



## Irregular immigration in the EU

### Some national perspectives on arrival of immigrants

**SUMMARY** *Recent events in the Mediterranean, which have led to many migrants dying off the shores of European Union Member States, have placed EU migration policies back on the political agenda. A particular difficulty in dealing with this phenomenon comes from the mixed flows of migrants, made up of both irregular immigrants and asylum seekers.*

*The EU's legal framework for irregular immigration is scattered over a multitude of legal instruments. Those which apply at the arrival of migrants focus on border surveillance, return of irregular immigrants and cooperation on readmission with third countries of origin and transit, as well as on preventing the departure for Europe of irregular immigrants.*

*Whilst many demand a more coherent EU policy on irregular immigration as well as EU-wide channels for legal migration, others defend a national approach, and point to the overburdening of national infrastructure by an influx of immigrants.*

*Member States with sea borders on the EU's southern frontier, such as Italy, Spain and Malta, have experienced particular difficulties due to migrant influx in the last years. A different approach is that of Australia, which focuses on measures to deter migrants from arriving by sea.*



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#### Glossary

**Irregular immigrant:** A third-country national who does not fulfil, or no longer fulfils, the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State. ([Glossary](#) of the European Migration Network)

**Asylum seeker:** A person whose claim to receive international protection has not yet been evaluated.

#### Irregular immigration as a global challenge

Europe, and the EU Member States (MS) in particular, has traditionally been a destination for immigration from third countries due to its high standards of protection of fundamental rights and of its living conditions. Immigration, however, is a global social phenomenon, resulting from demographic, social, and even environmental, changes as well as globalisation. It thus affects not only Europe but also other wealthy regions, such as Australia and the United States.

Immigrants and asylum-seekers often make dangerous journeys, sometimes using small unsafe vessels to cross the sea, to flee from persecution or discrimination in their home country or simply to seek a better life. The

uprisings in the southern Mediterranean have led recently to the displacement of many people fleeing from armed conflicts there but also from the political uncertainty following such conflicts. With the unfolding of the economic crisis in the EU, citizens and political actors have called for a more coherent approach to irregular immigration and asylum. The aim is to achieve a balance between the legitimate interests of people seeking better living conditions and security, and the need to ensure social cohesion in the countries of destination. The latter includes maintaining the trust of citizens in an area of free movement without internal borders, as well as the operability of national, social and other infrastructures.

## EU migration policies

### Towards a common EU approach

Although core aspects of immigration and asylum policy were 'communitarised' with the Amsterdam Treaty, it was not until the 2009 [Stockholm Programme](#) that a more integrated approach to immigration going beyond the area of freedom, security and justice, was put on the agenda. A coherent policy response was envisaged, including external relations as well as social affairs dimensions, through organising legal migration, fighting irregular migration, strengthening the external borders, building an EU asylum system and creating a global partnership for migration and development.<sup>1</sup> These goals were embedded in a [strategic framework](#) adopted by the European Commission (EC) in 2011 (the Global Approach to Migration and Mobility or the so-called GAMM initiative). Moreover, the Lisbon Treaty offered a more comprehensive legal framework based on solidarity between MS, with greater involvement of the European Parliament (EP) in the legislative process. In April 2012, the EU Ministers of Justice and Home Affairs adopted an action paper "[EU Action on migratory pressure - A strategic response](#)", setting strategic priority areas for EU action.

In the field of asylum, the second phase in building the Common European Asylum System was completed in 2013 with the recast of four instruments: on asylum [reception conditions](#), [asylum procedure](#), [EURO-DAC](#) and the [Dublin III Regulation](#).

Following the deaths of hundreds of migrants off the island of Lampedusa in October 2013, the European Council [invited](#) the newly-established Task Force for the Mediterranean (TFM), led by the Commission, to identify priority actions, with a view to taking operational decisions in December. Some of the Mediterranean MS called for more solidarity especially regarding the distribution of asylum-seekers amongst MS, and to revisit EU migration and asylum policies. On 4 December, Cecilia Malmström, the European Commissioner for Home Affairs, [called](#) on MS to follow up their declarations after the Lampedusa tragedy with concrete action, particularly through making more funding available. She presented five key areas for action: border surveillance, assistance and solidarity with the Mediterranean MS, fight against trafficking, smuggling and organised crime, refugee resettlement and asylum applications from abroad, and cooperation with third countries.

