

LEGAL AND JUDICIAL INFORMATION ON MIGRANT SMUGGLING

SWITZERLAND

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GENERAL INFORMATION ON MIGRATION



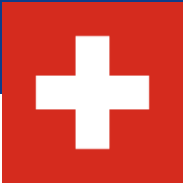
MAIN FIGURES AND TRENDS

By the end of July 2023, 14,357 asylum claims had been filed in Switzerland. This was the highest level for January to July since 2016. The top two nationalities by far were Turkey (3,216 claims) and Afghanistan (3,143), then came Eritrea (1 152), Algeria (991) and Morocco (918). The increase in the number of asylum claims in Switzerland still seems to stem more from migration along the Balkan route than from the situation in the Mediterranean. For example, some 12,900 Guineans and 12 600 Ivorians arrived in Italy by sea between January and July 2023. Over the same period the number of persons of these two nationalities arriving at the federal asylum centres managed by the Swiss State Secretariat for Migration (SEM) approached no more than 400. None of the top countries of origin in Switzerland are among the top 10 of migrants arriving in southern Italy.



MIGRATORY ROUTES

The main points of entry for irregular migrants to Switzerland are the southern and eastern borders. The southern border, with Italy, particularly the Chiasso border-crossing in the canton of Ticino, has traditionally been the busiest entry point. By contrast, the eastern border, with Austria, has only become active in recent years as a result of the huge increase in migration along the Balkan Route. Most migrants entering by the southern route do so by train, but they also come by car and, more recently, they have been using international buses (Flixbus). Some, particularly those entering by car, may ask for the help of a “facilitator”, a person accompanying them when crossing the border. Most do not intend to stay in Switzerland and are simply passing through to reach other European countries, especially Germany. The situation at the eastern border is slightly different. Most migrants enter Switzerland from Austria by train (on the direct rail link from Vienna to Zürich) and do not generally seek the help of a smuggler. However, some of them, particularly the young Afghans, claim asylum in Switzerland.



INSTITUTIONAL ORGANISATION

Detection of migrant smuggling

Federalism is one of the fundamental principles of Swiss constitutional law. It can be defined as a specific form of apportionment of powers within the state, aimed mainly at preserving diversity in unity and bringing the state closer to citizens. Anti-immigrant-smuggling measures and the protection of victims fall within the remit of various authorities and organisations. The Confederation and the cantons both perform key tasks.

Federal Office for Customs and Border Security (FOCBS)

The FOCBS enhances security by deploying mobile units in border areas, takes part in combating crime and illegal immigration, for example through searches for persons and vehicles, helps to curb drug trafficking and limit forgery of identity documents and contributes to Schengen external border checks at airports.

Cantonal police

The cantonal police forces are responsible, within the limits of their appointed tasks, for ensuring public safety, combating crime and controlling Schengen external borders at airports.

Labour inspectorates, labour market supervisory authorities, migration offices and other relevant authorities

These authorities report offences to the criminal prosecuting authorities if they discover evidence of migrant smuggling in the course of their duties.

Criminal proceedings

Federal Office for Customs and Border Security (FOCBS)

Based on delegation agreements and memorandums of understanding with the cantonal police, the FOCBS reports cases of migrant smuggling to the prosecuting authorities.

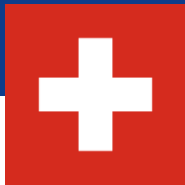
Cantonal police

As criminal prosecution authorities, the cantonal police forces conduct investigations on migrant smuggling and carry out searches on the instructions of prosecutors.

Cantonal prosecutors' offices

The cantonal prosecutors' offices conduct criminal investigations on alleged perpetrators, issue summary penalty orders in their fields of competence and file indictments with the relevant courts.

Judicial authorities



The judicial authorities rule on cases of migrant smuggling and pass sentence.



LEGISLATIVE FRAMEWORK

In Swiss law, the provision punishing migrant smuggling appears in Article 116 of the Federal Act of 16 December 2005 on Foreign Nationals and Integration (FNIA; RS 142.20). This ancillary criminal law provision penalises anyone who facilitates the entry, exit or illegal residence of a foreign national or finds employment for a foreign national in Switzerland without the required authorisation. Paragraph 1 describes the basic offence and paragraph 3 the aggravated offence. Paragraph 2, which used to describe less serious cases for which penalties could be mitigated, was repealed by a law on the harmonisation of sentencing. Article 116 FNIA punishes those who are complicit in the offences covered by Article 115 FNIA (illegal exit, entry and residence, and work without a permit). It also applies to persons who help a foreign national only once for respectable reasons. The possible penalties are a custodial sentence not exceeding one year or a monetary penalty for the basic offence (Article 116, paragraph 1, FNIA) or a custodial sentence of up to five years or a monetary penalty for the aggravated offence (Article 116, paragraph 3, FNIA).

