

Anti-smuggling penal policies: A cross-national exploration

Ciclo Seminariale: Mobilità e Sicurezza nel Mediterraneo
March 2021

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Introduction: Criminalisation models



- **Policies against human smuggling / irregular migration – Criminalisation models** → Two pillars
 - A) **Criminalising facilitation** of irregular migration (unauthorised entry / residence) ([Mitsilegas 2015](#))
 - [Protocol against Smuggling of Migrants](#) supplementing Convention against Transnational Organized Crime 2000 (**Palermo Convention**; Art. 6)
 - Council [Framework Decision 2002/946/JHA](#) of 28 November 2002 on strengthening of penal framework to prevent facilitation of unauthorised entry, transit and residence (Art. 1)

Introduction: Criminalisation models



- **Related** to [Directive 2002/90/EC](#) of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (Art. 1)
- **Facilitators Package:**
 - **Dispenses with condition** of obtaining **financial / other material benefit** (Art. 1 Directive 2002/90/EC)
 - Sets out particularly **severe penalties** (maximum sentences of no less than 8 yr.; Art. 1(3), 1(4) FD 2002/946/JHA)
 - Maximum penalties >5 yr. of imprisonment: BG, CY, EL, ES, IE, LT, LV, PL, RO, SK, UK
 - **Broad scope of criminalised conducts**

Introduction: Criminalisation models



- **EU Action Plan against migrant smuggling (2015-2020)** (COM(2015) 285)
 - Specific goal → Enhanced police / judicial response
 - Identifying, capturing, disposing of vessels
 - Depriving smugglers of their profits
 - Enhancing operational cooperation against migrant smuggling

Introduction: Criminalisation models



- B) **Criminalising irregular migration** itself
 - [FRA \(2014\)](#)
 - **Criminalising irregular entry** (generally, as misdemeanour) → **21** EU **MMSS** (exceptions: CZ, ES, MT, PT, SI, SK)
 - Criminalising **irregular stay** (generally, as misdemeanour) → **14** EU **MMSS** (exceptions: BG, CZ, EL, ES, FI, FR, LT, LV, MT, PT, RO, SI, SK)
 - **By contrast** → Criminalising **facilitation** → **26** EU **MMSS** (exception: SI)

Introduction: Criminalisation models



- [US Library of Congress report \(2019\)](#)
 - **123 countries criminalise** irregular migration
 - **Exceptions:** mainly, **Latin American nations** and certain EU and **Eastern European countries** (+ Turkey)

Anti-smuggling penal policies: Main problems



- Anti-smuggling penal policies → **Main problems**
 - **Normative dilemma** → **Criminalisation of irregular immigration as tricky legal issue** ([Spena 2017](#))
 - Normative / **factual challenge** → **Criminalisation of facilitation activities easily leads to racially / nationally biased penal practices**
 - E.g.: [Recent Italian cases](#)
 - E.g.: **Germany** (judicial data, 2010-2019) → **Noncitizen** sentenced individuals: 35.1% (all convictions); **93.1%** (smuggling crimes)

Anti-smuggling penal policies: Main problems



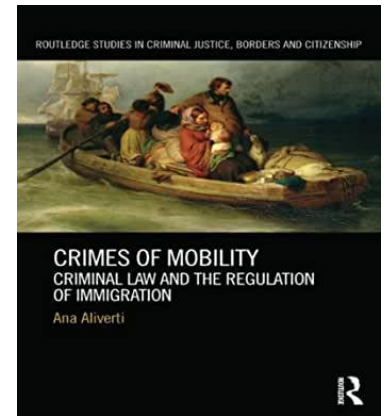
- **Normative / factual challenge** → Potential **criminalisation** of **humanitarian** activities ([Carrera et al. 2020](#); [European Parliament 2016](#))
 - **Unresolved by EU law provisions** (Art. 1(2) Directive 2002/90/EC)
 - [FRA \(2014\)](#)
 - Some EU MMSS (DK, EE, HR, LV, RO, SI) do not exclude humanitarian assistance from facilitation crimes + do not require profit
 - **Many EU MMSS** (BG, CY, CZ, EL, FR, HU, IT, LT, LU, MT, NL, PL, PT, SE, SK) **exclude humanitarian assistance** and / or **require profit only** in **certain facilitation crimes**

