



National Report for Italy



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Contents

1.	FULL-PROOF Scope	8
2.	Directives 2012/13/EU, 2013/48/EU and (EU) 2016/1919	9
2.1.	Directive 2012/13/EU: Right to information in criminal proceedings	9
2.1.1.	Right to Receive Information on Procedural Rights	10
2.1.2.	Framework Provided for Suspects or Accused Deprived of Liberty	14
2.1.3.	European Arrest Warrant Framework	15
2.1.4.	Right to Receive Information about the Accusation.....	18
2.1.5.	First Information on the Accusation.....	18
2.1.6.	Provisional Charges	18
2.1.7.	Reasons for the Arrest and Detention	19
2.1.8.	Information on Changes of the Accusation.....	20
2.1.9.	Modification of the Criminal Act	20
2.1.10.	Modification of the Legal Qualification.....	21
2.1.11.	Right of Access to the Materials of the Case	22
2.1.12.	Remedies for Breaches of Information Rights.....	27
2.1.13.	Remedies for Breaches of the Right of Access to File.....	29
2.1.14.	Remedies for Breaches of Information Rights within EAW Proceedings.....	30
2.2.	Directive 2013/48/EU: Right of access to a lawyer and to have a third party informed.....	35
2.2.1.	The Scope of the Right to Have Access a Lawyer	36
2.2.2.	The Right to Access a Lawyer before Questioning	37
2.2.3.	The Right to have a Lawyer present during Questioning	39
2.2.4.	The Right to Have the Lawyer Present during Identity Parades	41

2.2.5.	Voluntary Waiver of Certain Aspects of the Right to Access to a Lawyer	49
2.2.6.	The Right of Access to a Lawyer in European Arrest Warrant Proceedings	51
2.3.	Directive (EU) 2016/1919: Legal aid.....	56
2.3.1.	Legal Aid in Criminal Proceedings.....	58
2.3.2.	Legal Aid in European Arrest Warrant Proceedings.....	60
2.3.3.	Decisions Regarding the Granting of Legal Aid	61
2.3.4.	Quality of Legal Aid Services and Training	62
3.	Conclusions	68
4.	References.....	69

Abbreviations and acronyms

CA	Consortium Agreement
D	Deliverable
DoA	Description of Action
EC	European Commission
EU	European Union
GA	Grant Agreement
G.A	General Assembly
GDPR	General Data Protection Regulation
IPRs	Intellectual Property Rights
KO	Kick-off
LEAs	Law Enforcement Agencies
M	Month
PC	Project Coordinator
PO	Project Officer
R&D	Research and Development
RFI	Request For Information
RP	Reporting Period
T	Task
TOC	Table of Content
TRL	Technology Readiness Levels
WP	Work Package
WPL	Work Package Leader

Executive summary

Italian legislation on the procedural rights of suspects and accused persons in criminal proceedings contains an established set of safeguards that, in several respects, already aligned with the minimum standards laid down by EU procedural-rights Directives. Nevertheless, Italy has introduced targeted legislative amendments to ensure full compliance with the three Directives addressed in this report.

With respect to Directive 2012/13/EU, the transposition through Legislative Decree no. 101 of 1 July 2014 strengthened the informative duties of authorities, most notably by introducing a written Letter of Rights for persons deprived of liberty and judicial control over the fulfilment of this duty. Certain critical issues remain, particularly concerning the completeness and timing of information for suspects not deprived of liberty and the practical effectiveness of keeping the Letter of Rights during detention.

In relation to Directive 2013/48/EU, Legislative Decree no. 46 of 15 September 2016 consolidated the right of access to a lawyer, including participation during questioning and selected investigative acts, and adjusted rules in European Arrest Warrant proceedings. While the Italian framework offers a high level of protection overall, a number of residual grey areas persist, notably as to the opportunity to consult privately with a lawyer before questioning in specific scenarios and the practical application of derogations.

As regards Directive (EU) 2016/1919, Italy's legal aid regime is primarily governed by Presidential Decree no. 115 of 30 May 2002. The implementing Legislative Decree no. 24 of 7 March 2019 introduced limited but relevant adjustments, chiefly extending legal aid to passive European Arrest Warrant surrender procedures. Remaining challenges concern the accessibility of information about legal aid at the earliest stages of proceedings and the consistency of practice.

Overall, Italy can be considered broadly compliant with the EU minimum standards within the scope of this report. The concluding section identifies cross-cutting areas where further clarification, better operational guidance, or incremental legislative refinement may strengthen effectiveness in practice.

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1. FULL-PROOF Scope

FULL-PROOF “Ensuring the due course of criminal proceedings via strengthened respect for the procedural rights of the suspect and the accused” (Grant Agreement n° 101160524), is a 2-year (October 2024 – September 2026) project co-funded by the European Union, via the Justice Programme (JUST-2023-JACC-EJUSTICE) call for proposals for action grants to promote judicial cooperation in civil and criminal matters. FULL-PROOF's main objective is to raise awareness and knowledge on Directives 2012/13/EU, 2013/48/EU, and 2016/1919/EU to better approach and work with suspects and accused. The partnership will analyse the most prominent and common breaches in the practical implementation of these Directives, building upon identified best practices and develop a framework for their replicability, streamline the use of new and existing tools and materials to assist professionals in their daily work and promote international communication.

This national report for Italy is prepared within the framework of the FULL-PROOF project. It examines the national implementation and operation in practice of selected EU procedural-rights Directives in criminal proceedings, with particular attention to the early stages of the justice process.

The analysis covers: (i) Directive 2012/13/EU on the right to information in criminal proceedings; (ii) Directive 2013/48/EU on the right of access to a lawyer and the right to communicate upon deprivation of liberty; and (iii) Directive (EU) 2016/1919 on legal aid for suspects and accused persons and for persons subject to European Arrest Warrant proceedings.

For each Directive, the report summarises the main transposition measures in the Italian legal order, highlights key operational features, and identifies issues that may affect effectiveness or full compliance.

2. Directives 2012/13/EU, 2013/48/EU and (EU) 2016/1919

This section consolidates three previously drafted analytical notes into a single, coherent national report. To ensure a unitary narrative, short bridging paragraphs have been added at the beginning of each subsection, and internal cross-references have been standardised.

2.1. Directive 2012/13/EU: Right to information in criminal proceedings

Directive 2012/13/EU addresses the timely communication of procedural rights and information about the accusation. In Italy, the transposition focused primarily on strengthening the Letter of Rights for persons deprived of liberty and on introducing judicial verification of compliance. The following subsection reviews the Italian framework as it currently stands, highlighting both structural safeguards and residual gaps.

Introduction

Directive 2012/13/EU on the right to information in criminal proceedings (hereinafter “Directive”) was transposed into the Italian legal system by Legislative Decree n. 101 of July 1, 2014 (hereinafter “Legislative Decree”), entered into force on August 16, 2014.

For the most part, the national act intervenes on the information about procedural safeguards, modifying Arts 293, 294 par. 1 bis, 369 bis, 386, 391 par. 2 of the Italian Code of Criminal Procedure (CCP) and Art 12 of the Law n. 69/2005 implementing Framework Decision 2002/584/JHA on the European Arrest Warrant (EAW). As we will see, the crucial amendments concern in particular the implementation of the right for suspects or accused persons deprived of liberty to be provided with a written Letter of Rights by the police. A judicial control thereon was also introduced in order to ensure better compliance with such informative duty.

Overall, national provisions on the information about procedural rights fully implement Arts 3, 4, and 5 of the Directive, either directly or indirectly. A few critical profiles relating to both the content and the form of such information will be detailed below.

Except for the insertion of par. 1-bis in Art 369 CCP, no explicit transposition was made instead in relation to the right to be informed about the accusation. The same goes for the right to access the file. Overall, indeed, these domains were considered to be already sufficiently regulated by national law. Arts 6 and 7 of the Directive can be considered, thus, *de facto* implemented, although with different degrees of satisfaction in terms of the defendant's rights.

Similarly, no specific remedy has been introduced to address the violations of the rights included in the Directive. However, it will be argued that - at least partially - existing legislation already indirectly implemented Art 8 par. 2 of the Directive.

2.1.1. Right to Receive Information on Procedural Rights

The right to be informed on procedural rights will be analysed from two angles: the content of such information and the form through which the information is conveyed.

Content

Following the structure of the Directive, we can distinguish the content of procedural rights in three different frameworks: a general one providing for minimal safeguards, a specific one for suspects or accused deprived of liberty and, finally, a framework tailored to those arrested by virtue of an EAW .

General Framework

The Directive, under Art 3, foresees that suspects and accused must be promptly informed, at least, of the rights of access to a lawyer; to legal aid; to interpretation and translation and to remain silent, as well as to be informed about the accusation.

We will assess below the national implementation of those rights relating to suspects and accused who are not deprived of liberty, with the exception of the right to information about the accusation, which will be dealt with separately in § 4.3.

In all cases, it should be noted that the Italian legal system implements the Directive to a limited extent. Indeed – apart from the information on the right to silence, which also applies to the preliminary hearing – the rules that will be outlined below are laid down only for preliminary investigations and not for subsequent procedural phases as required by Art 2 par. 1 of the Directive.

a) Right of access to a lawyer

When the information on the right of access to a lawyer is at issue, it is necessary to distinguish between investigative acts carried out by the Public Prosecutor and those carried out by the police. In both cases, the national framework pre-exists the Directive and it can be considered satisfactorily de facto implemented.

As for the Prosecutor, when, during the pre-trial investigation, s/he carries out an activity to which the lawyer has the right to be present, s/he must previously send the suspect a notice of investigation (informazione di garanzia), requesting her/him to appoint a retained lawyer (Art 369 CCP).

According to the Supreme Court's case-law, the prior forwarding of the notice is not due in case of the so-called 'surprise acts' (search, seizure and inspection pursuant to Art 364 par. 5 CCP), nor has the Prosecutor the obligation, if the suspect is present, to hand over the notice when these acts are executed, as the law requires in such cases equivalent information duties. In a similar vein, it has been outlined in literature that a series of other acts can be considered equivalent in content and thus alternative to the notice of investigation, such as the summons to appear for questioning according to Art 375 CCP or the notice of a non-repeatable technical ascertainment under Art 360 CCP.

Moreover, if the suspect has not appointed a retained lawyer yet, the Prosecutor must designate a court-appointed lawyer. To this end, s/he sends the suspect a notice about defence rights under Art 369 bis CCP, during the first activity in which the lawyer has the right to be present or, at the latest, along with the notice on the conclusion of preliminary investigations. Such notice provides the accused/suspect with the details of the court-appointed lawyer as well as with specific information on the technical defence, including the right to appoint a retained lawyer (Art 369 bis par. 2 lett. a-d CCP).

Moving to the warnings made by the police, the suspect is informed orally of the right to be assisted by a retained lawyer pursuant to Art 114 of the Implementing provisions of the CCP, when the police must carry out the 'surprise acts' indicated in Art 356 CCP (searches, urgent checks of the scene, objects and persons, and seizure). Such

information is also given by the police prior to the interview under Art 350 paragraphs 1-4 CCP. In the latter circumstance, if the suspect does not appoint a retained lawyer, the police officials shall designate a court-appointed one, as the lawyer's presence in case of questioning made by the police of its own initiative is compulsory.

b) Right to legal aid and to interpretation and translation

The rights to legal aid and to the interpretation and translation of essential documents can be discussed together as they are both foreseen by Art 369 bis par. 2 CCP. The first is codified under letter e) since the insertion of this article by the legislator in 2001, whereas the second was explicitly introduced by the Legislative Decree under letter d-bis.

However, the implementation of the Directive cannot be considered fully satisfactory in relation to the information on these two rights concerning suspects or accused not deprived of liberty.

Indeed, the notice to the suspect about her/his right of defence (Art 369 bis CCP), as interpreted by the Court of cassation, is not given when the suspect has already appointed a retained lawyer or in case of acts carried out by the police on its own initiative.

Prerequisite of the norm is in fact that a court-appointed lawyer has been designated. As mentioned, in case of 'surprise acts' under Art 356 CCP, police do not have the prerogative to designate a court-appointed lawyer. It can do so, instead, in the event of questioning under Art 350 CCP; for this reason, some scholars estimated that in this case the notice under Art 369 bis CCP is due. This theory seems, though, rejected by the Supreme Court's case-law, which considers that Art 369 bis CCP applies only to investigative acts carried out by the Prosecutor or by the police, when delegated by the Prosecutor pursuant to Art 370 CCP.

