The Italian Implementation of the EU Directives on Procedural Safeguards for Accused Persons in Criminal Proceedings

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The work of the legal experts has been carried out under the scientific supervision of Prof. Michele Caianiello, Principal Investigator of the Project.

Disclaimer no 2: For the purposes of this report, national case law has been included, in first instance, only if issued after the approval of the procedural Directive it refers to. The report has been finalized at the end of the project, in February 2022.

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1 EXECUTIVE SUMMARY*

The approach undertaken by the legislator towards the transposition of the Directives on the procedural rights of suspected and accused persons adopted so far has been quite minimalistic. Deeming the national system to be overall compliant with the standards established therein, the legislative framework has indeed been subjected only to minor amendments. This left the judiciary to take charge for the opportune adjustments, at the interpretative level, to the pre-existing legislation.

The greatest diligence has been devoted to the implementation of Directive 2010/64, which has been subjected to a two-step transposition. The first step dated back to the 2014 (Legislative Decree no. 32, of March 4, 2014), and the second one was pursued in 2016 by the Legislative Decree no. 129, of June 23, 2016. This over-sensitivity on the part of the legislator is probably due to the fact that the field in question has been the first to be homogeneously ruled by the European Union; besides, it should be considered that, until EU institutions turned the spotlight on the rights to interpretation and translation, scarce attention had been devoted to the matter at the domestic level.

This has stimulated a proactive approach, which has nevertheless led to an incomplete alignment to European standards. On the bright side, it should be mentioned: the acknowledgement of the right to translation as separate and independent from the right to interpretation (Art 143(2) CCP); the obligation to translate a number of acts of the proceedings (Art 143(3) CCP);[1] the fact that waiving the right to translation of procedural acts by the accused is deemed admissible only where the person is informed about the consequences of this choice, having previously consulted a lawyer (Art 51-*bis* disp. att. CCP); the express recognition of the right to linguistic assistance where the accused, who is under arrest or subjected to precautionary detention, meets her defence counsel (Art 104(4-*bis*) CCP); the fact that costs for interpretation and translation shall be borne by the State, regardless from the outcome of the proceedings (until the transposition of the Directive, free assistance of interpreters and translators was acknowledged by the law, but disregarded in

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[1] In particular, notice of investigation, notice of the right to defence, the decision ordering personal precautionary measures, notice of the conclusion of preliminary investigations, decrees ordering the preliminary hearing and decrees of summons for trial, judgements and criminal decrees of conviction shall be translated. Besides these acts which shall be translated in any case, translation may be provided for those other acts which are deemed to be essential for the accused in order to state her case (Art 143(3) CCP).

practice; the entry into force of Legislative Decree no. 32/2014 contributed to render this right effective).

Moving to the gaps in the implementation, inconsistencies are to be detected, in particular, in relation to the quality of the service provided by interpreters and translators. Instead of establishing a serious mechanism of selection based on qualifications and corroborated professional credentials, the Italian legislator has resorted to a formalistic and rather inefficient system; besides, wages assigned to interpreters and translators are low and this too has a negative effect on the quality of the service provided by the appointed professionals.

Directive 2012/13 has been transposed into the Italian legal system by Legislative Decree no. 101 of July 1, 2014. National transposition mostly focused on the information about procedural safeguards, the crucial intervention concerning the duty to serve the Letter of Rights (Art 4 Directive) to suspects or accused persons deprived of liberty (Arts 293(1) and 386(1) CCP) or subjected to surrender procedure (Art 12 Law no. 69/2005 implementing the Framework Decision on the European Arrest Warrant). In order to ensure better compliance with such informative obligation, judicial oversight has been accordingly introduced (Arts 294(1-*bis*) and 391(2) CCP). Only minor changes were made instead in relation to the right to be informed about the accusation, and no amendments occurred as for the right to access the file.

In general terms, national provisions on the right to information within criminal proceedings fully implement the Directive, either directly, due to the *ad hoc* regulation enacted, or indirectly, on the basis of the pre-existent legislation. Also, courts have played a crucial role in this sense. Meaningful is the case of the duty to inform the accused about the modification of the legal qualification of the fact. Not explicitly provided for by the law, this right has been progressively acknowledged by the Italian jurisprudence following the landmark decision *Drassich v Italy* (2007) by the European Court of Human Rights.[2] Even though a few critical issues remain, as for the scope,[3] timing[4] and form[5] of the guarantees enshrined by the European legislator, the overall picture is satisfactory.

[2] *Drassich v Italy* App no 25575/04 (ECHR, 11 December 2007).

[3] In case of investigative questioning of the suspect on the part of the police (acting on her own motion), it is not foreseen that the suspect shall be informed about the criminal act she is accused of having committed (Art 350(1) CCP).

[4] With the exception of the right to silence, the information about the other rights of the accused shall be bestowed only during the pre-trial phase.

[5] The requirement of a 'clear and precise' information is prescribed not in each and every occasion the suspect or accused person shall be given notice of her procedural rights, but only when an arrest, a temporary detention or a precautionary measure are applied (Arts 386(1) and 293(1) CCP).

Directive 2013/48 has been transposed into the Italian system by the Legislative Decree no. 184, of September 15, 2016. Since the right to access a lawyer was already guaranteed in the Italian framework – under some aspects to an even higher degree as compared to European standards[6] – also in this case the legislator limited its intervention to minimal profiles. These substantially consisted in: the inclusion of the informal identification or line-up (Art 364(1) CCP) among the investigative acts requiring the appointment and assistance of the lawyer; in relation to European Arrest Warrants proceedings, the establishment of the duty for the executing authority to inform the requested person about the possibility to appoint a lawyer in the Issuing State (Art 9(5-*bis*) Law no. 69, of April 22, 2005[7]).

The overall evaluation on the implementation of this Directive is therefore positive. Only some minor shortcomings can be detected in the *law-in-action*. For example, with regard to derogations to the right to access a lawyer (Arts 3(6) and 8 of the Directive), the requirement of an in-depth motivation, based on the specificities of the case, is sometimes disregarded in practice.

The approval of the Legislative Decree implementing the Directive 2016/343 is very recent, dating back to November 8, 2021.[8] The core of the legislative act – which introduced minimal changes to the pre-existent legislation, with the explicit transposition of Arts 3, 4 and 10 of the Directive only – is devoted to setting a code of conduct for public authorities in situations where they are called to give information about the ongoing criminal proceedings.

The objective pursued by the legislator is to stop the tendency to present the defendant as being guilty before her culpability is definitely established and, therefore, avoid the vicious cycles that might be generated where incautious words of the public authorities are spread

[6] First of all, legal assistance is mandatory in Italy, even in proceedings for minor offences (the defence is understanded as an inviolable right). This means that self-defence is not admitted and, therefore, if the accused has not appointed a retained lawyer a court-appointed one shall be provided (Art 97 CCP). Besides, the right to have the lawyer present during questioning (Art 3(3)(b) of the Directive) is subjected to special protection where the questioning is executed (as a direct or a delegated action) by the police (Arts 350(3) and 370(1) CCP). In this case, unlike the case of a questioning accomplished by the Public Prosecutor (where the absence of the lawyer is admissible and perfectly tolerated, provided that the accused have been informed about her rights) the presence of the defence counsel is prescribed under penalty of nullity of the investigative act.

[7] It has to be noted however that no mention has been made by the legislator 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 exhaustively transposed in the Italian system.

[8] Legislative Decree no. 188 of November 8, 2021.

and often emphasized by the press. In this sense, the possibility for Prosecutors to hold press-conferences has been limited[9] and strictly regulated as for the type and mode of information being conveyed (Art 5 Legislative Decree no. 106, of February 20, 2006). Besides, it has been ruled that interim decisions adopted by judicial authorities shall avoid terms suggesting the defendant to be responsible for the alleged criminal conduct. Should the prohibition be violated, the accused has the right to ask for a correction of the given statement (Art 115-*bis* CCP). Although some (mainly representatives of the judiciary) have depicted this reform as an embargo for investigating authorities, the intervention has been generally warmly welcomed, as a long-awaited way to achieve the end of misrepresentation of justice on screens.

The other aspects of the presumption of innocence dealt with in Directive 2016/343 have not been addressed by the Legislative Decree, on the assumption that the Italian framework was already compliant with the European standards. This is generally true, even though some lacunas remain. This is the case, for instance, of the privilege against self-incrimination, whose level of protection finds full recognition only inside the realm of criminal proceedings *stricto sensu*. The Grand Chamber of the Court of Justice has recently stated that the right at issue should be applied also in proceedings which may lead to the imposition of administrative sanctions of a criminal nature.[10] In this sense, the Legislative Decree has represented a wasted opportunity to provide a coherent and systematic regime for the right to silence within administrative (but substantially punitive) proceedings.

Against this background, Directive 2016/800 is the only piece of EU legislation here examined that has not been transposed (yet). At a first glance, this does not cause particular gaps in terms of protection. Within the Italian system, in fact, the features of the 'fair trial for children' are fairly recognized. A special statute of guarantees is in force for juvenile defendants, independent and autonomous from that applying to adults, and tailored to the special needs of minors.[11] In this sense, it can be said that the pillar of the Directive, i.e. the acknowledgement of the inadequacy of ordinary rules for children, whose personality is under development, is firmly rooted at the national level.

[9] They can be held only in case there is a strong public interest towards the case. Otherwise, public authorities shall convey information about criminal proceedings only through official public statements.
[10] C-481/19 of 2 February 2021.
[11] Reference goes to the Presidential Decree no. 448, of September 22, 1988. For what is not specifically provided by this law, the precepts of the CCP are to be applied, but only at the condition they are 'suitable' and adequate to the peculiar features of the proceedings against minors (Art 1 Presidential Decree no. 448/1988).

Moreover, looking at the specific safeguards enshrined by the European legislator, the overall picture is reassuring, especially in relation to the right to information (Art 4), the right to have the holder of parental responsibility informed about the proceedings and its developing (Art 5), the right to individual assessment (Art 7), the necessary expertise of the authorities that, at different levels and bearing different responsibilities, get in touch with the minor along the proceedings (Art 20).

On second thought, however, some negative notes emerge. The first is related to the duty to audiovisual recording of the questioning conducted by investigating authorities (Art 9) which, as things stand, receives no implementation at the national level, even indirectly.[12]

The second concerns legal assistance (Art 6). Within the Directive, there are some indicators suggesting that the standard established in relation to the right to access to a lawyer for children may be higher than the one provided for adults. In particular, Recital (27) affirms that, where the Directive provides the assistance by a lawyer during questioning '*a lawyer should be present*' [emphasis added]. Besides, Art 6(7) provides that 'where the child is to be assisted by a lawyer […] but no lawyer is present, the competent authorities shall postpone the questioning of the child, or other investigative or evidence-gathering acts […] for a reasonable period of time in order to allow for the arrival of the lawyer, or, where the child has not nominated a lawyer, to arrange a lawyer for the child'. These wording seems to require an additional level of protection for juvenile defendants, namely, requesting the necessary presence of a defence counsel during her questioning. If this interpretative reconstruction were founded, a gap in the Italian legislation may be detected, since the assistance of the lawyer is not mandatory for children, as well as for adults, during questionings conducted by the prosecutor.[13] In this sense, should a piece of legislation aimed at implementing the Directive be adopted, it would be advisable for the legislator to foster this aspect of the right to legal assistance.

[12] The only provision providing for audiovisual recording of the questioning is Art 141 disp. att. CCP which applies only in case the (adult or underage) defendant is detained.

[13] While questionings carried out by the police pursuant to Art 350 and 370(1) CCP foresee the mandatory presence of the lawyer, that is not the case for those conducted by the Public Prosecutor. The questioning of the suspect by the Public Prosecutor is regulated by Art 364 CPP, 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 his or 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 his or her presence.

Directive 2016/1919 on legal aid has been transposed by the Legislative Decree no. 24, of March 7, 2019. Even in this case the intervention of the legislator has been minimal[14] under the assumption that European guarantees in this field already received ample recognition.

The roots of the acknowledgement of legal aid in the national framework should be traced in Art 24 of the Constitution. Given that defence has to be effective, it follows that the State shall pay for legal assistance in situations where the defendant is not in the condition to do it herself.[15] It is noteworthy that this principle receives a firm and convinced protection – which goes even further what is prescribed at the European level[16] – as it applies not only to the accused but also to other private parties, in some cases even regardless of the economic situation of the concerned person (Art 74 Presidential Decree no. 115, of May 30, 2002). Moreover, the benefit covers also legal services provided by the expert witness (Art 102 Presidential Decree no. 115/2002) and private investigator (Art 104 Presidential Decree no. 115/2002) eventually appointed by the party.

Against this backdrop, however a substantial deficiency of the Italian system has to be addressed. In accordance with Art 76 Presidential Decree no. 115/2002, legal aid is available to anyone who has an income taxable resulting the last declaration, not exceeding euros 11.746, 68. The threshold is clearly too low to guarantee a satisfactory protection.

Besides, there are other aspects, related to how legal aid functions in practice, that reinforce the impression that Italian system falls short of the European prescriptions. They include: untimely access to State funds; delays in the payment of the wages of lawyers providing legal aid services; and the absence of specific trainings to the personnel entitled of deciding the admission to legal aid. All these issues are neglected by the Legislative Decree, with the consequence that the right to receive legal assistance free of charge is (and continues being) pretentiously affirmed, but substantially denied in everyday judiciary life.

[14] Substantially amounting to the extension of the rules on legal aid to proceedings for the execution of a European Arrest Warrant (Art 75(2-*bis*) Presidential Decree no. 115/2002).

[15] In accordance with Art 76 Presidential Decree no. 115/2002 legal aid is available to anyone who has an income taxable resulting the last declaration, not exceeding euros 11.746, 68. The person concerned who is in this income condition may apply for legal aid at any stage of the proceedings and the application is decided by the judge proceeding at the time.

[16] See Art 2 of the Directive.

2 Introduction to the Italian Legal System*

2.1 The Adversarial Model

In the long-standing partition between inquisitorial and adversarial criminal systems, Italy has belonged to the latter type for more than 30 years now. For a long time after the advent of the Republic, the previous 1930 Code – enacted in the Fascist time – remained valid, even though the Constitutional Court made sure to remove from its body the most authoritarian elements. Following a period of long political and theoretical gestation, in 1988 a reform finally marked a rupture with the civil law inquisitorial tradition that had inspired the previous Code, and brought the Italian system closer to the adversarial model.[17] Indeed, one of the main objectives that underlined the adoption of the new Criminal Procedure Code was the implementation of the features of the accusatorial process in the domestic framework.

The new system is based on a strong separation between the preliminary phase and the trial. Fact-finding is designed to take place in the trial only, where both the prosecution and the defence share equal chances to present their cases before an impartial judge. Evidence is collected adversarially, through the method of cross-examination of witnesses. Instead, the evidence collected during the investigations cannot in principle be admitted in the trial and ground the final decision on the defendant's criminal responsibility, although some exceptions are foreseen at the constitutional and legislative levels. To preserve this partition and the judge's impartiality, a system of two dossiers (*doppio fascicolo*) is introduced: on the one hand, the parties' dossier (*fascicolo delle parti*) contains the evidence collected in the preliminary phase and is unknown to the judge; on the other, the trial dossier (*fascicolo del dibattimento*) includes all the evidence that are collected during the trial and will be used by the judge in for the adjudication of the case.

While the 1988 Reform was not well received by the judiciary, its features were definitely engraved in the national system with the Constitutional Law no. 2/2003. Art 111 Const. now enshrines the principles of the "fair trial" (*giusto processo*), and even though the Italian version of this provision does not express an explicit preference for the adversarial model, its features are clearly represented in its wording. Art 111(2) Const. provides indeed that any process must be carried out according to the adversarial principle (*contraddittorio*), with equal opportunities between the parties, before an impartial judge. Art 111(3) Const then lists a series of prerogatives inspired by Art 6(3) ECHR, among which: the right to be informed promptly of the nature and cause of the accusation against her; the right to have

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[17] CAMON and o (2019), 36 ff.; ORLANDI (2018).

adequate time and facilities for the preparation of her defence; to examine or have examined witnesses against her and to obtain the attendance and examination of witnesses on her behalf under the same conditions as witnesses against her; to have the free assistance of an interpreter if she cannot understand or speak the language used in court.

