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THE EFFECTIVENESS OF THE EUROPEAN APPROACH TO IRREGULAR MIGRATION: A LEGAL AND ECONOMIC ASSESSMENT**

Abstract: *There are few certainties in the field of migration. From the factors that drive migrants to flee their countries and the conditions they expect to find in the destination country to migrants' flows, routes and methods, migration policy is constantly functioning within a field of uncertainty. Yet, the importance of better managing migration processes is becoming increasingly relevant due to the multiple factors that stimulate the international movement of people, such as conflict, political or economic instability or climate change. The uncertainty surrounding the European Union's (EU) ability to manage migration has spurred a twofold approach: the criminalisation of migrant smuggling (in an all-encompassing way) and the externalisation of migration policy through agreements with third countries. However, are these approaches effective, or should the EU consider alternative strategies to address the challenges posed by irregular migration? The purpose of this article is to evaluate the effectiveness of the EU's policies on irregular migration, by exploring firstly the effectiveness of criminal law in deterring migrant smuggling and secondly the EU's recent emphasis on externalisation. The consequences of both are examined in an effort to determine their effectiveness towards the objective. The article concludes with some suggestions for the way forward.*

Keywords: migration, effectiveness, migration policy, migrant smuggling, externalisation

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INTRODUCTION

Migration, understood as the movement of people from one location to another (city, region or country) with the intention of resettling temporarily or permanently, is not a recent phenomenon: whenever people needed better opportunities, they moved.¹ Only recently has migration become a highly sensitive and politicised issue,² with countries reconfiguring their migration policy through measures aimed at restricting immigration and redirecting or returning migrants to other countries.

The significance of this topic is underscored by the number of policies and agreements being adopted within the EU and globally: examples include the European Agenda on Migration,³ the EU Action Plan on Return,⁴ the EU Pact on Migration and Asylum⁵, the New York Declaration for Refugees and Migrants⁶ or aspects of migration in the United Nations Sustainable Development Goals.⁷ The timing of these initiatives is not coincidental: the efforts to effectively manage migration became relevant to the EU's agenda at the height of the 2015–2016 migration crisis, during which over 1.2 million people applied for asylum.⁸ Managing, and thus forecasting, migration is relevant for policy, population and business decisions.⁹ Still, measuring and predicting migration remains a complex task due to several factors: the lack of uniform concepts, the motives driving migration, the inherent uncertainty of the process – which is dependent on human agency and external

¹ *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*, International Council on Human Rights Policy, Geneva: 2010, p. v.

² For example, Germany's reintroduction of border controls to identify undocumented migrants, in response to a crime allegedly committed by an asylum seeker – see E.M. Bredler, “*Not Only Legally Dubious But Also Ineffective*”: Five Questions to Lilian Tsourdi, *Verfassungsblog*, 27 September 2024, available at: <https://verfassungsblog.de/not-only-legally-dubious-but-also-ineffective/> (accessed 30 June 2025).

³ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration*, Brussels, 13 May 2015, COM(2015)240 final.

⁴ As part of a comprehensive plan to address migration – European Commission, *Communication from the Commission. EU Action Plan on return*, Brussels, 9 September 2015, COM(2015)453 final.

⁵ Presented by the Commission in 2020, the Pact comprises several legislative texts and non-legislative initiatives. It entered into force in June 2024, although it will not enter into application until two years from this date.

⁶ UNGA resolution of 19 September 2016, *New York Declaration for Refugees and Migrants*, A/RES/71/1.

⁷ United Nations Department of Economic and Social Affairs, Population Division, *Integrating Migration into the 2030 Agenda for Sustainable Development*, December 2015, available at: <https://www.un.org/en/development/desa/population/migration/publications/populationfacts/docs/MigrationPopFacts20155.pdf> (accessed 30 June 2025).

⁸ See the analysis in V. Pavlov, R. Cardoso, *The New Trend in the EU's Migration Policy: Is Externalization Any Better?*, 10(3) *Journal of Liberty and International Affairs* 88 (2024), p. 96.

⁹ J. Bijak, *Migration Forecasting: Beyond the Limits of Uncertainty*, 6 *Global Migration Data Analysis Centre, Data Briefing Series* 1 (2016), p. 1.

factors – the limited data and the need for different approaches for various migrant groups.¹⁰ As a result, numbers, statistics and forecasts may vary greatly depending on the selected criteria, the available data¹¹ and the extrapolated estimates, making migration a topic prone to manipulation, as it is difficult to prove or disprove assertions.¹² Recognising that some aspects of migration can be known and managed while others cannot is particularly consequential for acknowledging the limitations of any course of action.¹³ Especially for the long-term perspective, the focus should be on preparedness rather than management, as forecasts are too uncertain¹⁴ and the clarity that states seek to impose¹⁵ is often impossible to attain.

While the emphasis is on controlling and managing immigration (from third countries), especially in “frontline states”,¹⁶ it is also paradoxically clear that Europe needs those migratory inflows, due to its ageing populations, labour force decline and reduced intra-EU migration (particularly from newer Member States (MSs)).¹⁷

¹⁰ *Ibidem*, pp. 2 and 5. Specifically regarding the decision to initiate a migratory movement, P.G.J. O’Connell, *Migration Under Uncertainty: “Try Your Luck” Or “Wait and See”*, 37(2) *Journal of Regional Science* 331 (1997).

¹¹ For example, data related to Germany, one of the most important MMs with regard to migration, is lacking from Eurostat – see J. Bijak, D.V. de Vilhena, M. Potančoková, *White Paper on Migration Uncertainty: Towards Foresight and Preparedness. Harnessing Scientific Knowledge for Better Policy: Evidence and Recommendations from the Horizon 2020 Project “Quantifying Migration Scenarios for Better Policy” (QuantMig)*, Population Europe, Berlin: 2023, p. 17.

¹² Usually hinging upon existent data on some migration processes, but not others, thus failing to recognise that any knowledge in the field of migration can only be approximate (*ibidem*, pp. 27–28).

¹³ *Ibidem*, p. 6.

¹⁴ M. Czaika, H. Bohnet, F. Zardo, J. Bujak, *European Migration Governance in the Context of Uncertainty*, QuantMig, Southampton: 2022, pp. 7–8, available at: https://www.quantmig.eu/project_outputs/project_reports/ (accessed 30 June 2025).

¹⁵ N. Maru, M. Nori, I. Scoones, G. Semplici, A. Triandafyllidou, *Embracing Uncertainty: Rethinking Migration Policy through Pastoralists’ Experiences*, 10(5) *Comparative Migration Studies* 1 (2022).

¹⁶ Reykjavík Declaration – United around Our Values, Reykjavík, 16–17 May 2023, available at: <https://edoc.coe.int/en/the-council-of-europe-in-brief/11619-united-around-our-values-reykjavik-declaration.html> (accessed 30 June 2025).

¹⁷ See Bijak, de Vilhena, Potančoková, *supra* note 11, pp. 4 and 25 with figures. A telling example is that of Bulgaria, with one of the fastest shrinking populations (see *Countries with Declining Population 2025*, World Population Review, available at: <https://worldpopulationreview.com/country-rankings/countries-with-declining-population>). Concurring, J. Portes sees restrictionism (displaying tight controls over legal paths into the country) and protectionism of the “national identity” (granting short-term visas to meet labour demands) as impractical, as it has been demonstrated that neither approach provides a solution – J. Portes, *The Big Idea: Why We’re Getting the Immigration Debate All Wrong*, The Guardian, 2 September 2024, available at: <https://www.theguardian.com/books/article/2024/sep/02/the-big-idea-why-were-getting-the-immigration-debate-all-wrong> (both accessed 30 June 2025). One example is Finland, where work-based immigration is actively promoted – S. Hanhinen, *The Finnish Authorities Should Work Together More Closely to Integrate Work-based Immigrants Better*, 2 *Migration Policy and the EU* 80 (2023).

This reliance is evident in the overrepresentation of migrants in certain sectors of the economy.¹⁸

In the EU, *effectiveness* plays a crucial role, not only as a facet of subsidiarity in exercising its powers (Art. 5(3) of the Treaty of the European Union (TEU)) but also as a necessary requirement for a legitimate use of criminal law,¹⁹ which the EU uses to manage migration as well. As challenges in the common migration policy grew, the EU shifted towards externalising its approach, forming strategic partnerships with third countries to address irregular entry, migrant readmission and smuggling. The purpose of this article is therefore to analyse the effectiveness of the EU's approach to irregular migration, through both criminal law and externalisation.

To achieve this, the article starts with a brief definition of migration and effectiveness, thus establishing the parameters used in the analysis. Then, the available data is explored (with the caveats exposed above) to determine whether the EU's action is effective. Finally, some conclusions and suggestions are made for the most effective use of EU funds. In this regard, a mixed methodology is used, given the interdisciplinary nature of the study, including legal, documentary and case-law analysis, as well as statistical and empirical data analysis. The conclusions highlight that the European two-pronged approach to migration is largely ineffective, suggesting that European funds would be better used in alternative methods for improving migration management.

1. DEFINING AND MEASURING MIGRATION

Overall, migration refers to the movement of a person or group of people from one location to another, whether that is within a country or international; this study focusses on international migration into the EU, rather than intra-EU movement. This migratory movement can be further categorised as *regular* or *irregular*,²⁰ depending on whether the migrants have authorisation from the destination state (and/or transit state) to enter its territory.²¹ This concept became relevant with the creation of the nation-state, with clearly defined borders and a corresponding

¹⁸ N. Broberg, J. Gonnot, F. Poeschel, M. Ruhs, *Essential Work, Migrant Labour: What Explains Migrant Employment in European Key Sectors?*, ESPOL-Lab, Lille: 2024.

¹⁹ For a detailed analysis, see R. Cardoso, *Navigating Troubled Waters: evaluating the Function and Material Legitimacy of European Criminal Law*, 43 Polish Yearbook of International Law 95 (2023).

²⁰ The term "irregular" is preferred over "illegal", as the latter may entail a moral judgement, thus equating unsanctioned migration with a crime. "Irregular" simply indicates that migrating people did not meet the established requirements for authorised entry, transit or stay in a given territory. See also UNHCR, *Guidelines on International Protection No. 14*, 23 September 2024, HCR/GIP/24/14, para. 6, available at: <https://www.refworld.org/policy/legalguidance/unhcr/2024/en/148632> (accessed 30 June 2025).

²¹ While there are also restrictions on leaving a country, the irregularity discussed in this study is limited to entering a country (or rather, the territory of the EU), or irregular migration detected within the EU.

territory where sovereign power is exercised; sovereignty has been interpreted as allowing states the unilateral choice of who gets to enter and who must leave their territory, thus making immigration a “taboo”.²² The formalisation of entry, transit or residence has correspondingly given rise to the need to access the opportunities in that territory without meeting legal requirements, given the disproportion between migratory intentions and legal possibilities.²³

Although the motives behind the decision to migrate vary, the legal possibilities established by states are meant to carve a distinction between desired and undesired migrants: “highly skilled workers” are usually welcome, while “unskilled workers” have slim chances of finding a regular path into the country.²⁴

The concept of *mixed migration* emerges precisely to acknowledge “that migration flows involve individuals travelling with various motivations, challenging states and policymakers to ensure humanitarian and human rights protections for all migrants while managing border crossings.”²⁵ Myriad reasons influence migrants’ decision to leave one’s country and to choose another, known as *push* and *pull factors*.²⁶ *Push factors* include those that drive individuals to leave – for instance, the first EU migration crisis was mainly caused by the Arab Spring’s uprisings and rebellions.²⁷ These events forced nearly 3 million people to enter Europe in the three-year period between 2014 and 2016 (see Table 1 below, which uses the number of asylum applications as a benchmark²⁸). The same can be said for the years following 2020, with ongoing conflicts in other countries such as Ukraine or Afghanistan.

²² The expression is from V. Chetail, *Demystifying Sovereignty: Totem and Taboo of Migration Control in International Law*, 118 *American Journal of International Law Unbound* 193 (2024). The author argues that the conflation of sovereignty with the power to control immigration is a myth that has persisted since the nineteenth century.

²³ I. van Liempt, *A Critical Insight into Europe’s Criminalisation of Human Smuggling*, Swedish Institute for European Policy Studies, Stockholm: 2016, p. 2.