Therefore, if the activities are carried out solely by the police, it could be possible that the suspect is informed of these rights only at the conclusion of the preliminary investigations, if s/he has not appointed a retained lawyer yet. Or, in case of activities carried out either by the police or the Prosecutor, it is also possible that such notice is

never provided if the suspect has already appointed a retained lawyer. These scenarios do not seem justified and in line with Art 3 par. 1 and recital 19 of the Directive, which establish that suspects must always be promptly informed of these safeguards.

c) Right to remain silent

The information on the right to remain silent was already satisfactorily regulated prior to the entering into force of the Directive, which can thus be considered *de facto* implemented, except for one critical profile discussed below.

The key provision governing the right to silence is Art 64 par. 3 CCP. This is a general rule that finds application in case of questioning made by the Prosecutor (Arts. 375 and 388 CCP), by the police of its own initiative or delegated by the Prosecutor (Arts. 350 par. 1 and 370 CCP), by the judge who has decided on the application of a personal precautionary measure or who has confirmed the arrest or temporary detention (Arts. 294 and 391 par. 3 CCP) and also by the Preliminary Hearing Judge (Art 421 par. 2 CCP).

Information on the right to silence is given orally straight before questioning pursuant to Art 64 CCP, but it could also be granted previously in writing according to Art 369-bis par. 2 lett. a) CCP, which requires to specify in the notice "the rights assigned by law to the suspected person". This provision, however, is not interpreted consistently, as such specification can be more or less detailed. It emerges from practice that in some instances the right to silence figures among the prerogatives listed in the defence rights notice.

In addition, the information on the right to remain silent is guaranteed through a preventive warning concerning the person (a potential witness) who is not accused or suspect and who makes incriminating statements before the Prosecutor or the police. In this case, pursuant to Art 63 CCP, the examination is interrupted, and the person is warned that investigations may be carried out against her/him and is advised to appoint a lawyer. The right to silence is safeguarded requiring that such statements are not used against the person who made them.

The critical point which can be highlighted concerns the spontaneous statements made by the suspect to the police, since, under Art 350 par. 7 CCP, Arts. 63 and 64 CCP safeguards and the right to be assisted by a lawyer must not apply in this case. This framework is highly criticised by scholars from the defence rights perspective and does not seem totally in line with Art 3 par. 1 and recital 19 of the Directive. Nevertheless, the Court of cassation has explicitly excluded any contrast with the Directive, arguing that the duty to inform suspects "promptly" about rights leaves States a certain margin of discretion as for the moment in which such information shall be given.

2.1.2. Framework Provided for Suspects or Accused Deprived of Liberty

Art 4 of the Directive has been explicitly transposed by the Legislative Decree, which modified both Art 293 relating to the enforcement of precautionary detention orders, and Art 386 relating to the moment of the arrest or temporary detention (fermo). In both cases, an analogous information duty of the police on all the rights listed by the Directive has been introduced.

In compliance with the Directive, such information shall be provided via a written notice (Art 293 par. 1 and 386 par. 1 CCP) or – in the lack of available notice in a language the suspect/accused understands – orally, without prejudice to the obligation to hand her/him over the written notice without delay (Arts. 293 par. 1-bis and 386 par. 1-bis CCP).

The Legislative Decree, in order to allow the control on the above-mentioned provisions, also established that police must include the carry out of these information duties in the record of the operations (Art 293 par. 1-ter CCP and 386 par. 3 CCP). Such record is subsequently forwarded to the judge who issued the order of precautionary detention (Art 293 par. 1-ter CCP) or to the one who must confirm the arrest or temporary detention (Art 122 of the Provisions Implementing the CCP). The judge shall verify that the information has been given and, in the negative, s/he must provide it (see, respectively, Arts. 294 par. 1-bis CCP and 391 par. 2 CCP as modified by the Legislative Decree).

These amendments have been welcomed by scholars they entail a considerable increase in the safeguards compared to the previous version of the CCP, which granted to persons deprived of liberty information only on the right to appoint a retained lawyer, without written notice. Overall, Art 4 of the Directive can, thus, be considered satisfactorily explicitly transposed (although some critical aspects concerning the form and the effectiveness of such information will be discussed further in § 4.2.2).

As an additional problematic aspect, it should be noted that the Italian legal system does not lay down any specific provision on the opportunity for the suspects or accused persons to read the Letter of Rights and on the permission to keep it in their possession throughout the time that they are deprived of liberty, as required by Art 4 par. 1 of the Directive.

2.1.3. European Arrest Warrant Framework

Art 5 par. 1 of the Directive has been explicitly implemented by the Legislative Decree adding to Art 12 of the Law n. 69/2005 (hereinafter "EAW Law") the necessity to provide the requested person with a written notice at the time of her/his arrest. Under Art 12 par. 1 of the EAW Law, the rights that must be included in the notice are those foreseen by Art 11 of the Framework Decision 2002/584/JHA on the EAW. Such prerogatives consist, in particular, in the possibility of consenting to the surrender, in the right to appoint a retained lawyer (in the executing State) and in the right to be assisted by an interpreter. Subsequently, the Legislative Decree n. 184/2016 implementing the Directive 2013/48/EU has added the right to be informed of the faculty to appoint a lawyer in the issuing State (Art 12 par. 1-bis EAW Law).

In comparison to the indicative model Letter of Rights set out by Annex II of the Directive, it can be observed that the written notice must not contain the right to be informed on the content of the warrant (but this information is communicated orally and must be mentioned in the arrest record) and the right to be heard. By contrast, the model written notice provided by the Italian Ministry of the Interior adds to the list contained in Art 12 EAW Law and to Annex II, the right to inform consular authorities and the right of access to urgent medical assistance.

The provision of such minimal informative safeguards by the EAW Law has been rightly criticised in literature, as it seems to imply an unjustified worse treatment compared to the one set up for national proceedings. However, this difference in frameworks has been recently endorsed by the CJEU, which clarified that other articles of the Directive – namely the information on the remedies available in the issuing State (Art 4 par. 3), on the reasons of the arrest (Art 6 par. 2) and on the access to the materials of the case (Art 7 par. 1) – do not apply to the EAW Framework.

Despite this questionable ruling of the CJEU, in order to ensure the effectiveness of defence rights within surrender procedures, it seems that the requested person should also be informed of other rights which are applicable to the proceedings taking place in the executing State. This is the case, for instance, of the additional rights mentioned above listed in Annex II of the Directive – i.e., the right to be informed on the content of the warrant and the right to be heard – and in the ministerial model – i.e., the right to inform consular authorities and the right of access to urgent medical assistance

Moreover, it should be added the information on the right to legal aid, introduced for the EAW by the Italian Legislative Decree n. 24 of 2019 modifying Art 75 of the Presidential Decree n. 115/2002. This information would be indeed all the more relevant within EAW proceedings, considering the particular economic burden of opting for a double defence in both the executing and the issuing member States.

Similarly, it does not seem reasonable that the requested person is informed only of the right to an interpreter and not of the right to translation. In order to comply with the Directive 2010/64/EU, as also foreseen by Annex II of the Directive in comment, the EAW Law should be amended to include the right to a translation of the warrant and the respective information right on such prerogative.

To conclude, it should be noted that the EAW passive procedure might also be initiated to enforce a precautionary measure pursuant to Art 9 EAW Law, although this case is rarer than the arrest on the initiative of the police pursuant to Art 12 EAW Law. In such event, the requested person is informed by the police of her/his right to appoint a lawyer in the issuing member State (Art 9 par. 5-bis EAW Law). Moreover, the information duties provided for national proceedings under Art 293 CCP in case of

enforcement of a precautionary measure shall apply by virtue of the reference made by Art 9 par. 5 to the compatible code's provisions. In addition, when brought before the Court after the enforcement of the measure, the individual is also informed orally by the judge of the content of the warrant, of the possibility to consent and of the right to renounce to the speciality principle (Art 10 par. 1 EAW Law).

Form

The national implementation of the Directive is characterised by different flaws from the point of view of the form of the information about procedural rights and, thus, of its effectiveness.

According to the Directive, the information must be conveyed "in a simple and accessible language" (Art 3 par. 2, Art 4 par. 4 and Art 5 par. 2). Explicit implementation in this regard is provided only in relation to the information given in case of deprivation of liberty of suspects or accused persons. Arts. 293 and 386 CCP require indeed the information to be written "clearly and precisely". Nevertheless, the use of precise technical language does not necessarily guarantee that the meaning of the information is accessible to the general public.

Moreover, Arts. 293, 369 bis and 386 CCP and Art 12 of the EAW Law make a simple list of rights copying from the provisions of the Directive. As has been outlined in literature, this does not seem to comply with the Directive, which requires to inform on the rights "as they apply under national law" (Art 3 par. 1 and 4 par. 2). On the same line, the model Letter of Rights set up out by the Ministry, contrary to the Directive's Annexes, is not detailed as for the implications of the rights listed. Therefore, the understanding of the content of the letter might be jeopardised.

In addition, linguistic problems may arise. In order to avoid communication about procedural rights to be given orally, a central model Letter of Rights adding at least the Arabic language to the English, French, Spanish, German and Chinese versions would be desirable.

Finally, no specific provision taking into account the needs for vulnerable suspects or accused persons is foreseen as asked by Art 3 par. 2 of the Directive. Moreover, to this day, the Italian legislator has not implemented a specific legal framework concerning

the information rights for children, as required by Art 4 of the Directive 2016/800/EU. Therefore, the same rules as adults apply.

2.1.4. Right to Receive Information about the Accusation

The implementation of Art 6 of the Directive will be discussed analysing firstly the framework on the knowledge of the charges and, subsequently, the one relating to changes in the accusation.

2.1.5. First Information on the Accusation

Three informative moments broadly form part of the information on the accusation: the knowledge of the provisional charges during the preliminary investigations; the reasons for the arrest and detention; and the knowledge of the proper accusation when formal charges are brought.

2.1.6. Provisional Charges

Under the Italian legal system, a composite framework de facto implements Art 6 par. 1 of the Directive when it comes to the information on the provisional charges against the suspect.

Firstly, Art 335 par. 3 CCP provides the possibility for the suspect, the victim and the lawyers, upon their own request, to be informed of the Prosecutor's recording of the *notitia criminis* in the dedicated register. Such entering contains both the alleged criminal act and its legal qualification and represents, thus, an important source of information for the suspect during the preliminary investigation. However, this provision is widely criticised in literature as certain grave crimes listed in Art 407 par. 2 lett. a) CCP are excluded from its scope of application and, especially, because according to Art 335 par. 3-bis CCP, the Prosecutor may order the secrecy over the entering the *notitia criminis* in case of specific needs concerning the investigation. Despite the longstanding critical remarks on the discretionary character of such a limit to the right to information, the Legislative Decree implementing the Directive made no modifications in this regard.

Secondly, the suspect receives information about the date and place of commission of the criminal act together with a brief description of the facts and on its legal qualification when s/he is notified of the notice of investigation pursuant to Art 369

CCP. Should the legal definition of the criminal act change during the investigation, the suspect is not given a new notice. The Legislative Decree, though, introduced Art 369 para. 1-bis CCP, according to which the suspect is made aware of his/her right to have access to the *notitiae criminis* register pursuant to Art 335 CCP, which must be updated by the Prosecutor in case of changes.

Finally, more detailed information on the criminal act and on the rules of laws allegedly violated is provided with the notice on conclusion of preliminary investigations (Art 415-bis CCP).

Overall, can be shared the view that the combination of Arts 335, 369 and 415-bis CCP draws up a satisfactory implementation of the right to be informed promptly and in sufficient detail of the provisional charges during the preliminary investigations.

2.1.7. Reasons for the Arrest and Detention

Arts 293(1)(b) and 386(1)(b) CCP explicitly implement Art 3 par. 1 lett. c) of the Directive, providing for a right for those deprived of liberty to obtain information on the accusation raised.

A series of other provisions then ensure the information on such right, indirectly satisfactorily implementing Art 6 par. 2 of the Directive. In particular, at the enforcement of a precautionary detention order, the suspect or accused person is delivered a copy of the order (Art 293 par. 1 CCP), which contains a brief description of the criminal act with the indication of the allegedly violated rules of law (Art 292 par. 2 lett. b) CCP).

