albania-agreement-has-aroused-interest-in-Europe-and-can-act-as-a-pilot-model/>
6. <https://reliefweb.int/report/italy/italy-albania-agreement-yet-another-attack-right-seek-asylum>
7. <https://balkaninsight.com/2023/11/08/albania-italy-deal-to-set-up-migrant-centres-raises-alarm-in-both-countries/>
8. <https://www.trtworld.com/europe/italy-to-build-detention-hubs-in-albania-what-do-they-mean-for-migrants-16014262>
9. <https://magyarnemzet.hu/english/2023/11/albanian-solution-wont-cut-it>
10. <https://www.lidentita.it/centri-per-i-migranti-in-albania-tajani-spiega-come-saranno-opposizioni-divise/>
11. [Tajani annuncia ddl di ratifica sull'intesa Italia-Albania - Notizie - Ansa.it](#)
12. <https://www.infomigrants.net/en/post/53392/italy-parliament-to-ratify-albania-deal-to-process-asylum-seekers>
13. <https://tg24.sky.it/mondo/2023/11/08/migranti-accordo-italia-albania-cosa-prevede#07/>

### Relevant case law:

1. European Court of Human Rights (ECtHR), *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019, paras. 139 et seq, [link](#)
2. European Court of Human Rights (ECtHR), *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012, [link](#)