INSIGHT

UNRAVELLING *CELAJ*

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ABSTRACT: In the judgment of 1 October 2015 on case C-290/14, *Celaj*, the Court of Justice ruled that Directive 2008/115/EC, known as the Return Directive, in principle does not preclude legislation of a Member State which provides for the imposition of a prison sentence to migrants illegally staying as a result of their illegal re-entry into the country. The comment explores the apparently different attitude taken in the earlier and well known case-law (*El Dridi*, *Achughbabian* and *Sagor*). It first scrutinizes the Court's methodology respectively adopted in that case-law and in *Celaj* while identifying the *effet utile* of the Return Directive and shows that *Celaj* cannot be seen as reversing the Court's approach on the matter. The comment also highlights the full consistency of *Celaj* with *Achughbabian* and *Sagor* on the nature of State's competence to establish provisions on criminal sanctions vis-à-vis irregular migrants as one shared with the Union. However, *Celaj* raises serious doubts in terms of substantive law: since it establishes no conditions and limits to the duration of a custodial sentence for migrants having illegally re-entered an EU Member State in breach of an entry-ban, it potentially undermines the effective return policy which is set as the main purpose of the Return Directive.

KEYWORDS: Return Directive – breach of an entry-ban – custodial sentence for illegal migrants – criminal competence – observance of fundamental rights.

I. INTRODUCTION

In its judgment of 1 October 2015 on case C-290/14, *Celaj*, the Court of Justice of the European Union ruled that Directive 2008/115/EC, known as the Return Directive,[1] in principle *does not* preclude legislation of a Member State which provides for the imposition of a prison sentence to migrants illegally staying as a result of their illegal entry into the country. As is well known, in *El Dridi*,[2] the Court had taken the opposite stand and had

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[1] Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals.

[2] Court of Justice, judgment of 28 April 2011, case C-61/11 PPU, *El Dridi*.

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followed on its own footsteps in two successive rulings (*Achughbabian*[3] and *Sagor*[4]). *Celaj* is interesting precisely in connection with the different attitude of the Court.

Indeed, while the four cases are all about criminal sanctions involving deprivation of liberty for migrants in the process of being deported from EU Member States on account of their illegal stay, the circumstances of the case in *Celaj* are unprecedented: unlike in the previous cases, the applicant in the main proceedings is an illegal migrant who, after having returned to his home country as a result of an earlier deportation procedure in compliance with Directive 2008/115, re-entered the host country in breach of an entry-ban. In all of the four judgments the Court relied on *effet utile*, i.e. it ruled on the issue of the compatibility of domestic criminal sanctions with the purpose of Directive 2008/115, i.e. the actual return of illegal migrants. Accordingly, in *El Dridi*, *Achughbabian* and *Sagor* the relevant sanctions were believed to hinder the attainment of such purpose and to end up impeding the *effet utile* of the Directive; in *Celaj* they did not. The main reason given by the Court is precisely the difference in the circumstances of the case. What is more, the Court was keen on pointing out its faithfulness to its earlier case-law.[5] Hence the following remarks will primarily focus on the said difference with a view to understand why *Celaj* leaves the purpose of the Return Directive unaffected, unlike in the previous cases. This is a question worth asking, to say the least because the Advocate General recommended the opposite conclusion after considering the difference between *Celaj* and the earlier cases as irrelevant for the prompt return of irregular migrants which Directive 2008/115 is aimed at.[6] A careful assessment of the Court's position in this connection obviously requires going through its consideration of the objectives of the Return Directive. This exercise will in turn lead to scrutinize the Court's methodology while identifying the *effet utile* of a piece of EU legislation in areas where Member States retain their competence, as is admittedly the case with respect to criminal policy against illegal migration. Ultimately, I shall make a few remarks on the actual consistency of the criminal sanction contested in the framework of national proceedings against Mr. Celaj and the purpose of the Return Directive as highlighted in *El Dridi* and subsequent rulings.