²⁴ Chetail, *supra* note 22. The author further comments: “By enforcing this double standard, migration control is orchestrating an organized hypocrisy: while being the political scapegoat of globalization, undocumented workers can be exploited at will by filling the gaps in the labor market.”

²⁵ A. Mesnard, F. Savatic, J.-N. Senne, H. Thiollet, *The Effects of Externalization Policies on Refugees and other Migrants*, Externalizing Asylum, available at: <https://externalizingasylum.info/the-effects-of-externalization-policies-on-refugees-and-other-migrants/> (accessed 30 June 2025).

²⁶ M. Minetti, *Human Trafficking and Migrant Smuggling: Analysis of the Distinction through the Lens of the “European Migration Crisis” and of the Italian Policy Response*, University of Kent, Canterbury: 2016, pp. 11ff.

²⁷ L. Buonanno, *The European Migration Crisis*, in: D. Dinan, N. Nugent, W.E. Patterson (eds.), *The European Union in Crisis*, Palgrave Macmillan, London: 2017, pp. 100–130.

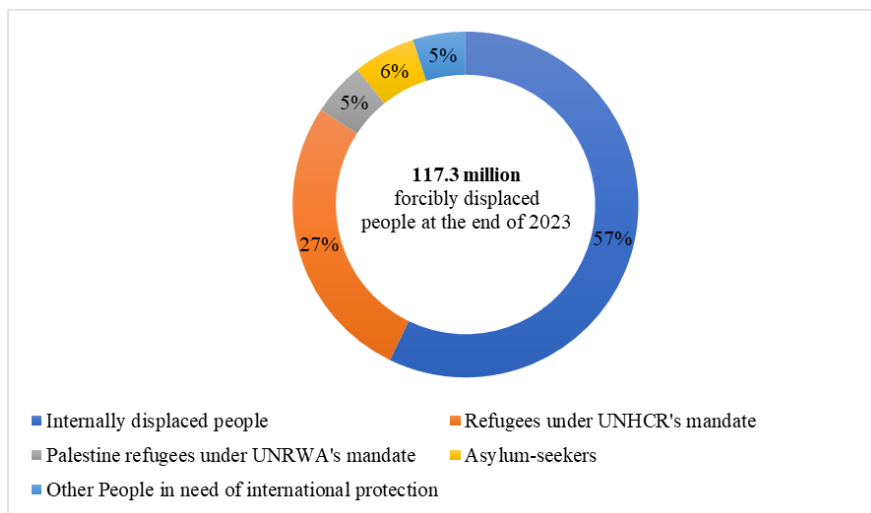
²⁸ The number of asylum requests is a source for forecasts by the European Union Agency for Asylum, in addition to data available on the Global Database of Events, Language and Tone (the GDELT project) and the number of detected irregular border crossings at the EU’s borders (provided by Frontex) – see Czaika, Bohnet, Zardo, Bujak, *supra* note 14, p. 11.

Table 1. Number of asylum applications in the EU and its MSs from 2014 to 2023

Country/ Year	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
European Union (27 countries, from 2020)	530,560	1,216,860	1,166,815	620,265	564,680	628,930	415,235	535,985	873,680	1,049,550
Belgium	14,045	38,990	14,250	14,035	18,130	23,105	12,905	19,545	32,100	29,260
Bulgaria	10,805	20,160	18,990	3,470	2,465	2,075	3,460	10,890	20,260	22,390
Czechia	905	1,235	1,200	1,140	1,350	1,570	790	1,055	1,335	1,130
Denmark	14,535	20,825	6,055	3,125	3,465	2,605	1,420	1,995	4,475	2,355
Germany	172,945	441,805	722,270	198,255	161,885	142,450	102,525	148,175	217,735	329,035
Estonia	145	225	150	180	90	100	45	75	2,940	3,980
Ireland	1,440	3,270	2,235	2,910	3,655	4,740	1,535	2,615	13,645	13,220
Greece	7,585	11,370	49,875	56,940	64,975	74,910	37,860	22,660	29,125	57,895
Spain	5,460	14,600	15,570	33,035	52,730	115,175	86,380	62,050	116,135	160,460
France	58,845	70,570	76,790	91,965	126,580	138,290	81,735	103,790	137,510	145,095
Croatia	380	140	2,150	880	675	1,265	1,540	2,480	2,660	1,635
Italy	63,655	82,790	121,185	126,550	53,440	35,005	21,330	45,200	77,200	130,565
Cyprus	1,480	2,105	2,840	4,475	7,610	12,695	7,065	13,260	21,590	11,660
Latvia	365	330	345	355	175	180	145	580	545	1,625
Lithuania	385	275	415	520	385	625	260	3,905	905	510
Luxembourg	1,030	2,360	2,065	2,320	2,225	2,200	1,295	1,365	2,405	2,615
Hungary	41,215	174,435	28,215	3,115	635	465	90	40	45	30
Malta	1,275	1,695	1,735	1,610	2,035	4,015	2,410	1,200	915	490
Netherlands	21,780	43,035	19,285	16,090	20,465	22,485	13,660	24,730	35,500	38,320
Austria	25,675	85,505	39,875	22,455	11,580	10,985	13,400	37,800	109,775	56,135
Poland	5,610	10,255	9,780	3,005	2,405	2,765	1,510	6,240	7,700	7,720
Portugal	440	870	710	1,015	1,240	1,735	900	1,350	1,975	2,600
Romania	1,500	1,225	1,855	4,700	1,945	2,455	6,025	9,065	12,065	9,875
Slovenia	355	260	1,265	1,435	2,800	3,615	3,465	5,220	6,645	7,185
Slovakia	230	270	100	150	155	215	265	330	500	370
Finland	3,490	32,150	5,275	4,330	2,950	2,445	1,445	1,355	4,815	4,450
Sweden	74,980	156,115	22,335	22,190	18,635	20,770	11,765	9,015	13,180	8,945

It is noteworthy that the total number of first-time asylum seekers in the EU for this decade exceeds 7.6 million. When compared to the EU population, which stood at 449.2 million as of January 2024,²⁹ it may be concluded that the number of asylum seekers in the EU equates to approximately 1.7% of the Union's citizens. Still, it is important to acknowledge that these push factors represent only one aspect of the person's decision, and mostly, even during conflict, people decide against leaving their country,³⁰ as shown in Figure 1 below.

Figure 1. Share of forcibly displaced people by type as of the end of 2023



Pull factors include the perceived or known conditions in the destination country, attitudes towards migration, the presence of an established migrant community and policy uncertainty.³¹ As factors change, migration flows shift, impacting countries differently based on the mix of push and pull factors. To facilitate comparison, Figure 2 illustrates the impact on each MS, by analysing the total number of first-time asylum requests per country from 2014 to 2023 (asylum applicants made up 85.9% of the 1,046,336 irregular entries in 2015,³² compared to the total number of asylum applications in the same year).

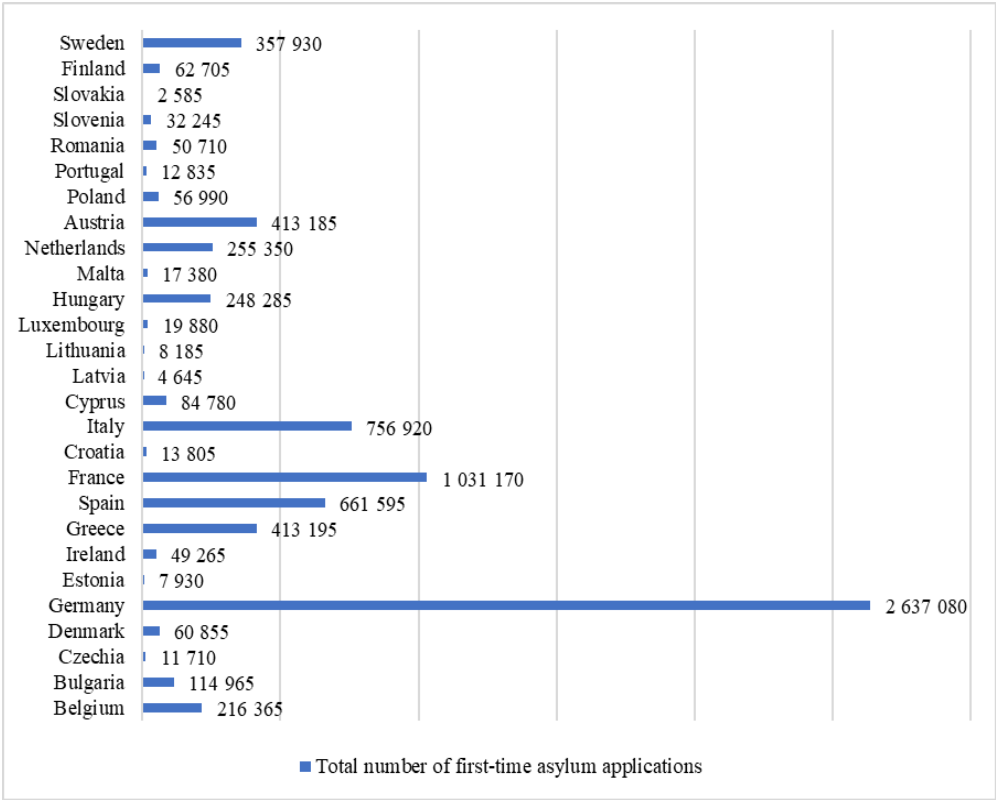
²⁹ *EU Population Increases Again in 2024*, Eurostat, available at: <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20240711-1> (accessed 30 June 2025).

³⁰ See Bijak, de Vilhena, Potančoková, *supra* note 11, p. 11.

³¹ *Ibidem*, pp. 12–14. A practical example (from the UK) can be found in Czaika, Bohnet, Zardo, Bujak, *supra* note 14, p. 4.

³² According to Frontex and the Spanish Ministry of Interior – *Migration Flows: Eastern, Central and Western Routes. Yearly Irregular Arrivals (2015–2024)*, Council of the European Union, available at: <https://www.consilium.europa.eu/en/infographics/migration-flows-to-europe/> (accessed 30 June 2025).

Figure 2. Total number of first-time asylum applications per EU MS for the period 2014–2023



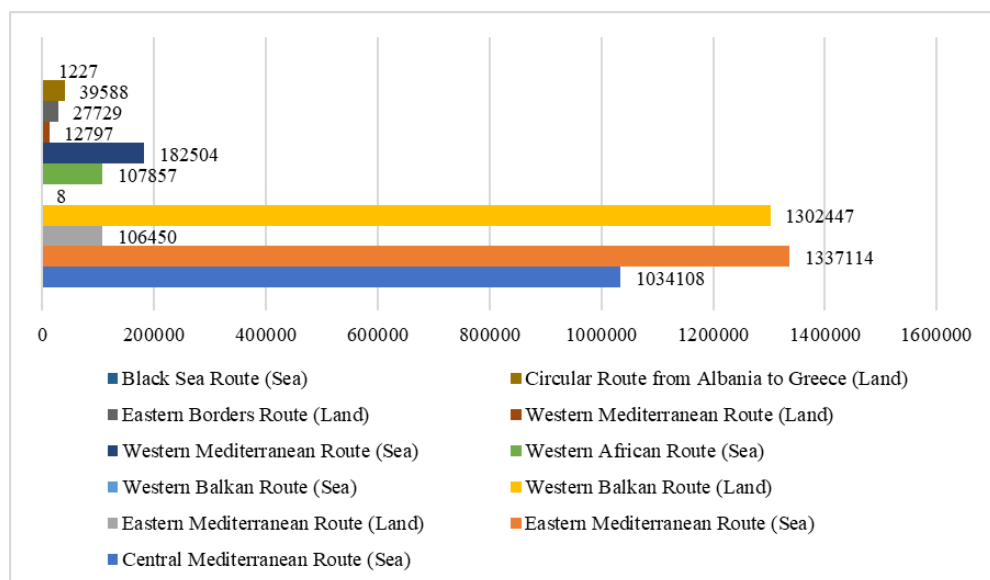
As shown, Italy, France and Germany are the most affected by these immigration processes. Their combined share of asylum seekers nears 60% of all applications in the EU during that decade. In order to evaluate the significance of these numbers, it is important to compare the number of asylum applicants to the population of each country. Germany’s share is approximately 3%, Italy’s is 1.3% and France’s is 1.5%. In contrast, the impact is higher in some MSs hosting a smaller number of applicants: Austria with 4.5%, Sweden with 3.4%, Malta with 3.1% and Hungary with 2.6%.³³

The migratory routes only partially explain such variation: for instance, as Germany is not a border state of the EU, it should not be one of the most impacted

³³ The calculations were made by comparing the number of asylum applications to the population of each MS at the time of writing – *EU countries*, European Union, available at: https://european-union.europa.eu/principles-countries-history/eu-countries_en. The public *perception* of these percentages is distinctively higher around the globe – see *Perils of Perception: A 30-Country Ipsos Global Advisor Survey*, Ipsos, 8 November 2024, pp. 16–21, available at: <https://www.ipsos.com/en/perils/perils-perception-2024> (both accessed 30 June 2025).

countries, while Greece should have much higher numbers. Figure 3 displays the number of irregular crossings at the EU's external borders, aggregated by route.