Most importantly, however, Art 111(4) Const. provides that in criminal proceedings "the formation of evidence is based on the principle of adversary hearings". Only evidence that was formed in the presence and with the participation of both the defence and the prosecution can justify a finding of criminal responsibility. That is why it is established that the defendant's guilt cannot be established on the basis of statements by persons who, out of their own free choice, have always voluntarily avoided undergoing cross-examination by the defendant or the defence counsel. Art 111(5) Const., however, provides for derogations to the principle of adversarial formation of evidence. These are the consent of the defendant, reasons of ascertained objective impossibility or proven illicit conduct. Based on these exceptions, unrepeatable evidence (e.g. reports of interception of communications, seized materials) can be inserted in the trial dossier even though they were not collected according to the adversarial scheme. Also, following her consent, the defendant may agree on including in the trial dossier evidentiary elements collected in the preliminary phase, or opt for special proceedings lacking for the trial (e.g. application of punishment upon request, summary trial procedure).

2.2 The Status of the Public Prosecutor

Another pivotal feature of the 1988 Reform was the abolishment of the inquisitorial figure of the investigating judge (*giudice istruttore*). The alignment to the adversarial model implied indeed a strong separation between prosecuting and adjudicating functions in the process. As dominus of the preliminary investigations, the Public Prosecutor was given a wide range of powers to interfere with individuals' fundamental freedoms.[18]

Under the Italian Constitution, the Public Prosecutor falls within the concept of "judicial authority" (*autorità giudiziaria*), which can issue warrants for searches and seizures of evidence. This interpretative choice has long been supported by the jurisprudence of the Italian Constitutional Court, and several arguments corroborate this. From a systematic reading of the Constitution, it can be noted that some provisions specifically refer to the "judge" and others to the expression of "judicial authority". This distinction led interpreters to believe that when the Constitution mentions the judicial authority, it points out not only to the judge, but also to the public prosecutor as the issuing authority. Also, from a historical

[18] On the figure of the public prosecutor in Italy, see generally CAIANIELLO (2016).

perspective, it should be kept in mind that in using the expression "judicial authority" the drafters of the Constitution had still in mind the old Napoleonic inquisitorial tradition. From 1913 indeed, the concept of judicial authority had been used in the Criminal Procedure Code to signify both the judge and public prosecutor.

It should also be kept in mind that – from an institutional perspective – the public prosecutor shares with the judge the status of magistrate. This means that prosecutors, as judges, are irremovable from their office (*inamovibili*) and are not dependent from the Ministry of Justice, which can only oversee their activities without being able to impose orders. On the one hand, these safeguards have been considered enough by the scholarship to assert the external independence of the public prosecutor from the government. On the other, however, this does not mean that the single prosecutor is not affected by any influence when exercising her functions. Public prosecutors are indeed incorporated in a hierarchical structure and may thus be subjected to the orders of their Head of the Prosecution Office (*procura*).

On a different note, the figure of the Public Prosecutor in Italy still suffers some ambiguities, which are most likely the legacy of the inquisitorial tradition. While the Italian prosecutor enjoys the same guarantees of external independence as the Judge, this does not mean that she also offers the equal safeguards of impartiality with regard to the proceeding and participating parties. Certainly, the discretionary powers of the prosecutor suffer various limitations in the domestic system; however, she still embodies the role of the accusing party in an adversarial setting.

2.3 The Principle of Mandatory Prosecution

The principle of mandatory prosecution is established by Art 112 Const. It means that the public prosecutor should always take action and initiate the process, no matter the seriousness or political relevance of the facts. Mandatory prosecution is generally considered to be grounded on the principles of equality (Art 3 Const) and of non-discrimination. The reasoning behind is that if all citizens are equal before the law, the criminal justice system should ensure that anyone that commits a criminal offence incurs the same risks of being prosecuted. In this sense, the principle of mandatory prosecution should rather be seen as an alternative to a "regime of opportunity", where the Prosecutor is entitled to make political choices in deciding which cases to prosecute (*e.g.*, notably, in the United States).

Mandatory prosecution does not imply that the Italian Prosecutor is deprived of any margin of discretion in performing her duties. Rather than a "political" or strategic discretion in deciding which cases should be brought to trial, she disposes of a "technical" kind of discretion. Not every notice of crime should necessarily be followed by the initiation of a

trial. In deciding whether to discontinue the case or bring it further to trial, the Prosecutor must indeed abide by legal criteria which are subject to jurisdictional control. Specifically, Art 125 disp. att. CCP provides that the prosecutor must institute the criminal trial only when the evidence is apt to sustain the accusation in the trial.

Moreover, the principle entails that the Italian Prosecutor enjoys a certain freedom in proactively searching for notices of crimes. This norm aims to make sure that no crime goes unpunished. Nonetheless, to diminish the Prosecutor's margin of discretion, the Constitutional Court has found that where investigations are initiated, these should be "complete" at their end. This certainly means that the Prosecutor has an obligation to look for evidence both at charge and discharge for the suspect, but the exact standard of "completeness" remains to this day undefined.

Although the principle of mandatory prosecution is enshrined in the Constitution, it should be kept in mind that in the practice things may work quite differently. Prosecution offices spread across Italy do not have enough material and human resources to take each case to trial, where necessary. That is why some forms of implicit ranking have often been introduced (e.g. priority is given to offences due to expire for statute limitations, or to some serious offences). Usually, these criteria are not directly decided by single prosecutors, but at the office level; still, they definitely impact on their activities: the prosecution of less relevant offences is not given the same attention and resources, with a high risk of expiration of the statutory time-limits.

2.4 Public Defender and Legal Aid

In the Italian system, the categories of the public defender and the legal aid should be kept distinct. On the one hand, being assisted by a public defender does not necessarily mean that the suspect or accused person has access to legal aid. The role of the public defender is subsidiary to the one of the retained lawyer, meaning that she is appointed anytime the suspect or accused person does not have a retained lawyer. This rule is explained by the fact that legal assistance is mandatory in criminal proceedings in Italy. The appointment of a public defender may have a stable nature (Art 97(1) CCP) or a provisionary one (Art 97(4) CCP). Moreover, the public defender is generally to be paid by the suspect or accused person. In this sense, Art 369-bis CCP provides that the information about the appointment of the public defender must be accompanied by the notice that her professional activity is at the charge of the client, unless the conditions to access the legal aid are satisfied.

On the other hand, legal aid finds its basis in Art 24(2) Const., which provides that the "[t]he poor are entitled by law to proper means for action or defense in all courts". At the legislative level this right translates into Art 98 CCP, which legitimises the accused person

(and the suspect), the injured person who intends to join the proceedings as a civil party and the person with civil liability for damages to apply for legal aid at the expense of the State according to the provisions of the law on legal aid for destitute persons. These persons may potentially benefit from the services of a court-appointed lawyer, or appoint a retained lawyer of their choice, provided that the latter is enrolled in one of the dedicated registers.

2.5 BIBLIOGRAPHY

CAIANIELLO, Michele (2016): "Increasing Discretionary Prosecutor's Powers: The Pivotal Role of the Italian Prosecutor in the Pretrial Investigation Phase", in *Oxford Handbook Online on Criminology* (New York, Oxford University Press) 1 - 27

CAMON, Alberto, CESARI, Claudia, DANIELE, Marcello, DI BITONTO, Maria Lucia, NEGRI, Daniele, PAULESU, Pier Paolo (2019): *Fondamenti di procedura penale* (Cedam)

ORLANDI, Renzo (2015): "La Prolusione di Rocco e le dottrine del processo penale", *Revista Brasileira De Direito Processual Penal*, 1,1

3 Directive (EU) 2010/64: Right to interpretation and translation*

3.1 Introduction

Directive 2010/64 on the right to interpretation and translation in criminal proceedings (hereinafter "Directive") was transposed into the Italian legal system through a double legislative initiative by Legislative Decree no. 32 of March 4, 2014, and Legislative Decree no. 129 of March 23, 2016. Previously, the relevant legislation was very fragmented.

In fact, the Italian procedural system, translation and interpretation of the acts of the criminal trial take the form of a "progressive development right".

If in the previous code (1930), the interpreter represented an auxiliary of the judge, functional so that the latter could easily carry out the investigative activity,[19] the coming into force of the Constitution first, and of the ECHR later, have contributed to the progressive abandonment of the functionalist approach.[20] Both charters have, in fact, favored the emergence of a defensive conception of the interpreter, who, in the dynamics of the proceedings, plays an essential role in ensuring the effectiveness of the right of defense of the accused who are not Italian nationals.

Such an approach, which has found citizenship in the code of 1988 (Art 119 and 143 CCP), has been considered by the doctrine as "a Copernican rotation of the functional figure of the interpreter".[21]

In spite of this and of the renewed regulation, the majority of national case law has substantially maintained its traditional hermeneutic approach, not recognizing the micro-right to translation.[22]

* The following Chapter has been drafted as follows: Cosimo Emanuele Gatto, §§ 3.1, 3.5 and 3.6; Alessandra Santangelo, §§ 3.2, 3.3, 3.4 and 3.7.

[19] GIALUZ (2018) 276 ff. For an historical account of the role of the interpreter within the criminal proceedings, see SAU (2010) 5-46.

[20] According to this approach, still present in civil proceedings (Art 122. c.p.c.), the interpreter performs a "functional" activity for the judge's knowledge and the good administration of justice. See GIALUZ (2018) 277; SORRENTI (2019) 471 ff.

[21] SAU (2010) 44. A distinguished author has talked about a 'genetic mutation of the interpreter' (CHIAVARIO (1990) 112).

[22] As pointed out by the scholar, «Regardless of the regulatory technique used, it does not seem possible to

Only the intervention of the Italian Constitutional Court[23] has ensured that, from the 1990s onwards, the right, in the wake of Art 6(3)(a) ECHR, has been effectively applied in the courts according to the new code of 1988.

In the words of the Court, in fact, the right of the accused to be informed immediately and in detail in the language he understands of the nature and reasons for the charge against him must be considered a perfect subjective right, directly enforceable. In this perspective, continue the Judges, Art 143, c. 1 CCP "should be interpreted as a general clause, (…) intended to expand and specify, within the scope of the purposes normatively recognized".[24]

Notwithstanding this authoritative affirmation, in the following years the case law has applied with excessive parsimony the micro-right to translation by excluding from its scope cardinal act of the process such as the precautionary order and the sentence.[25]

The negative repercussions on the right of defence of such an approach emerge *ictu oculi*.[26]

A further step forward in the direction of the consecration at the domestic level of the right to the interpreter was taken with the constitutional reform of fair trial (Constitutional Law, 23 November 1999, n. 2) which amended Art 111 of Italian Constitution. According to the wording in force today, "in criminal proceedings, the law ensures that the person accused of a crime (...) is assisted by an interpreter if he or she does not understand or speak the language used in the proceedings".

It is on the ground of the new Art 111 of the Italian Constitution that the Constitutional Court has once again took a stand on the right to interpretation and translation of the acts, stating that the recognition of the right to appoint an interpreter to a foreign defendant who does not know the Italian language cannot (...) suffer any limitation.[27]

affirm that the right to interpretation and the right to translation constitute two independent subjective rights: rather, they seem to be "micro-rights" that together create a unitary "macro-right" to linguistic assistance». See GIALUZ (2018) 134 and 280 and, in particular, the case-law cited at footnotes 26-28.

[23] Constitutional Court, judgement no. 10/1993.

[24] *Ibidem.* In literature, see NIRO (2016) 63 ff.

[25] GIALUZ (2018) 281 ff. and, in particular, the case-law cited at footnotes 40-41. For a detailed account of the Italian regulation on the matter before the adoption of the Directive 64/2010/EU, see S. SAU (2010) 127-224.

[26] As for the connections between the right to interpretation and that of defense, see CURTOTTI NAPPI (2002), 233-344.

[27] Constitutional Court, judgement no. 10/1993. In literature, see NIRO (2016) 63 ff.

Despite the fact that the Constitutional Court left little room for strict interpretations of the right in question, the national courts, albeit with some exceptions, as pointed out by authoritative doctrine, "has continued to empty the right from within, on the one hand, by interpreting in a restrictive sense the assumption of the lack of knowledge of the language and, on the other hand, by extending the scope of the exceptions".[28]

It is in this chaotic and contradictory scenario that in 2010 the Directive 64 was introduced, receiving a "frosty" welcome by Italian judges.

Only the biphasic transposition of the Directive[29] has allowed, in the forms that we are going to analyze, a progressive affirmation of the right to translation and interpretation of acts in Italian criminal proceedings.

3.2 National Implementation: 'Knowing the Italian Language'

Although the implementation of the Directive 2010/64 has been reaching positive outlines, some legislative shortcomings required the case law to clarify the rights' extension at the national level.[30]

In particular, according to Art 2(1) of the Directive, the domestic law shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities. In this perspective, Art 143, c. 1 CCP states that the accused who does not know the Italian language is entitled to be assisted by an interpreter – free of charge and regardless of the outcome of proceedings – to understand the accusations against him and follow the actions and hearings in which he participates. One first issue concerns the fact that the legislative provision literally refers to the accused person ('*imputato*'),[31] undermining the implementation of the European rule

[28] See. GIALUZ, (2018) 286; Constitutional Court, judgement no. 254/2007.

[29] Legislative Decree no. 32 of March 4, 2014 and Legislative Decree no. 129 of March 23, 2016.

[30] As for the progressive development of the right to interpretation and translation, a decisive contribute has been provided by the Italian Constitutional Court which recognised its transition from tool that supported judicial authorities towards crucial component of the defendant's rights (judgement no. 10 of 1993), as examined in the previous paragraph.

[31] In fact, according to Art 60, CCP, 'a suspect becomes an accused person when he is charged with an offence in a request for committal to trial, immediate trial, criminal decree of conviction, application of punishment under Art 447, c. 1 CCP, in the decree of direct summons for trial and in direct trial'. On the contrary, during

from the subjective framework. However, scholars generally broaden this notion referring the right to all the suspect persons in accordance with Art 61 CCP:[32] even more so, several implementing norms specifically apply the right to interpretation and translation before formal charges, fostering the extensive approach.[33]

In addition, the right to interpretation and translation has been extended to the victims of the crime involved so that the maximum standard is guaranteed to all the criminal proceedings' actors.[34] In particular, the domestic law has been revised after the Directive 2012/29/EU, requiring under Art 7 the victims of crime to be ensured, upon request, free of charge interpretation or translation "in accordance with their role in the relevant criminal justice system". Thus, Art 143-*bis* CCP states that the proceeding authority shall appoint an interpreter when the victim to be interviewed does not know Italian or wants to attend the hearing.[35] However, trying to balance the opposite interests, the legislator also ruled that the translation is allowed if the document contains useful information for exercising the victim rights (Art 143-*bis*, c. 4).

the previous stages of the proceeding, the person is referred to as a mere suspect.

[32] In particular, according to Art 61 CCP: 'The rights and safeguards of the accused person extend to the suspected person. Any other provision concerning the accused extends to the suspect, unless otherwise provided'. See VENEGONI (2017) 223; COCOMELLO - CORBO (2014), 3.