II. The path to *Celaj*: comparing the Court's assessment of the circumstances of the case *versus* the objectives of the Return Directive in *Celaj* and *El Dridi, Achughbabian, Sagor*

In *El Dridi*, the Court identified the objective of Directive 2008/115 as follows: "the establishment of an effective policy of removal and repatriation on illegally staying third-

[3] Court of Justice, judgment of 6 December 2011, case C-329/11, *Achughbabian*.
[4] Court of Justice, judgment of 6 December 2012, case C-430/11, *Sagor*.
[5] Court of Justice, judgment of 1 October 2015, case C-290/14, *Celaj*, paras 26 and 28.
[6] Opinion of Advocate General M. Szpunar delivered on 28 April 2015, case C-290/14, *Celaj*.

country nationals".[7] This phrasing mirrors recital 4 of the Directive, which in turn echoes the new wording of its legal basis, i.e. Arts 79, para. 1, and 2, lett. c), of the Treaty of the Functioning of the European Union (TFEU).[8] The domestic legislation at stake in *El Dridi* laid down a custodial sentence for a third-country national who continued to illegally stay in the national territory after he had been notified an order to leave and the period granted in that order had expired. The Court easily concluded that such provision frustrated the quick and effective removal of illegal migrants: more in detail, according to the Court, should measures aimed at migrants' coercive deportation, in compliance with Art. 8, para. 4, prove unsuccessful, Member States are still committed to enforce a return decision, which is surely hindered by enforcing instead a custodial sentence on the sole ground of the alien having disobeyed a deportation order. Such a neat acknowledgment of the purpose of the Return Directive inspired the Advocate General in *Celaj*. Mr. Szpunar proved fully aware of the importance of the provision on an entry-ban for an illegal migrant who could not benefit from a period for voluntary departure since allegedly reluctant to leave the country or dangerous,[9] or for having re-entered the same Member State despite being the addressee of an entry-ban; yet he believed that entry-ban to be ancillary, to the point that its own enforcement, including by means of a custodial sentence for those who breached it, can never jeopardize the Directive's main purpose.[10]

In *Celaj*, despite reiterating in principle that a national legislation can never compromise the attainment of the purpose of a directive so as to deprive the latter of effectiveness,[11] the Court did not carry out an assessment of the national criminal legislation vis-à-vis the overall purpose of Directive 2008/115. It merely considered the common standards and procedures set out thereby:[12] as they had been applied already,[13] they could not be undermined by the enforcement of a term of imprisonment due to the illegal re-entry in the territory of the State in breach of an entry-ban.

Such a narrow understanding of the concept of "purposes of a directive", in view of which the effectiveness of the latter should be ensured, is not new. Indeed, while obviously never reversing its interpretation of the overall objective of Directive 2008/115 as set out in *El Dridi*, in later judgements the Court had settled on that narrower approach.

[7] *El Dridi*, cit., para. 59.

[8] Directive 2008/115 was adopted on 16 December 2008, i.e. *before* the entry into force of the Treaty of Lisbon but *after* its finalization and signature, on the basis of Art. 63, para. 3 b) of the Treaty establishing the European Community (TEC). This provision, as amended, is now embedded in Art. 79, para. 2, lett. c), TFEU. Art. 79, para. 1, is also applicable as a general provision newly introduced by the Lisbon Treaty.

[9] At risk of absconding or his/her application for a residence permit proved manifestly unfounded or fraudulent or he/she constitutes a threat for public policy, public security or national security.

[10] Opinion of Advocate General M. Szpunar, cit., para. 57.

[11] *Celaj*, cit., para. 21.

[12] *Ivi*, cit., paras 26-27.

[13] *Ivi*, cit., para. 27.