Anti-smuggling penal policies: Main problems

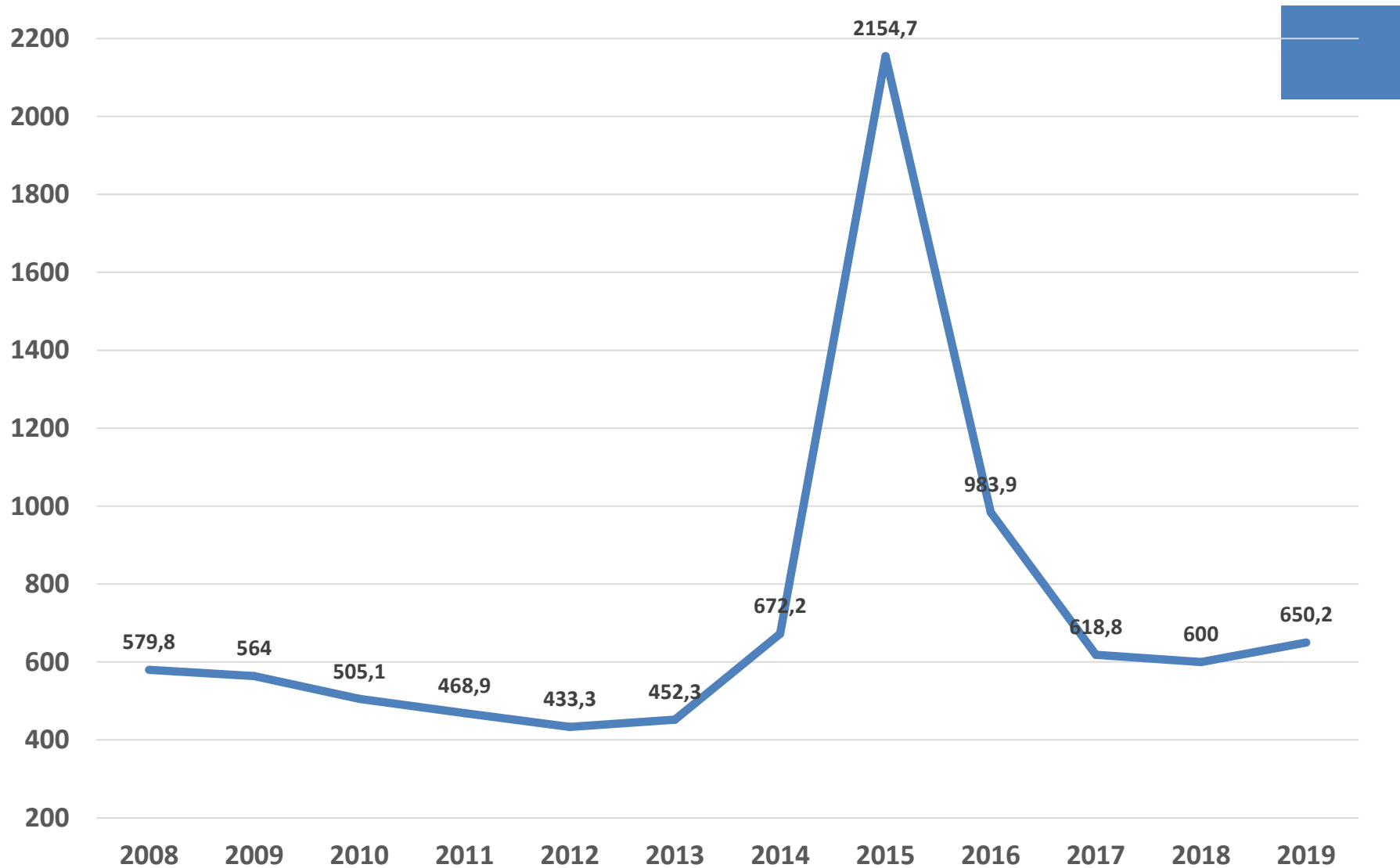


- **Still debated at political level**
 - New [Pact on Migration and Asylum](#) (September **2020**; COM(2020) 609)
 - **New [Guidance on implementation of EU rules on definition / prevention of facilitation activities](#)** (COM(2020) 6470; September 2020)
 - **Preventing criminalisation humanitarian actors** (including rescue operations)
 - Issue **recently** addressed by [FRA \(2020\)](#)