In case of arrest or temporary detention (*fermo*), instead, the information on the reasons for the deprivation of liberty is given by the Prosecutor during questioning pursuant to Art 388 par. 2 CCP or, at the latest, at the confirmation hearings according to Art 391 par. 3 CCP.

Indictment

The information on the submission of the accusation to a court (Art 6 par. 3 of the Directive) is de facto implemented in a number of provisions of the CCP.

The request for committal to trial (*richiesta di rinvio a giudizio*) submitted by the Prosecutor to the Preliminary Investigations Judge, according to Art 417 par. 1. lett. b) CCP must contain a clear and precise description of the criminal act, the aggravating circumstances and those that may result in the application of security measures, indicating the relevant legal provisions. The same requirements of providing detailed information on the accusation are imposed by Art 429 CCP regulating the decree for committal to trial issued by the Preliminary Investigations Judge. The same goes for the decree for direct summons for trial under Art 552 CCP, which is issued by the Prosecutor when the preliminary hearing is not deemed necessary by the legislator according to Art 550 CCP. Therefore, Art 6 par. 3 of the Directive can be considered fully implemented.

The same conclusion can be reached if the Prosecutor decides to resort to the so-called “special proceedings”. In case of direct trial (*giudizio direttissimo*) under Art 450 par. 1 CCP, the indictment is brought forward orally at the hearing. Art 450 par. 2 CCP on the start of direct trial for defendants not deprived of liberty and Art 456 CCP on the decree ordering immediate trial (*giudizio immediato*) both refer instead to the provisions of Art 429 CCP. Similarly, in case of proceedings by penalty order (*procedimento per decreto*), Art 460 par. 1 lett. b) CCP establishes that the order shall contain the description of the criminal act, the circumstances and provisions of law that have been violated.

2.1.8. Information on Changes of the Accusation

Art 6 par. 4 of the Directive is de facto implemented in relation to changes of the accusation pertaining to both the criminal act and to the legal qualification of the offence.

2.1.9. Modification of the Criminal Act

Information on changes in the material element of the accusation during the trial is fully regulated by the CCP. In case of different criminal act or joined offence and aggravating circumstances resulting from the evidence gathered at trial, the accused is informed by the Prosecutor of the changes during the hearing (see, respectively, Arts 516 and 517 CCP) or, if s/he is absent, s/he is notified the trial record containing the new accusation pursuant to Art 520 CCP. In case of new criminal act (Art 518 CCP),

the accused shall consent to the modification of the accusation in the hearing, and the amendment shall also be authorized by the President of the bench.

In addition, a series of prerogatives are granted to the defendant. Under Art 519 CCP, s/he is informed by the President of the bench of her/his right to request a period of time to prepare the defence and has the right to request the admission of new evidence. Moreover, in case of changes pursuant to Arts 516 and 517 CCP, the Constitutional Court recognised on several occasions the right for the accused to request special proceedings.

2.1.10. Modification of the Legal Qualification

On the contrary, the CPP does not provide, in general, for a right of the accused to be informed of a modification of the legal qualification made by the judge pursuant to Art 521. Nevertheless, such a right has been introduced by the Italian jurisprudence following the 2007 *Drassich v Italy* judgement of the ECtHR and is now also partially codified. An explicit safeguard has in fact recently been introduced in proceedings before the Court of Cassation: pursuant to Art 611 (1-sexies) CCP, whenever the Court intends to modify the legal definition of the facts, it must order a new hearing, indicate the reasons for such referral, and duly notify the parties, thereby ensuring that the defence can be heard in advance.

Otherwise, if the modification is made by the Tribunal or by the Appeals Court – according to the prevalent case-law of the Supreme Court – it is deemed sufficient for the defendant to adapt her/his defence to the new qualification appealing the first or second instance judgement, unless the new legal qualification was not sufficiently foreseeable. In the latter case, the defendant must be informed. This interpretation does not seem entirely in line with the Strasbourg case-law and with the Directive, according to which the defendant must be promptly informed of any changes of the accusation. In particular, the CJEU, in *BK*, has clarified that Article 6(4) of Directive 2012/13/EU requires timely notice of any envisaged reclassification and a genuine opportunity to respond before the decision, even where the new classification does not entail a harsher penalty. As has been outlined in literature, it would be advisable to inform the defendant within the same proceedings before the verdict, without postponing the exercise of her/his defence right to subsequent degrees.

As for the defendants' safeguards, so far, the Constitutional Court refused to extend the possibility for the defendants to request special proceedings following the new legal qualification. Such difference in treatment compared to the modification of the criminal act is highly criticised by Italian scholars. Nevertheless, it was deemed in line with EU law by the Luxembourg judges, who stressed that such a prerogative is not required by Art 6(4) of the Directive.

2.1.11. Right of Access to the Materials of the Case

Art 7 of the Directive recognizes to the defendant and his/her lawyer the right to access the file of the case, when the person is arrested and detained at any stage of the criminal proceedings, and at the latest upon submission of the merits of the accusation to the judgment of a court.

The Italian legislator did not consider it necessary to implement this provision, insofar as the transposition realized with the Legislative Decree basically covers only the right to information. In most cases, actually, the right of access to files remains implicit in the information duties imposed on the Prosecutor, as a merely ancillary profile.

This has also long been the perspective followed by the jurisprudence, that only recently, as it will be illustrated, affirmed the autonomous right of the defendant to access to the material of the case in case of arrest or detention in a broader perspective.

It is true that, thanks to pre-existing Italian legislation, the right of access to file is overall recognized and the Directive could be thus considered indirectly implemented. The general underestimation of this important right, however, leaves open a few critical profiles, especially related to the lack of specific remedies in case of their violations .

The Right of Access to File before the Conclusion of the Preliminary Investigation

The right of access to file is regulated in the Italian legal system by a sparse set of norms, each referred to specific procedural phases of the criminal proceeding.

Firstly, the right is recognized to the person(s) targeted by a pre-trial measure, including pre-trial detention, by Art 293, c. 3 CCP. This is the only case, of those considered by Art 7 of the Directive, which finds an explicit legal basis in the Italian legislation.

The provision indeed specifically requires making available to the defence lawyer the request to apply the measure issued by the Prosecutor together with the documents submitted with it, as well as the order that applied the measure.

Actually, in these circumstances, the level of protection granted under Italian law is higher than that of the Directive, as it is not limited to cases where the personal freedom of the accused is restricted in the most intrusive way, but extends to all precautionary measures.

Different is instead the case of a person arrested or stopped by police (*fermo di polizia*), where the applicable regulation only partially emerges from statutory law, and in particular by the combined reading of Arts 386, c. 2, 388 and 391 CCP. This is indeed one of the contexts in which the right of access to file does find an explicit recognition by Italian law, that refers only to the information duties incumbent upon the Prosecutor.

According to the CCP, after the stop or arrest, indeed, police shall immediately inform the lawyer of the arrested or stopped person.

During the interrogation, the Prosecutor shall inform the arrested or detained person of the fact for which the arrest or detention is being carried out; of the reasons which led to the measure; and of the elements against her/him, as well as, if it is not prejudicial to the investigation, of the sources from which such elements have been obtained. Nothing is explicitly said, however, on the duty for the Prosecutor to grant the defence lawyer the access to the material of the case.

The lacuna remained also in the subsequent phase of the proceeding, that is at the hearing held to validate the arrest that takes place before a judge. In that context, the Prosecutor shall state the reasons for the arrest or detention and explain the requests concerning the maintenance of limitations to the personal freedom of the accused. Again, however, nothing is explicitly said about the right of access to file of the arrestee or of his/her lawyer.

According to Art 116 CCP, during the proceeding and after its settlement, any person having an interest therein may obtain the issuance at his/her own expense of copies,

extracts or certificates of individual acts. In the investigation phase, the request is dealt with by the public prosecutor's office, who enjoys discretion in granting such access.

The statutory legal framework in this context, therefore, does not appear to be compliant with Art 7 of the Directive.

Nonetheless, an indirect implementation of the right of access to file may be found in light of the case law of the Supreme Court.

Indeed, in 2010 the Sezioni Unite of the Supreme Court clarified that the defence lawyer of the arrested or stopped person (fermato) has the right of access to the material of the case during the proceeding to validate the arrest or stop.

In particular, the material that should be disclosed includes all the elements that ground the request for validation of the arrest/stop, as well as the elements that might be subsequently used by the Prosecutor to issue a request for a precautionary measure.

The interpretation has been recently confirmed in a 2021 decision, that explicitly recognized how the information duty incumbent upon the Prosecutor is a “a merely illustrative activity that can be considered the result of a selection of the elements placed at the basis of the validation and of the precautionary request [and that] in itself not exhaustive for the purposes of the knowledge of the acts and the preparation of an effective defence”, and again in a 2023 decision.

In light of these case-law, therefore, Art 7(1) could be considered de facto implemented in Italian law.

A partially different conclusion shall be drawn with regard to Art 7(2) of the Directive, according to which the right of access to file shall refer to “all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons”.

Indeed, the provisions mentioned before, both with regard to the application of a pre-trial measure and in case of arrest or fermo, refer only to the elements used to apply the measure or that ground the validation request of the arrest/fermo. No mention, instead, can be found of the elements in favour of the accused at this stage of the

proceeding. In this sense, it can be concluded that the Italian system complies only partially with the Directive.

The Right of Access to File after the Conclusion of the Preliminary Investigation

The Italian system, on the other side, appears mostly compliant with Art 7(3), according to which access to the materials of the file shall be granted in due time and at the latest upon submission of the merits of the accusation to the judgment of a court.

Art 415-bis CCP indeed requires the Prosecutor to deposit the complete file of the case at the end of the investigation and to notify the defence lawyer and the accused of their right to access to it. From this moment on, the investigation file will remain in the continuous accessibility of the parties of the proceeding (Prosecutor, accused and her/his lawyer). All elements that may be collected subsequently will be included in the file and, therefore, will be subsequently made available also to the defence and the accused.

A critical profile could however be found in practice, in the lack of flexibility of the terms that the law recognizes to the defence to access to the case materials (20 days). Especially in case of particularly voluminous files, indeed, such a term may be considered too short to ensure an effective defence strategy; nonetheless, the law at the moment does not foresee for an extension of such terms depending on the concrete assessment of the case.

Derogations

The Italian system seems also to be in compliance with Art 7(4) of the Directive, that provides derogations to the right of access to file.

In general terms, the potential prejudice for the ongoing investigation represents the main exception to the right of access to file. As illustrated above, before the conclusion of the preliminary investigation, access to file is indeed only seldomly allowed.

In this phase of the proceeding, the prevailing principle is the confidentiality, or secrecy of criminal investigations (*segreto investigativo*). According to Art 329 CCP, information on the investigative acts carried out by the Prosecutor and law

enforcement shall not be disclosed while preliminary investigations are pending or until the defendant is informed.

This norm aims at allowing the best protection of the investigative goals, interests which sometimes persists also after the closure of the preliminary investigations.

The Public Prosecutor may indeed prolong the secrecy obligation with regard to specific acts or pieces of information by means of a reasoned decree. This may occur: a) where the defendant allows it or when knowledge of the act may hinder investigations concerning other persons; b) with regard to information relating to specific investigative operations, in case secrecy is necessary for the continuation of the investigation.

At the same time, derogations to this secrecy obligation may be authorized also before the closure of the investigations, by the public prosecutor, with a reasoned decree that allows the publication of specific acts or pieces of information.

The provision of Art 329 CCP thus seems to be in line with the first part of Art 7(4) of the Directive.

Some doubts may be raised, however, with regard to the last part of the Directive's provision, according to which "Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review".

In Italy, the decision not to disclose the sources from which elements against the accused have been obtained is taken by the Prosecutor, which does enjoy the same status of court judges. However, some ECtHR case law and legal scholars highlighted that the Prosecutor cannot be really considered an impartial subject within criminal proceedings, even during pre-trial investigations.

In this sense, the lack of specific judicial review against decisions refusing to grant access to the material of the file can be generally seen as problematic in terms of compliance with the Directive.

The only exception in this regard may be found in Art 415-bis, c. 2bis CCP, according to which the refusal of the Prosecutor to allow the defence access to the intercepted material (after the closure of the investigation) can be appealed before the judge of preliminary investigation.

