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## The returns directive in light of the El Dridi judgment

by

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## Abstract

The judgment of the Court of Justice of the EU in the El Dridi case clarifies the scope of application of the Returns Directive, in particular with regard to the difference between criminal detention and pre-return detention and to the general objectives of the EU's immigration policy. The ruling will have far-reaching consequences not only on the Italian criminal and expulsions system, but also on the national legislations of a number of Member States.

## Key-words:

Returns directive; El Dridi; irregular migration; detention; human rights; removal.



## 1. Introduction

The recent judgment of the Court of Justice of the European Union in the *El Dridi* case (Case C-61/11 PPU, *El Dridi*, 28 April 2011) has come to put an end to some months of judicial and administrative chaos in Italy, during which the application of national criminal provisions related to irregular migration, and in particular of the crime of non-compliance with expulsion orders, was subjected to an unacceptable level of legal uncertainty. Moreover, the judgment may affect all national legal systems providing for detention of irregularly staying third-country nationals merely based on their migration status, since in it the Court has set a balance between national criminal legislation and European immigration policies. Before moving to examine the case, and its potentially very broad consequences, it seems necessary to briefly recall the main elements of directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter “returns directive”), whose interpretation gave rise to the request for a preliminary ruling in the present case.

The directive provides for a common procedure to return irregularly staying third country nationals to non-EU States (countries of origin, of transit, or other third States willing to accept the immigrants, provided that they consent – art. 3.3), removing them from the territory of the European Union. According to the directive, States must issue a return decision to any irregularly staying third-country national, save in exceptional circumstances (article 6); as a general rule, such decision must include a period for voluntary return of between 7 and 30 days, during which the person is under an obligation to leave the national territory (article 7).<sup>1</sup> If the person concerned does not comply with such obligation, or if (exceptionally) no period for voluntary return is granted, States must take all necessary measures to enforce the decision, including by using coercive measures in order to remove the person (article 8). During the procedure, the person concerned may also be detained, if less coercive measures appear insufficient; articles 15 and 16 provide for a number of guarantees with regard to detention. In particular, article 15 limits its maximum length to 6 months (which may exceptionally be extended to 18) and establishes a number of measures to ensure that detention lasts only until there is a reasonable prospect of removal and that



it may be subjected to judicial review, while article 16 provides that irregular migrants should be kept in specialized detention facilities, and in any case separate from ordinary prisoners. Finally, return decisions may, and in some cases must, be accompanied by a re-entry ban, lasting no longer than 5 years (article 11). The final text of the directive, adopted after long and complex negotiations between Council and Parliament (Acosta 2009), has been strongly criticized by a number of actors, including the UNHCR and many NGOs, which condemned its lack of attention for fundamental rights;<sup>II</sup> on the contrary, in Italy, the directive has been regarded as an instrument aimed at protecting fundamental rights, as the procedure it sets is much more lenient than the national expulsion procedure.

## 2. Legal framework

Before moving to examine the case, it seems necessary to summarize the national provisions whose application gave rise to the present request for a preliminary ruling.<sup>III</sup> According to the Italian immigration law (law decree 286/98), which has not been amended in order to transpose the directive, the return of irregularly staying third-country nationals is ordered by a decree of the Prefetto (local representative of the Government) and implemented through a decree of the Questore (head of the local police). The latter decree should, as a general rule, order the person to be forcibly removed (article 13 of the immigration law); if forcible removal cannot be immediately carried out, migrants must be detained in special detention facilities (the so-called centers for identification and expulsion, or CIE). If neither forcible removal nor detention are possible (for instance, because time is needed to obtain travel documents for the person, or to identify him/her, and the CIEs are full), the Questore may issue a decree ordering voluntary departure in 5 days. If the person does not comply with such order, he/she commits an offence punishable by detention for up until 4 years, according to article 14 para. 5 *ter*; the maximum sentence increases to 5 years in case of reiteration.<sup>IV</sup> Since December 2010, thus, administrative authorities and Courts have been faced with a returns procedure which clearly does not comply with directive 2008/115, as well as with criminal provisions which allow the interruption of such procedure by imprisoning irregularly staying third-country nationals who do not voluntarily comply with a return decree. While administrative authorities have