Anti-smuggling penal policies: Law in action

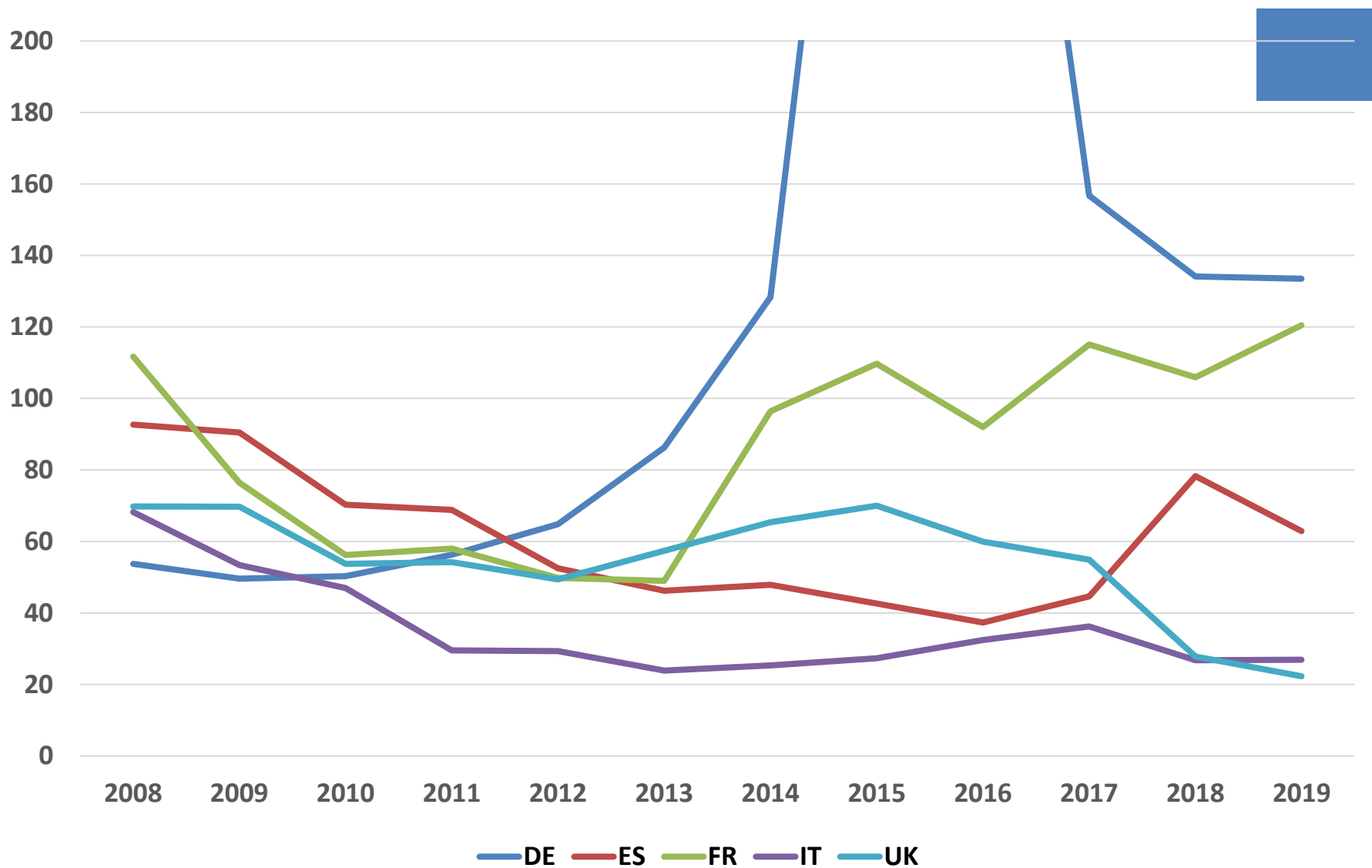


- **Overlooked aspect** → **Criminalisation efforts are hardly effective**
([Aliverti 2012a](#), [2012b](#), [2013](#))
 - **Immigration crimes** play **relatively insignificant role** within European criminal justice systems
 - **Criminal justice system's contribution to tackle smuggling / irregular mobility is largely irrelevant**



Detected undocumented noncitizens, EU28, 2008-2019 (thousands)

Source: Eurostat



Detected undocumented noncitizens, EU countries, 2008-2019 (thousands)

Source: Eurostat

Anti-smuggling penal policies: Law in action



- **Immigration crimes in Spain** (2010-2019, average) [source: INE]
 - Total convictions: 323,595 per year
 - Imm. crimes (**facilitation**): **286 (0.09%)** per year
 - Detected irregular immigrants: 55,137 per year

- Immigration crimes in **France** (2012-2018, avg.) [source: Ministry of Justice]
 - Total convictions: 574,970 per year
 - Imm. crimes (**IrrMig**): **2,502 (0.44%)** per year
 - **Detected** irregular immigrants: 88,253 per year (**Imm. cr.: 2.84%**)

Anti-smuggling penal policies: Law in action



- Immigration crimes in **Germany** (2010-2019, avg.) [source: DESTATIS]
 - Total convictions: 753,432 per year
 - Imm. crimes (**facilitation**): **817 (0.11%)** per year
 - Imm. crimes (**IrrMig**): **6,495 (0.86%)** per year
 - **Detected** irregular immigrants: 155,736 per year (**Imm. cr.: 4.17%**)