Costs

Lastly, Art 116, c. 1-2 CCP seems to indirectly comply with Art 7(5) of the Directive, according to which access shall be provided free of charge. This does not mean, however, that costs are never imposed on the defendant. While access is free of charge, indeed, obtaining copies of the material of the case shall be borne by the requesting party.

The possibility to charge fees in exchange for the release of copies seems in any case in compliance with the Directive, and in particular with Recital (34).

Remedies

According to Art 8(2) of the Directive, Member States shall ensure that suspects or accused persons or their lawyers have the right to challenge the possible failure or refusal of the competent authorities to grant the rights recognized by the Directive.

This provision could be considered only partially implemented in Italy. In any case, no specific amendment was introduced in this regard after the entry into force of the Directive: The partial implementation is therefore deriving from pre-existing Italian legislation and case-law.

2.1.12. Remedies for Breaches of Information Rights

In general terms, if the accused is not provided for with the information rights through the Letter of Rights, s/he can still be informed of the latter by the competent judge, who controls the legality of measures affecting personal freedom (cf. Arts 294-bis and 391, c. 2 CCP). When this opportunity fails, no specific remedy has been introduced in the Italian legal framework to address violations of the information rights. However, as anticipated, pre-existing legislation provides for some remedy in case of certain violations, at least to some extent.

Specifically, remedies were already recognized concerning the right to be informed of the right to access to a lawyer (Arts 369, 369bis, 386, c. 1, let. a), 293, c. 1, let. a), 386, c. 1, let. a) CCP). Violations of this information right are sanctioned with nullity in accordance with Art 178, c.1, let. c) CCP (nullità intermedia). Such nullity may be raised by the parties, as well as ex officio by the judge, within specific time limits that follow the different phases of criminal proceedings (not after the decision of first instance for violations occurred before the trial hearing; for those occurred at trial, not after the decision of the following instance). In case of violation of the information right established by Art 293 CCP, the nullity may also be invoked through the specific appeal remedies established against pre-trial measures (riesame, ricorso per cassazione, Art 309 ff CCP).

Also, remedies could already be found in the Italian legal system concerning the right to be informed of the accusation. Violations of this information rights as provided by Arts 293 and 386 CCP are sanctioned with nullità intermedia, which may be raised in accordance to the deadlines and ways illustrated above. Similarly to the previous case, also in this context, breaches of Art 293 CCP, such nullity may also be invoked through the specific appeal remedies established against pre-trial measures.

However, according to the jurisprudence of the Italian Supreme court, the nullity related to Art 386 CCP is considered to be able to affect only the arrest, and not the validity of the following proceeding (e.g. for the application of a pre-trial measure).

On the other side, violation of the right to be informed of the accusation ex Art 415 bis, c. 2 CCP have more significant consequences. Indeed, if the warnings listed in such provision are missing, the request to proceed to trial (Art 416 CCP) is sanctioned by nullity.

Also, specific provisions were already into place with regard to the right to be informed of any changes in the given information, and specifically of potential changes in the accusation. Violations of these information rights, established by Arts 423, 516, 517, 518, 520, 521, and 604 CCP, are sanctioned with the nullity of the decision in accordance with Art 522 CCP.

Specific exclusionary rules are then established for breaches of the right to be informed of the right to remain silent. Violations of this information rights are indeed sanctioned by the combined reading of Arts 63 and 64 CCP. According to it, statements obtained without the previous warning that the accused may remain silent cannot be used as evidence, unless they are in favour of the suspect.

Lastly, nullità intermedia is also the consequence in case of violations of other information rights (namely, the right to be informed of: the right to interpretation/translation; the right to communicate with third-parties and consular authorities; the right to medical assistance; the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority; the remedies applicable). On the other side, no specific remedy is provided for breaches of the right to be informed of the accusation in accordance with Art 335 CCP. In this case, indeed, Italian law allows only for the triggering of (not necessarily effective) disciplinary sanctions.

2.1.13. Remedies for Breaches of the Right of Access to File

Remedies to violation of the right to access to the material of the case find their legal bases almost exclusively in the case-law.

In particular, according to the Supreme Court, the refusal of the right to access, to the extent the latter is recognized during the investigation (see above, § 4.4.1), causes a nullity (nullità generale a regime intermedio) of the subsequent interview of the accused and of the act that validates his/her arrest. Such nullity shall, in any case, be raised during the hearing scheduled to validate the arrest ex Art 182, c. 2 CCP (and not to a later stage of the proceeding).

A (at least partial) statutory legal basis may instead be found with regard to the right of access to file after the conclusion of the investigations. Indeed, violations of the requirements listed by Art 415 bis CCP causes the nullity of the subsequent request to proceed to trial (Art 416 CCP). Nonetheless, besides for potential disciplinary liability of the Prosecutor, no specific provision is established to remedy to the (unlikely) situation where the defendant is prevented from actually accessing to the file.

2.1.14. Remedies for Breaches of Information Rights within EAW Proceedings

The EAW Law lists a series of specific remedies in case of breaches of (also) the information rights within the European Arrest Warrant proceedings.

In particular, Art 12, c. 3 EAW Law establishes a sanction of nullity (*nullità relativa*) if the arrest report does not refer to the fulfilment of the informative obligations provided for by Art 12, c. 1 of the same Law. Such nullity may be raised only by the parties, within specific and relatively short time limits, established by Art 181 CCP.

The level of protection, therefore, is not equal to that conferred in fully national proceedings. In the latter, indeed, the nullity is triggered by the fact that the information is not given to the defendant. In EAW proceedings, on the contrary, the sanction is linked to the mere lack of mentioning in the arrest report of the fulfilment of the informative obligations (without any check on the fact that the arrestee has been effectively informed or not).

The violation of the right to be informed of the right to appoint a lawyer in the issuing State is excluded from the illustrated regulation, although such right is explicitly recalled in the EAW Law. With regard to this provision, therefore, no specific remedy is currently available at the legislative level. The case-law, on its side, affirmed that this information can also be given to the defendant in a subsequent moment, that is by the judge during the procedure to validate the arrest, in accordance with Arts. 391 and 294 CCP. Nonetheless, the Court of Cassation consistently holds that failure to give such notice entails a more serious nullity (*nullità a regime intermedio*), subject to the same regime as in ordinary criminal proceedings.

Lastly some information rights (right to silence, right to be informed of the changes in the accusation) are not recognized as such to the defendant in case of EAW proceedings already at the European level.

In this case, therefore, no formal infringement could be found in Italian law, that does not establish specific remedy in case of their violation. Although the asymmetry between national and EAW proceedings seems to have been sustained by the Court of Justice, at least to a certain extent, the difference of treatment still appears critical in the perspective of an effective protection of defence rights.

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2.2. Directive 2013/48/EU: Right of access to a lawyer and to have a third party informed

Directive 2013/48/EU aims to ensure effective access to legal assistance, including prior to questioning, participation of counsel during key investigative acts, and communication with third parties upon deprivation of liberty. Italy implemented the Directive mainly through Legislative Decree no. 46/2016, amending selected provisions of the Code of Criminal Procedure and the European Arrest Warrant statute. The analysis below assesses the resulting protection level and the principal areas where practice and legislation may still diverge from the Directive's objectives.

Introduction

The Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings (the Directive) was transposed in the Italian system by the Legislative Decree of the 15 September 2016, no. 46 (the Decree). The Decree explicitly implemented only a limited amount of the Directive's provisions, amending Art 364 of Italian Criminal Procedure Code (CCP), Art 24 of the implementing provisions of the CCP (disp. att.), Arts 9 and 12 of the Law of 22 April 2005, n. 69.

The Italian legislator deemed that some of the provisions of the Directive (Arts 2(4)(a) and 11(6)) were not in need of any specific transposition, while others were subject to an implicit or de facto implementation in the national system. Indeed, the level of protection enshrined in the majority of the Directive's provision was already guaranteed in the national legal order, so that the overall implementation of the Directive can be considered satisfactory. Nonetheless, a limited number of national provisions seems to meet the standards of protection of the Directive only partially. Among these, we will draw attention to those pertaining to the right to access a lawyer before questioning, some aspects of the regime of derogations, the right of access to a lawyer in European Arrest Warrant procedures and the right to remedy for violations of the right of the suspect or accused to communicate with third parties (e.g. consular authorities, § 5.11). By contrast, others seem to provide a higher level of protection, such as those relating to the presence of the lawyer during questioning and some aspects of derogations.

2.2.1. The Scope of the Right to Have Access a Lawyer

In the Italian legal system, the right to have access to a lawyer pursuant to Arts 2(1) and 3(1) of the Directive is fully guaranteed by the right of suspects and the defendants to appoint lawyers of their choice (Art 96 CCP) or to be assisted by court-appointed lawyers (Art 97 CCP). Specifically, this latter provision foresees both the right to be assisted by a court-appointed lawyer throughout the proceedings (Art 97, c. 1 CCP) and the right to be assisted by an immediately available substitute when the presence of the lawyer is needed but the main defence counsel is not found or has not appeared (Art 97, c. 4 CCP). The way these provisions are interpreted by the Court of cassation reveals how the right to have access to a lawyer is protected to a high standard in the domestic order. The Court values the continuous and non-sporadic nature of the relationship between the lawyer and the client, for instance by considering that the failure to designate a “permanent” court-appointed lawyer under Art 97, c. 1 CCP after the retained lawyer waived his assignment constitutes an absolute nullity. In the case at stake, the Court observed that this procedural sanction occurs even if a temporary substitute pursuant to Art 97, c. 4 CCP is appointed at the hearing. Indeed, because the appointment of a temporary substitute bears an episodic nature, Art 97, c. 4 CCP can only be activated in cases of momentary impediment of the retained or court-appointed lawyer. When the retained or court-appointed lawyer waives her assignment, a new permanent lawyer needs to be appointed, being a temporary substitute unapt to fulfil the task.

Moreover, the Court of cassation emphasizes the right of the concerned person of being assisted by the lawyer of her choice. Indeed, in a recent decision the Court has acknowledged that the failure to give notice of the hearing to the retained lawyer promptly appointed by the convicted person constitutes an absolute nullity when its presence is mandatory, regardless of the fact that the notification was made to another lawyer and that a substitute was present at the hearing. Against this backdrop, we consider that the Italian system gives actual implementation to the need to provide effective and practical assistance to suspects and accused persons as laid down in the Directive.

In line with the provisions of the Directive (Art 2 and Recital 20), the Italian Court of Cassation further excludes that the questioning performed by the police immediately after the occurrence of the fact for the purposes of identifying the suspect and continuing the investigations (Art 350, c. 5 and 6 CCP) falls within the scope of the right to be assisted by a lawyer. Also, the Court considers that the right to be assisted by a lawyer, as outlined in Art 3 of the Directive, does not apply to searches, which can thus be regularly performed without the need to appoint a court-appointed lawyer if the retained one is not present.

2.2.2. The Right to Access a Lawyer before Questioning

Article 3(2) of the Directive provides that suspects and accused persons shall have access to a lawyer without undue delay. The provision identifies a number of situations where, at the earliest in the proceedings, Member States shall make sure that suspects or defendants have access to a lawyer. Specifically, Arts 3(2)(a) and 3(3)(a) of the Directive require that the persons concerned can privately consult with the lawyer before they are questioned by the police or by another law enforcement or judicial authority.

At a first glance, these provisions seem to be only partially implemented in Art 350 CCP, which regulates the collection of summary information from the suspect by the police in its own capacity. Art 350 CCP includes some crucial safeguards, such as the mandatory designation of a retained or court-appointed lawyer, and the necessary participation of the latter during the questioning (Art 350, c. 2 and 3 CCP). Nonetheless, no right to have access to a lawyer before questioning is explicitly foreseen by Art 350 CCP. With regard to individuals that are not subject to any measure limiting their personal freedom, it is true that the right to access a lawyer before questioning is implicitly guaranteed by the mechanism provided for in Art 350 CCP. Indeed, in the summons to appear addressed to the suspect, the latter is informed of her right to designate a lawyer in view of the questioning (Art 350, c. 2 CCP). Therefore, in the timeframe that moves from when the summons is notified to the interview itself, the suspect has certainly the chance to get in touch with a lawyer and privately speak with her in order to plan a defence strategy.