Starting from *Achughbabian*, the focus of the Court's reasoning was precisely on the specific objectives of the "common standards and procedures" set out in Arts 6, 8, 15 and 16 respectively.[14] That led it to preliminarily assess whether those provisions covered the situation in national proceedings. Subject to the positive outcome of his test, the relevant national legislation was in turn to be tested as to its compatibility with those Directive provisions.

In *Achughbabian*, the applicant was no longer entitled to voluntary departure since, after being served with an order to leave French territory within one month, he failed to comply with it and illegally stayed in France. Therefore, the situation of Mr. Achughbabian was covered by Art. 8, para. 1, of Directive 2008/115, which requires States to enforce a return decision by all necessary means.[15] Such obligation would clearly be disregarded should national authorities enforce a sentence of one year's imprisonment according to a national criminal provision regarding foreign nationals who illegally entered or resided in France.[16] Though not specifically requested by the referring judge, the Court further clarified its conclusion by pointing out that, instead, the said domestic provision – i.e. a custodial sentence on the sole ground of the illegal entry or stay in the Member State of a third-country national – could well be enforced *after* a return procedure was applied. The reason is clearly that then the situation of the alien would not be covered by any of "the common standards and procedures" set out in Directive 2008/115 and consequently the enforcement of a custodial sentence as laid down in domestic law could not compromise their proper application.

The applicant in *Sagor* was a street vendor who turned out to have entered Italy illegally and never have possessed a residence permit. Hence his situation was such as to require the application of a return procedure for which Directive 2008/115 sets out compulsory common standards and procedures. As for the two penalties applicable to Mr Sagor in accordance with national law, the Court found that a fine which may be replaced by an expulsion order was not liable to undermine the application of such common standard and procedures[17] whereas home detention was. As a result, the former penalty was deemed compatible with Directive 2008/115 and the latter was not. In close connection with the issue of the alternative fine/expulsion, the Court further acknowledged the compatibility with the Directive of a return decision to take the form of a criminal judgment and the removal referred to in Art. 8 to be carried out in the context of criminal proceedings. Moving from the assumption that "such an option is also not,

[14] The difference between the broad approach taken in *El Dridi* and the narrower taken later is particularly clear in *Sagor*, cit., para. 32.

[15] *Achughbabian*, cit., para. 35.

[16] Art. L 621-1 of the Code de l'entrée et du séjour des étrangers et du droit d'asile (Ceseda) as quoted in *Achughbabian*, cit., para. 14.

[17] *Sagor*, cit., especially paras 35-37.

in itself, prohibited by Directive 2008/115",[18] the overall purpose of the Directive played no role here either: the Court conducted its assessment on the basis of specific provisions, namely Art. 8, paras 1 and 3, and Art. 7.

At a closer look, even in *El Dridi* the Court did not limit itself to rely on the overall purpose of Directive 2008/115. That was the main concern, but the compatibility of the relevant domestic provision specifically with Art. 8, para. 1, was also investigated.[19]

In conclusion, *Celaj* cannot be seen as reversing the Court's approach to the *effet utile* of the Return Directive, not even in connection with penalties involving deprivation of liberty which previously had always been held as undermining it.

III. Leaving room to States' competence on imposing criminal sanctions on illegal immigrants

The above Section shows that, in *Celaj*, the *effet utile* is not evaluated in connection with the overall objective of Directive 2008/115 by itself, but with such objective as attained through the specific provisions applicable time by time. The Court's case-law on *effet utile* is too fragmented to undertake a thorough assessment of the consistency of such an approach with the usual attitude on *effet utile* in the framework of a comment focused on *Celaj*. Hence I should limit myself to note that the said approach proved to be more favourable to the Member States than the "traditional" methodology (contested domestic provision *versus* overall purpose of the relevant EU piece of legislation) and to make a few remarks on this point.