Foreign Nationals and Integration Act (FNIA)

Article 116. Encouraging unlawful entry, exit or an unlawful period of stay

1. Any person who:

a. in Switzerland or abroad, facilitates the unlawful entry or departure or an unlawful period of stay in Switzerland of a foreign national or assists a foreign national to prepare for the same;

abis. from within Switzerland facilitates the unlawful entry or departure or an unlawful period of stay in a Schengen State of a foreign national or assists a foreign national to prepare for the same;

b. finds employment for a foreign national in Switzerland without the required permit;

c. facilitates the entry of a foreign national who has left Switzerland or the international transit zone of the airports into the sovereign territory of another state in violation of the entry provisions applicable there or assists that foreign national in preparing for such entry;

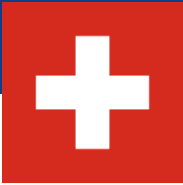
is liable on conviction to a custodial sentence not exceeding one year or to a monetary penalty.

2. ...

3. The penalty is a custodial sentence not exceeding five years or a monetary penalty if the offender:

a. acts intentionally for their own or another's unlawful financial gain; or

COUNTRY FACTSHEET* – Smuggling of migrants



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b. acts for an association or group that was formed for the purpose of the continued perpetration of this offence.

According to the federal and cantonal criminal prosecuting authorities, persons practising migrant smuggling range from isolated individuals getting members of their family across the border to major international criminal networks operating unscrupulously for profit.¹ The scale of penalties provided for in Article 16 FNIA caters for this because it ranges from a simple fine to a custodial sentence of up to five years plus a fine in the event of an aggravated offence.

The Protocol of 15 November 2000 against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime,² includes international definitions which apply to migrant smuggling. In this text, the expression “smuggling of migrants”³ means the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident. “Illegal entry” means crossing borders without complying with the necessary requirements for legal entry into the receiving State.

Since 1 January 2011, the authorities have been able to initiate criminal proceedings against a person living in Switzerland who has helped a foreign national enter a country other than Switzerland in the Schengen area illegally (Article 116, paragraph 1. a^{bis}, FNIA). This adjustment reflects Directive 2002/90/EC of the Council of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence,⁴ which requires the Schengen states to punish complicity in such offences. It requires them in particular to establish appropriate penalties for anyone who knowingly assists a non-national of a member state to enter the territory of a member state or to pass through it illegally. It also punishes assistance with illegal residence provided knowingly for financial gain. Instigation is also punishable. Under the terms of the directive, sanctions must be effective, proportionate and dissuasive. All member states may decide not to punish the behaviour defined in the directive by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

Foreign Nationals and Integration Act (FNIA): Federal Act of 16 December 2005 on Foreign Nationals and Integration (FNIA) (admin.ch)

Swiss Criminal Code (SCC): RS 311.0 - Swiss Criminal Code of 21 December 1937 (admin.ch)

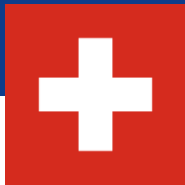
Article 305^{bis} SCC, on money laundering: migrant smuggling within the meaning of Article 116, paragraph 3, a and b, FNIA, is a preliminary money laundering offence under Swiss legislation. Where there is a suspicion of migrant smuggling, the financial intermediaries are obliged to report this to the Money Laundering Reporting Office (MROS), which will immediately report the offence to the prosecuting authorities if it finds that the suspicions are founded. The MROS records all relevant data and may transmit them to other national authorities as part of administrative assistance procedures.

¹ Report on “*Le trafic organisé de migrants et la Suisse*” [“Organised migrant smuggling and Switzerland”], Co-ordination service for measures to combat human trafficking and migrant smuggling (SCOTT), 2014, p. 14

² RS 0.311.541

³ The term “migrant smuggling” may also be used.