However, in absence of an explicit clear-cut safeguard ensuring that suspects can have a private meeting with their lawyer before the police questioning begins, we cannot exclude any abusive behaviour on the part of the proceeding authority at this stage. Indeed, the risks of abuse appear to be more intense when the person concerned – summoned as a simple person who may have useful information on the facts – acquires the status of suspect in the course of his or her interview with the police (Art 63 CCP). In this specific scenario, the new suspect has not clearly had any contact with a lawyer yet. The police may keep on questioning her even at the presence of a newly designated defence lawyer, but without allowing them to privately consult beforehand.

Normally, such risk is neutralized in the practice. The interview is usually suspended and rescheduled further on, in order to give the suspect enough time to reach out to a defence lawyer and agree on a strategy. Although practically implemented, however, this mechanism is not explicitly foreseen in the Code of Criminal Procedure. The lack of an explicit right to privately consult with a lawyer before questioning may thus lead to a potential gap in legislation, creating a grey zone where the rights of persons having made self-incriminating statements are not clear in terms of their chances of making a first contact with their lawyers and agree on a defensive strategy. It should also be noted that the same issue could emerge in the case of a questioning led by the Public Prosecutor, or one conducted by the police delegated by the Public Prosecutor under Art 370 CCP.

Against this backdrop, nonetheless, some remedies seem to be available. A systematic interpretation of the Italian framework suggests indeed that if the interview is not interrupted and is continued without the agreement of the suspect, her right to defence is considered violated and the related procedural sanctions can apply (Art 178, c. 1, let. c) CCP). This reconstruction emerges also in the case-law of the Court of cassation. In a recent judgement indeed, the Court took specifically under consideration the situation of the person that learns to have become a suspect during her questioning before the police. In the case at stake, the Public Prosecutor had summoned the concerned person as a simple person who may have provided useful information on the facts (Art 362 CCP), even though his co-defendant had already

formally assumed the status of suspect the day before. Following the admission of guilt of the suspect, the prosecuting authorities carried on questioning him without any interruption, in the presence of a court-appointed lawyer (Art 97, c. 4 CCP). Against this backdrop, the Court considered that the exception of nullity raised by the defendant for this violation of his defence rights was per se well founded. He had indeed been deprived of the possibility of communicating with his retained lawyer in the time interval of three days between the notice referred to in Art 375 CCP and the actual questioning. Also, he had not been able to contact her lawyer even on the day of the interview, which had immediately continued with the urgent designation of court-appointed lawyer. Nonetheless, the Court also stated that this nullity could no longer be raised. Firstly, it should have been raised during the questioning. Secondly, the co-defendants affected by the accusatory statements had no interest in raising it before the Court. Finally, the suspect's choice of the summary ritual had regularized all non-absolute nullities occurred in the pre-trial phase, including the one relating to the lack of assistance of a retained lawyer.

All in all, a comprehensive analysis of the Italian framework reveals that the right to access a lawyer before questioning is satisfactorily implemented in the national system. While the right in question is not explicitly foreseen in Art 350 CCP, the procedural guarantees to be provided before the occurrence of an interview by the police de facto ensure this important safeguard. However, due attention is to be paid to the risks of abuse. In situations where the interviewee acquires the status of suspect during questioning, she might be deprived of the right to access a lawyer before questioning if the authorities proceed with the act without any interruption. If this situation is not explicitly foreseen by the Code of Criminal Procedure, it has been addressed by the Court of Cassation, which has reconducted the case at stake to a violation of the right to defence under Art. 178, c. 1, let. c) CCP.

2.2.3. The Right to have a Lawyer present during Questioning

Article 3(3)(b) provides that 'Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned'. This provision can be considered as being fully implemented in the Italian legal system, although in different terms for the questionings taking place before the

police and those before the public prosecutor. While questionings carried out by the police pursuant to Arts 350 and 370, c. 1 CCP foresee the mandatory presence of the lawyer, that is not the case for those conducted by the public prosecutor. The reason for this differentiated regime finds its roots in the status of the authority performing the investigative act. Being the public prosecutor a magistrate, the Italian legislator has always considered that the suspects and accused questioned before this authority were already granted a satisfactory level of protection. This state of affairs was left unchanged with the transposition of the Directive in the domestic legal order.

The questioning of the suspect by the public prosecutor is regulated by Art 364 CCP, which requires the court-appointed or the retained lawyer to be informed at least 24 hours before the hour set for the questioning. However, the provision also indicates that the lawyer has only a right to be present during the activities, thereby implying that her presence is not necessary for the validity of the act. If the lawyer has been duly informed and he or she chooses not to appear, the questioning can be regularly performed without her presence. It should be highlighted here that the Directive as well does not require the mandatory presence of the lawyer at the questioning, but only enshrines a right for persons concerned to have their counsel present at the performance of the act. Because Art 364 actually lays down the conditions for this right to be fulfilled, this provision can be considered fully compliant with the Directive.

On a different note, as questioning conducted by the police pursuant to Art 350 CCP and 370, c. 1 foresees the mandatory presence of the lawyer, we consider that this provision offers a higher standard of protection than the Directive. The same goes for questionings carried out by the judge following to the application of a precautionary measure to the suspect or accused person (*interrogatorio di garanzia*). In these instances, indeed, Art 294, c. 4 CCP provides that the presence of the lawyer is mandatory during the questioning: in this case as well, the national system seems to offer more intense safeguards than the Directive.

With regard to questionings conducted by the police, after the transposition of the Directive a number of decisions of the Court of cassation have dealt with the question whether the right to be assisted by a lawyer is violated when the suspect – while being aware of his status and prerogatives in the investigation – voluntarily decides to make

statements before the police without the presence of the lawyer (Art 350, c. 7 CCP). Provided that the statements are actually made spontaneously, the Court has repeatedly considered that the domestic regime is compliant with supranational standards of EU law and the Convention. This interpretation appears indeed to be in line with Art 3 of the Directive, which only lays down the conditions for the right of the suspect to have her lawyer present during questioning, without actually requiring her mandatory participation. By contrast, it should be noted that Italy has been recently condemned by the ECtHR in *Knox v. Italy* case, for the violation of the suspect's right to have the lawyer present during questioning. According to national legislation and case-law indeed, the (non-voluntary) statements made by the suspect before the police in such instances cannot be used in the trial, unless they constitute themselves a criminal offence (e.g. calumny). In the examined case, the Court found that this interpretation of the applicable rules in the internal case-law was general in nature, and that the Italian government had failed to demonstrate whether other exceptional circumstances justified the limitation of the applicant's right to be assisted by a lawyer. Arguably, The *Knox* case highlights one possible gap in the Italian system with respect to the right of the suspect to have a lawyer present during police questioning: while the general regime appears to be fully compliant with the Directive, statements rendered without the due guarantees may escape sanction and be used in the trial to convict the concerned person when these constitute *corpus delicti*.

2.2.4. The Right to Have the Lawyer Present during Identity Parades

Art 3(3)(c) and (i) of the Directive foresees the right of suspects and defendants to have their lawyer present during identity parades, provided that the concerned persons must be present or are allowed to participate in the activity. Following the transposition of this provision at Art 364 CCP, a number of appeals before the Court of cassation have tried to leverage this new regime to extend the right to have a lawyer present also to instances of photographic identification (photo line-ups). In line with the wording of the Directive, which restricts the scope of the right at stake to situations where the suspect is present during the activity, the Court of Cassation has constantly found that the police can validly carry out photo line-ups without the presence of the lawyer. In a more articulated decision, the Court has distinguished diverse situations

where the right to have the lawyer present is not a precondition for the validity of the act of identification (with or without the use of photos). If the protection of Art 3(3)(c) and (i) of the Directive does not apply to identifications where the suspect is not present, the same goes for situations where the concerned persons are present but have not acquired the status of suspects yet. For instance, this might be the case where the alleged perpetrator is recognized by chance by an eyewitness to the crime for which proceedings are being initiated. This reconstruction seems coherent – as argued by the Court – with the Arts 2(1) and 3(3)(c) of the Directive that (i) grants protection only to persons that have been made aware of their status of suspects, and (ii) limits the right to have the lawyer present during investigative acts only to instances where the suspect or accused is present. Nonetheless, due attention should be paid to the risks of abuse, for instance when a person not formally registered as a suspect, but who has already drawn some suspicion of the authorities, is physically subject to an informal identification in the course of the investigation (not immediately after the fact).

Derogations

Art 3(5) and (6) of the Directive foresee some temporary derogations to the right of suspects and accused persons to have access to their lawyers. On the one hand, Art 3(5) grounds on the geographical remoteness of the suspect or accused person the temporary limitation of her right to have access to defence counsel without undue delay after deprivation of liberty. On the other, Art 3(6) allows Member States to temporarily derogate from the application of the rights provided for in paragraph 3, albeit only during the pre-trial phase and only in exceptional circumstances (e.g. potential serious adverse consequences for the life, liberty or physical integrity of a person, or dangers to the continuation of the proceedings).

Besides, Art 8 provides for some general conditions for applying temporary derogations. In particular, limitations to the right of access to a lawyer shall: be proportionate and not go beyond what is necessary; be strictly limited in time; not be based exclusively on the type or the seriousness of the alleged offence; not prejudice the overall fairness of the proceedings. In addition, the Directive provides for a reasoned decision taken on a case-by-case basis, either by a judicial authority or by

another competent authority on condition that the decision can be submitted to judicial review.

The Italian legislator did not take any step to transpose this articulated piece of legislation. The reason is that in this field the domestic legal order already provided an adequate level of protection, in relation to some specific aspects even higher than the European one. However, there are some other aspects which appear to be problematic, especially if seen through the lens of the case-law.

Within the domestic framework, Art 104, c. 3 and 4 CCP represents a key rule. It allows for a temporary derogation of the right of the suspect or accused person to privately communicate with the lawyer immediately after the deprivation of her liberty. More specifically, in case of precautionary detention, and only during preliminary investigations for crimes referred to in Art 51, c. 3-bis and 3-quarter when there are specific and exceptional reasons of caution, the court may, upon request of the Public Prosecutor, defer, by reasoned decree, the exercise of the right to consult with a lawyer for a period of time not exceeding five days (Art 104, c. 3 CCP). When the suspect is arrested or placed under temporary detention (*fermo*), and until the concerned person is brought before the court, the power to undertake derogations to the right in issue is assigned to the Public Prosecutor (Art 104, c. 4 CCP).

By providing that the deferment of the right to consult with the lawyer shall be up to (maximum) five days, the law implicitly tolerates that the detained suspect or accused person is questioned by the competent authority (the judge and the Public Prosecutor) without a previous private communication with the lawyer. It has to be noted however that the right for the lawyer to be present to the questioning is preserved in any case. In addition, the law provides for a sort of compensation on behalf of the suspect. Due to Art 309, c. 3-bis CCP, the days of deferment are not computed in the term for the appeal (*riesame*) of the precautionary detention.

As for the justifications for limiting the access to the lawyer, the national law refers to 'specific and exceptional reasons of caution', a broad expression which certainly includes the circumstances taken into account by the Directive and in practice is mostly related to the need to prevent arranged depositions between co-accused

persons. The vagueness of such an expression has been criticized in literature, since it gives rise to a weak and indulgent approach in jurisprudence. Precisely in order to strengthen the approach towards derogations, in 2017 the Italian legislator limited the possibility to defer the consult between the detained suspect and the person who represents him only where serious offences are under investigation – the so called “district crimes”, namely the crimes in persecuting which the function of Public Prosecutor shall be performed by the Prosecutor attached to the Tribunal of the district chief town in which the court with competence sits (Art 51, c. 3-bis and 3-quarter CCP). The choice of the legislator is not entirely satisfying. On the one hand, the wording of the rule now excludes the possibility to temporarily derogate to the right in issue where offences different from the “district” ones are at stake, notwithstanding the need for a derogation cannot be excluded; on the other hand, no effort has been made in order to detail the ‘specific and exceptional reasons of caution’ following that the persistent lack of clarity of such an expression may raise conflicts with the Directive.