In general terms, in the case-law under discussion the Court has been generous vis-à-vis domestic legislation to the maximum extent possible. Despite repeatedly ruling against the compatibility of domestic criminal sanctions with Directive 2008/115, the Court has constantly made an effort to point out what room was left for domestic legislation, so that the finding in *Celaj* proved perfectly predictable at the time of *Achughbabian* already.[20] Moreover, in *Sagor* the Court refused to declare that an expulsion order in the form of a criminal judgment is incompatible with Art. 7, on the obligation of States to grant the illegal migrant concerned a period for voluntary departure. Yet, as noted by the Commission, to pass an expulsion order in the context of criminal proceedings typically precludes such a possibility: at least that was the case for the relevant domestic provisions.[21] Still, the Court maintained that a case-by-case assessment was required and that this was a task for national judges.[22]

[18] *Ivi*, para. 38.

[19] *El Dridi*, cit., para. 59.

[20] R. Raffaelli, *Case Note: the* Achughbabian *case. Impact of the return directive on national criminal legislation*, in *Diritto penale contemporaneo*, www.penalecontemporaneo.it, 2012, p. 182.

[21] *Sagor*, cit., paras 39-40.

[22] *Ivi*, para. 41.

The above remarks lead me to consider what kind of domestic competence was at hand, in an attempt to draw conclusions on the relation between the methodology used by the Court to identify the incompatibility between EU law and domestic legislation on ground of the *effet utile* and of the nature of the State's competence to pass such legislation.

Domestic criminal sanctions against illegal migrants on ground of their illegal entry or stay in a Member State surely covers an area where no EU provision is directly applicable, as reflected by the use of *effet utile* itself: as the Court neatly explains in all of the abovementioned rulings, the latter applies as long as no direct contrast between EU and domestic legislation can be identified; in turn, such a direct contrast is capable of materializing insofar as a domestic and an EU provision overlap or otherwise deal with the same situation.[23] The Court also pointed out that criminal sanctions belong to States' competence: as to what kind of competence – whether exclusive, i.e. pertaining to an area where the principle of conferral is not operational, or shared with the Union, it seems to me that from *El Dridi* to *Celaj* a major change occurred in the Court's understanding of the matter. In *El Dridi*, the Court openly considered State's criminal law competence as exclusive,[24] on the basis of the long-lasting idea that it should be distinct from any other policies of the Union and that, unlike the corresponding substantive law in a certain area, it exclusively belonged to Member States.[25] The Court has been repeating this mantra in multiple cases since the *Casati* ruling of 1981[26] and reiterated it in *El Dridi*: "[i]n principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible".[27] Exclusive competence of Member States has obviously never meant absolute freedom to regulate the matter: the relevant domestic legislation cannot prevent the *effet utile* of EU law, which occurs whenever domestic legislation has such a content as to frustrate the purpose of the relevant EU provisions. However, since *Achughbabian* the Court put the mantra aside and instead seemed to refer to State's competence to establish provisions on criminal sanctions vis-à-vis irregular migrants as one *shared* with the Union.[28] In *Achughbabian*, *Sagor* and *Celaj* State's competence to criminalize the illegal entry, stay or re-entry of a third-country national in national territory, is acknowledged to be a consequence of the

[23] The fact that Directive 2008/115 *does not forbid* criminal sanctions like those relevant in national proceedings is highlighted in *Achughbabian*, cit., paras 28 and 32; in *Sagor*, cit., para. 31; in *Celaj*, cit., para. 20.

[24] *El Dridi*, cit., para. 53.

[25] A recent overview of this point is in S. MONTALDO, *I limiti della cooperazione in materia penale nell'Unione europea*, Napoli: Editoriale scientifica, 2015, pp. 25-36. Following the establishment of the EU, criminal matters were placed in the Third Pillar, the relevant issue then being the division of competences between two pillars of the Union: *ivi*, pp. 76-85.

[26] Court of Justice, judgment of 11 November 1981, case 203/80, *Casati*, para. 27.

[27] *El Dridi*, cit., para. 53.