Anti-smuggling penal policies: Law in action



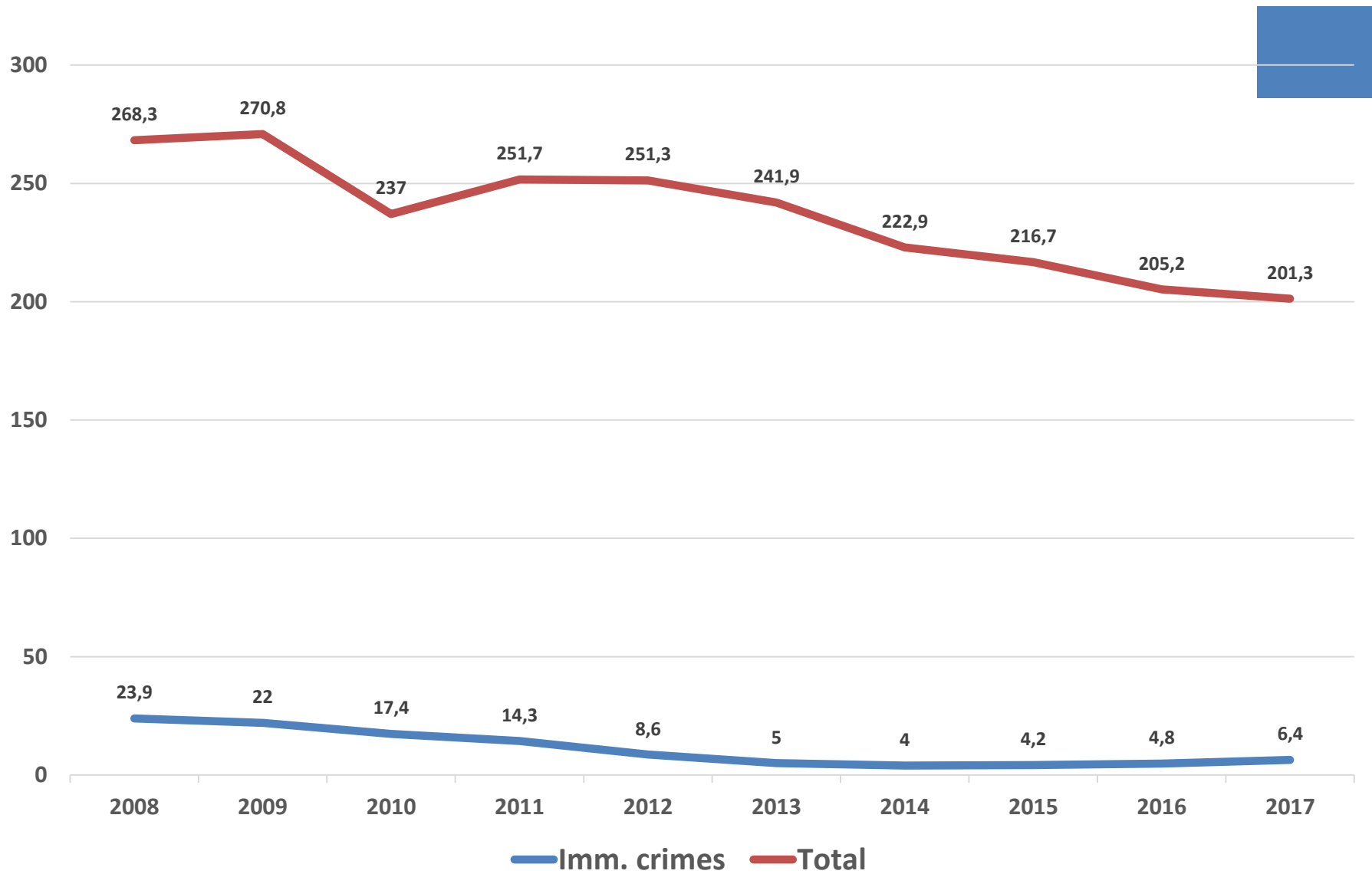
- Immigration crimes in the **UK** (2010-2019, avg.) [source: Ministry of Justice]
 - Total convictions: 1,241,272 per year
 - Imm. crimes (**facilitation**): **328 (0.026%)** per year
 - Imm. crimes (**IrrMig**): **31 (0.0025%)** per year
 - **Detected** irregular immigrants: 51,493 per year (**Imm. cr.: 0.06%**)