made efforts to render the national expulsion procedure compatible with the directive, this was clearly neither lawful nor sufficient;<sup>V</sup> on the other hand, judges questioned the admissibility of the crime of non-compliance with a return decision. According to a number of scholars, such a crime was not compatible with the returns directive, as it deprived it of its *effet utile* with regard to the protection of fundamental rights (Viganò - Maserà, 2010; Natale, 2011): according to this view, which many judges also shared,<sup>VI</sup> while the primary objective of the directive was to ensure the removal of third-country nationals irregularly present in the EU, its secondary objective would have been to protect the migrants' fundamental rights, and in particular their personal freedom. Thus, the penalties envisaged by article 14 of the immigration law were considered not to be compatible with the directive, since the offence was punishable by a maximum sentence much longer than that allowed by the directive and whose enforcement did not comply with any of the guarantees of articles 15 and 16 of the directive. Judges sharing this view thus refused to apply article 14, while other judges continued to sentence irregular migrants to detention – a framework of legal uncertainty and judicial chaos to which the present judgment of the EUCJ has come to put an end.

### 3. The facts of the case

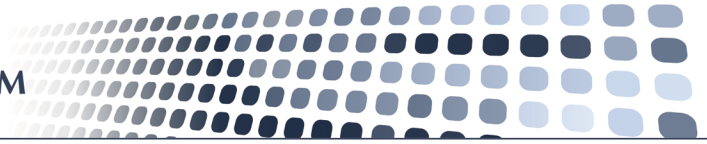
Mr. El Dridi is a third country national whose stay in Italy was irregular, since it violated a decree ordering voluntary departure issued by the Questore of Udine. He was found on the national territory in violation of this order, arrested and sentenced to one year's imprisonment, but he appealed against this decision. The Court of Appeals of Trento thus took into examination, first of all, the decree issued by the Questore, the violation of which formed the basis for the defendant's criminal conviction; in the Court's view the decree was lawful according to both national law and the returns directive. Indeed, while the Court found that the decree could appear to violate the latter, since Mr. El Dridi had been granted a period for voluntary departure of 5 days (instead of 7), the judges underlined that article 7 of the directive also provides for exceptions, and that, in the specific circumstances of the case, a shorter period could be justified given the existence of



a risk of absconding.<sup>VII</sup> Thus, the Court, after coming to the conclusion that the directive has direct effects, decided to request an interpretative judgment on the part of the Court of Justice, since it was in doubt as to the interpretation to be given to articles 15 and 16 of the directive.<sup>VIII</sup> In particular, the Court raised the following question: whether, in the light of the principle of sincere cooperation, the purpose of which is to ensure the attainment of the objectives of the directive, and the principle that the penalty must be proportionate, appropriate and reasonable, these articles preclude the possibility that criminal penalties may be imposed in respect of a breach of an intermediate stage in the administrative return procedure, before that procedure is completed, by having recourse to the most severe administrative measure of constraint which remains available; and the possibility of a sentence of up to four years' imprisonment being imposed in respect of a simple failure to cooperate in the deportation procedure on the part of the person concerned, in particular where the first removal order issued by the administrative authorities has not been complied with.

#### 4. The view expressed by the Advocate General

The reasons at the basis of the Court's judgment may be clarified by an analysis of the view of the Advocate General (View of Advocate General Mazàk, 1<sup>st</sup> April 2011). The AG firstly addressed the applicability of the directive to the case, and thus the interpretation of its article 2(2)(b):<sup>IX</sup> in his view, this rule only allows for exclusions from the scope of the directive in so far as a return obligation is imposed as a criminal law sanction. In the case of Mr. El Dridi, on the contrary, the obligation to return derived from an administrative decision: his situation therefore fell within the scope of the directive.<sup>X</sup> After comparing the national expulsion procedure with the directive, the Advocate General concluded that, while both envisaged the possibility of the third-country national's non-compliance with a decision ordering voluntary departure, they provided for very different legal consequences: according to the directive, such conduct could result in pre-removal detention, while under Italian legislation it was an offence punishable by criminal detention. In the Advocate General's view, the main question was therefore whether the national criminal provisions could be considered as "necessary measures to enforce the return decision", as such in line