Figure 3. Irregular border crossings at the external borders of the EU and Schengen Associated Countries, data aggregated by route, between 2014 and 2023



There are three main (irregular) immigration routes to Europe, affecting most MSs on the eastern and southern borders: the Western Balkan Land Route (Albania, Bosnia, Kosovo, Montenegro, North Macedonia and Serbia), the Eastern Mediterranean Sea Route (Bulgaria, Cyprus and Greece) and the Central Mediterranean Sea Route (Italy and Malta).

The quantification and categorisation of migrants is particularly relevant, as this information is often used to justify policy decisions, but the chosen concept of migration can influence the analysis, inflating or deflating the numbers³⁴ and providing a skewed picture of reality³⁵ that supports a particular state response to migration. However, migrating is a recognised human right,³⁶ encompassing the right to leave

³⁴ Czaika, Bohnet, Zardo, Bujak, *supra* note 14.

³⁵ S. Carrera, E. Guild, *Addressing Irregular Migration, Facilitation and Human Trafficking: The EU's Approach*, in: S. Carrera, E. Guild (eds.), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU*, Centre for European Policy Studies, Brussels: 2016, pp. 2ff. The problems are mainly threefold: considering irregularity to be an empirical, immutable reality; failing to acknowledge that people may re-enter the territory of the Union and should therefore not be double-counted (thus artificially inflating the numbers); and incorrect or inaccurate data from migration authorities.

³⁶ See E. McDonnell, *Challenging Externalisation Through the Lens of the Human Right to Leave*, 71 *Netherlands International Law Review* 119 (2024).

one's country and return to it,³⁷ being legally recognised in Art. 13 of the Universal Declaration of Human Rights, Art. 12 of the International Covenant on Civil and Political Rights and Art. 2 of Protocol 4 of the European Convention on Human Rights. This right can only be restricted (and not completely obliterated) for relevant reasons such as national security, public health or criminal prosecution,³⁸ and restrictions should be applied in a non-arbitrary and exceptional manner. However, in practice, the right to migrate depends on both the origin state's exit policies and the destination state's entry policies. In this regard, the EU's policies may actually contribute to the problem it has tried to curb for a decade (irregular entry into the EU) by not providing legal pathways for people in need of international protection.³⁹

2. DEFINING AND MEASURING EFFECTIVENESS

The principle of effectiveness is a key driver of the EU's activity, particularly when adopting criminal law measures. Criminal law must only be adopted when there is no other, less intrusive way of achieving a given goal (*ultima ratio*); additionally, it must do so effectively, which means it must be an adequate means of action. This derives from the broader principle of proportionality (Art. 5(4) TEU), binding the EU to act only when national measures are not effective at meeting the established goal (principle of subsidiarity) and to act only to the extent *necessary*. If the effectiveness of the EU's action is questionable, then its legitimacy is also in doubt.

That goal must also align with the constitutional identity of the EU and its MSs – which is not analysed here.⁴⁰ Rather, the intention is to define the EU's objective (effectiveness towards *what*) and evaluate the current policy in its striving for that objective. While that evaluation is made in each topic, it is important to establish the comparative benchmark for effectiveness beforehand.

The EU's "effective management of migration" includes ensuring secure external borders, implementing fast, efficient asylum procedures and establishing

³⁷ E. Guild, *To Protect or To Forget? The Human Right to Leave a Country*, EU Immigration and Asylum Law and Policy, 27 December 2017, available at: <https://eumigrationlawblog.eu/to-protect-or-to-forget-the-human-right-to-leave-a-country/> (accessed 30 June 2025).

³⁸ S. Elserafy, *The Smuggling of Migrants across the Mediterranean Sea: States' Responsibilities and Human Rights*, Arctic University of Norway, Tromsø: 2018, p. 50.

³⁹ H. Crawley, *How Europe's Migration Policies are Contributing to the Migration Crisis*, 2 Migration Policy and the EU 21 (2023).

⁴⁰ For an analysis of the material legitimacy of the migrant smuggling legislation, see R. Cardoso, *Legitimacy and Rationalization in European Criminal Law: A Critical Analysis of the Criminalization of Migrant Smuggling*, 9(2) University of Bologna Law Review 37 (2024). In particular, the problem is exacerbated by the European turn towards the securitisation of migration, which is being driven by political parties across Europe and their portrayal of migration as a security threat. A detailed analysis can be found in Ł. Gruszczyński, R. Friedery, *The Populist Challenge of Common EU Policies: The Case of (Im)migration (2015–2018)*, 42 Polish Yearbook of International Law 221 (2022).

an effective system of solidarity and responsibility, focussed especially on border management, targeting migrant smugglers and expediting returns.⁴¹ The clues for the meaning of effectiveness extend to European case law: in cases where a MS's criminalisation entailed the delayed return of a migrant, the Court of Justice of the EU (CJEU) deemed it contrary to EU law,⁴² as it prevents the speedy return of irregular migrants. From the EU's actions and the CJEU's case law (although with the benefit of opposing national legislation that criminalises migrants), it can be inferred that effectiveness ultimately means keeping unwanted migrants out of the EU's territory, either by preventing their arrival or swiftly returning those without the legal grounds to remain. It is against this benchmark that effectiveness is evaluated in the following sections.⁴³

The issue is that this concept of effectiveness invariably leads to human rights violations and their erosion (especially when uncoupled from sufficient legal safeguards), as well as the emergence of new phenomena aiming to exploit this overarching goal, such as the "instrumentalisation of migrants". This refers to third countries using migrants to destabilise the EU by overwhelming asylum systems, through facilitating, promoting or forcing them to reach EU borders in large numbers. The first instance of such a "threat" was in 2021, when Belarus provided visas and transportation for people with Middle Eastern and African nationalities, prompting an unprecedented response from Latvia, Lithuania and Poland: to restrict the right to asylum and authorise pushbacks.⁴⁴ This concept is problematic in and of itself, but especially because of its repercussions, namely the normalisation and legalisation of violating international obligations,⁴⁵ not only condoned but actively supported by the EU.⁴⁶

This represents the latest development in the erosion of migrants' human rights, one that starkly contradicts obligations stemming from international and European

⁴¹ *Commission Takes Stock of Key Achievements on Migration and Asylum*, European Commission, 12 March 2024, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1413 (accessed 30 June 2025).

⁴² For instance, Case C-61/11 PPU, *El Dridi*, EU:C:2011:268. See N. Vavoula, *C-61/11 PPU – El Dridi. Criminalisation of Irregular Migration in the EU: The Impact of El Dridi*, in: V. Mitsilegas, A. di Martino, L. Mancano (eds.), *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis*, Hart Publishing, Oxford: 2019, pp. 273–289.

⁴³ Effectiveness may acquire different meanings depending on the legislation and policy at stake. Different meanings will be mentioned where appropriate.

⁴⁴ See A. Ancite-Jepifánova, *Beyond the "Hybrid Attack" Paradigm: EU-Belarus Border Crisis and the Erosion of Asylum-Seeker Rights in Latvia, Lithuania and Poland*, 15(2) AVANT 1 (2024).

⁴⁵ *Ibidem*, pp. 17ff.

⁴⁶ Despite the criticism voiced against the Commission for not censuring the actions of these MSs, it has recently even shown its support in a tangible manner, by allocating additional funds for controlling irregular migration, totalling EUR 170 million (*inter alia* EUR 17 million for Latvia, EUR 15.4 million for Lithuania and EUR 52 million for Poland) – *Commission Steps Up Support for Member States to Strengthen EU*

law.⁴⁷ Such erosion began with the adoption of the European policy regarding the overcriminalisation of migrant smuggling and the agreements made and upheld with third countries for migration control.

3. THE CRIMINAL LAW APPROACH

Historically, the first legislative instruments to address migrant smuggling and human trafficking were the Palermo Protocols, annexed to the UN Convention against Transnational Organized Crime (CTOC). Their insertion in the CTOC meant that the criminal conduct⁴⁸ had to meet three additional criteria (besides the elements defined in the Protocol): it should be a *serious crime*⁴⁹ of a *transnational nature*⁵⁰ involving a *criminally organised group*.⁵¹

Migrant smuggling and human trafficking can be challenging to differentiate. Theoretically, the two phenomena differ in five key aspects:⁵² *consent*, as migrants consent to smuggling, while trafficking victims do not (or their consent is invalid due to coercion, fraud, abuse or exploitation); *intention*, as traffickers always intend to exploit the victim at the destination; *status*, as trafficked people are always victims, whereas the smuggled migrant may also be the object of the crime; *transnationality*, as trafficking does not entail crossing borders, while smuggling does; and *profit*, as traffickers profit from exploiting the person, while the smuggler's profit usually consists of a fee for their services (when it is a constituent element of the criminal conduct). The main difference is their respective legal consequences,⁵³ fuelled by

Security and Counter the Weaponisation of Migration, European Commission, 11 December 2024, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_6251 (accessed 30 June 2025).

⁴⁷ E.g. some cases before the European Court of Human Rights (ECtHR): *C.O.C.G. and Others v. Lithuania* (App. No. 17764/22), 2 December 2022; *H.M.M. and Others v. Latvia* (App. No. 42165/21), 3 May 2022; or *R.A. and Others v. Poland* (App. No. 42120/21), 27 September 2021. The sheer number of pending cases (over 30) showcases the problematic nature of these MSs' actions. However, the Court has examined cases with similar contours – e.g. the case law in I. Lang, *Instrumentalisation of Migrants: It is Necessary to Act, But How?*, EU Immigration and Asylum Law and Policy Blog, 15 October 2024, available at: <https://eumigrationlawblog.eu/instrumentalisation-of-migrants-it-is-necessary-to-act-but-how/> (accessed 30 June 2025).

⁴⁸ Defined in Art. 3 and criminalised in Art. 6 of the Protocol against the Smuggling of Migrants by Land, Sea and Air (adopted 15 November 2000, entered into force 28 January 2004), 2241 UNTS 507.

⁴⁹ Punished with imprisonment of at least 4 years (Art. 2(b) CTOC).

⁵⁰ A crime committed or affecting several states, or whose preparatory acts or authors are in more than one state (Art. 3(2) CTOC).

⁵¹ A structured group of three or more people acting together in order to commit serious crimes with the intention of obtaining a material or financial benefit (Art. 2(a) CTOC).

⁵² *Human Trafficking and Migrant Smuggling: How They Differ*, Human Rights First, 12 June 2014, available at: <https://humanrightsfirst.org/wp-content/uploads/2022/11/human-trafficking-v-smuggling.pdf> (accessed 30 June 2025).

⁵³ In more detail, R. Cardoso, *As Funções do Direito Penal Europeu e a Legitimidade da Criminalização. Entre o harm principle e a protecção de bens jurídicos*, Coimbra, Almedina: 2023, pp. 500, fn 1487–1489 and the corresponding text.

narratives sometimes inaccurately portraying migrant smugglers as vast criminal groups spanning multiple countries and obtaining large profits, despite empirical studies suggesting that this may not always be the case.⁵⁴

3.1. The criminalisation of migrant smuggling in the EU

The EU's legislation came about in 2002;⁵⁵ it currently states that a migrant smuggler is “any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens” or “any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens” (Art. 1(1)(a)(b) of Directive 2002/90/EC). This definition dispenses with the more restricting criteria of the Protocol and the CTOC, in particular the intention of smuggling migrants to obtain profit. The absence of this element, combined with the lack of a mandatory humanitarian clause, irrevocably marked the European legislation as overly broad, allowing for the criminalisation of conduct that clearly lacks criminal intent.⁵⁶

The most often identified problems relate to the criminalisation of solidarity,⁵⁷ which is rising – especially in border states – the criminalisation of migrants, including children,⁵⁸ and the faulty judicial procedure in such cases.⁵⁹ This is enabled by the all-encompassing nature of European legislation (despite the claims of the EU and MSs),⁶⁰ which perniciously devotes most resources to restricting⁶¹ and policing civil

⁵⁴ *Ibidem*, pp. 497ff; L. Achilli, *The Missing Link: The Role of Criminal Groups in Migration Governance*, 50(20) *Journal of Ethnic and Migration Studies* 5045 (2024), p. 5051.