[33] In particular, Art 386, c. 1 CCP, ruling the criminal police's duties in case of arrest or temporary detention, affirms that 'the criminal police officials and officers who have arrested or placed under temporary detention the perpetrator or to whom the arrested person has been surrendered, shall immediately inform the Public Prosecutor of the place where the perpetrator has been arrested or placed under temporary detention. They shall provide the arrested or temporarily detained person with a written notice, drafted clearly and precisely. If the arrested or temporarily detained person does not know the Italian language, the notice shall be translated into a language he understands. The notice shall contain the following information: [...] c) his right to an interpreter and to the translation of essential documents'. Similarly, in accordance with Art 293, c. 1, CCP, 'the official or officer in charge of enforcing the order of precautionary detention shall provide the accused person with a copy of the decision along with a clear and precise written notice. If the accused does not know the Italian language, the notice shall be translated into a language he understands. The notice shall contain the following information: [...] c) his right to an interpreter and to the translation of essential documents'.

[34] As for the severe damage to the victims' ability to effectively attend the trial when the right to interpretation and translation was not recognised, see SAU (2015) 474.

[35] The provision has been introduced by Art 1, c. 1, d), legislative decree no 212 of 15.12.2015, implementing the Directive 2012/29/EU. In addition, Art 90-*bis* and 107-*ter*, legislative decree no 271 of 28.07.1989, prescribe the right at stake to inform the victim and allow she or he to submit a report.

Moreover, Art 143, c. 4, CCP, provides that "knowledge of the Italian language shall be assessed by the judicial authority. Knowledge of the Italian language by Italian citizens shall be presumed unless proven otherwise".[36] Thus, the application of Art 143 CCP is not immediate but, rather, it is subject to the judicial assessment.[37] Nonetheless, it is to be regarded as lawful if the language knowledge is not expressively assessed by the judiciary but, rather, implicitly derived from empirical conditions:[38] in fact, it is possible that the understanding of the Italian language[39] emerged from procedural acts signed by the accused as well as by personal unequivocal declarations.[40]

In this light, national judicial authorities clarified that, complying with the domestic law as modified by the decree no. 32 of 2014,[41] the right to an interpreter is not automatically implied by the fact that the accused person is foreign but rather requires the judge to assess whether that person is not able to comprehend the Italian language. Consequently, if during the proceedings the accused never claimed he could not comprehend the language or he personally submitted a form in Italian, the guarantee would not apply.[42] Likewise, the Italian judge excluded the right to interpretation to be applied in a case where the foreign accused personally appointed his lawyer, she confirmed that she could understand the language during the first questioning, as emerged from the official reports, and personally submitted the

[36] As for the knowledge of the Italian language both comprehension and speaking abilities are to be considered: see RIVELLO (2018) 226 ff.

[37] Cass., sez. F, no. 44016, 04.09.2014, Rv. 260997-01, where the judges pointed out that the assessment on the accused's language knowledge represented a substantial evaluation to be completed by the national Tribunals or Appeal Courts rather than by the Court of Cassation.

[38] After all, the Constitutional Court has clarified that the main rationale of the right to interpretation and translation is allowing a conscious and effective involvement of the accused or suspected person in the criminal proceeding: judgement no. 254 of 2007.

[39] For a deeper analysis, SAU (2015) 477.

[40] In this perspective, Cass., sez. II, no. 7913, 31.01.2017, Rv. 269505-01, available at http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./20170217/snpen@s20@a2017@n07913@tS.clean.pdf, stating that the assessment on the accused person's acknowledge of the Italian language for the purposes of Art 143, Italian Procedure Criminal does not require to be fulfilled nor by the judicial authority neither before the lawyer assisting the defendant as it does not represent a defensive act.

[41] Criticising the delay in the national implementation, GIALUZ (2014) 439 ff.

[42] On the issue, see Cass., sez. II, no. 30379, 19.06.2018, Rv. 273246-01, available at http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./20180705/snpen@s20@a2018@n30379@tS.clean.pdf.

application before the Court of Cassation.[43] Therefore, a substantive perspective leads the case law standarised approach, avoiding that the European prescriptions could be exploited, lessening the criminal procedure and jeopardizing the assessment of the eventual criminal liabilities.

3.3 Free Assistance of an Interpreter to Confer with the Defender

A second relevant concern raised by the national scholars deals with the right to interpretation for communication between suspected or accused persons and their legal counsel[44] for the purposes of Art 2(2) of the Directive. In fact, the domestic legislation has fully implemented the provision claiming that the accused is also entitled to be assisted by an interpreter – free of charge – to be able to confer with her lawyer prior to questioning or for the submission of a request or brief during proceedings.[45] In addition, under Art 104-*bis* CCP it is established that the defendant in custody, the arrested and the detained, who do not know the Italian language, have the right to the free assistance of an interpreter to confer with the defender in accordance with the previous paragraphs. Nonetheless, this guarantee is frequently jeopardized in practice. In fact, some scholars observe that, despite the right at issue being formally recognised, the opportunities granted to the accused person to privately communicate with her legal counsel, benefiting from the presence of a professional interpreter, are quite rare.[46]

In addition, the Court of Cassation stated that in order to recognize the nullity of a general nature for the purposes of Art 178 CCP the accused is required to demonstrate the prejudice directly inferred by the absence of a proper interpretation while defining the defense strategy or the defensive acts.[47]

[43] See, in particular, Cass., sez. II, no. 8094, 04.02.2016, Rv. 266238-01, available at http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./Oscurate20171108/snpen@s20@a2016@n08094@tS@oY.clean.pdf

[44] In fact, the Italian Constitutional Court itself recognized the right to interpretation and translation to be applied even regarding the private parties' legal counsels: see, on this issue, the above-mentioned judgement no. 254 of 2007.

[45] Art 143, c. 1 and 2 CCP.

[46] See GIALUZ (2018) 87.

[47] Cass., sez. I, no. 30127, 24.06.2015, Rv. 264488 – 01.

3.4 Acts to be Translated

Considering the positive outlines brought about by the European norms, it is necessary to highlight that, initially, the domestic law did not provide an express list of the documents whose translation was to be regarded as essential for the rights of the defence. Thus, the judicial authority started identifying each essential document under a case-by-case approach. However, this method fostered severe uncertainty as for the boundaries of the right to translation, not preventing relevant discriminations due to the judiciary's discretion.

In this framework, implementing the 2010/64 Directive, Art 143, c. 2 CCP has been modified in order to literally enumerate all the acts whose translation shall be ensured for the purposes of fair trial.[48] Moreover, Art 143, c. 3 CCP states that national authorities must grant the "free-of charge translation of any other document or part thereof which is deemed essential for the accused to understand the accusations against him may be ordered by the court, also upon request of a party, by means of a reasoned decision, appealable together with the judgement".[49] In this light, is has been argued that in case of immediate dismissal or acquittal the judgement's translation is not required according to the rationale of the guarantee at stake.[50] All the more so, the translation of the essential documents for the purpose of Art 143, c. 3 CCP shall not include the whole document since it is perfectly reasonable that translating only the main sections of the original document would be sufficient to allow the defendant's effective and conscious attendance to criminal proceeding.[51]

Notwithstanding the positive effects the implementation of the EU provisions inferred, the domestic case law still presents some inconsistencies when the right to translation is implied. In particular, the Court of Cassation claimed that the enforcement injunction issued by the Public Prosecutor for the purposes of Art 656 CCP must be translated as it plays an essential role in order to grant an effective and efficient acknowledge of the charges withstanding the

[48] In fact, according to Art 143, c. 2, CCP, need to be translated: the notice of investigation, the notice of the right to defence, the decision ordering personal precautionary measures, the notice of the conclusion of preliminary investigations, the decrees ordering the preliminary hearing and the decrees of summons for trial, the judgements and the criminal decrees of conviction.
[49] Art 143, c. 3 CCP as modified by the above-mentioned legislative decree no 32 of 2014.
[50] VOENA (2020) 210.
[51] RIVELLO (2018) 239.

conviction.[52] On the contrary, after few months, the same Court overruled the previous decision stating that the enforcement injunction shall not be translated if the convicted person cannot be found.[53] On the one hand, it is undeniable that the national judges considered the procedural efficiency prevailing on individual rights and upheld the interpretative approach spread in the past.[54] On the other, the strict interpretation of the guarantee at issue contrasts with its rationale and undermines the scope pursued at the European level. It is to be questioned whether a similar case law could be considered consistent with the need to protect the defendant's rights from arbitrary exercises of punitive power

As for the translation's tools, the Directive allows Member States to provide oral or even summary translation if it does not prejudice the proceeding fairness (Art 3(7)). Firstly, the domestic law prescribed higher standards of protection, radically preventing this option.[55] More recently, a specific derogation has been stated: in extraordinary urgent cases, judicial authorities may require oral translation - when the material circumstances prevent a written one - as long as the right of defense is not undermined.[56] On the one hand, national legislator has undermined the guarantee at stake, fulfilling the previous gap between national and European standards. On the other, this provision underpins the criminal procedure's effectiveness whenever specific urgent requirements demand national authority to act promptly.[57]

[52] In particular, see the decision: Cass., sez. I, no. 40733, 10.01.2018, Rv. 274531 – 01, available at http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./20180921/snpen@s10@a2018@n40733@tS.clean.pdf.

[53] As for the most recent judgement, Cass., sez. I, no. 8591, 28.01.2020, Rv. 278364 – 01, available at http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./20200303/snpen@s10@a2020@n08591@tS.clean.pdf.

[54] Cass., sez. II, no. 12191, 17.02.2015, Rv. 262773 – 01, where the judges clarified that once the accused person cannot be found and notifications are received by the legal counsel, the right to translation does not apply.

[55] See GIALUZ (2018) 92; RECCHIONE (2014) 7.

[56] Art 51-*bis*, Legislative Decree no 271 of 28.07.1989, as introduced by Art 2, c. 1, Legislative Decree no 129 of 23.06.2016.

[57] See IERMANO (2017) 734, where the Author considers, as an example, the decisions for urgent cases under Art 400 CCP.

3.5 Remedies

Despite Art 2(5) Directive 2010/64, the domestic legislator has not prescribed specific remedies: the general rules on unlawful acts apply, depending on the specific act or procedural stage which are concerned. As a general rule, whenever the person involved is not able to comprehend or speak the language and interpretation or translation would be necessary for the purposes of fair trial, the nullity under Art 178 CCP[58] applies since participation and assistance in the criminal trial has been undermined. Nonetheless, in this framework, it is undeniable that the case law plays an essential role, affecting – in specific circumstances – the possibility itself to obtain procedural remedies.

In particular, the case law used to affirm that, if the report of intercepted communications did not contain detailed information on the interpreter who translated the dialogues, it had to be considered unlawfully gathered.[59] Consequently, the report could not be used as evidence during trial. The idea was that identifying the interpreter was necessary to assess the work's quality as well as the personal ability to face that specific assignment. However, more recently, the Court has decided to override the previous approach: when intercepted communications are at stake, since the absence of precise indications regarding the interpreter is not expressively included in the prohibitions of use listed by Art 271 CCP, the relative report is to be regarded as lawful.[60]

Hence, it is common ground that anytime the accused person submits a request for special proceedings, then the nullity under Art 178 is to be considered regularized:[61] once the private party opts for the application of punishment upon request (Art 444 CCP), she cannot claim there have been violations of the right to interpretation or translation during the proceeding.[62]

[58] According to Art 180, in particular, the nullities referred to in Art 178 shall be raised of parties as well as of court's own motion but shall neither be raised nor advanced after deliberation of the first-instance judgement or, if they emerge during the trial, after deliberation of the judgement of the next instance.
[59] Court of Cassation, sez. III, n. 28216 of 04.11.2015, rv. 267448 – 01.
[60] Court of Cassation, sez. V, n. 15472 of 19.01.2018, rv. 272683 – 01; in the same perspective, Court of Cassation, sez. V, n. 11060 of 17.11.2017, rv. 272863 – 01.
[61] In particular, Art 183 CCP stresses that 'unless otherwise provided, nullities shall be regularized if: a) the party concerned expressly waves to raise them or accepts the effect of the act; b) the party avails himself of the right granted by the act, even if such act is omitted or null'.
[62] See for a deeper analysis, RIVELLO (2018) 243.

3.6 Costs and Quality of Interpretation and Translation

Regarding the rights analyzed above to be applied generally and effectively, it is necessary to guarantee, on the one hand, free interpretation and translation and, on the other, their high quality. The first, in fact, allows a "universal" access to the rights in question, especially by those who could not afford an interpreter or a private translator; the second ensures the elimination - or, at least, the drastic reduction - of the language gap that could negatively affect defense rights.[63] For these reasons, the Directive devotes two articles, 4 and 5, respectively, to the costs and the quality of interpretation and translation. The implementing decrees have only partially followed up on the European legislation.

a) Interpretation and translation costs.

As regards the right to free interpretation and translation, these costs are borne by the States (Art 4 of the Directive), with Legislative Decree no. 32 of March 4, 2014, Art 143 of the Code of Criminal Procedure was amended, which already provided, albeit generically, for free interpretation only.

In its current formulation, in fact, paragraph 1 of this provision states that "[t]he accused who does not know the Italian language is entitled to be assisted by an interpreter - free of charge and regardless of the outcome of proceedings - to understand the accusations against him and follow the actions and hearings in which he participates. The accused is also entitled to be assisted by an interpreter - free of charge - to be able to confer with his lawyer prior to questioning or for the submission of a request or brief during proceedings".

Art 104, c. 4-*bis* CCP, introduced by the same legislative decree, also extends the guarantee of the interpreter to "the defendant in custody, the arrested and the detained, who does not know the Italian language".

Secondly, the same legislative decree amended Art 5 Presidential Decree no. 115 of 2002 (Consolidated Law on Legal Expenses), excluding from the repeatable expenses, as per lett. d), those incurred by the State for the activity carried out by the interpreters and translators appointed on the basis of Art 143 CCP.

Noting the insufficiency of these interventions and, thanks to the solicitations coming from the doctrine, the Italian legislator has again intervened on the point with the Legislative

[63] GIALUZ (2018) 149-177.

Decree, June 23, 2016, no. 129, introducing the Art 51-*bis* at Legislative Decree no. 271 of 28 July 1989: "[f]or each of the cases provided for in article 143, paragraph 1, second sentence, of the code, the defendant is entitled to the free assistance of the interpreter for one interview with the defense counsel. If, for particular facts or circumstances, the exercise of the right of defence requires the conduct of more than one interview in relation to the performance of the same procedural act, the free assistance of the interpreter may be provided for more than one interview".

As specified in the report accompanying the draft legislative decree amending Legislative Decree no. 32 of 2014,[64] Art 51 bis guarantees that there is free assistance for at least one interview with the lawyer, except for special needs. For those who are not well-off the costs of interpretation and translation remain in any case to be borne by the State (Arts 83 and 102 Presidential Decree no. 115 of 30 May 2002).

In fact, as pointed out by the scholars, this rule does not limit the right of the accused to meet the lawyer but limits only the number of defensive interviews assisted by the interpreter whose costs are borne by the state for defendants not admitted to legal aid.[65]

b) The quality of interpreting and translation.

The second aspect on which the implementing legislative decrees have intervened concerns the quality of interpretation and translation services. In fact, as pointed out by scholars, "it takes on the value of a true and proper essential feature of language assistance".[66]

The directive (Art 5) requires, in particular, that the quality of interpretation and translation be ensured both through institutional and procedural guarantees.[67]

The Italian legislator, for its part, has always shown little sensitivity to the requirement of quality of those rights[68] and, unfortunately, the implementation of the directive has not been up to the change of pace that might have been expected.