⁴ JO L 328 of 5.12.2002



Swiss Criminal Procedure Code (CrimPC): RS 312.0 - Swiss Criminal Procedure Code of 5 October 2007 (Criminal Procedure Code, CrimPC) (admin.ch)



JUDICIAL FRAMEWORK

Prosecution of smugglers

The people who organise smuggling are generally out of reach because they operate in the background and are very rarely in direct contact with those who transport and accompany migrants or with the migrants themselves. It is practically impossible to identify the leaders of smuggling organisations, many of whom live abroad. Thorough investigations (including searches of vehicles, homes, mobile phones and people) are needed to identify the hierarchical structures of smuggling networks. Indicators that these are repeated acts are often lacking and smugglers keep the objects they carry with them to a strict minimum, meaning that the authorities often give up on searches and in-depth investigations. In such cases, smugglers who are arrested are punished by means of summary penalty orders (see below). It is rare for convictions to attract as much media coverage as the trial in the Canton of Nidwald, and as a rule, the criminals convicted are merely those transporting and accompanying migrants.

Role of prosecutors / procedure / investigating methods

Prosecutors manage the procedure and, in accordance with the CPP, order coercive measures such as arrests, searches and surveillance. They bring evidence in court while ensuring defendants' participation rights.

Under Article 352 et seq. CrimPC, prosecutors are also responsible for issuing summary penalty orders, which is how most proceedings against smugglers are concluded. The summary penalty procedure is an accelerated one in which prosecutors take over judicial functions and may impose custodial sentences of up to six months or 180 day-fines.

Prosecutors may only order secret surveillance measures if they are justified by the seriousness of the offence (Article 269, paragraph 2.b, CrimPC, in conjunction with Article 116, paragraph 3, FNIA), that is if the perpetrator acts for their own or another's unlawful gain or for that of an association or a group of persons.

Links with other criminal activities

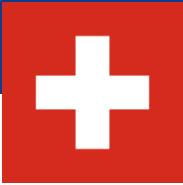
Forgery, money laundering, human trafficking, organised crime.



INTERNATIONAL CO-OPERATION

Exchange of police information

The central office of the Federal Police in charge of human trafficking and migrant smuggling manages international co-operation in this field. It co-ordinates international investigations and exchanges police information with foreign authorities. It co-operates with Interpol and Europol



and takes part among other things in working groups, co-ordination sessions, operational meetings and joint action days.

Exchange of information via the Schengen Information System (SIS)

Exchanging information strengthens international co-operation. The nerve centre of this process is the electronic search system shared by the Schengen states, the SIS. The SIRENE Bureau (Supplementary Information Request at the National Entries) is the national SIS liaison body, attached to the Operations Centre of the Federal Office of Police (fedpol).

Police attachés

Since 1995 fedpol has sent police attachés abroad to support the Swiss police and criminal prosecution authorities in the fight against serious cross-border crime. Since 1 January 2017, they have been authorised to deal with cases normally entrusted to the border police and customs officers on instructions from the FOCBS. Conversely, fedpol may instruct FOCBS attachés to deal with police matters. Fedpol sends police attachés to Brazil, Italy, Kosovo, Serbia, Thailand, Tunisia, Turkey, the United Kingdom and EUROPOL (Netherlands). The FOCBS sends attachés to Bulgaria, Germany, Poland and also to EUROPOL. The scope of the activities of both police attachés and other types of attaché combined can extend to 29 countries in all thanks to co-accreditations (18). A Swiss Liaison Officer has also been seconded to INTERPOL in Lyon.

Money laundering

As a member of the Egmont Group of Financial Intelligence Units (an international organisation bringing together 170 such units), MROS can exchange financial intelligence for the fight against money laundering and the financing of terrorism with partner offices. This means that where there is a suspicion of migrant smuggling, international financial flows can be traced (without surveillance). MROS may acquire intelligence on migrant smuggling from EUROPOL or INTERPOL through the SIRENE Bureau or the Swiss police attaché.

Mutual legal assistance and extradition

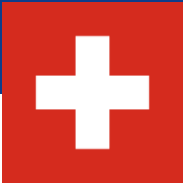
In the sphere of mutual legal assistance in criminal matters, the procedure is governed by the Federal Act of 20 March 1981 on International Mutual Legal Assistance in Criminal Matters (IMAC)⁵ and by various bilateral and multilateral treaties. The Federal Office of Justice is the authority responsible for receiving and passing on foreign requests for mutual legal assistance; some agreements do however provide for a direct channel between the criminal prosecuting authorities (relevant prosecutors). With regard to migrant smuggling, the Federal Office delegates the execution of requests for mutual assistance to the relevant cantonal prosecuting authorities in so far as these are the authorities with jurisdiction for the criminal prosecution of such offences in Switzerland. Decisions by cantonal prosecutors to grant mutual assistance may be disputed in the Federal Criminal Court then the Federal Supreme Court in the cases provided for by Article 84 of the Law of 17 June 2005 on the Federal Supreme Court (LTF).⁶