⁵⁵ Through the combination of Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence and Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/17, forming the *Facilitators Package*.

⁵⁶ There is a pending case in the CJEU regarding the overcriminalisation permitted by the Facilitators Package: Case C-460/23, *Kinsa*, EU:C:2023:784. The case that led to this request involved a migrant who brought her niece and daughter (aged 13 and 8) with her, all using fake passports; she was subsequently accused of migrant smuggling, on the basis of the Italian legislation (which is in conformity with its European counterpart), precisely because she was bringing the two minors with her.

⁵⁷ *Cases of Criminalisation of Migration and Solidarity in the EU in 2023*, PICUM, Brussels: 2024, p. 7, available at: <https://picum.org/blog/at-least-117-people-criminalised-for-helping-migrants-in-europe-in-2023/> (accessed 30 June 2025).

⁵⁸ *Ibidem*, pp. 11 and 14.

⁵⁹ *Ibidem*, p. 12.

⁶⁰ For a brief analysis of their arguments, see S. Zirulia, *The “délit de solidarité” before the Grand Chamber of the EU Court of Justice: Reflections in the Aftermath of the Kinsa Case Hearing (C-460/23)*, EU Law Live, 1 July 2024, available at: <https://tinyurl.com/4z7pvmh8> (accessed 30 June 2025).

⁶¹ Especially restricting freedom of assembly and association – *Europe Must End Repression of Human Rights Defenders Assisting Refugees, Asylum Seekers and Migrants*, Commissioner for Human Rights of the Council of Europe, 22 February 2024, available at: <https://www.coe.int/en/web/commissioner/-/europe->

society⁶² rather than targeting actual migrant smugglers. In this sense, the European legislation proves ineffective in allocating finite resources (financial, technical and human) to insignificant conduct, thus leaving fewer resources available to combat more harmful, truly criminal conduct.⁶³

This non-exclusively European approach⁶⁴ is also ineffective regarding asylum and the fundamental rights of migrants. Asylum⁶⁵ is made contingent on state discretion, while the overly broad criminalisation allows for the blatant disregard of the most basic rights (such as life or integrity) and hinders migrant rescues by deeming them migrant smuggling (e.g. when conducted by human rights organisations without authorisation). Furthermore, the widespread practice of detaining migrants disproportionately infringes their right to liberty, as it often lacks a sufficient legal justification⁶⁶ or exceeds what would be considered proportional.⁶⁷

Confronted with harsh criticism, in 2023 the Commission proposed a new definition of migrant smuggling that entails gaining a profit, thus formally (but not expressly!) opposing the criminalisation of conduct motivated by humanitarian reasons.⁶⁸ However, it added other conduct, such as potentially causing serious

must-end-repression-of-human-rights-defenders-assisting-refugees-asylum-seekers-and-migrants (accessed 30 June 2025).

⁶² S. Carrera, V. Mitsilegas, J. Allsopp, L. Vosyliute, *Policing Humanitarianism: EU Policies against Human Smuggling and their Impact on Civil Society*, Hart Publishing, Oxford: 2019.

⁶³ S. Zirulia, *Facilitating Irregular Immigration under the Lens of the Proportionality Principle – Brief Notes on the Advocate General’s Conclusions in the Kinsa Case (C-460/23)*, EU Law Live, 21 November 2024, available at: <https://tinyurl.com/2m8j6hxd> (accessed 30 June 2025).

⁶⁴ As demonstrated by the Canadian *Appulonappa* case (*ibidem*).

⁶⁵ See V. Mitsilegas, *Editorial. Reforming the “Facilitators’ Package” through the Kinsa Litigation: Legality, Effectiveness and Taking International Law into Account*, Eurojus.it rivista, 31 July 2024, available at: <https://tinyurl.com/25mhzmbe> (accessed 30 June 2025).

⁶⁶ The ECtHR seems to take a firmer stance on detention being arbitrary (thus unlawful under the Convention), whereas the CJEU is more lenient towards MSs, allowing continued detention even when it is no longer (legally) justified. For a comparison, see ECtHR, *M.B. v. The Netherlands* (App. No. 71008/16), 23 April 2024, and case C-387/24 PPU *Bouskoura*, EU:C:2024:868. For and in-depth analysis of the concept of arbitrariness in detention, see C. Ferstman, *Conceptualising Arbitrary Detention: Power, Punishment and Control*, Bristol University Press, Bristol: 2024.

⁶⁷ Art. 31(2) of the 1951 Refugee Convention allows for *necessary* restrictions, and these should “only be applied until their status in the country is regularized or they obtain admission into another country”. When interpreted according to the guidelines, the “necessity” requirement must mean that restrictions serve “legally authorized purposes, are proportionate and are subject to judicial control” – UNHCR, *Guidelines on International Protection No. 14*, 23 September 2024, HCR/GIP/24/14, p. 6, available at: <https://www.refworld.org/policy/legalguidance/unhcr/2024/en/148632> (accessed 30 June 2025). Current European practices appear to be non-compliant with a strict interpretation of the obligations that stem from international law – commenting and comparing, L. Bernardini, “Criminal or Nay?” *Migrants’ Administrative Detention within the IAHRs: Lessons (Not) Learned by Europe*, 8(3) *Revista Brasileira de Direito Processual Penal* 1537 (2022).

⁶⁸ Art. 3 of the European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946/JHA*, Brussels, 28 November 2023, COM(2023)755 final.

harm to individuals or publicly instigating third-country nationals to enter, transit or stay within the territory of any MS (in response to migrant instrumentalisation) alongside aggravating circumstances, and criminalisation of attempt, inciting, aiding and abetting these acts.⁶⁹ While the inclusion of profit is a positive step, experts argue that this definition remains too broad⁷⁰ and that failing to introduce a humanitarian exception in the legal (therefore, binding) part of the text and introducing the new criminalised conduct maintain a hostile attitude towards migration. The inclusion of the “likelihood of causing serious harm”, combined with the lack of a clear humanitarian exception, can still lead to the criminalisation of humanitarian organisations, as a riskier rescue operation could inadvertently result in harm.⁷¹

This Proposal was recently appraised by the Council, who introduced multiple changes, including a way to allow MSs to criminalise assistance to illegal entry without profit (removing the Commission’s statement regarding the non-criminalisation of migrants and family members), heavier sanctions, new rules on aggravating and mitigating circumstances, limitation periods and jurisdiction.⁷² The Parliament’s opinion remains to be seen; however, such a piece of legislation would hardly curb the criticisms the current one faces.

3.2. The effectiveness of criminal law

Although two areas of the ineffectiveness of European criminal law have been identified – allocation of resources and protection of the migrant’s rights (including the right to request asylum) – it must be assessed whether this approach is successfully keeping migrants out, which is the apparent primary goal of the EU. Relevant factors include the number of irregular arrivals (which the EU tries to reduce through the threat of criminal punishment), the number of accusations and trials for migrant smuggling (to assess the deterrent effect over time) and its impact on returning migrants who are not permitted to remain in the EU.

Irregular arrivals at the EU border have decreased since 2015–2016 (Figure 4), but it is doubtful that the conduct’s criminalisation caused it, as the definition of this crime dates back to 2002 and it did not prevent irregular arrivals in that decade. The dwindling numbers are most likely due to other European practices, namely

⁶⁹ *Ibidem*, Arts. 3 to 5.

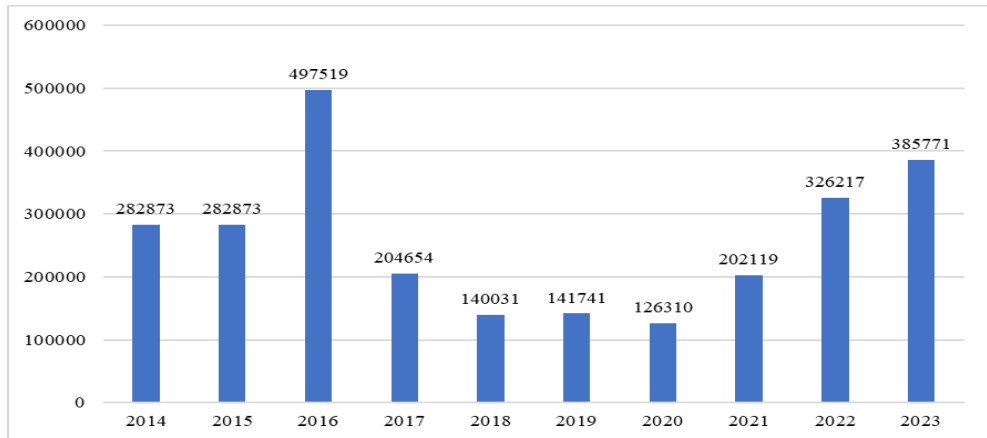
⁷⁰ Mitsilegas, *supra* note 65.

⁷¹ Criticism in Parliamentary Assembly of the Council of Europe, Report 15963 (2024), *A Shared European Approach to Address Migrant Smuggling*, pp. 14 and 15.

⁷² For a comparison, see S. Peers, *The Council’s Position on Proposed EU Law on Migrant Smuggling: Cynical Political Theatre?*, EU Law Analysis, 9 December 2024, available at: <https://eulawanalysis.blogspot.com/2024/12/the-councils-position-on-proposed-eu.html> (accessed 30 June 2025).

agreements with third countries for migration control, which make it harder for migrants to reach European territory.

Figure 4. Irregular border crossings from 2014 to 2023, presented annually



Several issues with the data arise when evaluating the impact of migrant smuggling. In addition to those identified above, it is important to acknowledge that migrant smuggling thrives under prohibition: the European restrictive stance on legal entry was its catalyst, even before the perceived peak of 2015–2016.⁷³ Smugglers are found precisely where legal avenues for obtaining the desired result are lacking;⁷⁴ therefore, criminal law has no impact on their existence – it simply changes or creates routes in response to increased policing.⁷⁵ The lack of results is also implied in official European discourse, which recognises that the demand for smuggling services continues to rise⁷⁶ (independently of their penal consequences) and attributes the decline in certain routes to other policies.⁷⁷

⁷³ For example, in 2002 there were already over 700,000 undocumented migrants in Italy – F. Fasani, *Country Report Italy. Undocumented Migration Counting the Uncountable. Data and Trends across Europe*, European Commission, Brussels: 2008, p. 31 available at: https://migrant-integration.ec.europa.eu/sites/default/files/2009-07/doc1_9054_957632787.pdf (accessed 30 June 2025).

⁷⁴ For an analysis of the absence of legal pathways into Europe and its impact on irregular migration, see L. Martini, T. Megerisi, *Road to Nowhere: Why Europe's Border Externalisation is a Dead End*, European Council on Foreign Relations, 14 December 2023, available at: <https://ecfr.eu/publication/road-to-nowhere-why-europes-border-externalisation-is-a-dead-end/> (accessed 30 June 2025).

⁷⁵ Scholars argue that the European asylum system is partly dependent on migrant smugglers (Achilli, *supra* note 54, p. 5046).

⁷⁶ *Understanding EU Action against Migrant Smuggling*, European Parliament, 12 December 2023, p. 1, available at: [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2023\)757577](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)757577) (accessed 30 June 2025).

⁷⁷ *Ibidem*, p. 4.

To account for the number of irregular migrants resorting to smuggling services is all but impossible. Despite official European reports consistently repeating that 90% of irregular migrants resort to smuggling⁷⁸ and attributing the increase in irregular arrivals to such services,⁷⁹ this overquoted percentage is empirically questionable. Firstly, migration estimates are often inaccurate and can be exaggerated, which is acknowledged by international institutions and migration data collecting platforms, who claim that “data on smuggling are scarce, and there is no annual global report on migrant smuggling trends. Official statistics [...] are limited as many countries do not collect or publish such data.”⁸⁰ Secondly, statistics fail to recognise that “most irregular migrants have entered Europe legally and subsequently overstayed their visa”,⁸¹ meaning that they did not use smuggling services. Thirdly, even if focussing only on the number of arrivals at the borders, this percentage is based on outdated data, with a very small sample from which to draw sufficient conclusions.⁸² This unduly contributes to an estimation of migrant smuggling which may not exist at such high rates.