with article 8(1) of the returns directive, or, on the contrary, as measures that could hinder its enforcement: clearly, the answer could not be but that they can delay the returns procedure, hampering its conclusion. In his reasoning, the AG also referred to the position expressed by the Italian Republic in the course of the proceedings, according to which the penalty of criminal detention for the crimes set out in article 14 was conceived as a punishment for non-compliance with an order issued by public authorities, designed to maintain the authority of the public powers: thus, national criminal legislation gave preference to this aim over the directive's objective, that is, the enforcement return decisions. The AG therefore concluded that criminal detention taking place in the course of the expulsion procedure is *per se* incompatible with the directive, as it precludes enforcement of the decision, delaying it for the whole detention period, and thus the achievement of the directive's purpose: the establishment of an effective returns policy.

## 5. The judgment of the Court

The judgment begins with an analysis of the returns directive, its objectives and its scope of application: according to article 1, its aim is to establish “common standards and procedures” for returning illegally staying third country nationals. The EUCJ then briefly summarizes the expulsions procedure set out in the directive, highlighting that this establishes an order in which the various stages of that procedure should take place: such order corresponds to a gradation, going from the measures which allow the person concerned the most liberty to measures which restrict that liberty the most, namely, detention (para. 41). After recalling the principle of proportionality, according to which detention of a person against whom a deportation or extradition procedure is under way should not continue for an unreasonable length of time,<sup>XI</sup> the Court proceeds to examine the specific questions referred by the Court of Appeals of Trento.

Firstly, after recognizing that the directive has not been transposed into Italian law, as admitted by the Italian Government itself, the EUCJ states that its articles 15 and 16, being unconditional and sufficiently precise, may be relied upon by individuals against the State; thus, the Court very clearly rejects the view according to which these provisions would have no direct effect (Epidendio 2011, Focardi 2011).<sup>XII</sup> Secondly, the Court also dismisses



the argument according to which the case referred would not fall into the scope of application of the directive, given its article 2(2)(b), since in the case of Mr. El Dridi the obligation to return was not a criminal sanction, but resulted from an administrative order (para. 49). Moreover, the judgment adds that “the criminal penalties referred to in that provision do not relate to non-compliance with the period granted for voluntary departure”: what seems to emerge from this - partly obscure - statement is that the Court interprets article 2(2)(b) as not allowing States to criminalize the conduct of non-compliance with a return decision, sanctioning it with expulsion as a criminal penalty, and to refer to article 2(2)(b) to exclude such expulsion from the scope of application of the directive.<sup>XIII</sup> The Court then also clearly states that the removal procedure set out by Italian law is incompatible with the returns directive.

After this preliminary analysis, the Court proceeds to examine the core of the problem: the admissibility, under directive 2008/115/EC, of criminalizing non-compliance with a return decision granting a period for voluntary departure. Firstly, the Court takes into examination article 8(4) of the directive, which refers to the use of coercive measures: whenever such measures, which may include forcible removal and deportation, do not lead to effective removal of the persons concerned, “Member States remain free to adopt measures, including criminal law measures,” aimed at dissuading them from remaining illegally on their territory (para. 52). However, the Court also recalls that, according to general EU law, States may not apply rules, even criminal law rules, which may jeopardize the achievement of the objectives pursued by the directive, depriving it of its effectiveness. Thus, the Court seems to search for a balance between the State’s competence with regard to criminal law matters, including in order to deter illegally staying third country nationals whose expulsion is impossible to achieve, and the need to ensure the *effet utile* of the directive: the conclusion is that States may not detain irregularly staying third-country nationals who do not comply with a decision ordering voluntary departure, but they must “pursue their efforts to enforce the return decision”. Indeed, in the Court’s view, a custodial penalty “risks jeopardizing the attainment of the objective pursued by that directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals,” as it could frustrate the application of measures aimed at enforcing the return decision, by delaying it (para. 59). The Court then expressly recalls national judges to their duty to refuse to apply national legislation contrary to the results of the directive, including article





14 para. 5 *ter*, and to take due account of the principle of retroactive application of the more lenient penalty, which forms part of the constitutional traditions common to the Member States.<sup>XIV</sup>

It seems particularly useful to compare these last paragraphs of the judgment with the national debate which preceded its adoption. Indeed, the argument according to which article 14 para. 5 *ter* is incompatible with the directive had been originally based on the need to ensure its effectiveness with regard to its (assumed) “secondary” objective, that is, the protection of fundamental rights of irregularly staying third country nationals, first and foremost their personal freedom. The Luxembourg judges, on the contrary, have not considered the question from the point of view of fundamental rights – an aspect which is merely touched upon by the judgment, – but have come to the conclusion that criminal detention inflicted during the return procedure jeopardizes the attainment of the “principal” - and sole expressly recognized - objective pursued by the directive, as it delays the enforcement of the return decision and thus renders the expulsion procedure less effective.