[28] *Achughbabian*, cit., para. 28; *Sagor*, cit., para. 31; *Celaj*, cit., para. 20.

fact that "Directive 2008/115 concerns only the return of illegally staying third country nationals and is thus not designed to harmonise in their entirety Member State rules on the stay of foreign nationals".[29] In other words, competence does not exclusively belong to States *in principle*, but *because* EU law left room to them, as is the idea of shared competence in accordance with Art. 2, para. 2, TFEU.

It is remarkable that, in this way, the Court seemingly put an end to the traditional idea that criminal law is a self-standing area of competence. Such a new perspective is indeed well grounded on several arguments. To limit myself to those arising from the Treaty of Lisbon, Art. 83, para. 2, TFEU allows the Union to establish minimum rules on the definition and criminal offences and sanctions *in whatever areas have already been subject to harmonisation measures at the EU level*.[30] Since a major obstacle to a Union's criminal law competence has often been identified in the minor role of the European Parliament in the decision-making process, such an obstacle was removed as a result of the extension of the ordinary legislative procedure to Art. 83.

As to the methodology for ascertaining the extent of the Union's pre-emption of States' action in the relevant area of shared competence, it is worth noting that the Court did not deem sufficient that an EU piece of legislation was existing already to rule out any domestic provision in the same area, along the lines of a field pre-emption. In accordance with Protocol 25, the actual content of Directive 2008/115, i.e. the fact that it was not to achieve the harmonisation of States' legislation in the whole of the relevant area, was key.[31] Beyond Protocol 25, the Court's approach seems very much justified by the applicable legal basis: "illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation" is too wide to reasonably consider that to take *any* measure on the Union side can pre-empt States from passing *any* piece of legislation in the area. Yet, the Court did not go so far as to state that the Return Directive *does pre-empt* State competence *to the extent* that it does not *actually* leaves room to it. Instead, the idea emerging from the Court's language seems to be that, regardless to its content, the Directive *by itself* fills the room available in a certain sub-area in its entirety. In other words, to criminalize illegal stay or entry still falls within the remit of Member States since Directive 2008/115 only covers the return of illegal migrants, i.e. a different subject-matter within the broad area of illegal immigration (or, to put it with the words of the Court, the stay of foreign nationals). This can be labelled "a soft field pre-emption" and reflects a restrictive interpretation of Art. 2,

[29] Quote from *Celaj*, cit., para. 20. A similar language is in *Achughbabian*, cit., para. 28 and *Sagor*, cit., para. 31.

[30] S. MONTALDO, *La competenza dell'Unione europea ad adottare norme di diritto penale ex Art. 83, par. 2, TFUE e sue possibili applicazioni*, in *Studi sull'integrazione europea*, 2013, p. 101 *et seq.*

[31] The necessity to rely on the actual content of EU secondary law to understand the extent of State competence in areas of shared competences is underlined in P. CRAIG, *Competence: Clarity, Conferral, Containment and Consideration*, in *European Law Review*, 2004, pp. 334-335.

para. 2, TFEU and Protocol 25 with regard to the room available to State legislation in areas of shared competence.[32] Against this background, the abovementioned restrictive application of the principle of effectiveness is an interesting counterbalance.

IV. Beyond methodology: *Celaj* as an attempted sabotage of the Return Directive?

On a different note, to hold it decisive that an illegally staying third country national in the position of Mr. Celaj is one to whom the common standards and procedures laid down in Directive 2008/115 *had been applied already*, could be flawless in terms of methodology, yet it raises serious doubts in terms of substantive law. The main one is about the law applicable to illegal migrants in a similar situation: given that, unlike the other irregular migrants, they can serve a custodial sentence on the sole ground of their illegal entry or stay into the territory of a Member State, the question arises as to what extent they are subject to the abovementioned standards and procedures.