The issue is not only the circumvention of European rules, but also the amount of money flowing into this business, which may be funnelled into other criminal activities, as the prevailing narrative is that smuggling operations are controlled by organised criminal groups. Estimating these profits is, again, challenging, although the EU estimates prices ranging between EUR 2,000 and 5,000 per migrant,⁸³ with a total (global) annual gross amount between EUR 4.7 and 6 billion. On a global scale, estimates for the cost of smuggling services vary widely, depending on the route and risks involved. For instance, Asian migrants travelling to Europe through Africa

⁷⁸ E.g. *Preventing and Countering the Facilitation of Unauthorised Entry, Transit and Stay in the EU*, European Parliament, 22 March 2024, p. 2, available at: [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2024\)760365](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)760365) (accessed 30 June 2025); or European Commission, *Communication from the Commission to the European Parliament and the Council on the Seventh Progress Report on the Implementation of the EU Security Union Strategy*, Brussels, 15 May 2024, COM(2024)198 final, p. 13.

⁷⁹ *Ibidem*, p. 2 (citing a 7% increase in irregular arrivals at the borders of the EU in 2023 compared to the previous year, which is attributed to a corresponding increase in smuggling activities, “as evidenced by a new record high number of migrant smugglers – over 15 000 – as per the reports by the Member States” to Frontex).

⁸⁰ *Smuggling of Migrants*, Migration Data Portal, 21 May 2024, available at: <https://www.migrationdataportal.org/themes/smuggling-migrants> (accessed 30 June 2025).

⁸¹ Council of Europe, Report 15963 (2024), *A Shared European Approach to Address Migrant Smuggling*, p. 10. We are assuming that the official statistics do not include situations where migrants enter using forged documents, as those would not be regarded as “legally entering a country”. Indeed, the *Kinsa* case – pending before the CJEU – showcases exactly that such situations will be equally regarded and treated as migrant smuggling.

⁸² *Ibidem*, p. 10: “this figure is an estimate based on 1,500 debriefings of migrants collected by Frontex and EU Member States in 2015.”

⁸³ See *Latest Trends in Migrant Smuggling: Nearly 7000 Suspected Smugglers Reported, Increased Exploitation, Higher Prices*, Europol, available at: <https://tinyurl.com/26a32p22> (accessed 30 June 2025).

reportedly pay between EUR 4,180 and 5,575 for the flight alone, while a smuggling journey from Agadez to Libya or Europe would be priced at EUR 1900–2850.⁸⁴

It could be argued that profits, combined with the lack of legal entry routes into Europe, drive smuggling networks to become more organised and sophisticated. However, the idea that profits are high and reinvested in criminal activities is contested in the literature: besides the difficulty of following (and thus proving and calculating) money flows,⁸⁵ there is evidence suggesting that profits from migrant smuggling are often reinvested back into the community.⁸⁶

The decrease in irregular arrivals is not due to the criminalisation of smuggling, but is it effective at punishing smugglers? Examining judicial data may help evaluate this question.

Table 2. Number of persons suspected of being involved in migrant smuggling by MS between 2016 and 2022

Country/ Year	2016	2017	2018	2019	2020	2021	2022	Total Number of Suspects
Austria	7	69	35	50	48	19	1,034	1,262
Belgium	-	353	93	-	138	-	201	785
Bulgaria	364	323	48	87	190	391	1,398	2,437
Croatia	167	321	620	983	692	885	774	4,442
Cyprus	19	14	8	17	19	22	88	187
Czechia	47	48	34	57	60	52	277	528
Denmark	279	124	151	90	36	49	69	798
Estonia	-	-	-	-	-	-	-	-
Finland	452	116	44	92	196	82	80	1,062
France	-	4,395	4,219	4,639	3,976	6,626	6,277	30,132
Germany	-	-	2,342	2,441	2,761	3,283	3,468	14,295
Greece	950	1,399	1,653	1,533	1,112	1,092	1,478	9,217
Hungary	745	-	-	-	362	789	1,828	3,724
Ireland	-	-	-	-	-	-	-	-
Italy	4,711	4,127	4,131	3,676	2,925	2,560	3,941	26,071

⁸⁴ *Smuggling of Migrants: The Harsh Search for a Better Life*, UNODOC, available at: https://www.unodc.org/toc/en/crimes/migrant-smuggling.html#_ednref8 (accessed 30 June 2025).

⁸⁵ Council of Europe, Report 15963 (2024), *A Shared European Approach to Address Migrant Smuggling*, p. 10.

⁸⁶ G. Sanchez, *Five Misconceptions about Migrant Smuggling*, European University Institute, Fiesole: 2018.

Country/ Year	2016	2017	2018	2019	2020	2021	2022	Total Number of Suspects
Latvia	52	26	25	-	7	20	20	150
Lithuania	163	95	77	-	48	328	361	1,072
Luxembourg	-	-	-	-	-	-	-	-
Malta	0	-	-	0	2	-	-	2
Netherlands	378	-	63	-	29	-	-	470
Poland	220	194	132	82	87	427	801	1,943
Portugal	71	82	98	102	89	144	183	769
Romania	101	283	261	322	660	1,090	746	3,463
Slovakia	128	-	99	-	79	108	286	700
Slovenia	650	-	414	1,021	472	413	431	3,401
Spain	663	685	900	370	662	1,204	1,175	5,659
Sweden	226	100	136	-	104	150	124	840

Table 3. Persons imprisoned for migrant smuggling per MS between 2016 and 2022

Country/ Year	2016	2017	2018	2019	2020	2021	2022	Total Number of Persons Imprisoned
Austria	1	0	2	-	-	86	183	272
Belgium	-	-	-	-	-	-	-	-
Bulgaria	12	29	54	50	41	89	97	372
Croatia								-
Cyprus								-
Czechia	69	22	48	38	27	31	70	305
Denmark	-	-	-	-	-	-	-	-
Estonia	1	1	-	-	-	-	0	2
Finland	-	-	-	-	-	-	-	-
France	-	730	-	-	-	366	412	1,508
Germany	-	-	73	69	58	55	52	307
Greece	1,478	1,166	2,001	1,853	1,850	1,467	1,632	11,447
Hungary	646	-	-	3,445	870	1,977	1,938	8,876
Ireland	-	-	-	-	-	-	-	-
Italy	1,469	1,328	1,194	-	919	979	1,138	7,027

Country/ Year	2016	2017	2018	2019	2020	2021	2022	Total Number of Persons Imprisoned
Latvia	24	99	40	12	6	8	18	207
Lithuania	7	5	9	3	1	4	7	36
Luxembourg	-	1	-	-	-	-	-	1
Malta	0	-	-	0	2	7	4	13
Netherlands	-	-	-	-	-	-	-	-
Poland	16	12	19	21	17	23	31	139
Portugal	11	12	16	16	14	14	2	85
Romania	82	90	82	74	70	66	139	603
Slovakia	44	-	33	-	35	82	50	244
Slovenia	50	-	203	368	443	-	-	1,064
Spain	228	246	320	365	367	323	441	2,290
Sweden	20	11	6	3	1	3	3	47

As indicated in Tables 2 and 3, there is a significant difference between the numbers of people suspected and imprisoned for migrant smuggling. Recent data reveals that Eurojust investigated a total of 425 cases in 2023, nearly twice the number of cases in 2019.⁸⁷ The perceived significance of the crime is also rising internally – for instance, in Portugal the investigated cases multiplied exponentially in 2023, with a staggering 298% increase.⁸⁸

Nevertheless, these are low numbers when compared to the estimated prevalence of the crime among irregular migrants: if 90% of irregular migrants used smuggling services, there should be much higher numbers of court cases as well. This difference might be due to two overlapping factors. Firstly, migrant smugglers may be organised groups that are somehow evading justice (namely, by never leaving their country of origin or entering a European jurisdiction); secondly, the cases that are tried and punished are those of low-level smugglers⁸⁹ (who represent a comparatively low risk),

⁸⁷ Council of Europe, Report 15963 (2024), *A Shared European Approach to Address Migrant Smuggling*, p. 10. These figures are still widely distant from the reported cases by Europol: between January and June 2016 (and one must bear in mind that this was a peak year for irregular migration), “Europol received intelligence on more than 7000 newly-identified migrant smuggling suspects”, 95% of them male with an average age of 36 – Europol (n. 81).

⁸⁸ *Relatório Anual de Segurança Interna*, Sistema de Segurança Interna, Lisboa: 2023, p. 53, available at: <https://www.portugal.gov.pt/pt/gc24/comunicacao/documento?i=relatorio-anual-de-seguranca-interna-2023> (accessed 30 June 2025).

⁸⁹ Council of Europe, Report 15963 (2024), *A Shared European Approach to Address Migrant Smuggling*, p. 11.

humanitarian associations and the migrants themselves:⁹⁰ for performing rescue operations and for, in most cases, driving vehicles with other migrants, respectively.

A potential third factor coincides with another aspect of effectiveness: the low numbers in the judiciary may also be attributed to the CJEU's jurisprudence, which has prioritised the return of migrants instead of criminalisation.⁹¹ If this is the case, it would be further confirmation that most smuggling suspects are indeed migrants, who are not convicted because they must be returned. If organised groups exist, they are able to continue their activities, and new (legitimate) rules would not impact the effectiveness of European criminal law.

Effectiveness is not simply measured by numbers, despite the EU's focus on expulsions and returns. This statistical approach often overlooks the underlying reasons for low return rates or the drivers for migration (and they partially coincide). Criminalisation is only one factor influencing the decision to migrate;⁹² destination state policies play a significant role, whether through employment, human rights, economic welfare or even the existing migrant networks there – many of these were found to drive away migration in addition to an anti-immigration attitude.⁹³ MSs' policies are designed to restrict lawful entry into the EU. In this regard, the EU's visa, externalisation and containment policies contribute to migrant smuggling, as most asylum seekers will have no legal means to apply without first resorting to false documents and clandestine methods of reaching the territory.⁹⁴

Considering the established benchmark and other aspects of effectiveness, the criminalisation of migrant smuggling must be deemed ineffective. It has not reduced the number of irregular migrants entering the Union, it misdirects finite resources towards low-risk, low-harm activities, it increases the potential for human and fundamental rights' violations (of both migrants and European citizens), breaches international obligations (such as the right to claim asylum) and leads to nonsensical results, such as keeping migrants in the territory only to punish them (ultimately curbed by the CJEU's jurisprudence).

⁹⁰ See *Cases of Criminalisation...*, *supra* note 57.

⁹¹ The case of *El-Dridi* and subsequent case law.

⁹² See Bijak, de Vilhena, Potančoková, *supra* note 11, p. 8, who propose a complex migration decision-making process in which individuals form migratory aspirations, evaluate information about options, prepare and realise migratory decisions and consider the locus of control and the degree of agency in taking migratory decisions.

⁹³ *Ibidem*, p. 13.

⁹⁴ UNHCR, *Guidelines on International Protection No. 14*, 23 September 2024, HCR/GIP/24/14, para 4; and Ancite-Jepifánova, *supra* note 44, p. 18.

4. THE EXTERNALISATION APPROACH

Another European approach to unwanted migration is to externalise migration control systems, which entails engaging third countries in its management, so that migrants can be subject to these controls before they are in EU territory.⁹⁵ These practices range from pushback operations (though not formally labelled as such) to improving asylum systems in third countries and establishing lists of safe countries for return⁹⁶ – all with the common goal of progressively rendering the EU impervious to unwanted (irregular) migration.

4.1. The main agreements in the field of migration

Several agreements have been struck between the EU or MSs and third states⁹⁷ to halt the flow of migrants into Europe. As the primary goal is to prevent people from leaving that territory, the EU or MSs provide the necessary material and personnel.⁹⁸ By 2020 the EU had signed agreements with 18 countries for readmission⁹⁹ (a simplified procedure for returning people to third countries). Additionally, negotiations were launched in 2016 with Nigeria, Tunisia and Jordan, and efforts were being made to engage with Morocco and Algeria as well.