The judgment of the Court is very clear in establishing what States may and may not do: as expressly stated in paragraph 58, once a return decision has been issued, States must pursue their efforts to enforce it. While States are allowed to adopt criminal law provisions aimed at dissuading those third-country nationals against whom coercive measures were unsuccessful from remaining illegally on their territory,<sup>XV</sup> they cannot punish with criminal detention anyone against whom the return procedure is still ongoing; once an irregular immigrant is found, a return decision must be issued, and its enforcement must be pursued with all reasonable efforts. The Court thus clearly excludes the admissibility of criminal provisions sanctioning with imprisonment irregular migrants who can, and therefore should, be returned: a conclusion which may have a very strong impact on national criminal legislations of EU Member States.

## 6. Consequences of the judgment

With regard to the Italian legal system, the first consequence of the decision is that persons who are currently under trial for the crime that has been declared incompatible with the



directive (as well as for the crime set out in article 14 para. 5 *quater*, which is also inspired by the same logic) will have to be acquitted: indeed, the Supreme Court has already adopted the first few decisions in this sense.<sup>XVI</sup> Secondly, persons who are currently detained for these crimes will have to be immediately released, and the judgments which convicted them will need to be withdrawn.<sup>XVII</sup>

In addition to these “direct” effects, the judgment also bears further consequences for the national system. Indeed, the Court has clearly stated (para. 45 and 50) that the Italian expulsion procedure does not comply with the directive, which has not been transposed into national law: consequently, all expulsion decrees issued under articles 13 and 14 of the Italian immigration law are to be deemed unlawful under EU law.<sup>XVIII</sup> It therefore seems that, at the moment, third-country nationals irregularly present on the national territory may not be lawfully removed following the administrative expulsion procedure, as any administrative decision aimed at their return and removal would violate the returns directive: a consequence of the inaction, on the part of the Italian Government, in transposing and implementing the directive (Miraglia 2011). Moreover, as stated by the Consiglio di Stato, the judgment also bears consequences for the regularization procedure for irregularly staying third-country nationals who work as domestic help, which was launched by law 102/2009: indeed, according to some interpretations, the law would have hindered regularization of foreigners who had been convicted of the crime provided for by article 14, para. 5 *quater*. Since this provision has been declared inconsistent with EU law all employers whose (irregularly staying foreign) domestic employees were denied regularization may request re-examination of their claim.<sup>XIX</sup>

The El Dridi judgment seems, however, to bear further consequences for national criminal provisions which criminalize irregular entry *per se*, providing for a custodial sentence:<sup>XX</sup> indeed, such provisions frustrate the removal procedure, delaying the person’s return, as they take place either *after* issuance of a return decision (interrupting the return procedure) or *instead* of such issuance (delaying the opening of the procedure itself). It thus seems that all Member States criminalizing, and sanctioning with a custodial sentence, illegal immigration, are called to amend their national legislation in order to ensure full implementation of the directive: the judgment of the Court therefore may have very far-reaching consequences.<sup>XXI</sup>