Anti-smuggling penal policies: Law in action



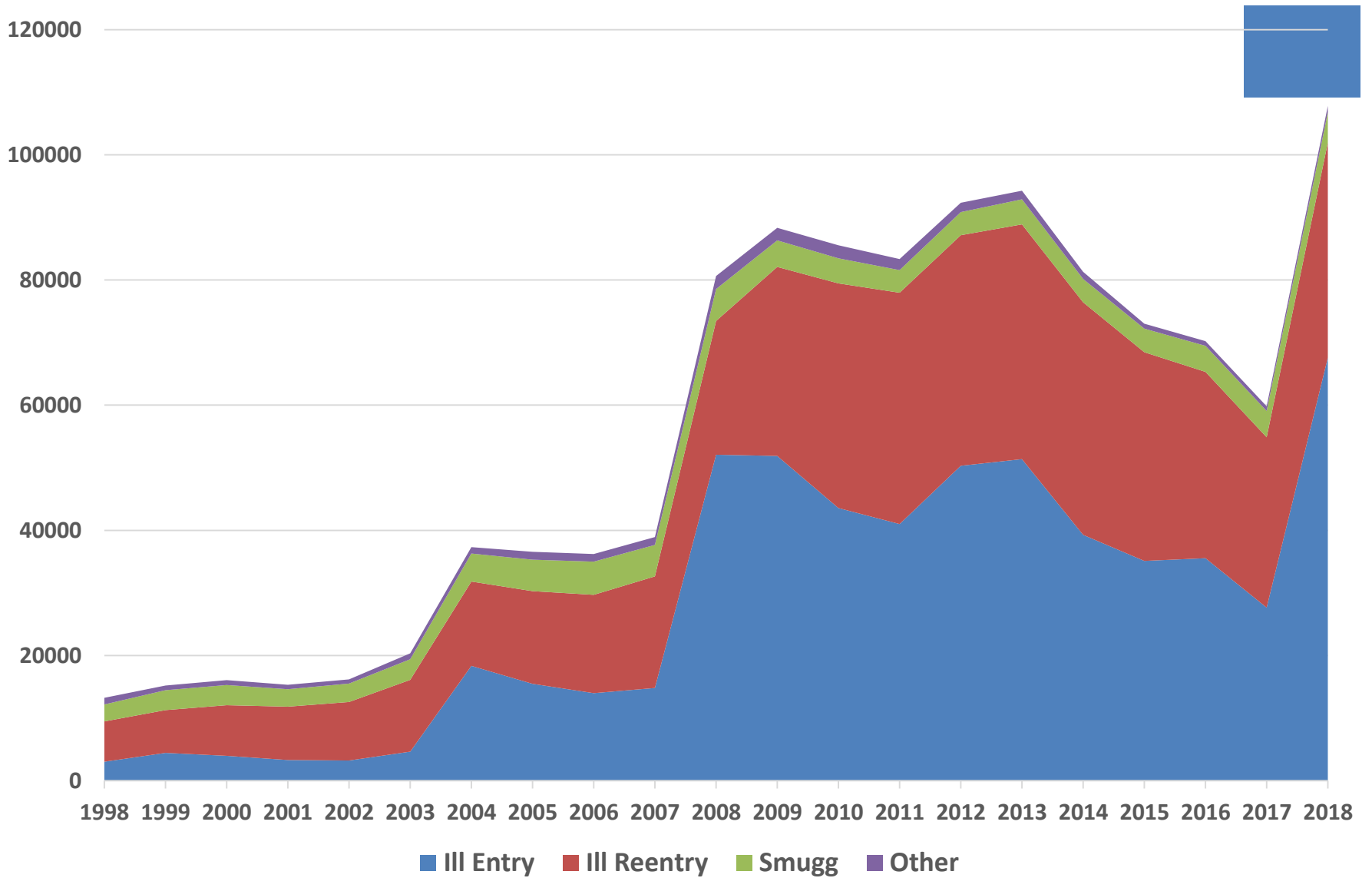
- Immigration crimes in **Italy** (2008-2017, avg.) [source: ISTAT]
 - Total convictions (felonies): 247,784 per year
 - **Imm. crimes** (felonies): **11,065 (4.47%)** per year
 - **Detected** irregular immigrants: 37,257 per year (**Imm. cr.: 29.70%**)

- Does the **Italian** case **challenge Aliverti's thesis?**



Convictions in Italy (felonies), 2008-2017 (thousands)

Source: ISTAT



Noncitizens prosecuted for immigration crimes, US, 1998-2018

Source: US Department of Justice

Anti-smuggling penal policies: the US case



- **Criminalisation of irregular migration in the US**
 - US criminalisation efforts essentially rely on **2 irregular migration crimes** → Illegal entry / illegal re-entry
 - **Facilitation** criminal **offences** (bringing in / harbouring undocumented aliens) do **not** play **significant role** in practice
 - 2018 data → Ill Entry (62.7%); Ill Re-entry (31.9%); Smuggling (4.5%)

Anti-smuggling penal policies: the US case



- Illegal entry / Illegal re-entry (federal crimes)
 - **Illegal entry** ([8 U.S.C. Section 1325, I.N.A. Section 275](#))
 - **Misdemeanour** → Punished with fine, or imprisonment up to 6 months, or both
 - **Illegal Re-entry** ([8 U.S.C. Section 1326, I.N.A. Section 276](#))
 - **Felony** → Punished with fine, or imprisonment up to 20 years, or both
 - Requires previous enforcement of crime-related deportation