As for the requirements enumerated in Art 8, at a legislative level the overall picture is satisfying. The derogation allowed by Art 104, c. 3 and 4 CCP is strictly limited in time – the deferment shall be up of maximum five days; the decision is taken, on a case-by-case basis, by the judge or the Public Prosecutor and shall be duly reasoned. By subjecting derogations to these limits, the domestic law appears to be in line also with the principle of proportionality and the overall fairness clause (Art 8(1)(a) and (d)). It has to be noted however that the requirement of an in-depth motivation, based on the specificities of the case, is sometimes disregarded in practice, since the case-law tends to infer the risk of arranged depositions from: i) the seriousness of the offence at stake; ii) and the fact that more than one person is charged for it.

Moving to the case of geographical remoteness of the suspect, the Italian system foresees no possible derogation to the right to access a lawyer in such situation. When there is a geographical distance between the lawyer and the suspect, the investigating authorities still need to wait for the arrival of the counsel, before proceeding with any questioning. The authorities are required to put their investigative activities on hold only for a reasonable timeframe, according to the circumstances. In any case, it is always possible to appoint a court-appointed lawyer, so that the suspect

or accused is always granted a right to access a lawyer after deprivation of liberty (except for the derogations foreseen at Art 104 CCP, see below). This reconstruction of the applicable rules was indeed confirmed in a judgment of the Court of Cassation, which deemed the questioning of the suspect to be unlawful if the notice to the lawyer is not given in time, taking into account the concrete possibility for the lawyer to be physically present at the performance of the activity and to carry out adequate defensive assistance. To this end, the Court indicated a set of factors to be taken under consideration when appreciating what a reasonable timeframe for the lawyer can be: the distance between the lawyer and the place where the questioning takes place, the speed of the means of communication and transportation available to the lawyer; the time needed for the examination of procedural documents, even if these have already been filed previously.

No derogation is allowed even where the distance is remarkable, such as where the suspect is in overseas territories or where the State undertakes or participates in military operations outside its territory (Recital 31). However, it is clear that in these situations special problems arise. Art 9, c. 5 and 6 Decree Law 1st December 2001, n. 421 converted in the Law 31st January 2002, n. 6, states that, in case of arrest or temporary detention (*fermo*) of a person participating in an international military operation, when for military or operational reasons it is not possible to bring the suspect before the court within the strict terms established by the law, the questioning by the Public Prosecutor and the confirmation hearing are held remotely, with the aid of video and audio links. In this context, the suspect is entitled to consult with her lawyer via adequate means of communication and has also the right to be assisted by another trusted lawyer in the place where she is located, although on the condition that the questioning is not delayed. Against this background, it can be argued that the same rules apply also for communications (between the suspect participating in military operations abroad and her counsel) held before the questioning or the confirmation hearing following that the discipline on the access to a lawyer in these problematic circumstances is in line with the Directive.

Furthermore, recalling the case-law of the CJEU, the Court of cassation recently held that the limitations set out in Directive 2013/48 cannot be interpreted as including a

derogation from the right of suspects and accused persons to legal assistance in the event of their absence from trial, since the non-appearance of the suspect or accused person does not fall among the derogation grounds provided for in Article 3 of the Directive.

Finally, Art 364, c. 5 CCP needs to be mentioned. According to this provision, in case of absolute urgency, if there are reasonable grounds to believe that the delay may compromise the search for or the securing of the sources of evidence, the Public Prosecutor may carry out a questioning, inspection, informal identification or line-up even prior to the set time limit. Notably, in such cases the lawyer shall be promptly informed and his right to intervene shall be preserved. So, urgency only consents to anticipate the implementation of the investigative act. Of course, the reduction of the timeframe between the notice and the act may make it more difficult to arrange a private consult with the lawyer. However, it does not appear that this could instantiate a substantial hampering to the right to access to defence counsel, also considering that legal assistance during the investigative act shall be preserved in any case.

Confidentiality

The right of suspects and accused persons to have confidential communications with their lawyers (Art 4 of the Directive) is fully implemented in Art 103 CCP, which was recently amended by Law n. 114/2025. The interpretation of this provision in the case-law of the Court of Cassation seems to confirm that the standards of protection of the domestic order are compliant with the requirements of the Directive.

Concerning the interception of communications between the client and the lawyer, these are forbidden by Art 103, c. 5 CCP; in addition, Art 103 c. 6-ter CPP provides that the interceptions must be immediately interrupted when the judicial authority understands that they “fall within those prohibited”. Furthermore, according to the interpretation given by the Court of cassation, this safeguard applies not only to communications between the lawyer and the client after the defensive mandate has been formalized, but also for situations in which a defensive mandate has not been formalized, since the defensive activity also includes legal advisory services.

Because this safeguard only concerns conversations or communications in which the lawyers perform their defensive activities, the Court of cassation has repeatedly found that the same regime does not extend to conversations which themselves constitute a criminal offence. While Art 4 does not explicitly include any derogation of this kind, Recital 33 indicates that the protection afforded by the Directive 'is without prejudice to procedures that address the situation where there are objective and factual circumstances giving rise to the suspicion that the lawyer is involved with the suspect or accused person in a criminal offence'. Taking into account this specification, we can conclude that the level of protection offered by Art 103, c. 5 CCP is compatible with the one provided by the Directive.

With respect to seizures of correspondence between the suspect or defendant and the lawyer, the interpretation of Art 103, c. 6 CCP given by the Court of cassation validates the high level of protection granted in the Italian system. According to the Court, the prohibition of usability applies to all correspondence between the defendant and the lawyer, regardless of the place where the seizure of correspondence takes place. This is because the protection granted at Art 103, c. 6 – differently from the one provided for searches and seizures in lawyers' offices – is anchored to the persons exercising their mandate, and thus extends to all correspondence between the lawyer and the client even if seized outside the premises of the workplace.

The Right to have a Third Person Informed upon Deprivation of Liberty and to Communicate with Third Persons during Detention

Articles 5, 6 and 7 of the Directive establish communication rights: a) the right to have at least one person, such as a relative or an employer, informed upon deprivation of liberty; b) the right to communicate, while deprived of liberty, with at least one third person without undue delay, provided that this does not prejudice the due course of the criminal proceedings; c) the right to communicate with consular authorities. They are well protected within the domestic legal order so that no explicit transposition has been considered necessary.

In this sense it has to be noted that in case of arrest or temporary detention, the police officials and officers shall provide the suspect or accused person with a written notice in which her/his rights are explained. One of these rights is precisely the right to inform relatives and consular authorities about the deprivation of liberty (Art 386, c. 1, let. f) CCP). Besides, Art 387 CCP states that, with the consent of the regarded person, the criminal police must inform her relatives without undue delay about the arrest or temporary detention. Moreover, both provisions have been recently amended by Legislative Decree n. 131/2024, introducing the right to inform also "another person of trust" or "other people designated" by the accused person.

If the suspect or accused person is below the age of eighteen (and has to be considered a child for the purposes of para 2 of article 5 of the Directive), Art 18 D.P.R. 448/1988 establishes that notice upon the arrest or temporary detention shall be immediately given to the holder of parental responsibility and eventual foster parent, regardless of the child's will. Also, juvenile services, which are tasked with ensuring additional assistance to the minor during all phases of the proceedings, must be promptly informed. As the precept doesn't mention the need to inform the holder of parental responsibility about the reasons pertaining the deprivation of liberty, it seems to be less safeguarding than the European standard (Art 5(2) of the Directive). The shortcoming however is more seeming than real. Since the national law expects the holder of parental responsibility to be effectively involved during the proceedings in order to help the child in receiving proper legal assistance, it goes without saying that she shall be informed not only that the child has been deprived of her liberty but also about the reasons pertaining such a decision.

In case of foreign suspects, notice of the deprivation of liberty is given to consular authorities, unless the suspect declares her intention not to take advantage of the intervention of those authorities or in case the information might cause the risk of persecution of the foreigner or her family members for reasons related to race, sex, language, religion, political opinion, national origins, personal or social conditions (Art 4, c. 3 and 4 Decree 230/1999). Shaped this way, the rule appears to be perfectly coherent with the Directive which allows possible derogations where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of

a person (Art 5(3)(a)). In addition, Art 35 D.P.R. 230/2000 promotes contacts between foreigner detainees and consular authorities where the detention is in force.

Where precautionary detention is resorted to, the police official or officer in charge of enforcing the order shall provide the suspect or accused person with a copy of the decision which contains an evaluation of specific grounds for the measure and serious indications of guilt and a written notice in which her rights – communication rights included – are explained (Art 293, c. 1, let. f). It is not expressly foreseen that, where the concerned person is a child, the holder of parental responsibility is served on a copy of the decision, but this can be inferred at a systematic level: as she is entitled to appeal such decision (Art 34 D.P.R. 448/1998), it follows that he shall be served on a copy of it. In order to dispel any doubt, however, it would have been appropriate to amend the law in order to set a clear and unambiguous rule when the Directive was transposed.

Finally, Art 29 Law 354/1975 needs to be addressed. It states that immediately after the entrance in the penitentiary institute, the detainee is enabled to inform a family member or another person of the deprivation of liberty and the place of detention if she wishes to. The communication is made by post or telegraphic means. This right is established with no exception, meaning that the Italian legislation goes beyond the standard imposed at European level. Even the choice about the person to whom the communication is made cannot be argued or limited, provided that this does not raise security problems. The provision, which is aimed at safeguarding the detainee's relationships with the world outside the place of custody and especially with family members, ideally weld itself to Art 18 Law 354/1975 and Art 37 and 39 D.P.R. 230/2000 that regulate the right of every detainee to communicate and correspond with third persons during detention.

2.2.5. Voluntary Waiver of Certain Aspects of the Right to Access to a Lawyer

The provisions relating to the waiver of certain defence rights have not been expressly transposed but they are respected in practice. Within the domestic system the right to legal defence during the proceedings is unwaivable, even in respect to minor offences. It is possible however to renounce to one or more of the specific rights referred to in Arts 3 and 10 of the Directive, provided that the provisions requiring the

mandatory presence of the lawyer (for instance where the suspect is questioned by a police official) are observed.

In this framework, the suspect or accused person is provided with sufficient information about the content of her rights and possible consequences of waiving them. For instance, when an order limiting the liberty is enforced the regarded person is provided a 'clear and precise' written notice in which core defence rights are explained (for example, the right to appoint a retained lawyer, the right to silence, the right to access documents on which the decision is based, the right to be brought before the judicial authority). If she does not know the Italian language, the notice shall be translated into a language she understands (Art 293 CCP).

Also, during the first activity in which the lawyer has the right to be present and, in any case, prior to sending the summons to appear for questioning or no later than the service of the notice on the conclusion of preliminary investigations the Public Prosecutor, under penalty of nullity of subsequent acts, shall serve on the suspected person the notification on the designation of a court-appointed lawyer. The notice shall contain the information that technical defence in criminal proceedings is mandatory, along with the specification of the rights assigned by the law to the suspect (Art 369-bis CCP).

Besides, prior to the questioning, the person is warned, under penalty of exclusion of the statements eventually made, that: a) her statements can always be used against him/her; b) except for information concerning personal details, s/he has the right to silence, but the proceedings will in any case continue their course; c) if s/he make any statement on facts concerning the liability of others, he will become a witness in relation to those facts, except for the incompatibilities provided for in Art 197 CCP and the safeguards under article 197-bis CCP (Art 64 CCP). In general, the information provided to the suspected person is clear and detailed. Only the third warning sounds a bit deceptive in light of the wording of the precept which refers to provisions the content of which is probably unknown to the suspect. It follows that s/he is unlikely to effectively understand the effects of his actions in case the lawyer is absent from the questioning.

In addition, the rules on recording procedure of investigative acts require the registering of all the events taking place during the act (Art 136 CCP) so that Art 9(2) Directive, which prescribes that the circumstances under which the waiver was given shall be noted, can be considered perfectly respected.

2.2.6. The Right of Access to a Lawyer in European Arrest Warrant Proceedings

The legal act transposing the European Arrest Warrant Framework Decision (Law no 69/2005) has been only partially amended by the Legislative Decree transposing Directive 2013/48 (Legislative Decree no. 184/2016). Law 69/2005 however was already extending some defence rights also to the case of the EAW.

Therefore, in Italy transposition in regard to Article 10 can be considered in part explicit, and in part indirect.

Nonetheless, few problematic profiles remain in this context.

The main issue emerges with regard to Art 10(5) of the Directive, concerning the delicate possibility for the defendant to appoint a lawyer in the issuing Member State, and in particular the duty of the executing authority to "promptly inform the competent authority in the issuing Member State" of the defendant's wish to appoint there a lawyer, where this is not already the case.