With regard to the Italian situation, an additional comment seems to be necessary: in the national immigration law, article 10 *bis* (introduced in 2009) criminalizes illegal entry or stay, subjecting it to a criminal fine and providing for a special procedure for its trial, which is usually to end with suspension of the fine and criminal expulsion. The crime has been introduced as a way to simplify the return procedure, at the same time ensuring – in the Government’s view – its compatibility with directive 2008/115: indeed, the crime was intended to allow for immediate expulsion of irregular migrants without directly breaching the directive, as in these cases expulsion is a criminal sanction and thus may be excluded from the directive’s scope of application according to article 2(2)(b).<sup>XXII</sup> This provision, however, seems, again, to run counter the spirit of the directive and to deprive it of its effectiveness: while the directive aims at establishing common procedures for the repatriation of irregularly staying third-country nationals, Italian legislation establishes a completely different expulsion procedure, which is only considered to be criminal in order to exclude it from the scope of application of the directive. Such an interpretation is clearly not allowed under the principle of sincere cooperation; an indication in this sense comes directly from the judgment of the Court in the case under consideration, where, referring to article 2(2)(b), the Court states that “the criminal penalties referred to in that provision do not relate to non-compliance with the period granted for voluntary departure.”<sup>XXIII</sup> It seems that the same conclusion could be reached with regard to penalties imposed directly for illegally staying on the national territory: such a conduct should, according to article 6, give rise to the issuance of a return decision, opening the repatriation procedure described in the directive. Criminalizing irregular entry and stay in order to punish it with criminal expulsion, eluding the application of the directive, renders it totally ineffective, as the expulsion procedure applied in Italy does not comply with the “common standards and procedures” set out in the directive, thus depriving it of its harmonizing effect (Viganò – Masera 2010).<sup>XXIV</sup>

It therefore seems that the judgment of the Court in the *El Dridi* case has the potential to affect the national legislation of a high number of Member States, in particular with regard to their criminal legislation: if the Court confirms this interpretation of its judgment in its future decisions, criminalizing irregular immigration will no longer be an option in the national immigration policies of EU Member States.



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<sup>I</sup> As stated in the Preamble, recital 10, the directive is inspired by the principle of preference for voluntary return, which was already included in the *Council of Europe's Twenty Guidelines on Forced Return*, adopted in September 2005 and available at [www.coe.int/t/dg3/migration/Source/MalagaRegConf/20\\_Guidelines\\_Forced\\_Return\\_en.pdf](http://www.coe.int/t/dg3/migration/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf)

<sup>II</sup> See, for instance, the Position adopted by the UNHCR on the 16<sup>th</sup> of June 2008. <http://www.unhcr.org/refworld/pdfid/4856322c.pdf>. ECRE, *Information Note on the directive 2008/115/EC*. [www.ecre.org/files/ECRE\\_Information\\_Note>Returns\\_directive\\_January\\_2009.pdf](http://www.ecre.org/files/ECRE_Information_Note>Returns_directive_January_2009.pdf). Save the Children, *Letter to the Members of the European Parliament* of 11 June 2008, available online at [http://www.savethechildren.net/separated\\_children/publications/reports/Letter\\_to\\_MEP\\_on>Returns\\_directive-1.pdf](http://www.savethechildren.net/separated_children/publications/reports/Letter_to_MEP_on>Returns_directive-1.pdf).

<sup>III</sup> As well as to the other requests which were submitted to the Court of Justice of the European Union in the short period since the deadline to transpose the returns directive expired (on the 24<sup>th</sup> of December 2010): see Tribunale di Ragusa, 9 February 2011, Mohamed Mrad, case C-60/11, OJ C 113, 09.04.2011, p.8; Tribunale di Ivrea, 4 February 2011, Lucky Emegor, case C-50/11, OJ C 113, 09.04.2011, p.7; Tribunale Ordinario Di Milano, 31 January 2011, Assane Samb, Case C-43/11, OJ C 113, 09.04.2011, p.7; Tribunale di Bergamo, 28 February 2011, Survival Godwin, Case C-94/11 (unpublished); Tribunale di Rovereto, 11 February 2011, John Austine, Case C-63/11, OJ C 120, 16.04.2011, p.5; Tribunale di Santa Maria Capua Vetere, 7 March 2011, Yeboah Kwadwo, Case C-120/11; Corte Suprema di Cassazione, 21 March 2011, Demba Ngagne, Case C-140/11.

<sup>IV</sup> In practice, however, immediate forcible removal is hardly ever possible: in most cases, migrants are firstly detained in the CIE (so as to allow time to organize their expulsion) or simply notified an order for voluntary departure – as happened to Mr. El Dridi.

<sup>V</sup> See Ministero dell'Interno, Dipartimento della Pubblica sicurezza, Circolare 17 dicembre 2010. 2011, *Guida al diritto* 5, pp. 20-23. On the principle according to which States must remedy the incompatibility of national legislation with EU law by means of national provisions of a binding nature having the same legal force as those which must be amended, and the insufficiency of implementing EU legislation through mere administrative practices, see the jurisprudence of the EU CJ (i.a., case 168/85, *Commission v. Italy*, 15 October 1986; case 334/94, *Commission v. France*, 7 March 1996).