As a matter of fact, even with regard to those who re-entered the territory of a Member State in breach of an entry-ban a term of imprisonment *does delay* their repatriation and hence it *does weaken* the Union's "effective return policy". Indeed, the legacy of *El Dridi* is that the Return Directive is all about such a policy.[33] That was the reason for the referring judge to trigger proceedings for a preliminary ruling in *Celaj*: he believed that the custodial sentence laid down in domestic legislation was as incompatible with such a policy, which is embedded in the Return Directive, as those challenged in *El Dridi* and in *Achughbabian*.[34] The Advocate General steadily placed *Celaj* in the framework of that policy, too:[35] he argued against a different treatment of illegal migrants in the position of the applicant on the ground that he deemed Directive 2008/115 to aim at bringing an illegal stay to an end more than preventing it.[36] In other words, as a matter of fact in connection with migrants who re-entered a EU Member State in disregard

[32] According to A. Arena, *Il principio della preemption in diritto dell'Unione europea*, Napoli: Editoriale scientifica, 2013, pp. 112-113, Art. 2, para. 2, TFEU and Protocol 25 do not favour field preemption.

[33] *Celaj* has been heavily criticized since based on a difference with the previous cases which is deemed irrelevant with regard to the purpose of the Return Directive as established thereby: I. Majcher, *The CJEU's Ruling in Celaj: Criminal penalties, entry bans and the Returns Directive, in EU Law Analysis*, eulawanalysis.blogspot.it; L. Masera, *La Corte di giustizia UE dichiara il delitto di illecito reingresso dello straniero espulso (Art. 13 co. 13 TU imm.) conforme alla direttiva rimpatri (2008/115/CE)*, in *Diritto penale contemporaneo*, www.penalecontemporaneo.it, paras 9-10. On the "effective return policy" as the core of *El Dridi*, *Achughbabian* and *Sagor* see especially C. Favilli, *L'attuazione in Italia della direttiva rimpatri: dall'inerzia all'urgenza con scarsa cooperazione*, in *Rivista di diritto internazionale*, 2011, p. 708 *et seq.*; F. Spitaleri, *L'interpretazione della direttiva rimpatri tra efficienza del sistema e tutela dei diritti dello straniero*, in *Diritto, immigrazione e citadinanza*, 2013, p. 19 *et seq.*

[34] Opinion of Advocate General M. Szpunar, cit., para. 47.

[35] *Ivi*, paras 28-30.

[36] *Ivi*, para. 57.

to an entry-ban the Court *ignored the effective return policy* implemented through Directive 2008/115.

Hence the doubt that the return procedure laid down in Arts 6, 7, 8, 11, 15 and 16, should *not* be applicable to those migrants.

For the sake of clarity, the Court did not truly take a stand on the point, although the statement on the common provision and standards laid down in Directive 2008/115 having been applied already sounds so ambiguous that it might well be regarded as an *obiter dictum*. All the more so since the applicant was by no means placed within the scope of Art. 6, on the issuance of a return decision vis-à-vis *any* third-country national staying illegally on State territory. Nor was the purpose of the Directive, as identified in the previous rulings, established as a condition or limit for the custodial sentence imposed on an illegal migrant, who acted in breach of an entry-ban, to be in compliance with the Directive itself. The Court only required that this entry-ban be compliant with Art. 11.[37] It follows that to consider illegal migrants in the position of Mr. Celaj to fall short of the scope of the Directive might reconcile the finding in *Celaj* with the general purpose of that Directive as established in earlier case-law.

Yet this interpretation would deprive the Directive of such a purpose with regards to a portion of illegal migrants, whereas there are no elements to believe that the "effective return or repatriation policy" established thereby should not apply to those in the position of Mr. Celaj.[38] As the Advocate General put it, "the Directive makes no distinction as to how many times a third-country national attempts to enter the territory of a Member State".[39]

Thus a further and final alternative option: to acknowledge that the purpose of Directive 2008/115 is not limited to effective repatriation but covers the fight against illegal migration as limited to the treatment of illegal migrants. Custodial sentences for those who acted in breach of an entry-ban issued on the basis of Art. 11 can well be consistent with that broader purpose: they are a punishment and a dissuasive tool at the same time.