However, political challenges, the COVID-19 pandemic and the Russian aggression in Ukraine have spurred the partial suspension of certain agreements,¹⁰⁰ leading to the need to negotiate new ones. For instance, on 2 May 2024, the EU signed an agreement with Lebanon under which it will provide EUR 1 billion over

⁹⁵ This enables states to avoid responsibility for violating migrants' rights, as they are not under their jurisdiction. Critically, V. Moreno-Lax, *Meta-Borders and the Rule of Law: From Externalisation to "Responsibilisation" in Systems of Contactless Control*, 71 *Netherlands International Law Review* 21 (2024).

⁹⁶ There are nine instruments that make up the European toolbox for externalisation; for the full list, see M. Rosina, I. Fontana, *The Tools of External Migration Policy in EU Member States*, EUROPP Blog, 17 September 2024, available at: <https://blogs.lse.ac.uk/europpblog/2024/09/17/the-tools-of-external-migration-policy-in-eu-member-states/> (accessed 30 June 2025).

⁹⁷ While these are not within the competence of the Union (and therefore criticism is best directed at the MSs), the EU's failure to oppose, criticise or punish the outcomes of such agreements implies endorsement and thus merits criticism. For an analysis, see V. Guiraudon, *20 Years After Tampere's Agenda on "Illegal Migration": Policy Continuity in Spite of Unintended Consequences*, in: S. Carrera, D. Curtin, A. Geddes (eds.), *20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice*, European University Institute, Florence: 2020, p. 152.

⁹⁸ E.g. Council of the European Union, *Strategic Review on EUBAM Libya, EUNAVFOR MED Op Sophia & EU Liaison and Planning Cell*, 15 May 2017, Doc. 9202/17, p. 36, para. 130ff.

⁹⁹ See *EU Migrant Return Policy – Cooperation with Third Countries on Readmission*, European Court of Auditors, Luxembourg: 2020, p. 6, available at: https://www.eca.europa.eu/lists/ecadocuments/ap20_07/ap_migrant_return_policy_en.pdf (accessed 30 June 2025).

¹⁰⁰ Such as the agreement with Belarus, suspended in 2021 and later used to retaliate against European restrictive measures – European Commission, *A Renewed EU Action Plan against Migrant Smuggling (2021–2025)*, Brussels, 29 September 2021, COM(2021)591 final, p. 5.

three years to support the country's economy and prevent the irregular migration of Syrian refugees, following tensions in Cyprus and an increase in the number of arrivals from Syria via Lebanon.¹⁰¹ It should be noted that this EUR 1 billion represents a substantial portion of the EUR 22.7 billion allocated for migration and border management (budget for 2021–2027).¹⁰² Though not identical, all agreements consistently aim to keep migrants within third states and to facilitate returns from the EU.

The EU-Türkiye statement of cooperation from 2016 commits the EU to accepting one Syrian national for every Syrian returned to Türkiye and providing the necessary financial support (EUR 6 billion) and expediting visas for Turkish citizens. In exchange, Türkiye's borders are reinforced against migrant smuggling, and it agrees to the facilitated return of asylum seekers coming therefrom (so that the MSs do not process them).¹⁰³ Regarding its effectiveness, the outcome was most likely the rerouting of the migration flow to Libya,¹⁰⁴ rather than decreasing the number of irregular migrants coming into Greece. Meanwhile, Türkiye has suspended the return component of the agreement and recent judgments highlight the challenging conditions faced by migrants seeking asylum in the country.¹⁰⁵

In 2023, the EU and Tunisia signed a Memorandum of Understanding (MoU). Under the guise of a “holistic approach to migration”,¹⁰⁶ the EU aimed to improve Tunisian border management, increase search and rescue operations (conducted by the Tunisian authorities) and establish procedures for facilitated returns of Tunisian nationals – while providing financial and technical support. More than

¹⁰¹ *EU External Partners: Member States Push for Outsourcing of Migration Procedures to Third Countries – EU Signs €1 Billion Migration Deal with Lebanon – Tunisian Authorities Expel Hundreds of Migrants to Border with Algeria – Migrants Released from Detention in Libya*, European Council on Refugees and Exiles, 10 May 2024, available at: <https://tinyurl.com/m25vnhcz> (accessed 30 June 2025).

¹⁰² The budget itself has been significantly increased from the previous EUR 10 billion for the period 2014–2020: *Asylum and Migration in the EU: Facts and Figures*, European Parliament, 30 June 2017, available at: <https://tinyurl.com/2a9e98s3> (accessed 30 June 2025).

¹⁰³ Elserafy, *supra* note 38, p. 57. For an account of the agreement, see Pavlov, Cardoso *supra* note 8, p. 92; see also *Legislative Train 08.2024 / 1 Foreign Affairs – AFE. EU-Turkey Statement and Action Plan*, European Parliament, available at: <https://www.europarl.europa.eu/legislative-train/carriage/eu-turkey-statement-action-plan/report?sid=8301> (accessed 30 June 2025). The EU's continued support can be gleaned from the recent Communication from the Commission to the Council and European Parliament, *Eighth Annual Report of the Facility for Refugees in Türkiye*, Brussels, 19 December 2024, COM(2024)593 final – where the allocation of another EUR 355.6 million for refugee support and migration management is analysed.

¹⁰⁴ Mesnard, Savatic, Senne, Thiollet, *supra* note 25.

¹⁰⁵ G. Ovacık, M. Ineli-Ciger, O. Ulusoy, *Taking Stock of the EU-Turkey Statement in 2024*, 26 European Journal of Migration and Law 154 (2024).

¹⁰⁶ *Memorandum of Understanding on a Strategic and Global Partnership between the European Union and Tunisia*, European Commission, 16 July 2023, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3887 (accessed 30 June 2025).

EUR 1.7 billion was invested prior to the MoU.¹⁰⁷ However, Tunisia is clearly uninterested in playing a part in the EU's externalisation programme: it still lacks a general law on asylum and refuses to include clauses on readmission, fearing the uncontrolled use of both (and its classification as a safe third country) to use its territory as a "disembarkation platform"¹⁰⁸ and containment area for unwanted foreign nationals. European funds and support led to much-deserved criticism regarding the EU's complicity in human rights violations,¹⁰⁹ yet an additional EUR 160 million was allocated to bolster the Tunisian coastguard and counter-smuggling efforts.¹¹⁰ The outcome of this MoU was not what the EU was expecting: departures from Tunisia continued unabated, while the Tunisian economy (transportation, accommodation etc.) experienced rapid growth fuelled by the migration market; likewise, social instability in the country prompted even more migrants (namely sub-Saharan Africans) to come to Europe seeking asylum, facilitated by that same economy.¹¹¹ This suggests that this agreement is ineffective by any standard (asylum, respect for human rights or even maintaining irregular migrants outside of the EU).

Egypt signed an agreement with the EU in early 2024: EUR 200 million will be invested in border management, returns and combating migrant smuggling.¹¹² This is part of a larger deal which bequeaths EUR 7.4 billion to Egypt, with EUR 5 billion in soft loans to boost the economy.¹¹³ Its effectiveness cannot yet be assessed, but its focus on securitisation and disregard for human rights¹¹⁴ (while Egypt secures European political support) suggests limited effectiveness (within this aspect).

The MoU between Italy and Libya in 2017 was endorsed by the EU, with the consequent (indirect) allocation of EUR 700 million (until 2022)¹¹⁵ to enhance

¹⁰⁷ *EU Migration Support in Tunisia*, European Commission, June 2023, available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/5fd60eeb-7748-4f29-bda6-de875be53317_en (accessed 30 June 2025).

¹⁰⁸ H. Sha'ath, F. Raach, *Cooperation within Reason: Tunisia's Approach to Asylum and Readmission*, 26 *European Journal of Migration and Law* 179 (2024).

¹⁰⁹ T. Strik, R. Robbesom, *Compliance or Complicity? An Analysis of the EU-Tunisia Deal in the Context of the Externalisation of Migration Control*, 71(1) *Netherlands International Law Review* 199 (2024).

¹¹⁰ Martini, Megerisi, *supra* note 74, p. 16.

¹¹¹ *Ibidem*, p. 16.

¹¹² A. Pacciardi, J. Berndtsson, *European Externalization and Security Outsourcing in North Africa*, Externalizing Asylum, available at: https://externalizingasylum.info/european-externalization-and-security-outsourcing-in-north-africa/#_ftn12 (accessed 30 June 2025).

¹¹³ J. Moorsel, A. Bonfiglio, *A Conscious Coupling: The EU-Egypt's Strategic and Comprehensive Partnership*, Mixed Migration Centre, 29 April 2024, available at: <https://mixedmigration.org/eu-egypt-partnership/> (accessed 30 June 2025).

¹¹⁴ El-Sayed, *The Elusive "Collectivised Refugee Protection": The Case of the EU-Egypt Migration Cooperation*, 26 *European Journal of Migration and Law* 241 (2024).

¹¹⁵ *EU Support on Migration in Libya – EU Emergency Trust Fund for Africa – North Africa Window*, European Commission, March 2022, available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-03/EUTF_libya_en.pdf (accessed 30 June 2025).

cooperation and the commitment of EUR 65 million (2021–2027),¹¹⁶ with the majority of these funds aimed at preventing departures, intercepting migrants at sea and returning them to Libyan territory.¹¹⁷ Although there was a notable 90% (approximate) decrease in migrants arriving in Italy from Libya directly after signing the MoU, other entry routes were soon increasingly being used, and within three years migration from Libya had risen again as other groups supported and established new routes in the eastern part of the country.¹¹⁸ Once again, the effectiveness of this agreement was temporary at best, only managing to divert the migratory flow. Furthermore, regarding human rights, asylum and non-refoulement, it is evidently ineffective¹¹⁹ due to documented human rights abuses in Libya and suspicions that migration management is carried out by local militias and organised groups involved in migrant smuggling and human trafficking.¹²⁰ All this MoU manages to do is avoid the international responsibility of EU MSs, as migrants never actually come under their jurisdiction.¹²¹

The cooperation with Morocco dates from 2004, and EUR 2.1 billion has been allocated for multiple purposes,¹²² although an agreement was not signed until 2023. Within migration, the focus remains on security, border management, anti-smuggling support and facilitated returns.¹²³ A key factor in securing cooperation from Morocco was the EU's support for their claim on Western Sahara.¹²⁴ The agreement's effectiveness is limited, as migrant numbers fluctuate depending on the measures affecting other routes; additionally, the EU's actions have inadvertently supported

¹¹⁶ A. De Leo, *The Court of Crotone on the Libyan Coast Guard: Interception and Returns to Libya Are Not Rescue Operations. Will It Be Enough to Stop EU Funding?*, Review of European Administrative Law Blog, 27 September 2024, available at: <https://tinyurl.com/3vasbb6c> (accessed 30 June 2025).

¹¹⁷ Pacciardi, Berndtsson, *supra* note 112, p. 4010ff.

¹¹⁸ See Martini, Megerisi, *supra* note 74, p. 14 with figures denoting arrivals in Italy by sea.

¹¹⁹ De Leo, *supra* note 116, discussing a judicial decision regarding the impossibility of Libya performing search and rescue operations and, consequently, that the “EU support to Libyan border management authorities [is] structurally unable to reach the stated objective, and thus, from this perspective, irremediably ineffective” [*sic*], also considering the *principle of sound financial management*.

¹²⁰ Achilli, *supra* note 54, p. 5051.

¹²¹ For more detail, see Cardoso, *supra* note 53, pp. 515–516. The indirect responsibility of the MSs is theorised in Elserafy, *supra* note 38, p. 59. On the responsibility of MSs and Frontex, which has recently gained relevance, see e.g. C. Costello, I. Mann, *Border Justice: Migration and Accountability for Human Rights Violations*, 21(3) German Law Journal 311 (2020).

¹²² *EU Migration Support in Morocco*, European Commission, February 2023, available at: <https://tinyurl.com/256tjtpm> (accessed 30 June 2025).

¹²³ See L. den Hertog, *EU and German External Migration Policies: The Case of Morocco*, Centre for European Policy Studies, Bruxelles, pp. 21f., available at: <https://ma.boell.org/fr/2018/03/19/eu-and-german-external-migration-policies-case-morocco> (accessed 30 June 2025).

¹²⁴ Pacciardi, Berndtsson, *supra* note 112.