Anti-smuggling penal policies: the US case



- Criminal offences **created** in **early 20th century** (1929) ([Eagly 2010](#); [García Hernández 2019](#))
- However → **Hardly enforced** until late 1990s – **early 2000s** ([García Hernández 2018](#))
- Until then → **Apprehended** undocumented **noncitizens** were **largely ‘pushed back’** (returned) to Mexico, without formal criminal law procedure ([Abrego et al. 2017](#); [Chazaro 2016](#); [Vázquez 2017](#))

Anti-smuggling penal policies: the US case

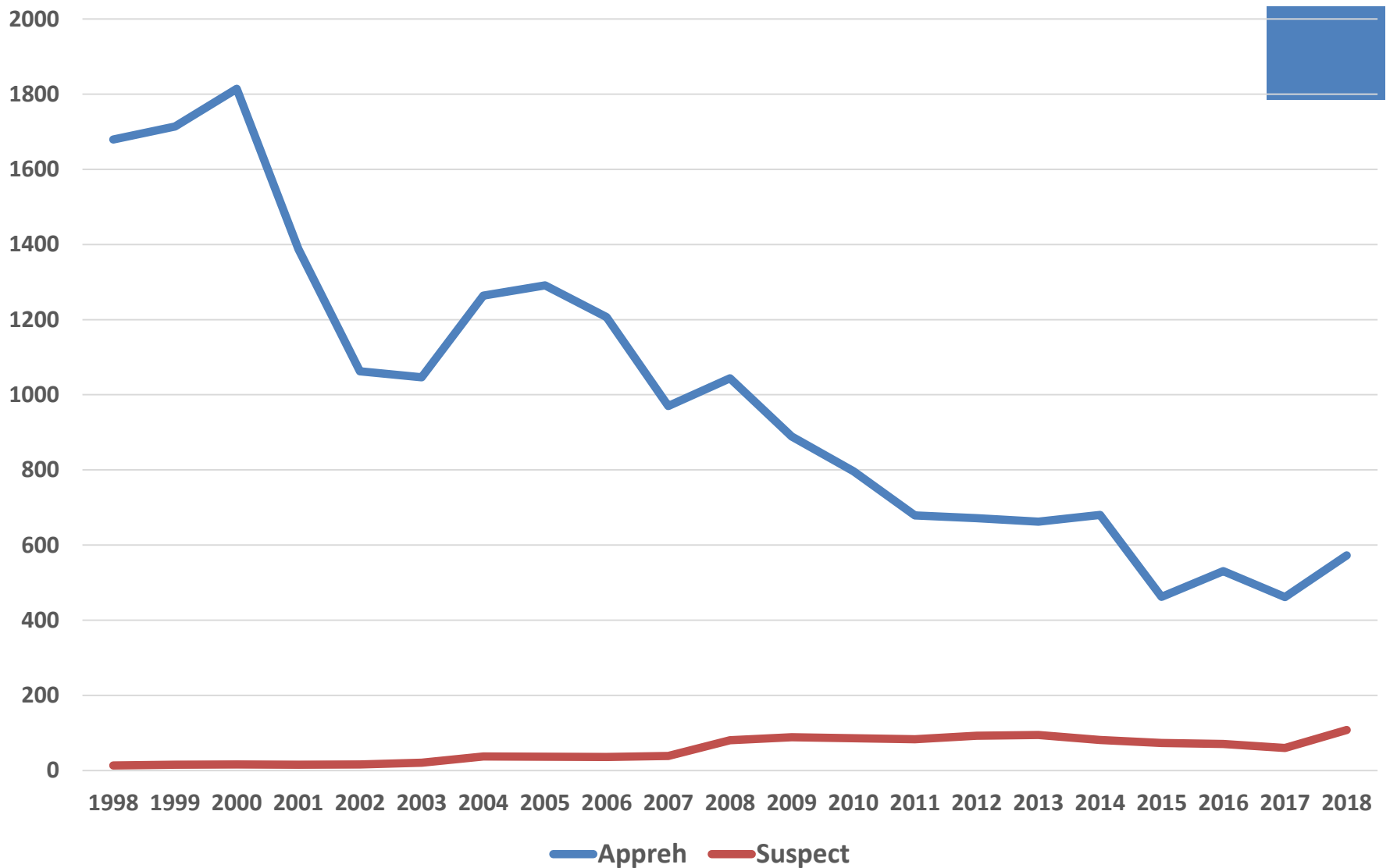


- **Immigration crimes gain momentum → Determinants**
 - Rising **anti-immigration sentiments** → Especially after **9-11** terror attacks ([Armenta 2017](#); [Kanstroom 2012](#); [Wadhia 2015](#))
 - **Expanding immigration enforcement system** → Increasing **financial resources** ([Golash-Boza 2015](#); [Kanstroom 2012](#)) → Increasing **logistical resources** (new immigration detention estate) ([Macías-Rojas 2016](#); [Koulish 2010](#))
 - Creation of **‘fast-track’** criminal law **procedures** → **Managerial criminal justice** → **‘Assembly-line’** criminal justice ([Kubal and Olayo-Méndez 2020](#); [Martínez et al. 2018](#))