### Mixed flows of migrants

EU law does not provide for the regulated arrival of asylum-seekers, so their entry to EU territory is in most cases irregular as they travel without the necessary documentation and/or use unauthorised border crossing points. Asylum-seekers cannot be refused entrance at borders nor be returned to a third country if there is a risk of persecution or other serious harm. This is the principle of *non-refoulement* established by the 1951 Geneva [Refugee Convention](#) and incorporated into EU law (Article 78(1) [TFEU](#)). However, the EU asylum rules apply only from arrival on EU territory and not before.<sup>2</sup> The [Asylum Procedures Directive](#), amended in 2013, laying down the asylum procedure and guarantees, for instance, does not apply

to those who cannot reach the border of a MS or at least its territorial waters (Article 3(1)). Due to [mixed flows](#) of asylum-seekers and irregular immigrants, it is often difficult for national authorities to establish at the arrival or interception of immigrants at sea whether they are irregular immigrants or rather persons entitled to seek international protection. Commentators and NGOs criticise push-backs at sea or refusal of entry at borders as possibly representing a violation of the principle of *non-refoulement*.

## Legal framework for irregular immigration 'at arrival'

According to Article 79(2)(c) [TFEU](#), the EU has to adopt measures in the area of “illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation”. Article 77(2)(c) TFEU provides for the gradual establishment of an integrated management system for external borders.

### Border surveillance

MS are in charge of managing their external borders, under the conditions established by the [Schengen Borders Code](#), in a way that ensures the mutual trust on which the Schengen area of free movement is based. As these borders are also the EU's external borders, MS experiencing particular migratory pressure receive support from the EU and the other MS under the principle of solidarity (Article 80 TFEU). To this end, in 2004, the [Frontex](#) agency was created to provide MS with operational support at EU external borders. Frontex coordinates [joint operations](#) and, if requested by an MS, can deploy rapid border interventions ([RABIT](#)) through European Border Guard Teams. These consist of border guards from MS and experts in border management. The [External Borders Fund](#) provides funding to MS under particular migration pressure. Moreover, the

According to [Frontex](#), detections of illegal border-crossing along the EU's external borders dropped in 2012 to 72 437 detections, a 49% decrease compared to 2011.

Between January and September 2013 approximately 31 000 immigrants [arrived](#) in the EU using the central Mediterranean route, mainly via Sicily and Lampedusa.

Commission announced in its [Communication](#) on the TFM that it is setting aside funding of €50 million for assistance to MS under high migration pressure: up to €30 million for Italy and €20 million for other MS.

Moreover, external border management is being strengthened by the [Eurosur](#) communication system. This facilitates real-time sharing of data and intelligence from various authorities and surveillance tools, such as satellites or ship reporting systems to improve the management of the EU's external borders. Parliament, in its negotiations in trilogue at [first reading](#), insisted on the system also being used to help save migrants' lives when in danger.

### Rescue at sea

Interception of immigrants on the high seas is governed by [international law](#), in particular by the [UN Convention on the Law of the Seas](#), the [Safety of Life at Sea](#) (SOLAS) and the [Search and Rescue](#) Conventions. These instruments include the obligation to rescue persons in distress at sea and to bring them to a safe place.

In April 2012, the EC presented a [proposal](#) for a Regulation establishing rules for border surveillance in the context of joint operations at sea coordinated by Frontex, to replace the 2010 Council [guidelines](#) annulled by the [CJEU](#).<sup>3</sup> The Commission proposes that when migrants are intercepted or rescued on the high seas, disembarkation will normally occur in the third country from which the ship departed. If returning migrants to the country from which they left is not possible, or would violate international law (principle of *non-refoulement*),<sup>4</sup> disembarkation will take place in the MS hosting the joint operation. Lack of agreement as to where migrants should be disembarked has in the past resulted in distress calls from boats carrying migrants going unheeded, due to disputes

among MS over which country was responsible for search and rescue. In opposition to this principle, which was included in the original 2010 Council guidelines, Malta withdrew from hosting Frontex missions in 2010. Moreover, the six Mediterranean MS are said to [oppose](#) the proposal addressing the question other than through reference to the existing international law obligations.