<sup>VI</sup> See for instance Court of Cassation, decision n. 11050/2011, 18 March 2011 (reference for a preliminary ruling to the Court of Justice); Procura della Repubblica presso il Tribunale di Firenze, Document of 18 January 2011; Procura della Repubblica presso il Tribunale di Milano, Guidelines of 11 March 2011. All documents available online, at [http://www.penalecontemporaneo.it/materia/3-legislazione\\_penale\\_speciale/41-stranieri/](http://www.penalecontemporaneo.it/materia/3-legislazione_penale_speciale/41-stranieri/)

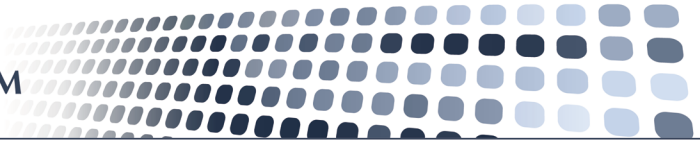
<sup>VII</sup> The decision of the Court on this point seems, however, very questionable: according to art. 3(7) of the directive, a risk of absconding implies “the existence of reasons in an individual case which are based on objective criteria defined by law.” Italian law, on the contrary, does not define such objective criteria: a decision on the existence of a risk of absconding could thus not be taken in accordance with the directive.

<sup>VIII</sup> See Corte d'Appello di Trento, Ordinanza nel procedimento a carico di Ei Dridi Hassen, 2 February 2011, at <http://www.penalecontemporaneo.it/upload/Appello%20Trento%20-%20Ordinanza%20Corte%20Giustizia%20UE.pdf>

<sup>IX</sup> Article 2(2)(b) allows States not to apply the directive to third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures. In the national debate, some suggested that this rule implied that the directive could have no impact over criminal law: see Procuratore Generale di Torino, *Ricorso per Cassazione avverso la sentenza del Tribunale di Torino del 5 gennaio 2011*, filed on 4 February 2011 and available online, at <http://www.penalecontemporaneo.it/upload/direttiva%20rimpatri%20ricorso%20maddalena.pdf>

<sup>X</sup> The AG also added that a Member State which has not adopted the provisions transposing a directive cannot rely on the application of a right deriving from it, such as the right to restrict the scope *ratione personae* of the directive, as otherwise the State would be able to benefit from rights deriving from the directive without fulfilling its obligations to transpose it: see para. 28 of the view.

<sup>XI</sup> See paragraph 43 of the decision: the Court also makes reference to the jurisprudence of the European Court of Human Rights, and in particular to its judgment in the case *Saadi v United Kingdom*, 29 January 2008.



<sup>xii</sup> See the reference to the Constitutional Court by Tribunale di Busto Arsizio, 21 January 2011. *Gazzetta Ufficiale della Repubblica Italiana, I Serie Speciale*, n. 19, 4 May 2011, p. 37

<sup>xiii</sup> A conclusion which may be used to call into question the compatibility of the Italian legislation criminalizing illegal immigration and sanctioning it with immediate expulsion. For an in-depth examination of this issue, see below, § 6.

<sup>xiv</sup> And, we may add, which is expressly recognized by article 49(1) of the Charter of Fundamental Rights of the European Union. Mention of this principle is particularly relevant, as its applicability to cases such as the present one had been questioned by national judges, and given its interpretation by the national Court of Cassation: see for instance its judgment in Grand Chamber n. 2451, 27 September 2007, *Magera* (the Court ruled that article 14, 5 *ter*, was still applicable to Romanian citizens after the enlargement, if they had violated the decree ordering voluntary departure before becoming EU citizens).

<sup>xv</sup> This statement seems to allow to criminalize violation of a re-entry ban (issued in accordance with article 11 of the directive) on the part of a third-country national who was effectively expelled: in this case, it seems, the directive would no longer apply. See for instance article 13, para. 13 and 13 bis, of the Italian immigration law.