[64] https://www.giustizia.it/giustizia/it/mg_1_2_1.page?contentId=SAN1226282&previsiousPage=mg_1_2_0.
[65] See IERMANO (2017) 733.
[66] GIALUZ (2018) 150.
[67] *Ivi*, 155.
[68] Prior to the transposition of the directive, authoritative doctrine had stated that in Italy, with regard to the profile of the adequacy of linguistic assistance, "we are almost in the Stone Age". See. M. BARGIS (2013) 114. The practice shows that interpreters are paid little and, as the scholar states, "gratuitousness goes hand in hand with inadequacy". *Ivi*, 110. The remuneration of the language expert is in fact still regulated by Law no. 319 of

In fact, the Legislative Decree of 2014 had provided, in Art 2, only, the inclusion in the register of experts established at each court (Art 67, c. 2 Legislative Decree, no. 271, 28 July 1989) of the professional figures of interpreters and translators. This was, as noted by scholars, "a low-cost pseudo-solution" with the risk of being faced with a merely formal change.[69]

In order to respond more faithfully to the requests of the Directive, Art 2, c. 2 of the Legislative Decree of 2016 has provided, through Art 67 bis Legislative Decree, no. 271, July 28, 1989, the establishment at the Ministry of Justice of the national list of interpreters and translators registered in the register of experts at the court.[70]

Even this addition, however, cannot be considered sufficient. In fact, as pointed out by the Italian scholar "Far from setting up a proper register as required by Directive 2010/64 (Art 5(2) (36)), he envisaged a mere list of the names of suitable language assistants already listed in the expert registers of the individual courts".[71]

The accompanying report specifies that Legislative Decree 129 of 2016 provides that a ministerial decree[72] should specify the procedures for access, training, maintenance and updating of the national list of interpreters and translators.

In this perspective, as pointed out by the scholar, "Even if, in fact, an *ad hoc* list of language assistants is provided for in the register of experts, the registration requirements vary from one judicial office to another and, in practice, lists prepared in a more or less informal way by the offices themselves are often used. (...) In any case, it would be desirable to create an independent register of interpreters and translators, similar to that of the experts referred to in Art 67 CCP, where registration is based on predefined requirements, such as

8 July 1980, dedicated to the remuneration of experts, technical consultants, interpreters and translators, as updated by Ministerial Decree of 30 May 2002. The fees are determined in time, taking into account the unit corresponding to the two hours, which is defined as "vacancy": the measure is equal to €14.68 for the first vacancy and €8.15 for each subsequent vacancy until the end of the assignment". See. GIALUZ (2018) 332 f.

[69] See, GIALUZ, (2018) 293.

[70] "*Each court shall transmit to the Ministry of Justice by electronic means the updated list of interpreters and translators registered in the register of experts referred to in Article 67. The judicial authorities shall make use of this national list and shall appoint interpreters and translators other than those listed in the register only where there are specific and special needs*".

[71] See IERMANO (2017) 736.

[72] Currently, the decree has not been issued yet.

advanced knowledge of the foreign language and culture duly certified, as well as judicial systems and national legislation and language(s) of work".[73]

Lastly, it should be noted that, although there is an *ad hoc* provision in the Directive (Art 6), no provision was introduced by the Italian legislator in order to ensure adequate training of judicial personnel, a profile which is inevitably intertwined with the quality of translation and interpretation services provided during the trial.

This shortcoming has been highlighted by scholars, who have pointed out that, in the absence of legislation, it will be necessary to provide training courses at national level aimed at implementing communication between legal professionals and interpreters.[74]

3.7 Conclusions

The right to interpretation and translation plays a crucial role for judicial cooperation at the European level non only being the first field homogeneously ruled by a Defense Directive but also representing a boundless test bench for proceeding fairness. In fact, before the amendments imposed by the implementation of European provisions, the domestic law recognised very little room for interpretation and translation in criminal proceedings (see *retro*, §1). On the contrary, the guarantee's rationale has been consistently fostered due to the successful attempt to harmonise Member States' legislation, improving the protection of fundamental rights within criminal trials. In this perspective, it is notable that the domestic law had a (late but) positive reaction, adapting the Criminal Procedure Code – and some additional provisions – in order to meet the European benchmarks. Moreover, subsequent EU developments brought about further innovations, applying the rights at stake not only to the accused or the suspect person but also to the victims of crimes, reducing discrepancies and discriminations in the criminal field.

Nonetheless, several shortcomings persist as the national legislator omitted specific rules in crucial sectors, allowing the case law to control the requirements and effects of the right to interpretation and translation and avoiding useful innovations the Directive could have encouraged. In fact, the judicial authorities have been committed to define when the acknowledge of the Italian language occurs, circumscribing the actual perimeter of the

[73] See IERMANO (2017) 738.
[74] See GIALUZ, (2018) 171 ff.

guarantee at stake. In this light, it is also notable that the Parliament has not provided specific remedies, implying that general procedural sanctions apply; despite the case-by-case approach has been proved to successfully balance opposing interests, it is undeniable that the lack of normative indications provoke inconsistencies reflected in the highest courts' overruling and distinguishing. Furthermore, the quality of the interpreter and translation is poorly verified: instead of establishing a proper register, a simple list has been created implying a mere 'cosmetic compliance' as the professional skills are superficially assessed and the training opportunities are scarce.[75]

The national legislator could also have evaluated the Directive's recital no 22, allowing vehicular languages to be used as well as the accused or suspected person's mother tongue languages, enforcing the guarantees and avoiding waste of public resources. In this perspective, oral and summary translation under Art 3(7) could be extended beyond the hypothesis of exceptional urgency, balancing the enforcement of fair trial with financial needs.

Therefore, several issues remain to be solved in order to effectively align the national and the supranational perspective, avoiding undermining the rationale of the right to interpretation and translation once the guarantees enshrined in the Directive meet the contingencies of national legal order.

3.8 BIBLIOGRAPHY

BARGIS, Marta (2013): "L'assistenza linguistica per l'imputato: dalla Direttiva europea 64/2010 nuovi inputs alla tutela fra teoria e prassi", in *Studi in ricordo di Maria Gabriella Aimonetto*, a cura di M. Bargis (Milano, Giuffrè) 91

CHIAVARIO, Mario (1990): *La riforma del processo penale* (Torino, Giappichelli)

COCOMELLO, Assunta, CORBO, Antonio (2014): "Sulla lingua del processo. A proposito dell'attuazione della Direttiva 2010/64/UE sul diritto all'interpretazione e alla traduzione nei procedimenti penali", *Arch. pen*., 2, 1

CURTOTTI NAPPI, Donatella (2002): *Il problema delle lingue nel processo penale* (Milano,

[75] GIALUZ (2018) 86.

Giuffrè)

GIALUZ, Mitja (2018): *L'assistenza linguistica nel processo penale* (Milano, Wolters Kluwer)

GIALUZ, Mitja (2014): "La riforma dell'assistenza linguistica: l'Europa chiedeva un intervento più attento all'effettività della garanzia*"*, in *Le nuove norme sulla giustizia penale. Liberazione anticipata, stupefacenti, traduzione degli atti, irreperibili, messa alla prova, deleghe in tema di pene detentive non carcerarie e di riforma del sistema sanzionatorio*, a cura di C. Conti-A. Marandola-G. Varraso (Padova, Cedam) 439

IERMANO, Anna (2017): "Il D. lgs. n. 126/2016 e i limiti nella trasposizione della Dir. 2010/64/UE in tema di interpreti e traduttori*"*, *Dir. pen. proc*., 6, 731

NIRO, Raffaella (2016): "Dalla 'lingua' del processo penale all'uso processuale delle lingue", in *Il fattore linguistico nel settore giustizia*, a cura di G. Di Cosimo, (Torino, Giappichelli) 47

RECCHIONE, Sandra (2014): "L'impatto della direttiva 2010/64/UE sulla giurisdizione penale: problemi, percorsi interpretativi, prospettive", *Dir. pen. cont*., 1

RIVELLO, Pierpaolo (2018): *Gli atti nel processo penale* (Torino, Giappichelli)

SAU, Silvio (2015): "Lingua, traduzione e interprete*"*, in *Procedura penale. Teoria e pratica del processo. I, Soggetti. Atti. Prove*, a cura di G. Spangher-A. Marandola-G. Garuti-L. Kalb (Torino, Giappichelli) 474

SAU, Silvio (2010): *Le garanzie linguistiche nel processo penale* (Padova, Cedam)

SORRENTI, Giusi (2019): "*La lingua nel e del processo: giurisdizione penale e giurisdizione civile a confronto", Riv. Aic.,* 2, 451

VENEGONI, A. (2020): Voce *Art 143,* in C*odice di procedura penale. Rassegna di giurisprudenza e di dottrina*, diretto da G. Lattanzi - E. Lupo, (Milano, Giuffrè) 889

VENEGONI, A. (2017): Voce *Art 143 (Aggiornamento)*, in C*odice di procedura penale. Rassegna di giurisprudenza e di dottrina*, diretto da G. Lattanzi - E. Lupo, (Milano, Giuffrè) 219

VOENA, Giovanni Paolo (2020): "Atti*"*, in *Compendio di procedura penale*, a cura di G.

Conso- V. Grevi- M. Bargis (Milano, Wolters Kluwer), 155

4. Directive (EU) 2012/13: Right to information in criminal proceedings*

4.1 Introduction

Directive 2012/13 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 c. 1 *bis*, 369 *bis*, 386, 391 c. 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 (see *infra* § 4.2).

Except for the insertion of c. 1-*bis* in Art A69 CCP, no explicit transposition was made instead in relation to the right to be informed about the accusation (see *infra* § 4.3). The same goes for the right to access the file (see *infra* § 4.4). 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 (see *infra* § 4.5).

* The following Chapter has been drafted as follows: Irene Milazzo, §§ 4.1 to 4.3; Giulia Lasagni, §§ 4.4 and 4.5.

4.2 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 (§ 4.2.1) and the form through which the information is conveyed (§ 4.2.2).

4.2.1 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 (§ 4.2.1.1), a specific one for suspects or accused deprived of liberty (§ 4.2.1.2) and, finally, a framework tailored to those arrested by virtue of an EAW (§ 4.2.1.3).

4.2.1.1 General Framework

The Directive, under Art 3, foresees that suspects and accused must be promptly[76] 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(1) of the Directive.[77]

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, she carries out an activity to which the lawyer has the right to be present, she must previously send the suspect a notice of investigation (*informazione di garanzia*), requesting her to appoint a retained lawyer (Art 369 CCP).

[76] I.e., according to Recital 19 of the Directive, "at the latest before the first official interview of the suspect or accused person by the police or by another competent authority."
[77] For a critique in this regard see CIAMPI (2012), 9.

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 c. 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.[78] 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.[79]

Moreover, if the suspect has not appointed a retained lawyer yet, the Prosecutor must designate a court-appointed lawyer. To this end, she 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,[80] 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* c. 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,[81] and seizure). Such information is also given by the police prior to the interview under Art 350 c. 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.[82]

b) Right to legal aid and to interpretation and translation

[78] See Cass., Sez. Un., no. 7, 23.02.2000, *Mariano*.

[79] See, for a complete list of equivalent acts, RIVELLO (2020), 1737.

[80] This chronological specification has been introduced by the Legislative Decree. See CIAMPI (2014), 13-15.

[81] It could be useful to note that it is currently debated within the Court of cassation whether such information must be provided when the police shall carry out the breathalyzer test and the suspect (unlawfully) refuses it. See LAPESCHI (2020), commenting on Cass., Sez. IV, n. 4896, 16.01.2020, Rv. 278579 - 01.

[82] For the different framework concerning spontaneous statements made by the suspect to the police (Art 350 par. 7 CCP) and its criticalities see *infra,* lett. c) on the right to silence. It should be noted that the information on the right to be assisted by a lawyer is also not due in case of questions asked at the scene or immediately after the offence has occurred, as the presence of the lawyer in this case is not compulsory (Art 350 par. 5 and 6 CCP).

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* c. 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 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[83] or in case of acts carried out by the police on its own initiative.[84] 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.[85] 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.[86]

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 she 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(1) and recital 19 of the Directive, which establish that suspects must always be promptly informed of these safeguards.[87]

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.

[83] See Cass., sez. V, no. 37122, 12.05.2009, Rv. 245084 – 01.
[84] See Cass., sez. IV, no. 32612, 17.04.2002, Rv. 222392–01 and Sez. IV, no. 35935, 29.01.2003, Rv. 226194–01.
[85] See CIAMPI (2003), p. 1610.
[86] See Cass., sez. V, no. 25465, 23.04.2014, Rv. 262560 – 01.
[87] See, in this sense, PUGLISI (2015), 89, note 37.

The key provision governing the right to silence is Art 64 c. 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 c. 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 c. 3 CCP) and also by the Preliminary Hearing Judge (Art 421 c. 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* c. 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 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 c. 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[88] and does not seem totally in line with Art 3(1) and recital 19 of the Directive.[89] 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. [90]

4.2.1.2 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

[88] See, *inter alia*, BOSCO (2018), 3; RAMPIONI (2017).

[89] In this sense see CAIANIELLO and MANES (2020), 238.

[90] Cass., Sez. II, no. 26246, 03.04.2017, Rv. 271148 – 01. The Court specified that Art 350 c. 7 CCP is also in line with the ECtHR's case-law, as long as the suspect has not been forced or urged by the police to make the statements.

analogous information duty of the police on all the rights listed by the Directive has been introduced.[91]

In compliance with the Directive, such information shall be provided via a written notice (Art 293 c. 1 and 386 c. 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 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 c. 1-*ter* CCP and 386 c. 3 CCP).[92] Such record is subsequently forwarded to the judge who issued the order of precautionary detention (Art 293 c. 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, she must provide it (see, respectively, Arts. 294 c. 1-*bis* CCP and 391 c. 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.[93] 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(1) of the Directive[94].

[91] I.e. the rights already set out in Art 3 of the Directive plus a series of other prerogatives: the rights of access to the materials of the case; to have consular authorities and one person informed; to access to urgent medical assistance; to be informed on the maximum number of hours or days of deprivation of liberty before being brought before a judicial authority and on any possibility, under national law, of challenging the lawfulness of the arrest, obtaining a review of the detention, or making a request for provisional release.

[92] These provisions are the only ones explicitly implementing Art 8(1) of the Directive on the need for a recording procedure of the information provided. For the general framework *de facto* implementing the Directive in relation to record-keeping, reference should be made to Arts 134-142 CCP.

[93] See PUGLISI (2015), 85 and 90.

[94] Furthermore, according to an Italian empirical study, in several cases the letter is read but is not handed over to the suspect deprived of liberty. See PATERNITI MARTELLO, MARIETTI, ANTONUCCI, VILLAREJO (2018), 26.

4.2.1.3 European Arrest Warrant Framework

Art 5(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(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 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 has added the right to be informed of the faculty to appoint a lawyer in the issuing State (Art 12 c. 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[95]) 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.[96]

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.[97] However, this difference in frameworks has been recently endorsed by the CJEU,[98] which clarified that other articles of the Directive – namely the information on the remedies available in the issuing State (Art 4(3)),[99] on the reasons of the arrest (Art 6(2))[100] and on the access to the materials of the case (Art 7(1)) – do not apply to the EAW Framework.

[95] See Art 12 c. 1 and 3 EAW Law.
[96] Ministry of the Interior, circular no. 559/D/007.15/022571, 11 August 2014.
[97] CIAMPI (2014), pp. 20-21; PUGLISI (2015, Giappichelli), 207.
[98] *IR,* case C-649/19 of 28.01.2021, ECLI:EU:C:2021:75.
[99] In this regard the Court argues that the right to effective judicial protection does not require that the right to challenge the decision to issue a EAW in the issuing State can be exercised before the surrender. Still, it should be noted that this conclusion has been partially contradicted by a more recent decision requiring the right to review by a court prior to surrender in case of EAW issued by a Public Prosecutor (*PI*, case C-648/20 of 10.03.2021, ECLI:EU:C:2021:187).
[100] The exclusion of the information on such right is not convincing, since, as stressed by the CJEU, the content of the warrant basically includes the information on the reason of the arrest (*IR,* case C-649/19 of 28.01.2021, ECLI:EU:C:2021:75, § 78).

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, 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 c. 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 c. 5 to the compatible code's provisions.[101] 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 c. 1 EAW Law).