⁵ RS 351.1; https://www.fedlex.admin.ch/eli/cc/1982/846_846_846/en; further information is available on the following web page:

https://www.fedlex.admin.ch/eli/cc/1982/846_846_846/en

⁶ RS 173.110; <https://www.fedlex.admin.ch/eli/cc/2006/218/fr>

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Switzerland regularly carries out requests for mutual legal assistance with regard to migrant smuggling. Most of these requests are made by European countries but some also come from non-European countries. The Federal Criminal Court and, at last instance, the Federal Supreme Court have, on a number of occasions, confirmed the admissibility of requests when appeals were made to them and have therefore ruled in favour of affording co-operation to foreign states which have requested it.

Switzerland has amended its legislation to increase its capacity to co-operate with other states to combat transnational crime, particularly by providing for certain new mutual assistance measures – such as early transmission of information and joint investigation teams⁷ – which can be useful when co-operating in response to this type of offence.

The Swiss authority in charge of extradition is the Federal Office of Justice. The related procedures are governed in particular by the aforementioned IMAC and the applicable bilateral and multilateral conventions. The Office's decisions on detention and extradition can be contested in the Federal Criminal Court and, at last instance, in the Federal Supreme Court if the conditions set out in Article 84 LTF are met. The Federal Criminal Court also rules on whether offences are political in nature or prosecutions are motivated by political reasons; it is also possible in such cases to appeal to the Federal Supreme Court if the conditions in Article 84 LTF are met. Where asylum proceedings are run in parallel with extradition proceedings, the Supreme Court gives the final ruling on granting refugee status and the possibility of extradition.

Switzerland is regularly confronted with cases of extradition connected with migrant smuggling (a dozen per year). Procedures are based in particular on the European Extradition Convention of 13 December 1957 and its four Additional Protocols, or on its domestic law or other bilateral instruments.

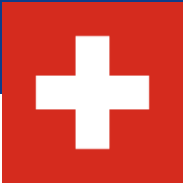
In 2008, Switzerland signed a co-operation agreement with Eurojust. The first Liaison Prosecutor took up her functions in 2015 and has been followed by several more. Eurojust has set up a Focus Group on migrant smuggling which brings together all the national prosecutors of all the countries represented in Eurojust. The aim of the group is to improve legal and operational knowledge and strengthen co-operation on investigations in this area. A Swiss prosecutor is a member.

Participation in international bodies

Switzerland is involved in many different international efforts to combat migrant smuggling. For example, the Swiss Federal Department of Foreign Affairs takes part in the activities of the Working Group on the Smuggling of Migrants set up by the UNODC. It has participated in the Council of Europe Working Group on fostering international co-operation and investigative strategies in fighting the smuggling of migrants and sent a representative from the Federal Office of Justice to attend its meetings. It also supported the action plan produced by this working group through activities with the CDPC.

Lastly, Switzerland is an active member of the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC), which oversees the

⁷ Article 80d^{bis} et seq. IMAC, in force since 1 July 2021



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implementation of the Council of Europe's international criminal co-operation instruments, most of which Switzerland is a party to. Here again, Switzerland makes every effort to have the best possible instruments for international criminal co-operation.



RELEVANT CASES

The relevant prosecuting authority has control over the information on cases pending. In so doing it takes account of tactical considerations.

❖ Case in the Canton of Nidwald

On 5 September 2022, a Gambian transported 23 persons from Italy towards Basel on board a delivery vehicle. They must have been standing for several hours. Other smugglers were supposed to have taken over in Basel and taken the migrants on to France, Germany or Great Britain. The vehicle crossed the border at Stabio (Ticino) at 4.20 a.m., then was checked by police officers two and a half hours later in Hergiswil (Nidwalden), where the 23 persons aboard were able to get out of the vehicle. The driver was placed in detention pending trial. At the beginning of July 2023, through a simplified procedure, he was sentenced by the Nidwald Cantonal Court to partly suspended imprisonment and a financial penalty of 120 day-fines of 10 Swiss francs each. He was given an 18-month unsuspended prison sentence.