<sup>xvi</sup> See Corte di Cassazione, Sez. I penale. Notizie di decisione. <http://www.penelecontemporaneo.it/upload/Informazione%20Cassazione%20sentenza%20UE.pdf>

<sup>xvii</sup> See i.a. Tribunale di Milano, 29 April 2011, at <http://www.penelecontemporaneo.it/upload/673%20Milano.pdf>. Also see the position adopted by the Procuratore generale presso la Corte di Cassazione on the 2<sup>nd</sup> May 2011, in which the Prosecutor invited all national prosecutors to file requests to obtain withdrawal of judgments convicting detainees for the crimes which have been declared incompatible with the returns directive, available in [www.penelecontemporaneo.it](http://www.penelecontemporaneo.it).

<sup>xviii</sup> See, already before the adoption of the present judgment, Giudice di Pace di Milano, 26 April 2011, available at

[http://www.asgi.it/public/parser\\_download/save/giudice.di.pace.di.milano.sentenza.n.29521.2011.pdf](http://www.asgi.it/public/parser_download/save/giudice.di.pace.di.milano.sentenza.n.29521.2011.pdf); Giudice di Pace di Cremona, 25 March 2011, in <http://stranieriinitalia.it/briguglio/immigrazione-e-asilo/2011/aprile/gdp-cremona-rimpatri.pdf>; Giudice di Pace di Napoli, 11 April 2011, in [www.asgi.it](http://www.asgi.it).

<sup>xix</sup> See Consiglio di Stato, Adunanza Plenaria, 10 May 2011, n. 7, Charaf, at <http://www.penelecontemporaneo.it/>. Also see the *Circolari* (administrative memoranda) issued by the Ministry for Home Affairs: *Circolare* n. 3958 of 24 May 2011; n. 4027 of 26 May 2011; and n. 17102 of 23 June 2011, all available at <http://www.meltingpot.org/>. On the judgment of the Consiglio di Stato see Caruso C. (2011).

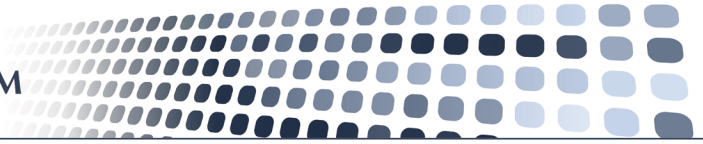
<sup>xx</sup> See for instance Articles L. 621-1 and L-621-2 of the French immigration law (Code de l'entrée et du séjour des étrangers et du droit d'asile), punishing illegal immigration by detention and a fine; § 95 of the German immigration law (Aufenthaltsgesetz), punishing illegal immigration by detention or a fine.

<sup>xxi</sup> See in particular Cour d'Appel de Douai, *Ordonnance*, 6 May 2011; Cour d'Appel de Toulouse, *Ordonnance*, 9 May 2011; Cour d'Appel Nimes, *Ordonnance*, 6 May 2011; all ordering immediate release of third-country nationals irregularly present in France who had been arrested for the crime of irregular entry. Judgments available in <http://www.actuel-avocat.fr/droit-justice-cabinet/index.html>. Also see the order issued by the Justice Minister, contesting this interpretation: *Circulaire*, 12 May 2011, at [http://gisti.org/IMG/pdf/circ\\_2011-05-12.pdf](http://gisti.org/IMG/pdf/circ_2011-05-12.pdf).

<sup>xxii</sup> This speech of the Minister, On. Roberto Maroni, is available at [http://www.camera.it/470?stenog=/\\_dati/leg16/lavori/stenbic/30/2008/1015&pagina=s020#Maroni%20Roberto%204%202](http://www.camera.it/470?stenog=/_dati/leg16/lavori/stenbic/30/2008/1015&pagina=s020#Maroni%20Roberto%204%202).

<sup>xxiii</sup> See para. 49 of the judgment.

<sup>xxiv</sup> On the question of the compatibility of article 10 *bis* of the Immigration law with the returns directive, see Giudice di Pace di Torino, 22 February 2011 (ruling that the crime does not comply with the directive as it is punishable even before the irregular migrant has been given a term for voluntary return). Also see the reference for a preliminary ruling from the Giudice di pace di Mestre lodged on 24 March 2011, Criminal proceedings against Asad Abdallah, Case C-144/11.



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