4.2.2 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.

[101] It is not clear how the written notice is shaped in practice in this scenario (no model has been provided by the Ministry). In principle, the notice shall relate to the rights deemed applicable to the EAW proceedings, in conformity with the information given in case of arrest pursuant to Art 12 EAW Law.

According to the Directive, the information must be conveyed "in a simple and accessible language" (Art 3(2), Art 4(4) and Art 5(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,[102] this does not seem to comply with the Directive, which requires to inform on the rights "as they apply under national law" (Art 3(1) and 4(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.[103]

In addition, linguistical 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.[104]

Finally, no specific provision taking into account the needs for vulnerable suspects or accused persons is foreseen as asked by Art 3(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 Directive 2016/800 Therefore, the same rules as adults apply.

4.3 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 (§ 4.3.1) and, subsequently, the one relating to changes in the accusation (§ 4.3.2).

4.3.1 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

[102] CIAMPI (2014), p. 21.

[103] From a survey of 111 detainees in different Italian prisons, it was found that "awareness of rights depends on the right concerned; they were generally aware of the right to a lawyer, but not necessarily of the right to legal aid or the right to silence." (LLOYD-CAPE (2018), p. 36).

[104] In this sense, see PATERNITI MARTELLO et al (2018), p. 21.

the arrest and detention; and the knowledge of the proper accusation when formal charges are brought.

4.3.1.1 Provisional Charges

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

Firstly, Art 335 c. 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[105] as certain grave crimes listed in Art 407 c. 2 lett. a) CCP are excluded from its scope of application and, especially, because according to Art 335 c. 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 and on its legal qualification when she 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 c. 1-*bis* CCP, according to which the suspect is made aware of 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).[106]

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.[107]

[105] See, among many, CIAMPI (2014), pp. 6-10; GALANTINI (2018), pp. 3418-3419; ORLANDI (1995), p. 253.
[106] Such notice is compulsory and could also represent the first moment when the suspect is made aware of the existence of criminal proceedings against her, if no act in which the lawyer has the right to be present was carried out by the Prosecutor during the investigations.
[107] In this sense CIAMPI (2014), p. 6.

4.3.1.2 Reasons for the Arrest and Detention

Arts 293, c. 1, let. b) and 386, c. 1, let. b) CCP explicitly implement Art 3(1)(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(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 c. 1 CCP), which contains a brief description[108] of the criminal act with the indication of the allegedly violated rules of law (Art 292 c. 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 c. 2 CCP or, at the latest, at the confirmation hearings according to Art 391 c. 3 CCP.

4.3.1.3 Indictment

The information on the submission of the accusation to a court (Art 6(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 c. 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.[109] 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.[110] Therefore, Art 6(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 c. 1 CCP, the indictment is brought forward orally at the hearing. Art 450 c. 2 CCP on the start of direct trial for defendants not deprived of liberty and Art 456 CCP on the decree ordering immediate

[108] The Supreme Court stressed the importance of making aware the person of the facts against him, although not in detail, being insufficient to report in the order only the legal qualification (Cass., Sez. Un., n. 16, 14.07.1999, Rv. 214004 - 01).

[109] Such request is notified to the defendant pursuant to Art 419 CCP.

[110] The first decree is read at the end of the preliminary hearing or notified to the accused who is not present (Art 429 c. 4 CCP), whereas the second is notified to him before the hearing of first appearance at trial (Art 552 c. 3 CCP).

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, c. 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.[111]

4.3.2 Information on Changes of the Accusation

Art 6(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.

4.3.2.1 Modification of the Criminal Act

Information on changes in the material element of the accusation during the trial is fully regulated by the CCP.[112] 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 she is absent, she 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, she is informed by the President of the bench of her 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.[113]

4.3.2.2 Modification of the Legal Qualification

On the contrary, no right to be informed about the modification of the legal qualification made by the judge pursuant to Art 521 CCP is foreseen by the CCP. Nevertheless, such a right has been introduced by the Italian jurisprudence following the 2007 *Drassich v Italy* judgement of the ECtHR.

[111] In this case the effective knowledge of the order by the accused is ensured providing that if she cannot be found, the Preliminary Investigation Judge shall revoke the order (Art 460 c. 4 CCP). Therefore, the national framework is in compliance with the CJEU case-law on the matter. In this sense SIRELLO (2017), pp. 1222-1223.

[112] For changes occurring during the preliminary hearing, see Art 423 CCP.

[113] See, as an example, Constitutional Court, no. 265 of 30.06.1994, ECLI:IT:COST:1994:265.

In particular, according to the prevalent case-law of the Supreme Court, the accused must be informed of the new legal qualification if the change was not sufficiently foreseeable[114] and if the amendment is made by the Court of Cassation.[115] Otherwise, if the modification is made by the Tribunal or by the Appeals Court, it is deemed sufficient for the defendant to adapt her defence to the new qualification appealing the first or second instance judgement. 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.[116] 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 defence right to subsequent degrees.[117]

As for the defendants' safeguards, so far, the Constitutional Court[118] refused to extend the possibility for the defendants to request special proceedings following the new legal qualification.[119] Such difference in treatment compared to the modification of the criminal act is highly criticised by Italian scholars.[120] Nevertheless, it was deemed in line with EU law by the Luxembourg judges,[121] who stressed that such a prerogative is not required by Art 6(4) of the Directive.

4.4 Right of Access to the Materials of the Case

Art 7 of the Directive recognizes to the defendant and her lawyer the right of access to the case file, 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

[114] See, for instance, Cass., Sez. Un., n. 31617, 26.06.2015, Rv. 264438 – 01.

[115] See, most recently, Cass., Sez. VI, n. 422, 19.11.2019, Rv. 278093 – 01. It is not clear whether the information is given only in case of modification *in peius* or also in case of qualification more favorable to the defendant as required by the ECtHR judgement *D.M.T. and D.K.I. v Bulgaria* of 24.07.2012. The Italian Court of Cassation in the past issued contradictory decisions in this regard (see respectively Cass., Sez. VI, n. 24631, 15.05.2012, Rv. 253109 – 01 and Cass., Sez. I, n. 18590, 29.04.2011, Rv. 250275 – 01).

[116] In a similar vein, see BIONDI (2013), pp. 19-20.

[117] See, in this sense, LOMBARDI (2020); CENTAMORE (2013), pp. 8-10.

[118] Constitutional Court, judgements no. 131 of 29.05.2019, ECLI:IT:COST:2019:131; no. 192 of 31.07.2020, ECLI:IT:COST:2020:192, and no. 98 of 14.05.2021, ECLI:IT:COST:2021:98.

[119] Equally, safeguards provided by Arts. 519-520 CCP do not apply to changes in the legal qualification. For a critique see CAIANIELLO (2007), pp. 175-176.

[120] See, e.g., GALANTINI (2018), pp. 3423-3424; CENTAMORE (2018), pp. 47-49.

[121] *Moro*, case C-646/17 of 13 June 2019, ECLI:EU:C:2019:489.

information. In most cases, therefore, the right of access to files remains implicit in the information duties imposed on the Prosecutor, as a merely ancillary profile. For a long time, this perspective has also been shared 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 with specific reference to the arrest or detention.

It is true that, thanks to pre-existing Italian legislation, the right of access to file is overall recognized in the system, 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 (§ 4.5).

4.4.1 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 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.[122] 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*). Here, the regime emerges only partially 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 more generally to the information duties. Namely, after the stop or arrest, police shall immediately inform the lawyer of the arrested or stopped person.[123] During the following 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, as well as, if it is not prejudicial to the investigation, of the sources from which

[122] Also thanks to the intervention of the Constitutional Court, with decision no. 192, of 26.06.1997, ECLI:IT:COST:1997:192, annotated by DI CHIARA (1997), 1883 ff; RANALDI (1997), 1890 ff; TOGNAZZI (2021), 343 ff.

[123] If the person has not already appointed one or does not know who to appoint, a public defendant shall be appointed by the Public Prosecutor pursuant to Art 97 CCP.

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 remains 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 request to maintain a restriction on the accused's personal freedom. Again, nothing is however explicitly stated about the right of access to file of the arrestee or of her lawyer in this phase. On the other side, during the proceeding and after its settlement, according to Art 116 CCP, any person having an interest therein may obtain the issuance of copies, extracts or certificates of individual acts (at her own expense). In the investigation phase, the request is dealt with by the Prosecutor's office, who enjoys discretion in granting such access. Also in this context, therefore, the statutory legal framework does not appear to comply with Art 7 of the Directive.

Nonetheless, an indirect implementation of the right of access to file may be found considering the case law of the Supreme Court. 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.[124] In particular, the material to disclose includes all the elements that ground the request for validation of the arrest/stop, as well as the elements that might subsequently be used by the Prosecutor to issue a request for a precautionary measure.[125] This interpretation has recently been confirmed, with a decision explicitly recognizing 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".[126]

In light of these case-law, therefore, Art 7(1) could be considered *de facto* implemented into 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 legal provisions mentioned above, 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

[124] Cass., Sez. Un., no. 36212 of 30.09.2010, Rv. 247939, annotated by GAETA (2010), 80 ff; ANTINUCCI (2011), 1164 ss; BASSI (2011), 725 ss; PINNA (2011), 1793 ff; DIONISIO (2011), 68 ff; LO GIUDICE (2011), 883 ff.
[125] Cass., Sez. Un., no. 36212 of 30.09.2010, §§ 4-5.
[126] Cass., sez. VI, no. 9573, of 13.11.2019, Rv. 278623 – 01, at e).

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 with regard to the preliminary phases of the proceeding.

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

The Italian system, on the other side, appears fully 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 lawyer). All elements that may be collected subsequently will be included in the file and, therefore, be made available also to the defence and the accused.

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

4.4.3 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 officially informed.[127] This norm aims at allowing the best protection of the investigative goals, interests which

[127] For a general reference to the theme of confidentiality of investigations, see, for all, ADORNO (1995), 2168 ss; GIOSTRA (1960); GIULIANI (2020), 422 ff; CARLI (1994), 762 ff; GEMELLI (2003), 371 ff; BONZANO (2008), 256 ff.

sometimes persists also after the closure of the preliminary investigations. Indeed, the Prosecutor may decide to 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, the Prosecutor may also authorize a derogation to the secrecy obligation before the closure of the investigations, with a reasoned decree that allows the publication of specific acts or pieces of information. Art 329 CCP thus seems to be in line with the first part of Art 7(4) of the Directive.

However, some doubts may be raised with regard to the last part of the 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 formally shares the same status of court judges (e.g. in terms of recruitment). However, as most recently emphasized by the European case-law, a Prosecutor can hardly be considered an impartial subject within criminal proceedings.[128] Thus, the lack of proper judicial review against decisions refusing to grant access to the material of the file can be seen as problematic in terms of compliance with the Directive.

The only exception in this regard may be found in Art 415-*bis*, c. 2-*bis* CCP. According to it, after the closure of the investigation, the refusal of the Prosecutor can be appealed before a judge (the preliminary investigation judge), when it concerns the denial of the defence request to access material obtained thanks to wiretapping.

4.4.4 Costs

Art 116, c. 1-2 CCP seems to indirectly comply with Art 7(5) of the Directive, according to which access to the material of the case shall be provided free of charge. This does not mean that costs are never imposed on the defendant. Indeed, while access is free of charge, obtaining copies of the material (especially in paper format) has a cost that shall be borne by

[128] Cf., e.g. ECtHR, *Brazzi v. Italy*, App. no. 57278/11 of 27.09.2018; along this line, see, if you wish, LASAGNI (2018), 386 ff; CJEU, Criminal proceedings v H.K (Prokuratuur), 2.02.2021, case C-746/18, ECLI:EU:C:2021:152, § 50. The issue has recently been brought to the attention of the Italian legislator with the reform of the legislation on access to communication metadata (Art 132 of the privacy code, on which see, if you wish, LASAGNI (2022), 2 ff.

the requesting party. This possibility seems in any case in compliance with the Directive, and in particular with Recital (34).[129]

4.5 Remedies

According to Art 8(2), Member States shall ensure that suspects/accused or their lawyers have the right to challenge the failure or refusal to grant the rights recognized by the Directive. No specific amendment was introduced in this regard in the Italian legal system. However, a partial implementation can be appreciated, thanks to pre-existing legislation and case-law.

4.5.1 Remedies for Breaches of Information Rights

In general terms, if the accused is not granted the necessary information through the "Letter of Rights", she can still be informed of the latter by the competent judge, who controls the legality of all measures affecting personal freedom (cf. Arts 294-*bis* and 391, c. 2 CCP). When this opportunity also fails, the following remedies are recognized.

A first case concerns the right to be informed of the right to access to a lawyer (Arts 369, 369*bis*, 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 for pre-trial measures (*riesame* and *ricorso per cassazione*, cf. Art 309 ff CCP).

A second case regards the right to be informed of the accusation. Violations of this information right, when provided by Arts 293 and 386 CCP, are sanctioned with *nullità intermedia*, which may be raised in accordance with the deadlines and ways illustrated above. Similarly to the previous case, where breaches of Art 293 CCP are at stake, such nullity may also be invoked through the specific appeal remedies established for pre-trial measures. On the other side, according to the Italian Supreme court, the nullity related to Art 386 CCP can affect the arrest only, and not the validity of the following proceeding (e.g. for the application

[129] "Access to the materials of the case, as provided for by this Directive, should be provided free of charge, without prejudice to provisions of national law providing for fees to be paid for documents to be copied from the case file or for sending materials to the persons concerned or to their lawyer".

of a pre-trial measure).[130] Consequences are more significant for the violation of the right to be informed of the accusation *ex* Art 415 *bis*, c. 2 CCP: if warnings listed in such provision are missing, the request to proceed to trial (Art 416 CCP) is sanctioned by nullity.

A third case concerns 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 right are 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.[131]

A fourth case includes the violations of a variety of 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). Also in these situations, breaches are sanctioned with a *nullità intermedia*.

Lastly, 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, Italian law allows only for the triggering of (not necessarily effective) disciplinary sanctions.[132]

4.5.2 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. 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 her arrest. In any case, such nullity shall 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).[133]

A (partial) statutory basis may instead be found with regard to the right of access to file after the conclusion of the investigations. Violations of the requirements listed by Art 415 *bis* CCP cause the nullity of the subsequent request to proceed to trial (Art 416 CCP).

[130] Cass., Sez. II, no. 6013 of 30.01.2018, Rv. 272676-01.
[131] Cf., among others, Cass. Sez. Un., no. 1282, 13.12.1996, Rv 206846.
[132] CIAMPI (2014), 9 ff; *contra* (pre-entry into force of the Directive) GUALTIERI (1996), 498.
[133] Cf. Cass., Sez. Un., no. 36212 of 30.09.2010, Rv. 247939, mentioned above.

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.

4.5.3 Remedies for Breaches of Information Rights within EAW Proceedings

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

First, Art 12, c. 3 EAW Law establishes a sanction of nullity (*nullità relativa*) if the arrest report does not refer to the fulfillment of the informative obligations provided for by c. 1 of the same provision. Such nullity may be raised only by the parties, within specific and relatively short time limits, established by Art 181 CCP.[134] The level of protection, therefore, is not equal to that conferred in fully national proceedings. In the latter, 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 fulfillment of the informative obligations (without any check on the fact that the arrestee has been effectively informed or not).

Second, although the right to be informed of the right to appoint a lawyer in the issuing State is explicitly recalled in the EAW Law, the latter does not provide for specific remedies for its violation.[135] In this case, however, the case-law allows for the information to be given to the defendant in a subsequent moment, i.e. by the judge during the procedure to validate the arrest, in accordance with Arts. 391 and 294 CCP.[136]

Lastly, some information rights (right to silent, 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.[137] In these cases, therefore, the fact that Italian law does not provide for specific remedies cannot be considered an infringement of the Directive. Nonetheless, and despite a certain support showed by the CJEU,[138] the asymmetry between national and EAW proceedings appears critical in the perspective of an effective protection of defence rights.