Anti-smuggling penal policies: the US case



- **2005** → Creating '**Operation Streamline**' in SW border areas
 - [Dan Rather Report 'Operation Streamline'](#) (2013)
- **However** → Even in US → **Criminalisation efforts may not have significant effects on migration flows** ([Chacón 2012](#))



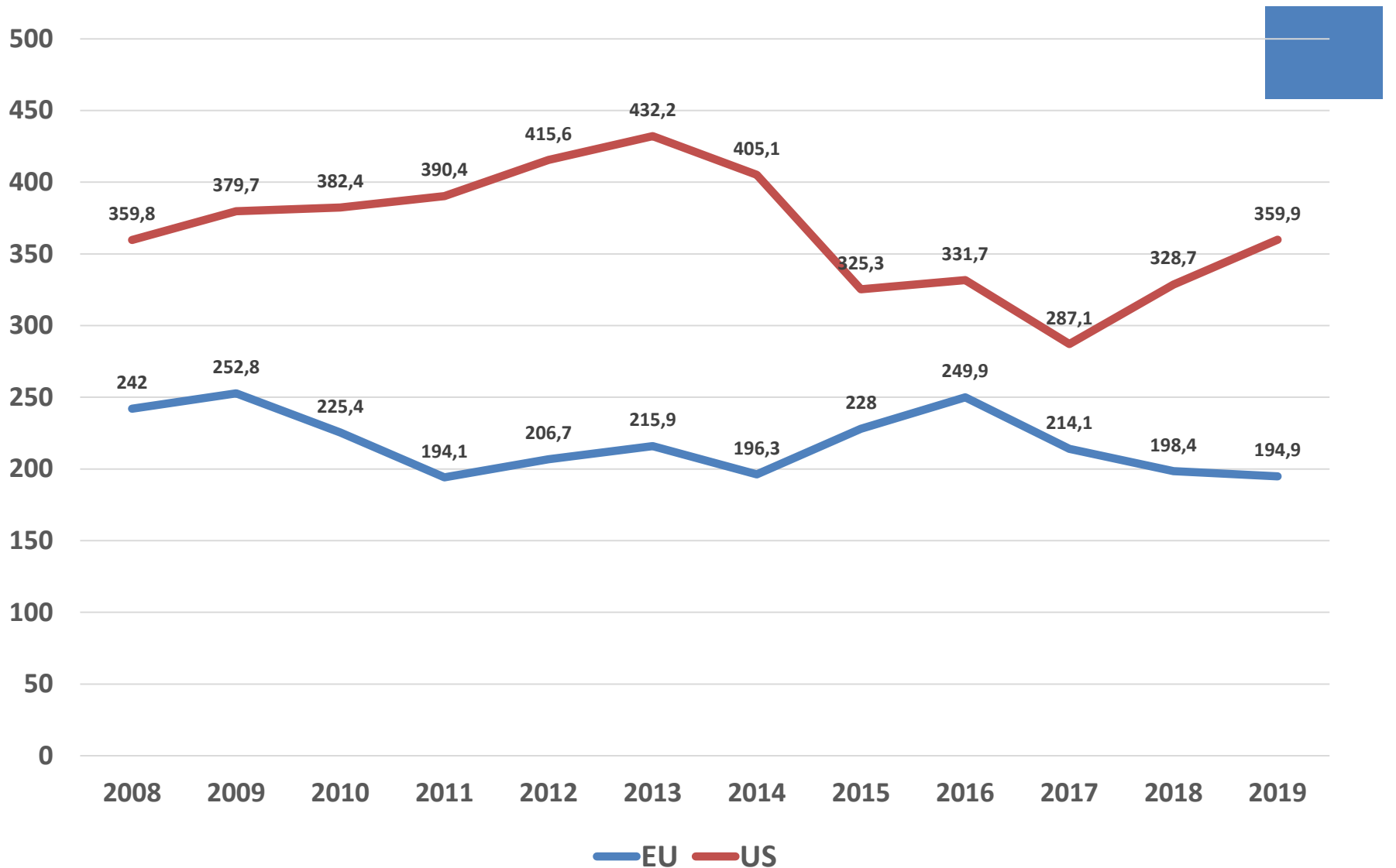
Apprehended and prosecuted undocumented noncitizens, US, 1998-2018 (thousands)