#### *Prosecution of smuggling and trafficking*

EU law provides for measures sanctioning those facilitating unauthorised access of migrants to EU territory *inter alia* through smuggling and trafficking.<sup>5</sup> The [Facilitation Directive](#) defines unauthorised entry, transit and residence and provides for sanctions against those who facilitate such breaches. Moreover, in 2011, the [Directive on trafficking in human beings](#) was adopted, requiring MS to introduce effective, proportionate and dissuasive sanctions (Article 3). Furthermore, the [Carrier Sanctions Directive](#) provides for sanctions against those who transport undocumented migrants to the EU.

### **Cooperation with third countries**

#### *Return*

As of late 2010, the [Return Directive](#) introduced common rules on return and removal, detention and re-entry. It establishes certain rights of people intercepted in connection with their irregular border crossing. MS return immigrants either under the [EU readmission agreements](#) or under their bilateral agreements with third countries. Frontex plays a key role in operational cooperation on return. The [European Return Fund](#) provides MS with funding.

MS point to the absence of readmission agreements with third countries of origin or transit, as well the non-compliance of third countries with existing ones, and the difficulties in establishing the identity of an immigrant as the main challenges surrounding the return of irregular immigrants to their countries.<sup>6</sup>

#### *Mobility partnerships*

Mobility partnerships seek to commit third countries to increasing the surveillance of their coastlines and to prevent boats with irregular immigrants leaving from them. They are compensated in return by making visas easier to obtain. Five mobility partnership agreements have been concluded so far, with Morocco, Cape Verde, Georgia, Armenia and Moldova. An agreement with Tunisia has also been negotiated and is awaiting signature.

#### *Development aid*

The EU has allocated development aid to address the causes of immigration, with migration and development being one of the priority areas of the GAMM initiative. Regional dialogues on migration, mobility and security take place in the context of the [Rabat Process](#) and the [Partnership on Migration, Mobility and Employment with the African Union](#). Moreover, the EU currently assists North African countries in migration matters through the [European Neighbourhood and Partnership Instrument](#) and through the [Thematic programme for Cooperation with third countries in the areas of Asylum and Migration](#).

#### *'Humanitarian corridors'*

In its [Communication](#) on the TFM, the Commission proposed to set up 'humanitarian corridors' for the provision of humanitarian visas to people in danger, at MS' consulates in the third country in question. This should prevent people in danger from undertaking dangerous trips to Europe. The creation of legal channels to enter the EU has also been [demanded](#) by Parliament.

### **Stakeholders' positions**

[Public opinion](#) towards immigration has become increasingly negative in recent years, not least as a consequence of the economic crisis in many MS. This has been reflected also in [political discourse](#).

Criticism has been voiced over the lack of enforcement of existing instruments to combat irregular immigration, such as return and removal. It is argued that the low probability of return for irregular immigrants who do not need international protection is a pull factor and undermines public trust in national and European authorities.

Immigration has also had an impact on intra-EU mobility with some MS calling for (temporary) [reinstatement of border controls](#). In this context, a general tendency can be [observed](#) towards a preference for national rather than European solutions to cope with irregular immigration.

On the other hand, [some](#) demand a more coherent EU foreign policy to avoid, or react to, conflicts in neighbouring countries and thus address the roots of the problem of people fleeing their countries. In this context, the 'externalisation' of EU borders is seen as flawed due to North African countries' lack of ability to prevent the departure of unsafe boats with immigrants<sup>7</sup> and due to incompatibilities with international law.<sup>8</sup>

Moreover, [think-tanks](#) and [NGOs](#) are critical that legal migration issues have been barely addressed at EU level, despite extensive legislation in the field of irregular immigration. Criticism focuses on the idea that EU migration policy responds only to security concerns, creating a '[fortress Europe](#)'. Furthermore, scholars call for the EU to make sure that MS do not treat rescues at sea by private companies' ships as 'smuggling', thus reducing their willingness to undertake rescues.<sup>9</sup>

In its [resolution](#) of 23 October 2013, Parliament welcomed the Commission's proposals to deploy a search-and-rescue operation from Cyprus to Spain, and to increase Frontex's budget and capabilities in order to save lives and combat human trafficking. It called for a more holistic approach to migration in order to ensure

that issues interlinked with migration can be dealt with in a comprehensive manner.