[134] The information rights included in this rule concern: information, in a language that the person understands, of the warrant issued and of its content; information in a written form, drawn up in a clear and precise manner, of the possibility to consent to his/her surrender to the issuing judicial authority; information in a written form, drawn up in a clear and precise manner, of right to appoint a lawyer (in the executing State); information in a written form, drawn up in a clear and precise manner, of right to be assisted by an interpreter.
[135] Provided for by Art 9, c. 5-*bis*, EAW Law, recalled by Art 12, c. 1-*bis* of the same law.
[136] Cf. Cass., sez. VI, no. 52013 of 16.10.2018, Rv. 274611-01.
[137] As highlighted also in Art 5 of the Directive.
[138] Cf. especially *Spetsializirana prokuratura*, case C-649/19 of 28.01.2021, ECLI:EU:C:2021:75.

4.6 BIBLIOGRAPHY

ADORNO, Rossano (1995): "Sulla pubblicazione del contenuto di atti di indagine coperti da segreto", *Cass. pen.*, 2168

ANTINUCCI, Mario (2011): "Verso a piena effettività del diritto dell'arrestato alla conoscenza degli atti in tempo reale", *Giur. it.*, 5, 1164

BASSI, Alessandra (2011): "Interrogatorio di convalida e diritto della difesa di accesso agli atti", *Dir. pen. proc.*, 6, 725

BIONDI, Giuseppe, (2013): "La riqualificazione giuridica del fatto e le spinte riformatrici che provengono dal diritto europeo", *Diritto penale contemporaneo*, 1-20

BONZANO, Carlo (2008): Voce *Segreti (Dir. proc. pen)* (Il Diritto - Enciclopedia giuridica del sole 24 ore, 14, Milano), 256

BOSCO, Valeria (2018): "Le dichiarazioni spontanee alla polizia giudiziaria: il rischio di una pericolosa caduta per le garanzie dell'indagato", *Legislazione Penale*, 1-15

CAIANIELLO, Michele (2007): "Mutamento del nomen iuris e diritto a conoscere la natura e i motivi dell'accusa ex art.art 6 C.e.d.u: le possibili ripercussioni sul sistema italiano", *La Giustizia Penale*, 12, 165-176

CAIANIELLO, Michele and MANES, Vittorio (2020): *Introduzione al diritto penale europeo* (Torino, Giappichelli)

CARLI, Luigi (1994): "Indagini preliminari e segreto investigativo", *Rivista italiana di diritto processuale penale*, 762

CASELLI LAPESCHI, Alberto (2020): "Rifiuto di accertamento etilometrico ex art.art 186 comma 7 cod. str. ed avviso all'indagato della facoltà di nominare un difensore ex art 114 disp. att. c.p.p.", *Sistema penale*

CENTAMORE, Giuseppe (2013): “L'applicazione dei principi dell'art. Art 6 C.e.d.u. in materia di riqualificazione giuridica del fatto: fra orientamenti "tradizionali" e nuove prospettive”, *Diritto penale contemporaneo,* 1-15

CENTAMORE, Giuseppe (2018), “Ancora in tema di riqualificazione giuridica del fatto: un'interessante ordinanza di rinvio pregiudiziale alla Corte di Giustizia dell'Unione Europea”, *Diritto penale* contemporaneo, 1, 37-50

CIAMPI, Stefano (2003): “Presupposti e limiti cronologici della nuova «informazione sul diritto di difesa”, *Cassazione penale*, 5, 1601-1614

CIAMPI, Stefano (2012): “La direttiva del Parlamento europeo e del Consiglio sul diritto all’informazione nei procedimenti penali”, *Diritto penale contemporaneo,* 1-11

CIAMPI, Stefano (2014): “Diritto all'informazione nei procedimenti penali: il recepimento low profile della Direttiva 2012/13/UE da parte del d. lsg. 1° luglio 2014 n. 101. Letter of Rights e Full Disclosure nel procedimento penale italiano”, *Dir. pen. cont*., 1-29

DI CHIARA, Giuseppe (1997): “Deposito degli atti e "diritto alla copia": prodromi del contraddittorio e garanzie difensive in una recente declaratoria di incostituzionalità”, *Giur cost*, 3, 1883

DIONISIO, Zelia (2011): “Il diritto ad un contraddittorio anticipato nell'udienza di convalida quale garanzia di effettività del diritto di difesa dell'arrestato o fermato”, *Giust. pen.,* 2, 68

GAETA, Piero (2010): “Il difensore ha diritto di consultare gli atti su cui si basa la richiesta di convalida del fermo. Le Sezioni Unite riaffermano l'importanza del diritto a un pieno contraddittorio”, *Guid. dir*., 44, 80

GALANTINI, Novella (2018): “Il diritto all'informazione per l'effettivo esercizio del diritto di difesa nel processo penale”, *Cassazione penale,* 10, 3416-3424

GEMELLI, Maurizio (2003): “Le investigazioni difensive ed il regime di utilizzabilità degli atti”, *La giustizia penale*, III, 371

GIOSTRA, Glauco (1989): *Processo penale e informazione* (Milano, Giuffrè)

GUALTIERI, Piero (1996): “Registro delle notizie di reato: i problemi del dopo riforma. Il punto di vista di un avvocato”, *Dir. pen. proc*., 494

LASAGNI, Giulia (2022): “Dalla riforma dei tabulati a nuovi modelli di integrazione fra diritti di difesa

e tutela della privacy", *Leg. pen*., 1-16

LLOYD-CAPE, Ed (2018): *Inside Police Custody 2. Comparative Report* (Irish Council for Civil Liberties)

LO GIUDICE, Marco (2011): "Sull'ostensione al difensore del dossier cautelare in sede di convalida: l'overruling delle sezioni unite ripristina il contraddittorio "effettivo"", *Cass. pen*., 3, 883

LOMBARDI, Filippo (2020): "La Corte costituzionale sulla rimessione in termini per l'istanza di oblazione nel caso di riqualificazione giuridica officiosa", *Penale diritto e procedura*

ORLANDI, Renzo (1995): "Commento all'art 18 legge n. 332 del 1995", in AA.VV., *Modifiche al codice di procedura penale. Nuovi diritti della difesa e riforma della custodia cautelare* (Padova, CEDAM)

PATERNITI MARTELLO, Claudio, MARIETTI, Susanna, ANTONUCCI, Carolina, VILLAREJO, Gabriela (2018): *Inside Police Custody 2. Rapporto sull'Italia* (Antigone)

PINNA, Matteo (2011): "Le incertezze dinamiche della discovery cautelare nella convalida dell'arreso o del fermo", *Cass. pen*., 5, 1793

PISAPIA, Gian Domenico (1960): *Il segreto istruttorio nel processo penale* (Milano, Giuffrè)

PUGLISI, Roberto (2015): "Le nuove garanzie informative nel procedimento cautelare", *Processo penale e giustizia*, 2, 84-92

PUGLISI, Roberto (2015): "Le nuove garanzie informative nel procedimento cautelare", in DIDDI, Alessandro and GERACI, Rosa Maria (a cura di), *Misure cautelari 'ad personam' in un triennio di riforme* (Torino, Giappichelli)

RAMPIONI, Matteo (2017): "Il controverso rapporto tra dichiarazioni spontanee e diritto di difesa: una questione ancora irrisolta", *Diritto penale contemporaneo*, 9, 55-67

RANALDI**,** Gianrico (1997): "Discovery" completa ed effettività della difesa nei controlli "de libertate", *Giur cost*, 3, 1890

RIVELLO, Pierpaolo (2020): "Sub. Art 369", in ILLUMINATI, Giulio and GIULIANI, Livia (a cura di), *Commentario breve al codice di procedura penale* (Padova, Cedam-Wolters Kluver)

GIULIANI, Livia (2020): "Indagini preliminari e udienza preliminare", in *Compendio di procedura*

penale, a cura di G. Conso e V. Grevi (Padova, Cedam, X ed.), 422

SIRELLO, Violette (2017): "Diritto all'informazione nei procedimenti penali e conoscenza effettiva del decreto penale di condanna", *Rivista italiana di diritto e procedura penale*, 3, 1219-1223

TOGNAZZI, Sonia (2021): "Misure cautelari e diritto di copia delle intercettazioni: l'equilibrio tra diritto di difesa, tutela della collettività e riservatezza", *Dir pen proc*, 3, 343

5 Directive (EU) 2013/48: Right of access to a lawyer and to have a third party informed*

5.1 Introduction

The Directive 2013/48 on the right of access to a lawyer in criminal proceedings (the Directive)[139] was transposed in the Italian system by the Legislative Decree of 15 September 2016, no. 46 (the Decree).[140] The Decree explicitly implemented only a limited amount of the Directive's provisions, amending Art 364 of Italian Criminal Procedure Code (CCP),[141] Art 24 of the implementing provisions of the CCP (disp. att.), Arts 9 and 12 of the Law of 22 April 2005, n. 69.[142]

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 at 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

* While this work is the result of a joint research carried out by the authors, Isadora Neroni Rezende is the author of §§ 5.1, 5.2, 5.3, 5.4, 5.5., 5.7, Marianna Biral is the author of §§ 5.6, 5.8, 5.9, and Giulia Lasagni is the author of §§ 5.10 and 5.11.

[139] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, p. 1–12.

[140] Decreto Legislativo 15 settembre 2016, n. 184, Attuazione della direttiva 2013/48/UE, relativa al diritto di avvalersi di un difensore nel procedimento penale e nel procedimentodi esecuzione del mandato d'arresto europeo, al diritto di informare un terzo al momento della privazione della liberta' personale e al diritto delle persone private della liberta' personale di comunicare con terzi e con le Autorita' consolari (16G00197) (GU n. 231 del 3.10.2016).

[141] Decreto Del Presidente Della Repubblica 22 settembre 1988, n. 447, Approvazione del codice di procedura penale (GU n.250 del 24-10-1988 - Suppl. Ordinario n. 92).

[142] Legge 22 aprile 2005, n. 69. Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri (GU n.98 del 29-04-2005).

pertaining to the right to access a lawyer before questioning (§ 5.3), some aspects of the regime of derogations (§ 5.6), the right of access to a lawyer in European Arrest Warrant procedures (§ 5.10) 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 (§ 5.4) and some aspects of derogations (§ 5.6).

5.2 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 defense 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.[143] 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 fulfill 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

[143] Cass. pen., sez. V, n. 13179/2019, ECLI:IT:CASS:2019:13179PEN. For more details on remedies, see below § 5.11.

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.[144] 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.[145] 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.[146]

5.3 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[147]. Art 350 CCP includes some crucial safeguards, such as the mandatory

[144] Cass. pen., sez. V, n. 181/2021, ECLI:IT:CASS:2021:181PEN. For more details on remedies, see below § 5.11.
[145] Cass. pen., sez. V, n. 44380/2015, ECLI:IT:CASS:2015:44380PEN.
[146] Cass. pen., sez. II, n. 8625/2021, ECLI:IT:CASS:2021:8625PEN.
[147] That is not the case when the questioning – or other specifically indicated investigative acts – is performed by the public prosecutor. Indeed, Art 364, c. 1 and 3 CCP provides that when the suspect is directly involved questioning, inspection, informal identification or line-up, the procedure referred to in Art. 375 CCP applies. This provision foresees that the summons to appear shall be served on the suspect at least three days prior to the day set for the questioning. This allows the suspect to have a reasonable timeframe to contact and privately

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 defense 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 behavior 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 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 defense 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 defense 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.

consult with a lawyer. In any case, Art 364 CCP foresees that the appointed lawyer should be informed of the performance of the act at least 24 hours before the hour set for the summoning.

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 defense is considered violated and the related procedural sanctions can apply (Art 178, c. 1, let. c) CCP).[148] 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.[149] 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. She had indeed been deprived of the possibility of communicating with her retained lawyer in the time interval of three days between the notice referred to in Art 375 CCP and the actual questioning. Also, she 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

[148] See § 5.1 for more details on the Italian regime on procedural nullities.
[149] Cass. pen., sez II, n. 9494/2018, ECLI:IT:CASS:2018:9494PEN.

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.

5.4 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.[150] 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 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.

[150] Cf. CAMON and o. (2019), 406.

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).[151] 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[152]. 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*[153] 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

[151] Cass. pen., sez. II, n. 14320/2018, ECLI:IT:CASS:2018:14320PEN; Cass. pen., sez. VI, n. 20558/2020 ECLI:IT:CASS:2020:20558PEN; Cass. pen., sez. III, n. 15798/2020, ECLI:IT:CASS:2020:15798PEN.
[152] See, in particular, Cass. pen., sez. II, n. 14320/2018 ECLI:IT:CASS:2018:14320PEN.
[153] ECtHR, *Knox v. Italy*, 24 January 2019, App. no. 76577/13.

sanction and be used in the trial to convict the concerned person when these constitute *corpus delicti*.

5.5 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.[154] 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.[155] 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).

[154] Cass. pen. sez. I, n. 50434/2018, ECLI:IT:CASS:2018:50434PEN; Cass. pen., sez. F, n. 43285/2019, ECLI:IT:CASS:2019:43285PEN; Cass. pen., sez. II, n. 3438/2021, ECLI:IT:CASS:2021:3438PEN.
[155] Cass. pen., sez. II, n. 9663/2019, ECLI:IT:CASS:2019:9663PEN.

5.6 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[156] of the suspect or accused person the temporary limitation of her right to have access to defense 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[157] or by another competent authority on condition that the decision can be submitted to judicial review.[158]

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.[159] 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

[156] In the view of the European legislator the concept of geographic remoteness of the accused person is related to very exceptional circumstances, such as the undertaking or the participation in military operations abroad by the Member State (see Recital no. 30).
[157] Namely a judge or a court (see Recital no. 38).
[158] At least during the trial phase (see Recital no. 38).
[159] QUATTROCOLO (2016).

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[160], 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.[161] It has to be noted however that the right for the lawyer to be present to the questioning is preserved in any case.[162] 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.[163]

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.[164] The vagueness of such an expression has been criticized in literature, since it gives rise to a weak and indulgent approach in jurisprudence.[165] Precisely in order to strengthen the approach towards

[160] See Cass., sez. VI, n. 39941, 17/09/2009, rv. 244265-01.

[161] In case of precautionary detention, Art 294, c. 1 CCP establishes that «the court that has decided on the application of the precautionary measure shall question the person under precautionary detention in prison immediately and in any case *by the fifth day* after the enforcement of detention» [emphasis added]. Also, in case of arrest or temporary detection (*fermo*), the questioning of the suspect by the Public Prosecutor (see Art 388 CCP) and that by the judge during the confirmation hearing (see Art 391 CCP) may take place before the consult between accused and lawyer where article 104, c. 3 and 4 CCP applies. Cfr. PROCACCIANTI (2020) 354.

[162] Though it is disputable that in the absence of a previous contact with the represented person, the lawyer could effectively participate during the act and offer an effective contribution to the defense of the suspect. Cfr. SIMONATO (2011) 1080.

[163] Following that the time "lost" before the questioning of the judge (see Art 294 CCP) is to some extent "recovered" during the phase of appeal.

[164] Cass., sez. VI, n. 2941, 21/10/2009, rv. 245806-01; Cass., sez. VI, n. 29564, 10/06/2003, rv. 226223-01.

[165] See MARZADURI (2002) 263.