As is clear from the above analysis, the ruling in *Celaj* is not founded on such a broader purpose. Yet the latter materializes in multiple points. One is the re-settlement in the new legal basis of Art. 79 TFEU of the repatriation policy implemented by means

[37] *Celaj*, cit., para. 31.

[38] On the applicability of the Return Directive to third-country nationals who re-entered the territory of a Member State in breach of an entry-ban, G. CAVALLONE, *(In)compatibile con la direttiva 2008/115/CE il reato che punisce il reingresso illecito degli stranieri entro 5 anni dall'espulsione*, in *Cassazione penale*, 2013, p. 783; R. BARBERINI, *E ora è il turno dell'Art. 13 co. 13: anche la sanzione penale del divieto di reingresso dello straniero è incompatibile con la direttiva*, in *Europeanrights.eu*, www.europeanrights.eu; L. MASERA, *Il delitto di illecito reingresso dello straniero nel territorio dello Stato e la direttiva rimpatri*, in *Diritto penale contemporaneo*, 2013, www.penalecontemporaneo.it, pp. 253-254.

[39] Opinion of Advocate General M. Szpunar, cit., para. 50.

of Directive 2008/115, which the Court accomplished in para. 23: "the implementation of a return policy is an integral part of the development, by the European Union, of a common immigration policy aimed at ensuring, inter alia, the prevention of illegal immigration and enhanced measures to combat it". Moreover, Art. 11 is not ancillary, as considered by the Advocate General, whose understanding of the Directive's purpose excessively relied on Art. 6, para. 1.[40] The role of Art. 11 in the framework of the Return Directive is far from negligible, given that in specified situations States are under *the obligation* to impose an entry-ban along with adopting a return decision. The Court shared this different view on Art. 11: meaningfully, it established that the compliance of the relevant entry-ban with that provision shall be the sole condition for a custodial sentence served to a migrant in the position of Mr. Celaj to be compatible with Directive 2008/115.[41] Therefore, the point can well be made that, based on Art. 11, the purpose of the Return Directive is not limited to making sure that illegal migrants are promptly and actually repatriated. In its framework, an "effective return policy" may well include fostering deterrence and imposing sanctions to those who entered or stayed in a EU Member State in breach of the relevant *rules*.[42]

V. Conclusion

The effort of "unravelling *Celaj*" has revealed that, in terms of methodology, the new ruling follows the path of its precedents on the interpretation of the Return Directive and thus is perfectly consistent with them, while in fact disregarding the effective return policy those precedents were built upon. In turn, to "unravel" such a dichotomy, a broader understanding of the purposes of the Directive is proposed. Yet one point remains hopelessly "unravelled": supposing that a custodial sentence for migrants having illegally re-entered an EU Member State in breach of an entry-ban is consistent with the said broader purpose, the fact remains that no conditions and limits to its duration have been established in *Celaj* in order to ensure its consistency with the abovementioned effective return policy.

[40] *Ivi*, para. 28. A criticism on the Advocate General's consideration of the role of the entry-ban is in F. Gatta, *Le conclusioni dell'Avvocato generale nel caso* Celaj*: il colpo di grazia alla detenzione dello straniero a causa della sua condizione irregolare?*, in *Eurojus.it*, rivista.eurojus.it.

[41] *Celaj*, cit., para. 31.

[42] On the role of Art. 11 in *Celaj* with regard to deterrence and sanctions against illegal migration, D. Vitiello, *La sentenza* Celaj *della Corte di Lussemburgo e la detenzione degli stranieri irregolari: un passo indietro?*, in *SidiBlog*, www.sidi-isil.org/sidiblog.