### Some coastal countries' perspectives

#### Italy

Italy's central piece of legislation in the field of irregular immigration is the Consolidated Act of measures governing immigration and norms on the condition of foreign citizens (Legislative Decree 286/1998). In 2009, in response to notable increases in the influx of irregular migrants, a so called 'security package' (*pacchetto sicurezza*) was adopted, which introduced stricter rules regarding refusals at the border, and intensified coastal patrols and rejections at sea. Moreover, the law introduced a 'crime of illegal immigration'. Immigrants staying illegally could be imprisoned after the issue of an expulsion order. The CJEU [held](#) that a prison penalty might undermine the objectives of the EU Return Directive to establish an effective removal policy. The Court clarified however that MS are not precluded from regulating a situation in which coercive measures have not resulted in the removal of a third-country national staying illegally on their territory.

Italy has been strengthening cooperation on readmissions and border controls with third countries, e.g. with Tunisia and Libya.<sup>10</sup> A new 'Mare Nostrum' patrolling, rescue and surveillance operation has been launched to improve humanitarian rescue activities in the Mediterranean.

The European Court of Human Rights (ECtHR) held in a 2012 [judgment](#) that the Italian coastguard violated the European Convention on Human Rights by returning some 200 immigrants, including potential refugees, to Libya based on an agreement between Italy and Libya. The Court held that given the situation in Libya, which had no functioning asylum system, the transfer of the immigrants violated the principle of *non-refoulement* (Article 3 ECHR, prohibition of torture).<sup>11</sup>

Italian authorities have launched public awareness campaigns about the dangers of irregular immigration, particularly by children, in third countries at the origin of high migratory flows. It has also signed bilateral agreements with countries such as Morocco, and Egypt, aimed at promoting labour migration, *inter alia* through creating lists of workers in the country of origin, as well as through language training.<sup>12</sup>

### Spain

The number of irregular immigrants arriving in Spain has dropped in recent years, but remains high in comparison with other MS. Spain is by far the country in the EU and the Schengen area with the most refusals of entry (199 830 in 2012, according to Eurostat; see annex for data for all MS). This high number largely reflects the migratory pressures faced at the external borders of the Spanish enclaves in Africa, Ceuta and Melilla,<sup>13</sup> while the number of irregular immigrants arriving on the Canary Islands dropped to 173 people in [2012](#), from 31 678 in 2006, due to the increased efforts of the Spanish border surveillance authorities supported by Frontex.

Recently, media reports have drawn attention to alleged illegal push-backs of immigrants to Morocco. According to [El País](#), around 20-30% of the migrants who manage to climb over the fence do not reach the temporary stay centre for migrants as they are intercepted before getting to a police station and returned to Morocco. Push-backs are often justified using a 1992 readmission agreement between Spain and Morocco.

In the context of collaboration with the countries in West Africa, Spain has provided Mauritania with a helicopter, an aircraft and two patrol boats, and Senegal with two patrol boats, an ocean-going vessel and a helicopter. Spain has signed cooperation agreements on immigration with several Asian and African countries.<sup>14</sup>

### Malta

With a population of approximately 418 000, the EU's smallest state is subject to heavy migratory pressure. Between January and October 2013, some 2 008 people [arrived](#) in Malta by boat from Libya. Recently, a [report](#) on Malta by the UNHR denounced the fact that detention measures are implemented automatically as a consequence either of a refusal to grant access to national territory or of the issue of a removal order. The Ministry of Home Affairs in contrast stated in a [press release](#) in June 2013 that over 90% of immigrants entering Malta irregularly apply for international protection and are duly interviewed.

On 6 August 2013, the Maltese government refused access to a tanker that had rescued 102 African migrants off the Libyan waters and demanded the tanker take the migrants back to Libya. Finally, Italy agreed to take the migrants. The Maltese government argued that the migrants had no urgent medical needs, and demanded support from the EU and the other MS to cope with the asylum surge. Tensions had risen earlier between Italian and Maltese authorities on decisions on where people rescued on the high seas should be disembarked. In October 2012 the Maltese Police and Italian Department of Public Safety signed a Memorandum of Understanding to strengthen police cooperation, in order to foster cooperation and communication in the fight against trafficking in human beings, illegal immigrants, organised crime and terrorism.<sup>15</sup>

Following an inter-ministerial pledging conference organised by the European Commission in May 2011, 217 beneficiaries of international protection were relocated in 2012 from Malta to other MS. Relocation activities were organised either as part of the EU pilot project on Intra-EU relocation (EUREMA), or through bilateral projects.<sup>16</sup>

### The Australian case

Australia faces similar issues to the EU's Mediterranean states, with migrants seeking to enter the country by means of dangerous voyages in unsuitable boats. The first arrivals by boat on Australian shores were reported in the mid 1970s, mainly from Vietnam. Arrivals by boat of irregular immigrants and asylum-seekers again came under the spotlight in 2008 when their number increased.