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[166]). 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;[167] 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.[168]

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[169] or the Public Prosecutor[170] and shall be duly reasoned.[171] 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.[172]

[166] The rationale underlying the disposition is to foster a coordinated approach towards investigations of offences which are expression of organized crime. See CAMON and o. (2019) 401 ff.
[167] Cfr. VISPO (2018).
[168] See GIALUZ and o. (2017) 176.
[169] In case of precautionary detention and in case of arrest or temporary detention (*fermo*), after that the suspect is brought before the court.
[170] In case of arrest or temporary detention (*fermo*), until the suspect is brought before the court.
[171] The violation of such requirements invalidates the act of deferment (Art 178, c. 1, let. c) CCP) with effects propagating to the subsequent acts – especially the questioning of the suspect – undertaken by the competent authorities (see Cass., sez. VI, n. 44932, 5/10/2012, rv. 254455-01; Cass., sez. I, n. 16815, 24/03/2004, rv. 228805-01). This does not occur where the suspect is provided with the chance to privately communicate with the lawyer before the questioning. Cfr. Cass., sez. II, n. 18566, 10/04/2020, rv. 279474-01.
[172] Cass., sez. III, n. 30196, 8/03/2018, rv. 273756-01; Cass., sez. VI, n. 1941, cit.

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[173]. 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.[174] 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.[175] 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

[173] Cass. pen., sez. VI, n. 41118/2014, ECLI:IT:CASS:2014:41118PEN.
[174] See RIVELLO (2010) 282 ff.
[175] In literature has been raised doubts on the possibility to organize effective means of connections in highly critical situations. See RIVELLO (2002) 555.

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[176] following that the discipline on the access to a lawyer in these problematic circumstances is in line with 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[177] and her 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 defense counsel, also considering that legal assistance during the investigative act shall be preserved in any case.

5.7 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. 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. 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.[178] While Art 4 does not explicitly include any derogation of this kind, Recital 33 indicates that the protection afforded by the Directive ‘is

[176] It has to be noted however that there is no specific provision nor jurisprudence on this point.
[177] The notice may be omitted only in case of inspection, where there are reasonable grounds to believe that the traces or other material items of the offence may be altered.
[178] Cass. pen., sez. II, n. 43410/2015, ECLI:IT:CASS:2015:44310PEN.

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[179]. 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.

5.8 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.[180] One of these rights is precisely the right to inform

[179] Cass. pen., sez. II, n. 19255/2017, ECLI:IT:CASS:2017:19255PEN. In this decision, the Court has also indicated that this interpretation was consistent with Art 4 of Directive 2013/48/EU, which has not been specifically transposed in the national system (the protection provided by Art 103 CCP being deemed sufficient).
[180] Following that the suspect is duly informed about his prerogatives at the very moment the coercive measure is being applied.

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.[181]

If the suspect or accused person is below the age of eighteen[182] (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[183], 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[184], 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, [185] 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

[181] As the communication concerns solely the fact of the occurred deprivation of liberty, its omission is not sanctioned with a nullity. Cf. VIGGIANO (2020) 1793.
[182] As for the rights established by the Directive 800/2016/EU on behalf of suspects and accused persons below the age of eighteen, see § 7.2.
[183] See Art 12, c. 2 D.P.R. 22 September 1998, n. 448.
[184] On the role of the holder of parental responsibility within the criminal proceedings against children, cfr. A. CAMON and o. (2019) 996. See also PRESUTTI (2019) 100 ff.
[185] See Art 2, c. 7 Decree 286/1998 and Art 4, c. 1 D.P.R. 394/1999. The information contains: a) the indication of the judicial or administrative authority providing the notice; b) personal details and nationality of the foreigner including, if possible, the details of the passport; c) the circumstances that impose the release of the information; d) the place where the foreigner is detained.

consequences for the life, liberty or physical integrity of a person (Art 5(3)(a)). In addition, Art 35 Law 354/1975 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 she shall be served on a copy of it[186]. 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.[187] This right is established with no exception, meaning that the Italian legislation goes beyond the standard imposed at European level.[188] 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.[189] 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.

[186] Cfr. BOSCO (2016) 664-665; CARACENI (2012) 213-214.
[187] Art 62 D.P.R. 240/2000.
[188] The directive foresees temporary derogations where particular circumstances happen (see art. 5(3)).
[189] In this sense SIRACUSANO (2019) 402. It has to be noted however that cases of limitation upon the choice of the recipient are not reported in jurisprudence.

5.9 Voluntary Waiver of Certain Aspects of the Right to Access to a Lawyer

The provisions relating to the waiver of certain defense rights have not been expressly transposed but they are respected in practice. Within the domestic system the right to legal defense 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 defense 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 defense 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 be used against her; b) except for information concerning personal details, she has the right to silence, but the proceedings will in any case continue their course; c) if she make any statement on facts concerning the liability of others, she 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 she is unlikely to effectively understand the effects of her 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.

5.10 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[190], and in part indirect[191].

Nonetheless, few problematic profiles remain in this context[192].

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.[193] 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.

[190] Cfr. Art 9, c. 5-*bis* Law no. 69/2005; Art 29, c. 4, let. c), disp. att. CCP.
[191] Cfr. e.g. Art 9, c. 5 Law no. 69/2005.
[192] See, for all, BARGIS (2016) 40 ff.
[193] "The order referred to in article 9 shall be notified, at the request of the arrested person, to her family members or, if she is a foreigner, to the competent consular authority" (translation made by the author).

5.11 Remedies

No specific remedy has been introduced in the Italian legal framework to address violations of the rights included in the Directive. However, some remedies may be found in the pre-existing legislation and case law, providing an overall 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[194], 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

[194] Cf., for all, CAMON (2019) 260.

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[195]; and where there is a failure to designate a court-appointed lawyer, after the retained lawyer waived her assignment (Art 97, c. 1 CCP)[196].

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 present during the performance of the act. 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.[197] Other cases refer to situations 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.

In all these cases, 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 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 assolute*, a regularization (*sanatoria*) of the invalidity.

[195] Cass. pen., sez. V, n. 181/2021, ECLI:IT:CASS:2021:181PEN.
[196] Cass. pen., sez. V, n. 13179/2019, ECLI:IT:CASS:2019:13179PEN.
[197] Arts 360 and 364, c. 3 CCP.

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 be challenged by the accused before a specialized judge (*magistrato di sorveglianza*) through a specific remedy (called *reclamo giurisdizionale*).[198] The decision of the *magistrato di sorveglianza* may be further challenged before a specialized court (*tribunale di sorveglianz*a) 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).

5.12 BIBLIOGRAPHY

BARGIS, Marta (2016): "Il diritto alla "dual defence" nel procedimento di esecuzione del mandato di arresto europeo: dalla direttiva 2013/48/UE alla direttiva (UE) 2016/1919", in *Diritto Penale Contemporaneo*, 3, 40 ff.

BOSCO, Valeria (2016): "Art. 34", in *Il processo penale minorile. Commento al D.P.R. 448/*1998, edited by G. Giostra (Giuffrè).

CAMON, Alberto, CESARI, Claudia, DANIELE, Marcello, DI BITONTO, Maria Lucia, NEGRI, Daniele, PAULESU, Pier Paolo (2019): *Fondamenti di procedura penale* (Cedam).

CARACENI, Lina (2012): "La detenzione cautelare del minorenne è ancora un'ingiustizia necessaria", in *Le limitazioni alla libertà personale del minorenne*, edited by C. Cesari (Giuffrè).

[198] As established by Arts 69, c. 6, let. b) and 35-*bis*, Law 26 July 1975, no. 354.

GIALUZ, Mitja, CABIALE, Andrea, DELLA TORRE, Jacopo (2017): "Riforma Orlando: le modifiche attinenti al processo penale, tra codificazione della giurisprudenza, riforme attese da tempo e confuse innovazioni", *Diritto Penale Contemporaneo*, 3, 176.

MARZADURI, Enrico (2002): "Giusto processo e misure cautelari", in *Il giusto processo tra contraddittorio e diritto al silenzio*, edited by R.E. Kostoris (Giappichelli).

PRESUTTI, Adonella (2019): "I soggetti e le parti private", in *Procedura penale minorile*, edited by M. Bargis (Giappichelli).

PROCACCIANTI, Teresa (2020): "Art. 104", in *Commentario breve al codice di procedura penale*, edited by G. Illuminati, L. Giuliani (3rd edn., Wolters Kluwer-Cedam).

QUATTROCOLO, Serena (2016): "Interventi minimi in materia di accesso al difensore: la recente trasposizione della direttiva 2013/48/UE*"*, *Eurojus,* available here.

RIVELLO, Pier Paolo (2010): "Il procedimento militare", in *Trattato di procedura penale*, edited by G. Ubertis, G.P. Voena (Giuffrè).

RIVELLO, Pier Paolo (2002): "Operazioni militari all'estero: rimodellata la disciplina processuale applicabile", in 8 *Diritto Penale e Processo*, 5, 549 ff.

SIMONATO, Michele (2011): "Il differimento del colloquio tra indagato in vinculis e difensore, tra orientamenti consolidati e interpretazione convenzionalmente orientata", *Giurisprudenza di merito*, 4, 1078 ff.

SIRACUSANO, Fabrizio (2019): "Art. 29", in *Ordinamento penitenziario commentato*, edited by F. Della Casa, G. Giostra (6th edn., Cedam).

VIGGIANO, Filippo (2020): "Art. 387", in *Commentario breve al codice di procedura penale*, edited by G. Illuminati, L. Giuliani (Cedam).

VISPO, Domenico (2018): "I colloqui del difensore con l'imputato in vinculis: tra esigenze investigative ed effettività del diritto di difesa", *Legislazione penale*, available here.

6 Directive (EU) 2016/343: Presumption of Innocence and of the Right to be Present at the Trial*

6.1 Introduction

Directive 2016/343 intended to strengthen the presumption of innocence and the right to be present at trial.

In line with the Directive and Art 48 of the Charter of Fundamental Rights, the Italian Constitution recognizes the presumption of innocence and so does the Code of Criminal Procedure (CCP). In particular, the Italian legal system recognizes the rule of treatment and the rule of judgment that commonly refer to the presumption of innocence in Art 27 of the Constitution and Art 533 CCP. According to it, no one shall be treated as guilty until the final determination of her guilt, and the burden of proof to establish such guilt lies on the Prosecutor. From this particular point of view, the legal system draws an asymmetry between the accused and the Public Prosecution, where the first one is presumed innocent.

The transposition of the Directive gave the Italian system the chance to further strengthen the presumption. Parliamentary work on the transposition began with the 2019 European Delegation Act, l. No. 53/2021,[199] which led to Legislative Decree No. 188/2021.[200] One aspect that has been addressed concerns references in public on the guilt of the accused. Indeed, legal instruments to prevent such drifts in domestic law, i.e. Legislative Decree 106/2006[201] and Arts 114 CCP and 147 implementing rules to the Code of Criminal Procedure (disp. att. CCP), have repeatedly demonstrated their inability to guarantee the purpose.[202] Legislative Decree 188/2021, in force since 14 December 2021, has made amendments to both the Code of Criminal Procedure and to Legislative Decree 106/2006, seeking on the one hand to limit references in public to the guilt of the suspect, and, on the

* While this work is the result of a joint research carried out by the authors, Antonio Pugliese is the author of §§ 6.1 to 6.4; Giulia Lasagni is the author of § 6.5, and Laura Bartoli is the author of §§ 6.6-6.7.

[199] Law no. 53 of April 22, 2021.

[200] Legislative Decree of November 8, 2021, n. 188.

[201] Legislative Decree No. 106 of March 23, 2006.

[202] See for this the recent work by ROSSI (2021), as well as on the multiple aspects of the topic, please refer to the Objective The duty of communication contained in no. 4 of 2018 of Questione Giustizia, Rivista Trimestrale, with writings by MACCORA, LINGIARDI, IPPOLITO, CESQUI, ROSSI, GIUNTI, GIORGI, PIGNATONE, DE CATALDO, PETRELLI, GUGLIELMI, GIORGI, LECCA, CALANDRA, SPATARO, DEIDDA, FERRARELLA, BRUTI LIBERATI, FASSONE (2018).

other hand, structuring a system of remedies aimed at rectifying statements or correcting certain procedural acts when the public authority has referred to a suspect or defendant as guilty. What Legislative Decree 188/2021 already made clear is that the Italian system lacked an "effective remedy" that could be activated when the presumption of innocence is violated. The provisions of Legislative Decree 188/2021 came into force in December 2021, so some time will still be necessary to monitor their application to check its effectiveness, also in light of the case law that will develop on the matter.

As for the other aspects regulated by the Directive, also the defendant's rights to remain silent and to be present at trial at its various stages are regulated in the Italian legal system. The reference here is to Articles 63 and 64 CCP and to Articles 420-*bis* ff CCP, as amended by Law 67/2014.

6.2 Subject Matter

Article 1 of the Directive identifies the objects of the regulatory intervention. First of all, it expresses the need to protect the presumption of innocence. In this respect, as illustrated above, Article 27 Const assumes centrality in this regard. Also of importance is the provision on the inviolability of the rights of defense expressed in Article 24 Const. It has already been said, yet it bears repeating: the presumption in question lives with a double meaning. It is expressed both as a rule of judgment (no one can be considered guilty before a final conviction) and as a rule of treatment (no one can be treated as guilty until a final conviction).

The right to silence, which is an expression of the right of defense under Art 24 Const., deserves to be treated separately. The Italian legal system is endowed with a pivotal norm on this matter: Art 64 CCP, which contains general rules for the interview of the accused. Among the latter, she has the right to be warned by the judicial authority about her right to remain silent; statements received in violation of this rule cannot be used (*inutilizzabilità*).

No explicit Constitutional provision may be found also with regard to the right to be present at trial, which is also in any case related to the right of defense under Article 24 Const. (see § 6.6.1). In Italy, the defendant has the right to participate at trial, but she has also the right not to be present, following her defensive strategy. The court, in particular, shall not investigate the reasons that lead the accused not to attend the trial, but must only carry out the necessary checks to ascertain the defendant's awareness of the proceedings. In this regard, the regulation introduced by Law No. 67/2014[203] constituted a turning point. Before the aforementioned reform, it was possible to proceed in the absence of the accused even when the defendant's knowledge of proceedings was considered only "probable" (*contumacia*).

[203] Law no. 67 of April 28, 2014.

After the reform, the general rule is to suspend the trial until it is reasonably certain that the accused has knowledge of the proceeding (e.g. in case of arrest).[204] In these cases, the trial shall proceed *in absentia*. If the defendant appears at a later stage, the judge lifts such order. If the accused is absent due to blameless ignorance of the proceeding or due to the impossibility of appearing, the court must adjourn the hearing and the defendant may request the acquisition of documents and evidence, as well as the renewal of the evidence or access to special proceedings (Arts 438, known as "rito abbreviato", and 444, known as "patteggiamento" CCP), depending to the stage of the trial.[205] These particular aspects will be examined in greater depth later in the text.[206]

6.3 Scope

Article 2 identifies the scope within which the Directive in question operates. As one might expect, the rights expressed therein are to be recognized to every natural person under investigation or accused in a criminal trial,[207] at every stage of the proceedings, from the investigation to the final judgment. Italian legislation on this point is, for the most part, safeguarding.[208] The reference goes to Articles 60 and 61 CCP and Art. 220 disp. att. CCP.[209] The first two provisions specify that each of the guarantees recognized to the accused (i.e. the subject against whom the criminal trial is carried out) are to be understood as extended also to the suspect (i.e. the investigated person). In addition, Art 220 disp. att. CCP, requiring that such rights be respected as soon as suspicions of a crime emerge in the course of administrative investigations, anticipates as far as possible the protections offered by the criminal procedure law. Thus, it can be concluded that, in this respect, Italy mostly complies with the principles and guidelines that can be found in the European Union legislation.