Indeed, Art 10, c. 3 Law n. 69/2005 only provides for the notification to the competent consular authority of the order applying the pre-trial measure. However, no mention is made concerning the duty to inform the issuing authority of the lack of an appointed lawyer in that issuing State, nor of the will of the requested person to proceed in this regard. In this sense, therefore, Art 10 of the Directive cannot be considered satisfactorily transposed in the Italian system.

Remedies

No specific remedy has been introduced in the Italian legal framework to address violations of the rights included in the Directive.

Similarly to most of what so far illustrated, however, some remedies may be found in the pre-existing legislation and case law, providing an overall a satisfactory legal framework in light of the standards set by the Directive.

Firstly, for what concerns the right of access to lawyer, some remedies are currently provided for by statutory law for violations occurring in situations where the investigative or trial acts cannot be carried out without the necessary presence of the defence lawyer.

They include a series of investigative acts directly involving the accused, and namely: the police interview of the suspect in a state of liberty (Arts 350, c. 1 and 370, c. 1 CCP); the confrontation - delegated by the public prosecutor to the police - in which the person under investigation participates in a state of liberty (Art 370, c. 1 CCP); the hearing to validate the arrest in flagrante delicto or the detention (*fermo*) ex Art 391, c. 1 CCP; and the interview of the suspect before the judge, after the execution of a pre-trial custodial measure (*interrogatorio di garanzia*) ex Art 294, c. 4 CCP.

Other situations refer instead to specific phases of the criminal proceedings, where the presence of the defence lawyer is mandatory: the anticipated acquisition of evidence during the investigation or the preliminary hearing (*incidente probatorio* - Art 401, c. 1 CCP); preliminary hearings (Art 420, c. 1 CCP); hearings of the summary proceeding (*giudizio abbreviato*), via the referral of Art 441, c. 1 CCP; hearings scheduled to discuss a pre-trial acquittal (Art 469 CCP); trial hearings in first (Tribunale) and second (Corte d'appello) instances (Art 484, c. 2 and 2-bis, and Art 598 CCP); hearings before the Court of Appeal following the renewal of the preliminary investigation (Art 599, c. 3 CCP); hearings during the enforcement proceedings (Art 666, c. 4 CCP); and lastly, hearing before the Court of Appeal in passive extradition proceedings (Art 704, c. 2 CCP).

To these cases should also be added other situations, identified by case law and legal scholars, in particular where: the lawyer is present, but lacks the necessary requisites to exercise such an office (e.g. she is not qualified to exercise the profession because she is not registered in the defenders' register or has been disbarred); the lawyer is present but in a situation of incompatibility (e.g. she is defending suspects with conflicting positions); where there is a failure to give notice of the hearing to the retained lawyer promptly appointed by the convicted person, regardless of the fact that the notification was made to another lawyer and that a substitute was present at

the hearing; and where there is a failure to designate a court-appointed lawyer, after the retained lawyer waived her/his assignment (Art 97, c. 1 CCP).

In all these cases, the act performed without the presence of the lawyer is affected by “absolute nullity” (*nullità assoluta*), in accordance with Art 178, c. 1, let. c) CCP. Complaints about this invalidity may be raised by parties or ex officio by the judge at any time in the course of the proceeding, until the decision becomes final (i.e. it acquires the force of *res judicata* in accordance with Art 648 CCP). The declaration of such nullity may have three effects: i) the spreading of the nullity to the acts following the invalid act; ii) the renewal of the invalid act; iii) the regression of the proceedings at the stage in which the defective act was committed.

Secondly, some remedies are also provided for in case of violations of the right of access to a lawyer, where the possibility of her presence is impaired, even though it is not mandatory by law to have a lawyer actually present at the act performance. This occurs, for instance, where the lawyer is not notified of the time, date and place where an investigative act which she has the right to attend shall be carried out.

Other cases occur where the lawyer is not allowed to immediately confer with the defendant (Art 104 CCP) and the reasons for such deferral are not adequately justified, or where the conditions of the communication with the client are not allowing adequate privacy protection, or where the client is not granted the assistance of an interpreter to communicate with the lawyer.

In all these situations, the act is affected by an intermediate nullity (*nullità intermedia*, Art 178, c. 1, let. c) CCP). This form of nullity is less severe than absolute nullity, although it can equally be raised by parties and ex officio by the judge. Such nullity can indeed be successfully opposed only within determined time-deadlines, and namely: If the violation occurs before the trial, the nullity shall be deducted within the first instance trial decision; if it occurs during the trial, the nullity shall be raised within the next instance decision (Court of appeal, Supreme court). The inertia of the party or of the judge beyond such time limits produces, unlike *nullità assoluta*, a regularization (*sanatoria*) of the invalidity.

In addition to what already illustrated, it shall also be recalled that if breaching the privacy of client-attorney communication amounts to illegal recording or interception of confidential information, such conduct may be punished as a criminal offence, in accordance to Art 617 of the Italian Criminal Code.

Different considerations shall be drawn with regard to potential violations of the right to communicate with third parties in case of deprivation of liberty.

Breaches of this right can actually be challenged by the accused before a specialized judge (magistrato di sorveglianza) through a specific remedy (called *reclamo giurisdizionale*). The decision of the magistrato di sorveglianza may be further challenged before a specialized court (tribunale di sorveglianza) within fifteen days of service of the notice; and the decision of such court can in turn be challenged before the Supreme Court (Corte di cassazione) for breaches of law (i.e. not on the merit).

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2.3. Directive (EU) 2016/1919: Legal aid

Directive (EU) 2016/1919 concerns access to legal aid and the quality and timeliness of legal aid decisions. In Italy, the central legal aid regime predates the Directive and is contained in Presidential Decree no. 115/2002, with limited adjustments introduced by Legislative Decree no. 24/2019, especially for European Arrest Warrant proceedings. The following subsection presents the main features of the Italian system and the points of interaction with the Directive's standards.

Introduction

The Italian mechanism providing for legal aid support in criminal (as well as other kind of) proceedings is established by a specific piece of legislation, Presidential Decree no. 115 of 30 May 2002 (hereinafter "DPR 115/2002"). Such regulation has only been partially amended after the transposition of Directive 2016/1919, which came to place only after the expiration of the transposition terms.

The implementation was indeed issued with Legislative Decree no. 24 of 7 March 2019 (hereinafter "LD 24/2019"). The changes brought by the transposition were however rather marginal, except for the extension of the legal aid regime to the passive procedures pertaining to the European arrest warrant.

Subject Matter

Art 1, in identifying the object of the Directive, specifies that it intends to apply to suspects and defendants in criminal proceedings, as well as to persons subject to a European arrest warrant.

From the first point of view, these general provisions already find ample legislative coverage in Italy. The Italian Constitution, at Art 24, is the first guarantor of everyone's right, including suspects and defendants in a criminal trial. DPR 115/2002 extensively regulates the matter of legal aid and Art 1 of that Decree begins by stating general guidelines on legal aid. As regards, however, the need to ensure access to legal aid also to persons subject to a European Arrest Warrant, Italy resulted compliant with the Directive only after the entry into force of LD 24/2019. This Act amended Art 75 of DPR 115/2002. There, it introduced a new paragraph (2 bis), stating that the rules on legal aid also apply to passive surrender procedures, pursuant to Law no. 69/2005

(regulating in Italy the European Arrest Warrant), until the surrender or until the moment when the decision of non-surrender becomes final.

Scope

Art 2 of the Directive is rather extensive, providing that it applies both to suspects and defendants in criminal proceedings. In view of the differences between the laws of the various Member States, the Directive takes care to delineate a particularly broad scope, albeit with the clarification that the rules contained therein refer to the criminal courts. It is thus specified that free legal aid shall be offered to the benefit of those who are subject to a precautionary measure, and that it must be recognized at every stage and level of criminal proceedings. It is also made clear how the Directive also applies to persons who are not initially suspected or accused of a crime, but who become so in the course of police interviewing or other law enforcement authorities. This last aspect is tantamount to recognising the prerogatives of the Directive from the very beginning of criminal proceedings.

Also following the reforming intervention most recently put in place by LD 24/2019, the Italian system appears respectful of Art 2 of the Directive, as it offers adequate guarantees to individuals at any state and grade of criminal proceedings. The Italian Code of Criminal Procedure, moreover, at Arts 60 and 61, extends the rights and prerogatives recognised to defendants in criminal proceedings also to suspects. This means that in Italy the lexical difference of legal terms does not already amount to a difference in treatment between the two subjects identified.

This is also confirmed by Art 63 CCP, that, in a sense already in conformity with what expressed by the Directive, requires public authorities who are interviewing a person informed of the facts under investigation, to interrupt the examination if any evidence against him/her should emerge. From that moment on, the person is warned of the possibility that investigations may be carried out against him/her and in relation to it, obviously, s/he will be recognised all the guarantees offered to suspects. These include, as anticipated, the right to receive legal assistance at the expense of the State if certain conditions are met.

The Italian Constitution and legal system, moreover, guarantee indigent persons the right to free legal aid in any jurisdiction, not only in criminal proceedings, thus showing that a broader level of protection than that recognised in the Directive.

Definition

Art 3 of the Directive clarifies what is meant by "legal aid" within the meaning of the Directive. The provision thus specifies how legal aid is to be understood when the costs of defending the accused are borne by the State.

Such rule does not give rise to any doubts in the domestic context, where Art 74, DPR 115/2002 guarantees legal aid in criminal proceedings to individuals with low-income, not only defendants, but also victims, i.e. to a broader extent than that provided for by the Directive. The Italian regime thus offer access to legal aid to each of the parties to the criminal proceedings. In some cases, moreover, access to the benefit is also disconnected from income, in application of a merit test only. That is what happens when one is a victim of certain types of crime, including sexual violence.

Access to legal aid guarantees that all these persons will be granted a technical defence in the proceedings.

2.3.1. Legal Aid in Criminal Proceedings

Art 4 of the Directive is concerned with reminding Member States of the need to identify the cases in which legal aid should be granted. For the most part, the Italian legislation was already mostly compliant with the Directive at the time of its promulgation. Currently, following the regulatory changes introduced by LD 24/2019, the domestic legislation can be said to fully comply with the principles recognized in the Directive.

DPR 115/2002 identifies the conditions for admission to legal aid.

In particular, legal aid is available to anyone who has an income taxable resulting the last declaration, not exceeding euro 13.659,64, as updated by a Ministry of Justice Decree of April 22, 2025, published in Gazzetta Ufficiale no. 159 on July 11, 2025. This latest adjustment is explicitly based on the variation of the ISTAT consumer price index for the period July 1, 2022, to June 30, 2024, which registered an increase of 6.4%. Prior

to this, the limit was €12,838.01 as per a Ministry of Justice Decree of May 10, 2023, published on June 6, 2023. Such persons may apply for legal aid at any stage of the proceedings, and their application is decided by the judge proceeding at the time. Furthermore, the income limit is increased by €1,032.91 for each cohabiting family member in criminal proceedings.

The periodic adjustment of the income threshold, explicitly linked to the ISTAT consumer price index, demonstrates a legislative commitment to maintaining the real value of the income limit for legal aid. This directly addresses the criticism, that the threshold was "too low". By regularly updating this figure, the legislator aims to prevent the erosion of the threshold's purchasing power due to inflation, thereby ensuring that a slightly broader segment of the population can qualify for legal aid. This proactive mechanism helps to enhance effective access to justice, aligning with the fundamental right to defence enshrined in Article 24 of the Italian Constitution.

LD 24/2019 amended Art 91, DPR 115/2002, which lists cases of exclusion from legal aid. Currently, for instance, persons convicted of tax offences are excluded from legal aid in the execution phase, after final judgment.

Case-law has also been very interested in defining admissions and exclusions to the legal aid benefit. Among others, significant is a recent case of the Supreme Court, that affirmed how the possible untruthfulness of the self-certification on the possession of the requirements to apply for legal aid does not lead to the revocation of the benefit, if the income of the individual anyway does not exceed the limits provided for by law.

The same Court stated also that, in order to be admitted to legal aid, compliance with the income conditions set out in Art 76, DPR 115/2002 shall be verified with regard to the last income declaration. However, the applicant, even where such value is higher than the threshold, is allowed to prove that s/he has undergone a significant and supervening decrease of income, such as to bring it, in practice below the income threshold established by the law.