The Australian approach to this type of migration is characterised by distinguishing between 'genuine refugees' who wait offshore in resettlement camps and other refugees arriving directly in Australia by boat.<sup>17</sup> The latter are often seen as taking the places of those who are awaiting resettlement. Particularly in the early 2000s emphasis was placed on discouraging unauthorised arrivals through the introduction of mandatory detention laws, processing of asylum-seekers offshore and cooperation with transit countries such as Indonesia and Malaysia. Under the Migration Act, non-national citizens without the right to enter or stay must be detained. However, since 2011, the mandatory detention regime has been eased with some boat arrivals being issued 'bridging visas' while their claims are decided.<sup>18</sup>

Another instrument to deter people from undertaking unauthorised boat journeys to Australia is the issue of Temporary Protection Visas to all those arriving by boat. In this way they are not allowed to settle permanently in Australia and their status is reassessed every few years.<sup>19</sup>

Recently, [offshore processing](#) of asylum claims has been reintroduced by the

Australian government. This so called 'Pacific solution' envisages the transfer of asylum-seekers who reached Australia by boat to refugee camps offshore, e.g. in the South Pacific island state of Nauru or Papua New Guinea's Manus Island.

In 2011, the Government signed an agreement with Malaysia to send the next 800 refugees that Australia received by boat there, in exchange for accepting 4 000 refugees from Malaysia over the next four years. The 'refugee swap' ('Malaysia solution') was [deemed](#) to

deter refugees from making the dangerous journey to Australia by boat and "smash the people smugglers' business". The High Court [declared](#) the agreement invalid since Malaysia is not a signatory to the Geneva Refugee Convention and due to mistreatment of asylum-seekers there.

Between September 2012 and September 2013, [18 119](#) persons, who arrived in Australia by boat, claimed international protection, from a total of 26 427 asylum-seekers. In the same period, about 68% of asylum-seekers who arrived by sea, whose claims were considered and decided in the first instance by officials, were granted refugee status.

### Main references

[Practical measures to reduce irregular migration/](#) European Migration Network, October 2012.

[Handbook on European law relating to asylum, borders and immigration/](#) EU Agency for Fundamental Rights, 2013.

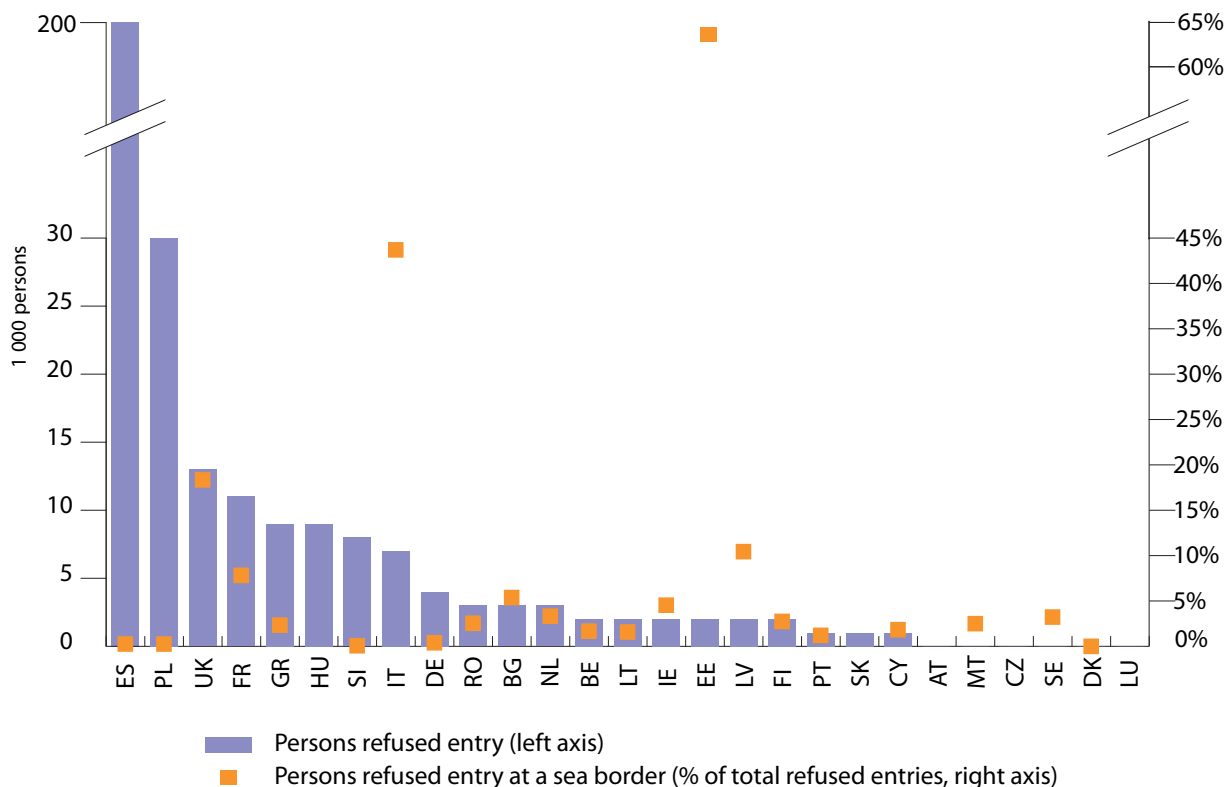
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## Annex: Persons refused entry to EU Member States (2012)