Source: DHS

Anti-smuggling penal policies: Conclusions



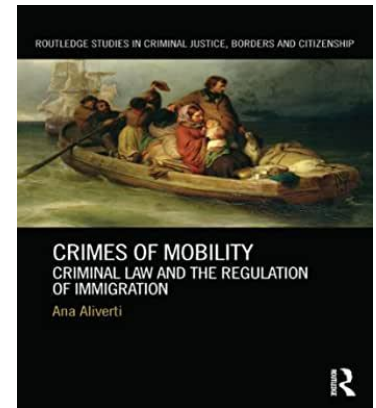
- **Conclusions (I)**
 - **Wide-ranging apparatus** aimed at criminalising irregular migration / facilitation / smuggling → **Prerequisites**
 - **Managerial** criminal justice **procedures**
 - **Institutional capacity** to enforce far-reaching **deportation policies**



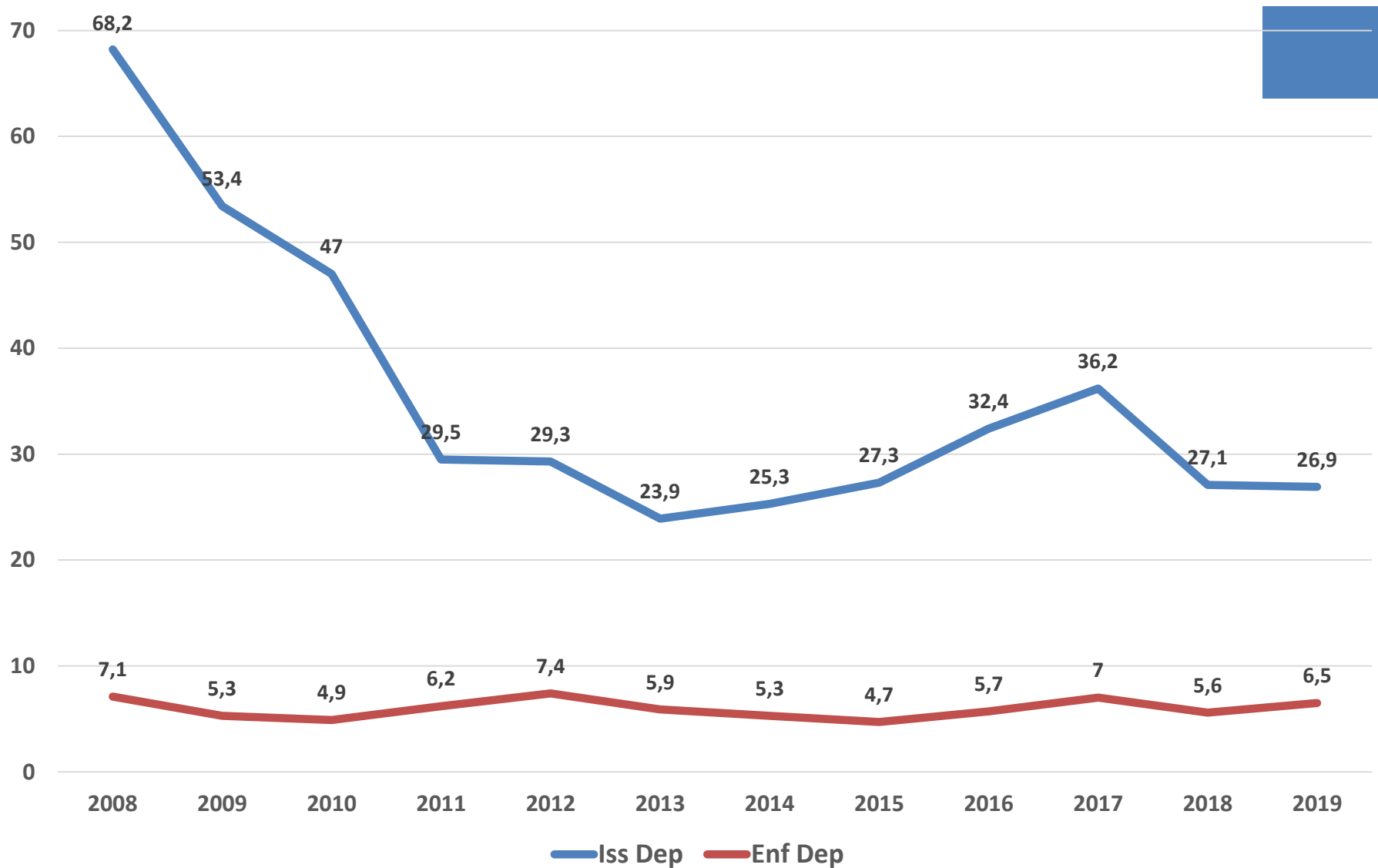
Deported noncitizens, EU28 and US, 2008-2019 (thousands)

Sources: Eurostat; DHS

Anti-smuggling penal policies: Conclusions



- **Conclusions (II)**
 - Further **developing Aliverti's thesis** on criminalization of immigration practices in Europe
 - **Negative correlation** between scope of **deportation system** and scale of **criminalisation practices**



Issued and enforced deportation orders, Italy, 2008-2019 (thousands)

Source: Eurostat