Furthermore, the Supreme Court has also stressed that the obligation to communicate income variations persists until the legal proceeding is definitively concluded, and

compensation is precluded if conditions are not met, reinforcing strictness of income verification and conditions for benefit.

On the constitutional level, the Constitutional Court, with judgement no. 223/2022, examined the legitimacy of excluding individuals definitively convicted of specific drug offences under Article 73 of DPR 309/1990. In particular, the Court cleared that it is unconstitutional to preclude any rebuttal of such a presumption of minor offences, restoring the requirement to allow applicants to contest this presumption and reaffirming the rights guaranteed under articles 3 and 24 of the Constitution. Likewise, the Supreme Court has also provided guidance on interpreting exclusions based on prior criminal records, particularly where the offence has been extinguished.

Finally, it is useful to point out that the admission to the benefit of legal aid is valid for every stage and degree of the proceedings. On this point, however, the guidelines expressed by the Court of Cassation are decisive, which has clarified the limits within which the ultravalence of legal aid should be understood. In particular, the Court has had the opportunity to clarify that with regard to the phase of criminal execution, in the proceedings before the Surveillance Court, the admission to legal aid previously obtained in the trial on the merits is not valid.

The Court of Cassation has in fact specified that the proceedings before the Surveillance Court must be considered as an autonomous trial and not as a further phase of the trial on the merits. Therefore, a new application for admission must be submitted in accordance with the requirements of the law.

2.3.2. Legal Aid in European Arrest Warrant Proceedings

Art 5 of the Directive requires to extend the benefit of legal aid also in the context of the European arrest warrant. This side of the Directive proved to be the one for which Italian legislation on legal aid was lacking. As already noted, Italy implemented national legislation through Legislative Decree 24/2019 by means of which, pursuant to Art 1, DPR 115/2002, is amended, specifying that the legal aid is also applied to passive surrender procedures, pursuant to Law no. 69/2005, from the moment of arrest made under the European arrest warrant until surrender or until the decision on non-surrender becomes final. The internal legislation, therefore, expressly transposing the

Directive, also uses the same approach present in Art 5 of the Directive. From this point of view, ultimately, the national system shows itself to be respectful of the principles deriving from the European legislation.

2.3.3. Decisions Regarding the Granting of Legal Aid

The content of Art 6 of the Directive is closely reflected in Arts 93, 96, 97 and 109 of DPR 115/2002. Those provisions, taken as a whole, identify the judge with jurisdiction to decide on the application for legal aid, the time allowed for it to decide, the communication and notification of the decision to grant legal aid and the commencement of the effects of the decree of grant. In detail, pursuant to Arts 93 and 96 of the DPR cited above, the judge proceeding at the time the application is submitted is competent to decide on the application. The latter has ten days to decide on the application (which is, however, not a peremptory term and not subject to procedural sanctions). If the judge admits the applicant to the benefit requested, the measure must be notified to him, and Art 97, DPR 115/2002 is primarily concerned with defendants detained or otherwise deprived of their liberty. These defendants must be notified of the measure in accordance with Art 156 of the Code of Criminal Procedure, i.e. preferably with delivering of a copy of the measure to the detainee. Moreover, pursuant to Art 109 of DPR 115/2002, the effects of the admission decision are retroactive to the moment of the application. This is certainly a substantial safeguard.

A significant procedural innovation impacting the decision-making process for legal aid applications was introduced by Legislative Decree 31 October 2024, no. 164, a key component of the "Correttivo Cartabia", which mandated the electronic filing of legal aid applications through the "Portale Deposito Atti Penali" (PDP). This digitalization measure aims to streamline administrative management of applications, reduce procedural delays linked to paper filing and enhance efficiency in the submission process.

Of crucial importance is the interpretative clarification coming with the Court of Cassation's judgement no. 6888, delivered by its Second Civil Section on March 14, 2025, which definitively confirmed the retroactive nature ("ex tunc") of legal aid admission. The Court held that legal aid, once granted, must cover legal services

performed from the date of the initial application, even in cases where an initial request for legal aid was rejected by the competent judge but subsequently accepted after an appeal or review. This interpretation ensures that lawyers are compensated for work performed before the formal admission, thus avoiding gaps in remuneration and guaranteeing continuity of defence.

The Code of Criminal Procedure, for its part, repeatedly establishes the right of the defendant (and not only of such person, also of the victim, for example) to be able to apply for legal aid. On the whole, therefore, the burden of information is variously satisfied by the Code, which in the performance of particularly sensitive acts warns the defendant of his right to apply for legal aid.

2.3.4. Quality of Legal Aid Services and Training

The Directive aims at ensuring a certain level of quality in legal aid services. As many scholars observed, however, the absence of EU wide funding for this service left the matter mostly in the discretion of Member States.

In Italy, as anticipated, a mechanism to monitor the quality of legal aid services was already established by DPR 115/2002 before the entry into force of the Directive.

In the current system, a specific procedure is established, that should discard unsuitable lawyer from providing legal aid services. Namely, Art 80, c. 1, DPR 115/2002 requires defence counsellors that wish to provide legal aid service to be registered before the Bar Council located in the district of the Court of Appeal where the court having jurisdiction on the merit of the case, or the court before which the case is pending, is sitting. In any case, the person wishing to appoint a lawyer providing legal aid can also choose one registered in a different district (cf. Art 80, DPR 115/2002).

In order to be registered in such a list, defence lawyers need to possess specific characteristics, listed in Art 81, DPR 115/2002. In particular, they include: (a) aptitude and specific professional experience in the subject matter (civil, criminal, administrative, accounting, tax and voluntary jurisdiction proceedings); (b) absence of disciplinary sanctions of a certain gravity in the five years preceding the application (i.e. more than a warning); (c) having been registered in the Bar for at least two years.

The concrete assessment on whether applicant lawyers possess these conditions is left to the competent Bar Council. Furthermore, local protocols for fee liquidation, such as the "Protocollo liquidazione compensi ai difensori settore penale 27.5.2025" in Pescara and the "Protocollo Patrocinio a Spese dello Stato Penale" in Civitavecchia, have been developed to standardize the calculation and disbursement of compensation for legal aid services. The National Bar Council (CNF) has also transmitted national protocols for standardized fee liquidation for both criminal and civil lawyers.

With regard to the second condition (b), it is also worth recalling that if, after the registration, a lawyer becomes subject to a disciplinary sanction more severe than warning, s/he shall be automatically removed from the list.

The list is renewed by 31 January of each year, and it is public (each judicial offices located in the territory of each province has access to the local list).

Despite this mechanism, the current Italian system does not appear sufficiently developed when it comes to ensuring adequate training to the actors playing a role in the legal aid service. In this sense, Art 7(2) of the Directive does not seem fully complied with.

Specifically, no specific training is foreseen for the judges that decide over the admission or refusal of legal aid.

Similarly, no general provision has been introduced to ensure that lawyers providing legal aid services enjoy adequate training. In this sense, the self-declaration of the lawyer that s/he possesses sufficient expertise, at least two-years professional working-time and had not been targeted before by disciplinary sanctions is usually considered sufficient by the Bar Council to proceed with the registration in the list illustrated above.

The only case in which a specific training is foreseen concerns the case where a lawyer, providing legal aid services, is also appointed ex officio by the court. In this situation, in fact, a mandatory training is requested. However, such training is necessary to be appointed ex officio, and not specifically to provide legal aid services.

Also in this sense, therefore, the implementation of the Directive in this regard is deficient.

On the other hand, the obligation of Art 7(4) of the Directive, to ensure that suspects, accused persons and requested persons have the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced, where the specific circumstances so justify seems de facto implemented in the current Italian system.

On one side, according to the general rules of legal representation, the accused has complete freedom to choose his/her defence lawyer, and can enjoy legal aid as long as the latter is registered in the list of those who are authorized to provide legal aid services (and, of course, as long as the accused him/herself fulfils the condition to access to that service). The same goes for the potential replacement of the defence lawyer.

According to Art 101, c. 1, DPR 115/2002, moreover, the lawyer of the person admitted to legal aid may appoint, for the purpose of carrying out defence investigations, a deputy or an authorised private investigator residing in the district of the court of appeal where the court with jurisdiction over the matter in question is located. Such auxiliaries may also be chosen outside the district of the competent Court of Appeal; in this case, however, the travel expenses and allowances provided for in the professional tariffs shall be paid by the accused.

Remedies

Similarly to the other Directives, also in case of Directive 1919 no specific remedy has been introduced to specifically address potential violations of the rights related to the legal aid regime. Still, the pre-existing regulation on legal aid seems to already provide some regulation, which however does not cover satisfactorily the standards required by EU legislation.

Arts 99 and 113, c. 1, DPR 115/2002, indeed, establish that interested parties may appeal against the decision rejecting the application for admission to the legal aid service. The appeal shall be filed within twenty days from the notification of the rejection, and before the President of the Court or the President of the Court of Appeal

to which the judge who issued the rejection decision belongs. The decision on the appeal can be further challenged before the Supreme Court.

Although formally compliant with the Directive, several critical aspects have been highlighted in this regard by legal scholars.

For instance, the twenty days deadline has been considered too short to allow the preparation of an effective defence strategy. Or, even more significantly, it is quite paradoxical that the costs for the appeal proceeding cannot be covered by the legal aid regime. The appellant who claims has the right not to pay for legal costs, therefore, risks not to be able to afford to concretely exercise this remedy.

A further critical aspect of this mechanism may be identified in the fact that appeals do not have a suspensive effect. This feature can indeed significantly affect defendants who do not have enough resources to carry out an effective defence strategy. However, even recently, the ECtHR has highlighted that having a suspensive effect is not necessary to make a remedy effective. Waiting for the Court of Justice to take a clear position on the matter, the Italian legal system does not therefore raise transposition issues with regard to this profile.

Vulnerable Persons

Lastly, Art 9 of the Directive requires to ensure that the particular needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of the Directive.

Also in this case, the pre-existing Italian legislation on the matter seems to provide a satisfactory regulation, at least in the most critical cases.

Generally, as illustrated above, access to legal aid service is subject to a mean test, i.e. income threshold. In case of minors, income documents (essentially, tax documentation) that must be submitted are those referring to the family members.

Against this background, Arts 116 and 118, DPR 115/2002, grant additional margin for protection to juvenile defendants in case of court-appointed lawyer.

In such situations, indeed, the State anticipates the costs and fees to the lawyer of the minor. The right to recover the amount paid can be exercised only if the judge

establishes that the income limits for admission to legal aid are exceeded. It is therefore the State itself that must take steps to verify the existence of the conditions for the repayment of the sums, since the minor or his/her family members do not have to submit any application for admission to legal aid (contrary to the case of adults, where it is the defendant who must take steps to avoid the repayment of the sums by the State).

It is worth mentioning that legal aid is also recognized to especially vulnerable minors, i.e. unaccompanied foreign minors. In these cases, legal aid is actually applicable to them regardless of the type of their involvement in the judicial proceeding.

The issue of the vulnerability of certain persons involved in the proceedings is then particularly sensitive with regard to the victims of certain particularly alarming crimes. As already mentioned, Art 76, c. 4 ter, DPR 115/2002, grants access to legal aid to the victims of a number of offences identified by the same provision. In these cases, admission to legal aid is guaranteed beyond the income requirements.

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3. Conclusions

Across the three Directives examined, the Italian legal order provides a generally solid baseline of safeguards. Transposition measures have, however, been selective and often focused on discrete procedural moments, which may leave certain practical situations dependent on judicial interpretation and operational practice.

Three cross-cutting aspects emerge. First, the timing and completeness of information provided to suspects who are not deprived of liberty remains vulnerable to inconsistencies, particularly where investigative acts are conducted by the police without prosecutorial delegation. Second, the effectiveness of access to a lawyer before questioning depends not only on the formal right to have counsel present, but also on the concrete opportunity for private consultation in scenarios where the status of the person evolves during an interview. Third, the legal aid framework is comprehensive in statutory terms, but its practical accessibility is closely linked to the quality of information provided at the earliest stages and to the speed and clarity of decisions granting the benefit.

Further refinement - whether through targeted legislative amendments, harmonised operational templates (including user-friendly Letters of Rights), or consolidated guidance for police and prosecutorial authorities - could strengthen uniformity and improve effective implementation in practice.

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