Morocco's autocratic regime instead of promoting democracy in the country, which highlights its ineffectiveness in aligning with European values.¹²⁵

The EU reached an agreement with Mauritania in March 2024, designed to boost the country's capacity to handle asylum requests, reduce irregular migration and improve border management. EUR 12.5 million was allocated for this purpose (for the period 2022–2027).¹²⁶ As it is so recent, conclusive data on its effectiveness is still unavailable.

A new form of externalisation is now observable in the Italian approach with Albania. Although only indirectly concerning the EU, it has not yet been met with its disapproval. Italy's idea was to externalise asylum requests: eligible (not vulnerable) migrants will be redirected to a processing centre in Albania, to submit their applications. People granted asylum would then be brought to Italy, while rejected applicants would be removed from Albania and returned. The arrangement preserves Italian jurisdiction: "applications will be processed by Italian officials using Italian and EU legislation, and Italian judges will be responsible for handling disputes",¹²⁷ which may be problematic concerning the extraterritorial application of EU law and constitutional issues in Albania, where foreign law is exclusively applied in part of the territory.¹²⁸ The effectiveness of this agreement was not off to a great start: an Italian judge declared it inadmissible the first time it was to be applied, and migrants were brought to Italy instead.¹²⁹ But other issues are likely to emerge, such as establishing who is responsible for upholding human rights standards or where refugees will be removed to if they are denied asylum.¹³⁰ The Italian centres in Albania are estimated to cost EUR 653 million over five years.¹³¹

¹²⁵For an analysis, see L.F. Torres, *Hindering Democracy through Migration Policies? An Analysis of EU External Migration Policies' Impacts on the Democratisation of Morocco*, in: R. Zapata-Barrero, I. Awad (eds.), *Migrations in the Mediterranean*, Springer, Cham: 2023, pp. 29ff.

¹²⁶R. Phillips, *EU Signs Controversial Migration Agreements in Africa*, InfoMigrants, 21 May 2024, available at: <https://www.infomigrants.net/en/post/57175/eu-signs-controversial-migration-agreements-in-africa> (accessed 30 June 2025).

¹²⁷L. Piccoli, *No Model for Others to Follow. Offshoring Asylum the Italian Way*, Verfassungsblog, 14 November 2023, available at: <https://verfassungsblog.de/offshoring-asylum-the-italian-way/> (accessed 30 June 2025).

¹²⁸Analysis in R. Bushati, E. Furrmani, *Potential Effects and Concerns of the Agreement Between Italy and Albania on Managing Migratory Flows*, 10(3) Journal of Liberty and International Affairs 28 (2024). The problematic nature of these processes has been highlighted by the UN Human Rights Committee, albeit concerning Australia – *Australia Responsible for Arbitrary Detention of Asylum Seekers in Offshore Facilities*, United Nations, 9 January 2025, available at: <https://www.ohchr.org/en/press-releases/2025/01/australia-responsible-arbitrary-detention-asylum-seekers-offshore-facilities> (accessed 30 June 2025).

¹²⁹A. De Leo, *Op-ed: Does the Rome Court's Refusal to Validate the Detention Order of the First Asylum Seekers Brought to Albania Mark the End of the Italy-Albania Deal?*, European Council on Refugees and Exiles, 24 October 2024, available at: <https://tinyurl.com/edzm6njx> (accessed 30 June 2025).

¹³⁰See Piccoli, *supra* note 127.

¹³¹*Italy-Albania Asylum-Seeker Deal to Cost €653 Million, Report Finds*, InfoMigrants, 23 April 2024, available at: <https://www.infomigrants.net/en/post/56618/italyalbania-asylumseeker-deal-to-cost-%E2%82%AC653-million-report-finds> (accessed 30 June 2025).

4.2. An overall assessment of the effectiveness of externalisation

While each agreement has been individually analysed, their overall effectiveness must include the number of returns performed, which depends on the clauses in each agreement¹³² and lists of safe countries. While return rates include all types of irregularity, be it upon arrival at the borders or arising subsequently, combining data on returns and asylum applications still offers the most meaningful metric for evaluating the effectiveness of this dimension of the externalisation policy. Unlike re-admission agreements, which focus exclusively on cooperation with third countries, these policies address broader mechanisms involving both asylum management and return procedures, which are reflected in the trends in asylum claims and return rates

Table 4. Third country nationals returned, by MS

C o u n t r y / Year	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	Total
Belgium	5,250	5,550	6,920	5,880	4,585	3,940	2,675	2,655	1,940	1,960	41,355
Bulgaria	1,090	540	1,105	1,250	610	595	230	520	515	510	6,965
Czechia	315	330	390	680	720	580	885	560	525	570	5,555
Denmark	910	1,040	930	1,115	1,165	1,460	725	980	930	1,390	10,645
Germany	19,060	53,640	74,080	44,960	29,055	25,140	12,265	8,195	7,730	10,290	284,415
Estonia	100	40	380	580	710	1,050	995	1,060	1,030	945	6,890
Ireland	335	205	245	270	310	470	325	160	190	285	2,795
Greece	27,055	14,390	19,055	18,060	12,465	9,650	6,950	6,855	6,985	5,820	127,285
Spain	14,155	12,235	9,530	10,165	11,800	11,525	4,855	3,230	3,335	5,995	86,825
France	13,030	12,195	10,930	12,720	15,445	15,615	6,930	6,290	8,640	10,625	112,420
Croatia	2,150	1,405	1,720	1,980	2,165	2,390	1,425	2,040	3,665	6,745	25,685
Italy	5,310	4,670	5,715	7,045	5,615	6,470	2,815	975	2,790	3,275	44,680
Cyprus	2,985	1,840	1,035	760	730	455	1,060	2,165	4,205	7,775	23,010
Latvia	1,550	1,030	1,355	1,275	1,465	1,565	910	765	1,745	2,020	13,680
Lithuania	1,925	1,685	1,545	1,860	2,110	2,015	1,590	:	2,410	3,425	18,565
Luxembourg	605	720	405	435	275	270	160	155	155	230	3,410
Hungary	3,440	5,755	780	685	875	810	995	1,495	965	1,140	16,940
Malta	495	465	420	470	530	600	380	710	665	920	5,655

¹³²The European Parliament considered that “in order to increase the efficiency of readmissions [...] it will be necessary to adopt new EU readmission agreements” – European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)), 15 February 2018, OJ C 58/9.

Country/ Year	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	Total
Netherlands	7,655	8,385	11,890	8,195	8,830	11,055	8,715	2,540	975	1,555	69,795
Austria	:	:	5,895	5,715	6,805	6,800	4,610	4,480	5,260	6,780	46,345
Poland	9,000	12,750	18,530	22,165	25,700	25,895	870	6,355	4,575	6,880	132,720
Portugal	760	565	370	310	280	465	470	265	595	370	4,450
Romania	2,085	1,995	1,865	1,815	1,705	2,355	1,725	1,655	2,610	2,700	20,510
Slovenia	150	155	205	120	150	155	125	135	170	75	1,440
Slovakia	655	970	1,390	1,725	2,095	1,580	410	370	235	265	9,695
Finland	2,855	2,980	5,610	3,565	2,850	2,990	2,200	1,070	960	1,240	26,320
Sweden	6,230	9,695	10,160	6,845	6,850	6,425	4,930	6,805	8,615	7,670	74,225
Total	129,150	155,230	192,455	160,645	145,895	142,320	70,225	62,485	72,415	91,455	

Table 4, as anticipated, illustrates that countries receiving a significant number of asylum applications (see Figure 2) also exhibit higher return rates. Comparing these figures offers key insights, as most migrants arriving irregularly are asylum seekers lacking the legal means to reach Europe. For example, Germany returned nearly 11% of asylum seekers between 2014 and 2023, similar to France, while in Greece, about 31% of asylum applicants were returned, and in Poland the dependence is even reversed – 132,720 third-country nationals were returned, compared to 56,990 first-time asylum applicants.¹³³

It could be preliminarily assumed that border MSs would likely have higher return rates, as the migratory flow going through them is larger than in countries in the EU's geographic centre, but attractive pull factors in central MSs like Germany draw migrants there.

Regarding the benchmark for effectiveness, this aspect of externalisation seems to fare no better. There is some correlation between the number of arrivals and returns,¹³⁴ which is expected. However, the relationship between the number of agreements with third countries and returns is unclear; otherwise, a substantial increase in returns would be expected as more deals with such clauses are signed, which does not appear to be the case. This results partly from the legal framework:

¹³³Poland's case illustrates the pitfalls of this method, as it would be difficult to return more asylum seekers than it receives. However, as official statistics do not differentiate the number of returns by category according to the motive for the return, there is no other way to assess effectiveness in this area.

¹³⁴The lower-than-expected numbers may also be attributed to various factors that prevent returns, leading to misreading of the data, including pending asylum proceedings, difficulties in determining the person's nationality or insufficient resources for performing all returns – S. Carrera, J. Allsopp, *The Irregular Immigration Policy Conundrum: Problematizing 'Effectiveness' as a Frame for EU Criminalization and Expulsion Policies*, in: A. Ripoll Servent, F. Trauner (eds.), *The Routledge Handbook of Justice and Home Affairs Research*, Routledge, London: 2017, pp. 74–75 with statistics.

migrants who cannot remain in the EU must be returned either to their country of origin – which can be challenging due to forged or non-existent documentation – or to the country from which they came if there are readmission agreements. Either way, this is only feasible if those countries are deemed safe, depending not only on existing agreements,¹³⁵ but also on a judicial assessment of their reception conditions.

The concept of a “safe country”, as defined in Annex I and Art. 38 of Directive 2013/32/EU, entails that “there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict”. MSs can designate safe countries of origin for returns, but must assess them regularly (Art. 37). It is currently impossible to designate only *parts* of a country as safe, or to designate them as safe for *groups* of people¹³⁶ – this was also stated by the CJEU, who clarified that the national court must assess the safety of the country on its own, even if the individual concerned does not raise the issue.¹³⁷

The implications of this designation include the possibility of a much speedier return and difficulty in proving that the country is actually *unsafe*.¹³⁸ The quantitative effectiveness of such arrangements is consequently higher: when almost all arriving migrants are successfully returned, it has a deterrent effect on aspiring migrants.¹³⁹ In Europe the rates are lower, given the reluctance of third states to act as “dumping-ground” for Europe’s unwanted migrants; however, this designation does not allow the returning country to immediately consider asylum requests inadmissible, if the receiving country refuses readmission¹⁴⁰ (as Türkiye has done with Greece). Nevertheless, it appears that a country being democratic bears little influence over the number of returns.¹⁴¹

¹³⁵ Although these prove ineffective as well, as states are typically unwilling to accept readmissions – see I. Avelas, A. Bosman, *A Rare Win: Greek Asylum Practices Before the CJEU*, *Verfassungsblog*, 19 November 2024, available at: <https://verfassungsblog.de/a-rare-win/> (accessed 30 June 2025).

¹³⁶ Although it will again be possible to do so with the new rules on asylum, which once again strive for maximal returns – S. Peers, “Safe Countries of Origin” in *Asylum Law: The CJEU First Interprets the Concept*, *EU Law Analysis*, 14 October 2024, available at: <https://eulawanalysis.blogspot.com/2024/10/safe-countries-of-origin-in-asylum-law.html> (accessed 30 June 2025).

¹³⁷ Case C-406/22 *CV v. Ministerstvo vnitra České republiky*, EU:C:2024:841.

¹³⁸ A. Pirrello, *Paesi di origine: sicuri che siano sicuri?*, *ADiM Blog*, 30 July 2024, available at: <https://www.adimblog.com/2024/07/30/paesi-di-origine-sicuri-che-siano-sicuri/> (accessed 30 June 2025).

¹³⁹ At a huge human rights cost, however – see the example of Australia, discussed in D. Thym, *Safe Third Countries: The Next Battlefield*, *EU Immigration and Asylum Law and Policy*, 5 July 2024, available at: <https://eumigrationlawblog.eu/safe-third-countries-the-next-battlefield/> (accessed 30 June 2025).

¹⁴⁰ Case C-134/23 *Elliniko Symvoulío*, EU:C:2024:838. For a commentary, see S. Peers, *Pyrrhic Victory for the Greek Government: The CJEU Rules on Turkey as a “Safe Third Country”*, *EU Law Analysis*, 11 October 2024, available at: <https://eulawanalysis.blogspot.com/2024/10/pyrrhic-victory-for-greek-government.html> (accessed 30 June 2025).