Source: Eurostat

## Endnotes

- <sup>1</sup> Commitments undertaken in the [European Pact on Immigration and Asylum](#) adopted by the European Council in 2008.
- <sup>2</sup> [Handbook on European law relating to asylum, borders and immigration](#)/ EU Agency for Fundamental Rights, 2013.
- <sup>3</sup> The Court held that the guidelines contained essential rules on external maritime border surveillance based on certain political choices, which make the involvement of Parliament necessary.
- <sup>4</sup> The proposal establishes that "No person shall be disembarked in, or otherwise handed over to the authorities of a country where there is a serious risk that such person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment or from which there is a serious risk of expulsion, removal or extradition to another country in contravention of the principle of non-refoulement".
- <sup>5</sup> While smuggling represents willing entry to the EU by immigrants, trafficking means "recruitment, transportation, transfer, harbouring or reception of persons, ..., by means of the threat or use of force or other form of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, ..., for the purpose of exploitation". Art. 1 Directive 2011/36/EU.
- <sup>6</sup> [Practical measures to reduce irregular migration. Synthesis Report](#)/ European Migration Network, October 2012, p. 52.
- <sup>7</sup> [EU borders and their controls. Preventing unwanted movement of people in Europe?](#) / E Guild, S Carrera, CEPS Essay No 6 /14 November 2013, p. 2.
- <sup>8</sup> [The European Union and illegal immigration in the southern Mediterranean: the trap of competing policy concepts](#) / T Demmelhuber, *The International Journal of Human Rights* 2011, pp. 818, 819.
- <sup>9</sup> EU borders and their controls, op. cit., pp. 2, 13, 14.
- <sup>10</sup> [European Migration Network \(EMN\) country factsheet on Italy 2012](#), p. 3.
- <sup>11</sup> ECtHR, [Hirsi Jamaa and Others v Italy](#), No. 27765/09, 23/02/2013.
- <sup>12</sup> [EMN country factsheet on Italy 2012](#), p. 26.
- <sup>13</sup> [Practical measures to reduce irregular immigration](#), op. cit., p. 26.
- <sup>14</sup> [Practical measures to reduce irregular immigration. Spain](#) / EMN report 2011, p. 25.
- <sup>15</sup> [EMN country factsheet Malta 2012](#), p. 3.
- <sup>16</sup> [Annual report on the situation of asylum in the European Union 2012](#) / European Asylum Support Office, 2013, pp. 46-47.
- <sup>17</sup> [Australia and Asylum-Seekers](#) / J McAdam, *International Journal of Refugee Law* Vol. 25 (2013) No. 3, p.437.
- <sup>18</sup> [Boat arrivals in Australia since 1976](#) / J Phillips, H Spinks, Parliament of Australia, Parliamentary Library, July 2013, pp. 14, 15.
- <sup>19</sup> [Australia and Asylum-Seekers](#), op. cit., p. 441.