¹⁴¹ As concluded by P. Stutz and F. Trauner – P. Stutz, F. Trauner, *Democracy Matters (To Some Extent): Autocracies, Democracies and the Forced Return of Migrants from the EU*, 30(2) *Geopolitics* 704 (2024).

While this phenomenon is not exclusively European,¹⁴² it unquestionably results in the violation of human and fundamental rights of the people who wish to leave a country, while seldom holding accountable those performing or condoning such violations.¹⁴³ The same is true for pushback operations,¹⁴⁴ which are internationally condemned and can lead to sanctions,¹⁴⁵ thus bringing into question their effectiveness as well (particularly regarding human rights, but also their rationale, as states are aware of their potential accountability).

Externalisation has brought some successes, such as improvements in third countries,¹⁴⁶ but the numerous problems it has exacerbated or created are hardly justified by the meagre results.¹⁴⁷ From human rights issues through third countries' refusal to comply with the EU's bidding (even with incentives) to the thwarting of problematic deals,¹⁴⁸ the drawbacks are evident to the EU – which becomes vulnerable to political pressure from third countries¹⁴⁹ – and to those same countries who face (and show) resistance¹⁵⁰ for aligning with European practices that fail to

¹⁴² See also A. Pijnenburg, *Externalisation of Migration Control: Impunity or Accountability for Human Rights Violations?*, 71 Netherlands International Law Review 59 (2024).

¹⁴³ Literature on this topic is abundant – e.g. M. Gkiliati, *Shaping the Joint Liability Landscape? The Broader Consequences of W.S. v Frontex for EU Law*, 9(1) European Papers 69 (2024); and the articles by E. Guild, *Frontex and Access to Justice: The Need for Effective Monitoring Mechanisms*, 30(1–2) European Law Journal 136 (2024); L. Marin, *Frontex at the Epicentre of a Rule of Law Crisis at the External Borders of the EU*, 30(1–2) European Law Journal 11 (2024); S.F. Nicolosi, *The European Border and Coast Guard Agency (Frontex) and the Limits to Effective Judicial Protection in European Union Law*, 30(1–2) European Law Journal 149 (2024); or J. Rijpma, *Watching the Guards: Ensuring Compliance with Fundamental Rights at the External Borders*, 30(1–2) European Law Journal 74 (2024).

¹⁴⁴ The collective expulsion of aliens without conducting individual assessments of their asylum claims. Commenting the situation in Latvia, Lithuania and Poland (Ancite-Jepifánova, *supra* note 44, pp. 9ff. But see S. Ganty, A. Ancite-Jepifánova, D. Kochenov, *EU Lawlessness Law at the EU–Belarusian Border: Torture and Dehumanisation Excused by “Instrumentalisation”*, 16 Hague Journal on the Rule of Law 739 (2024).

¹⁴⁵ See e.g. ECtHR, *M.A. and Z.R. v. Cyprus* (App. No. 39090/20), 8 October 2024; or ECtHR, *M.D. and Others v. Hungary* (App. No. 60778/19), 19 September 2024. Nevertheless, attributing responsibility to European states can be difficult – in an effort to avoid this externalisation effect, see the proposal for reframing jurisdictional control accounting for technological developments in A. Papachristodoulou, *The Exercise of State Power over Migrants at Sea through Technologies of Remote Control: Reconceptualizing Human Rights Jurisdiction*, 73(4) International & Comparative Law Quarterly 931 (2024).

¹⁴⁶ Ovacık, Ineli-Ciger, Ulusoy, *supra* note 105, p. 147.

¹⁴⁷ Although irregular arrivals had temporarily declined, they are evidently rising again, notwithstanding the new agreements and measures in place. See Martini, Megerisi, *supra* note 74, p. 9; see also A. Dimitrov, V. Pavlov, *EU-Third Countries Cooperation in Managing Irregular Migration*, 7(2) International Scientific Journal Security & Future 46 (2023).

¹⁴⁸ It was also clear by the backlash to the UK-Rwanda deal – F. Zanker, *Outsourcing Asylum to African States? An Endeavour Destined to Fail*, Externalizing Asylum, available at: <https://externalizingasylum.info/outsourcing-asylum-to-african-states-an-endeavour-destined-to-fail/> (accessed 30 June 2025).

¹⁴⁹ The example of Belarus is telling, as is the Turkish threat to allow migrants to enter Europe if the EU condemned the incursion into Syria – in Guiraudon, *supra* note 97, p. 155; see also Martini, Megerisi, *supra* note 74, p. 8.

¹⁵⁰ Ovacık, Ineli-Ciger, Ulusoy, *supra* note 105, p. 149.

account for their interests¹⁵¹ and strongly resemble colonialism. The huge amounts of money¹⁵² invested are also counterproductive: the more third countries observe how much they can profit, the more the externalisation market grows, as migrants who were once absorbed by those countries are now “commoditised”¹⁵³ by them. That irregular migrants in need will still come, despite irrational, undemocratic measures, is easily evidenced by the number of arrivals: although they do not yet rival those of 2015–2016, they are steeply rising again. These conclusions raise an important question: should “effectiveness” not mean the effective management of migration in a sensible approach to the future?

5. FINAL CONCLUSIONS AND THE WAY FORWARD

This analysis, encompassing multiple facets of effectiveness, demonstrates that the EU’s approach to migration is not effective: the number of irregular migrants arriving is not abating, and when it does diminish it is a temporary consequence of repressive measures that fail to have a lasting effect, as they are soon circumvented. These measures are also ineffective because they divert resources towards low-risk, low-harm conduct, rather than targeting actual criminal behaviour, thus compromising (instead of ensuring) border security. Additionally, they are ineffective in terms of migrants’ rights, international obligations and European values, as violations (even if “indirect”) keep occurring with at least the EU’s silent approval. Finally, regarding the power shift they entail, EU border security is increasingly handed over to third states, who cooperate only to further their own objectives. This undermines the EU’s mission to promote peace and its values (Art. 3(1) TEU), as it funds (and thus perpetuates) undemocratic regimes.

The adoption of short-term measures in response to “crises”¹⁵⁴ is still evident. Focusing solely on the number of migrants kept at bay or returned overlooks the possibility of remigration, due to a lack of means of subsistence within their communities – or in unfamiliar states that have agreed to accept them, but where they have no ties and slim chances for integration. Harsh reception conditions¹⁵⁵ are

¹⁵¹ A. De Leo, E. Milazzo, *Responsibility-Sharing or Shifting? Implications of the New Pact for Future EU Cooperation with Third Countries*, Policy Study, Friedrich-Ebert-Stiftung and European Policy Centre, Brussels: 2024.

¹⁵² For an interesting account, see *Outsourcing Borders: Monitoring EU Externalisation Policy*, Statewatch, 3 July 2024, available at: <https://www.statewatch.org/outsourcing-borders-monitoring-eu-externalisation-policy/> (accessed 30 June 2025).

¹⁵³ Martini, Megerisi, *supra* note 74, p. 30.

¹⁵⁴ A. Geddes, *Tampere and the Politics of Migration and Asylum in the EU: Looking Back to Look Forwards*, in: S. Carrera, D. Curtin, A. Geddes (eds.), *20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice*, European University Institute, Florence: 2020, pp. 8ff.

¹⁵⁵ As documented in France and the UK (see Carrera, Allsopp, *supra* note 134, p. 78).

also ineffective and serve only to further marginalise migrants and increase societal perceptions of insecurity. Instead of pivoting “towards the status quo”,¹⁵⁶ regarding migrants as problems and investing in more repressive measures¹⁵⁷ or failed policies, a radical shift in perspective is needed – one that considers the *full, complex* phenomenon of migration and invests in measures complying with values and the integration of migrants, in order to prevent bias against them.¹⁵⁸ In addition to improving the human rights situation,¹⁵⁹ the most logical approach would be to invest European funds in a twofold manner: firstly, in the root causes of migration rather than in repressive control measures that have no benefits and little to no effectiveness; secondly, in the effective integration of migrants into European society and its values, especially considering labour needs. This investment would also withstand a more rigorous audit of European resources.¹⁶⁰

To support these conclusions, data shows the beneficial fiscal impact of migrants in the destination country,¹⁶¹ while the cost of integration¹⁶² would require less investment than what is currently put into securitisation measures that do not work. While this would not solve Europe’s population issues,¹⁶³ a simple cost-ben-

¹⁵⁶ Czaika, Bohnet, Zardo, Bujak, *supra* note 14, p. ii.

¹⁵⁷ *Ibidem*, p. 14ff: insisting on the same measures can be an effort to avoid “very high economic or political-reputational costs”, as changing policies would imply admitting that the previous measures were ineffective.

¹⁵⁸ Bijak, de Vilhena, Potančoková, *supra* note 11, p. 14. It would also be important in preventing radicalisation – see the results of the IN2PREV project *Advancing Cross-sectoral Collaboration for Refugee Integration and Radicalisation Prevention*, Prisons System, 2 January 2025, available at: <https://prisonsystems.eu/advancing-cross-sectoral-collaboration-for-refugee-integration-and-radicalisation-prevention/> (accessed 30 June 2025).

¹⁵⁹ A. Chatziagianni, K. Nikolopouloup, *At Europe’s Borders: Between Impunity and Criminalization*, Greek Council for Refugees, Athina: 2023, p. 48. De Leo, *supra* note 129, suggests investing in more efficient asylum systems and regularisation mechanisms that would effectively curb irregular means of arrival.

¹⁶⁰ In response to the deserved criticism of De Leo, *supra* note 116.

¹⁶¹ According to a Professor of Economics in the UK: “Without immigration, the numbers of people paying tax will shrink just as the numbers needing state support in later life are growing. It’s not a sustainable mix.” – J. Portes, *The Big Idea: Why We’re Getting the Immigration Debate All Wrong*, The Guardian, 2 September 2024, available at: <https://www.theguardian.com/books/article/2024/sep/02/the-big-idea-why-were-getting-the-immigration-debate-all-wrong> (accessed 30 June 2025). That assessment seems to be proven by a study concluding that “higher net migration leads to lower deficits and debt, because migrants tend to be of working age” – C. Vargas-Silva, M. Sumption, B. Brindle, *The Fiscal Impact of Immigration in the UK*, The Migration Observatory, 25 October 2024, available at: <https://migrationobservatory.ox.ac.uk/resources/briefings/the-fiscal-impact-of-immigration-in-the-uk/> (accessed 30 June 2025).

¹⁶² These costs are more difficult to prove, but in Case C-158/23 *Keren*, EU:C:2024:461, the concerned person contracted a EUR 10,000 loan to finance the costs of civic integration. This is corroborated by an OECD Report from 2017, which also highlights that they are initially higher, but “decline considerably in the following years”, *Who Bears the Cost of Integrating Refugees?*, OECD, 10 January 2017, available at: https://www.oecd.org/en/publications/who-bears-the-cost-of-integrating-refugees-s_746b49ef-en.html (accessed 30 June 2025).

¹⁶³ Any lasting consequences would demand sustained immigration (Bijak, de Vilhena, Potančoková, *supra* note 11, pp. 23–25).

efit analysis demonstrates that such an investment would have a beneficial return in (the near) future,¹⁶⁴ proving a sounder investment than measures with zero economic return. It would also be indisputably more effective in dispelling the prevailing negative bias and marginalisation of migrants,¹⁶⁵ allowing for a positive view of migration to resurge.

Additionally, migrant smuggling could be construed as a legitimate criminal offence, and by redirecting the justice system's efforts towards the real crime, the inadequate resource allocation would be resolved. Concurrently, providing legal pathways for people needing to migrate to Europe would effectively dwindle the business of migrant smuggling,¹⁶⁶ as it would no longer be profitable due to decreased demand. Addressing the root causes of migration and supporting economies and democracies in third countries would also ensure that people would not *want* to migrate, reducing the phenomenon even further. In conclusion, a new approach to migration is urgently needed.

¹⁶⁴ While MSs bear some costs, they also receive European funds for migrants' integration: Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund [2021] OJ L 251/1.

¹⁶⁵ See the arguments and conclusions by A. Dimitrov, *Refugee Employment in Bulgaria: Why National Integration Policy Matters*, 18 *Economy & Business* 97 (2024).

¹⁶⁶ Criticism in Parliamentary Assembly of the Council of Europe, Report 15963 (2024), *A Shared European Approach to Address Migrant Smuggling*, p. 16.