[204] These brief mentions will find better specification later in the text (see § 6.6).
[205] See Art. 489, c. 2, CCP.
[206] See, *infra*, § 6.6.
[207]However, some problematic aspects should be pointed out. The reference to criminal proceedings seems questionable and sometimes unsuitable to provide adequate protection even in areas that, although (formally) different from criminal proceedings, often have evidentiary connections. The reference here is to so-called punitive administrative law and thus to the investigations that administrative authorities can carry out in this area. Here the rights are different and lesser than in criminal proceedings. Think of the right not to cooperate, the right to silence. In administrative proceedings, formally, this does not apply. However, the concept of "criminal meteria" is developing, as some recent CJEU rulings show (see CJEU, 2/02/2021, C-481/19). Cf., *infra*, § 6.5.2. In literature, see, LASAGNI (2020), 135-163; Id (2021), Id (2019), 235-257. See further in the text § 6.5.2.
[208] Albeit with the critical remarks mentioned in footnote 205 and further in the text, § 6.5.2.
[209] See, for all, ORLANDI (1992).

6.4 Presumption of Innocence

Article 3 of the Directive focuses on the meaning and the scope to be given to the presumption of innocence. The intention of the European Union legislation is clear when it requires Member States to ensure that accused persons in criminal proceedings are presumed innocent until they are eventually and legally found guilty.

If read in conjunction with what stated in Art 2 of the Directive, intermediate pronouncements lacking the character of finality, however, are not considered as treating the defendant as guilty. Even before the entry into force of the Directive, the value of intermediate non-final convictions was already considered particularly important in Italy,[210] where the case-law engaged to avoid the anticipatory treatment as guilty of non-final convictions.

6.4.1 Public References to Guilt

Art 4 of the Directive is devoted to a particular aspect of the presumption of innocence. If it is true that the accused must not be treated as guilty when the proceedings is ongoing, this imposes particular care on public authorities when referring to her in public, for example, during press conferences organised to inform the public about the progress of investigations.

In this sense, the Directive intervenes with the aim of limiting public statements by authorities in which reference is made to the guilt of a suspect[211]. Thus, the Directive requires

[210] See, most recently, ORLANDI, (2022). It is worth noting that Art 27 Const. appears to be marked by a broader scope. The Directive makes its own expressions that are already characteristic of the ECHR (Art 6) and the EU Charter of Fundamental Rights (Art 48). In the last two mentioned, the presumption of innocence is identified in similar terms, “until proved guilty according to law”. The Italian Constitution, on the other hand, uses a broader expression, affirming it persistent until “final conviction”. Orlandi’s recent paper provides the reader with useful historical insights into the basis of the expression ultimately approved in the Constitution, giving an account of how this "strong" idea of presumption made it possible to overcome the older “logical-probabilistic” conception of the presumption of innocence, see also ILLUMINATI (1991). For case law, on the subject of the imposition of personal precautionary measures, see Constitutional Court, no. 64, 23/04/1970 (ECLI:IT:COST:1970:64) and, more recently, Constitutional Court, no. 232, 16/07/2013 (ECLI:IT:COST:2013:232). See also Supreme Court, United Sections, no. 13539, 30/04/2020 (ECLI:IT:CASS:2020:13359:PEN).

[211] Recital 16 is incisive, stating that “the presumption of innocence would be violated if public statements made by public authorities (...) presented the accused as guilty (...). Such statements (...) should not represent the idea that a person is guilty”. Then recital 17 is instructive, stating that "public authorities" are to be understood as those involved in the criminal proceedings in question, “such as judicial, police and other authorities (...) such as ministers and other public officials”. Then nos. 19 and 20 go even further, on the one hand imposing on States a precise burden of action to ensure that “when providing information to the media, public authorities do not present suspects or accused persons as guilty” and, on the other hand, stating that they are opposed to the accused being shown in public through the use of physical coercion. In short: it is an immanent duty on the

States to provide for appropriate measures, of a corrective or restitutory nature, to remedy to potential violations in the "extra-trial" dimension of the presumption.[212] It should be noted that the Italian legislation has only recently implemented this point (with Legislative Decree no. 188/2021). Until this intervention, therefore, the domestic system could be considered only partially compliant with the EU legislation.

In particular, the criteria identified in Art 4 have a reference in several provisions of Italian law. First, in Art 5, Legislative Decree no. 106/2006, concerning the relations between Public Prosecutor's Offices and the press. According to it, the Prosecutor is identified as the person responsible for the relations with the media. This piece of legislation has often been criticized as lacking an effective protection.[213] For this reason, Legislative Decree no. 188/2021 intervened on this point, limiting, as far as possible, the dissemination of news and information concerning criminal proceedings.[214]

Legislative Decree no. 188/2021 also intervened on the Code of Criminal Procedure, introducing Art 115-*bis*, that provides for preventive and restorative remedies. Indeed, it can reasonably be argued that, until this recent reform, this particular aspect of the presumption of innocence was not adequately protected in Italy. In the first place, it prescribes that reference to the guilt of the suspect/investigated person in the judicial acts should be avoided when not necessary. For the purpose of a better understanding, one could think of the example of precautionary measures. Here it is physiological for the prosecution to highlight the indicia against the suspect; consequently, the judge who issues a precautionary measure will refer to the latter. However, proportionality should apply. According to it, markedly guilt-inducing citations should be avoided, when not strictly necessary for the stage of the proceedings at hand. In case of violation of such rule, the system now provides for the remedy of the "rectification", i.e. the possibility to request a correction addressed to the judicial authority.[215] Naturally, it remains to be seen whether such remedy is capable to offer an adequate

State to constantly adapt the set of rules that may prove to be in conflict with this principle to the presumption of innocence.

[212] See what is affirmed in paragraphs 2 and 3 of Art 4 of the Directive.

[213] See GIOSTRA (1994), 54.

[214] The legislation (Legislative Decree no. 188/2021) is an absolute novelty and its concrete effectiveness will have to be measured over time, by virtue of its concrete application. For example, press conferences are limited. Now the authority should provide communications about the proceedings «exclusively through official statements or, [only] in cases of particular public interest, through press conferences. The determination to hold a press conference shall be made by a reasoned act as to the specific public interest reasons justifying it». See art. 5, c. 1, Legislative Decree no. 106/2006.

[215] See Legislative Decree no. 188/2021, Art 4.

protection in practice: to date, the issue remains at the centre of the doctrinal and jurisprudential debate.[216]

6.4.2 Presentation of Suspects and Accused Persons

Art 5 of the Directive continues on the same wavelength as Art 4, again dealing with the best way of presenting the accused in public. In detail, Art 5 wants to prevent the defendant from being presented to the public (or even caught on camera) deprived of freedom, e.g., handcuffed. It is clear: the defendant deprived of freedom comes close to the idea of a convicted person. This is the situation that the Directive wants to avoid.

On this point, the Italian legislation seems to meet the European standards. A number of rules formally address such situations. One of them refers precisely to the case where a person deprived of her personal freedom is filmed by the media. The reference here goes to Art 114, c. 6 *bis*, CCP, according to which "it is prohibited to publish the image of a person deprived of her personal freedom taken while being subjected to the use of handcuffs or any other means of physical coercion, unless the person consents thereto". It should then be considered that in Italy television filming of the hearing may be permitted.[217] During the course of the hearing, the defendant who wish to participate should attend free and sitting next to the lawyer.[218] Although the rules are not explicit, it may follow that audiovisual filming of defendants attending free at the hearing would be permitted. This can derive from a combined reading of Arts 474 e 114, c. 6 *bis* CCP and 147 disp. att. CCP.

However, while in principle the protection offered by domestic legislation seems aligned with the Directive, its effectiveness may actually be questioned. This latter situation should be kept distinct from what has been said about Art 4 of the Directive.[219] Italy has made only a marginal legislative intervention on Art 474 CCP,[220] but this does not seem suitable to

[216] Outside the CCP, the protection of this particular aspect of the presumption of innocence is also addressed by guidelines and protocols regulating contacts between prosecutors' offices or courts and the media, taking care not to violate the defendant's right to the presumption of innocence. Finally, it is useful to mention the text of the Code of conducts of journalists, which requires respect for the presumption of innocence. Specifically, Art 8 requires to respect the principle when exercising the reporting activity and to give due prominence to the news of an acquittal.

[217] See art. 147 disp. att. CCP.

[218] Art 474 CCP states "The defendant attends the hearing free in person, even if detained, unless in this case precautions are necessary to prevent the danger of escape or violence".

[219] Art 4 refers to public statements by the authorities, or when the defendant is identified as guilty in judicial acts that do not establish guilt. Here we are dealing with a different profile, which is that of the image shown or disseminated of the accused person.

[220] See Art 474, c. 1 *bis* CCP.

strengthen, in concrete, this particular aspect of the presumption of innocence.[221] Above all, no specific remedy exists in the current regime in case the accused is presented in public as guilty, neither with regard to her appearance at trial, nor on the basis of what image of her is disseminated.[222] The shortage of a remedy, in this regard, could cast doubt on compliance with Directive.[223]

6.4.3 Burden of Proof

The Italian legal system is already equipped with appropriate instruments to ensure compliance with the standards imposed by Art 6 of the Directive.

Reference goes here to Arts 27 and 111 of the Constitution and Arts 530 and 533 CCP. First of all, these articles establish how evidence shall be presented at trial. Evidence, as a rule, must be presented and acquired at the presence of the parties, in accordance with the adversarial principle,[224] and before an independent and impartial judge, the same who is then called upon to decide.[225]

[221] Naturally, it remains to be seen whether the new Art 474 c. 1 *bis* CCP is able to offer adequate and additional protection, which is doubtful. So far, it happens that images of defendants under arrest or behind cages in court are disseminated.

[222] Notwithstanding the considerations made in the previous paragraph and with regard to the new precautions to be taken by the public authorities. There is a debate in the literature as to what remedies should be adopted when the distorted image of a suspect who is already *guilty* is disseminated, see MANES (2017), 114 ff. In addition, there are protocols on the subject, see BRUTI LIBERATI (2018). The circular is available at https://www.questionegiustizia.it/data/doc/1522/la_circolare_del_procuratore_repubblica_napoli_diffusione_pubblicazione_immagini_persone_arresto.pdf.

[223] Although, on this point, the Directive does not introduce a specific obligation for member states to act. It is appropriate to cite Recitals 20 and 21 of the Directive. The firs one states "The competent authorities should abstain from presenting suspects or accused persons as being guilty, in court or in public, through the use of measures of physical restraint, such as handcuffs, glass boxes, cages and leg irons, unless the use of such measures is required for case-specific reasons, either relating to security, including to prevent suspects or accused persons from harming themselves or others or from damaging any property, or relating to the prevention of suspects or accused persons from absconding or from having contact with third persons, such as witnesses or victims. The possibility of applying measures of physical restraint does not imply that the competent authorities are to take any formal decision on the use of such measures". And the second one "Where feasible, the competent authorities should also abstain from presenting suspects or accused persons in court or in public while wearing prison clothes, so as to avoid giving the impression that those persons are guilty".

[224] There are three exceptions to cross-examination in the formation of evidence set out in Art 111 of the Constitution: (i) objective impossibility of proceeding to the taking of evidence in cross-examination between the parties; (ii) consent of the accused to the taking of evidence; and (iii) as a result of unlawful conduct which would affect the genuineness of the evidence to be taken in cross-examination.

[225] See Art 525 CCP.

Secondly, the provisions designate the standard of proof to issue a conviction, which is one of the most significant aspects of respecting the presumption of innocence: it is beyond any reasonable doubt, that is the rule of judgment. The presumption that the accused is not guilty leads to the expectation that all the inculpatory evidence gathered at trial should not merely cast doubt on innocence: it must totally rebut the possibility that the defendant is not guilty. It follows that, in case of a reasonable doubt, the presumption holds, and the accused must be acquitted.[226]

6.5 The Privilege against Self-incrimination

In the Italian legal system, the right to remain silent is strongly protected, at least in the criminal matter *stricto sensu*. Therefore, although no explicit implementation of the Directive has been introduced so far in this regard, the level of protection recognised to this right could be considered ensured in the system, both with regard to the information duties and to its effects.[227] Actually, the sanctioning regime attached to potential violations of the right to silence within criminal proceedings provides, as it will be illustrated, a level of safeguard that is actually higher than the Directive's.

The privilege against self-incrimination is implicitly protected by Art 24 of the Italian Constitution (under the right to defence[228]), as well as in the criminal procedure code.

It has already been illustrated that the right to remain silent shall be included in the information duties that apply in favour of the arrested person (Art 386, c. 1, let d) CCP) and of the person targeted by a pre-trial detention order (Art 293, c. 1, let. d) CCP), and in the communication that follow the first investigative act to which the defence lawyer has the right to assist (Art 369-*bis*, c. 2, let. a) CCP).[229]

[226] See art. 530, c. 2, CCP.

[227] For an overview of the legal doctrine on the privilege against self-incrimination in the Italian legal system, see, for all, GREVI (1998), 1129 ff; ILLUMINATI (1991); SCAPARONE (1981), 91; AMODIO (2001), 3587 ff; PATANÈ (2006), 224 ff; DANIELE (2002), 196 ss; MAZZA (2004), 52 ff; ORLANDI (2002), 172 ff; GIALUZ (2008), 233 ff; TASSINARI (2012), 288 ff; MARCHESI and PANZAVOLTA (2021). On the level of protection of the right to remain silent at the EU level, see, for all, NEHL (2014), 1282 ff; ALLEGREZZA (2017), 950; DELLA TORRE (2017), 936 ff; LAMBERIGTS (2016), 38; CAIANIELLO (2021).

[228] According to which defense is an inviolable right at every stage and instance of legal proceedings. The case law of the Constitutional court has since long included the right to remain silent within this provision, cf. e.g. Const. court, ord. no. 291 of 19.06.2002, ECLI:IT:COST:2002:291; ord. no. 451 of 24.10.2002, ECLI:IT:COST:2002:451; ord. no. 485 of 26.11.2002, ECLI:IT:COST:2002:485; ord. no. 202 of 24.06.2004, ECLI:IT:COST:2004:202; see also Cass., sez. VI, no. 8958, 27.01.2015, Rv. 262499.

[229] See Directive 2012/13, § 4.2.1.1, let c).

Besides for these provisions, the main references to understand the level of protection of the right to remain silent in the system go to Arts 63 and 64 CCP.[230] According to Art 64, c. 3, before the interrogation begins, the accused must be warned that her statements may always be used against her, but that she has the right not to answer any questions. The non-cooperation of the accused naturally will not stop the procedure, that will follow its course without her informative contribution. Failure to comply with such warning provisions, makes the statements made by the accused unusable in the proceeding or at trial (*inutilizzabilità erga omnes*).

A specific regime (Art 64, c. 3, let c) CCP) is also established for statements made by the accused concerning the liability of third parties (i.e. co-defendants). Also in this case, before the interrogation begins, the accused shall be warned that if she makes statements on facts concerning the liability of others, she will expose herself to the possibility of being summed to testify with regard to such facts, in accordance with the special regime established by Art 197-197 CCP (*testimone assistito*). Should such warning be missing, the statements made by the accused cannot be used against the third persons they refer to, and the accused cannot be called to testify in relation to those facts (*inutilizzabilità* only towards third parties).

The Italian system also takes into account the case, rather frequent in practice, where a person is interviewed by the police or the Prosecutor as a potential witness, and only in the course of the interview it emerges that she shall instead be considered a suspect. This situation is regulated by Art 63 CCP. According to it, if the interviewed person makes self-incriminatory statements, the interviewing authority shall interrupt the examination. The latter shall warn such person that an investigation may be carried out against her as a result of such statements and invite her to appoint a lawyer. The statements made by the person before such warning shall not be used against her. To further strengthen the provision, Art 63, c. 2 considers also the situation in which the official recognition of roles does not follow the substantial development of the investigation. The rule, in particular, aims at avoiding potential abuses by the police or prosecutors, that might be tempted not to officially recognized a person as a suspect in order to avoid complying with defence rights (including the right to silence).

Specifically, this is the case where a person is heard as a potential witness, although s/he should have been treated from the very beginning as an accused or as a suspect (e.g. because suspicions were already raised, even unofficially, against her). In such case, Art 63 establishes that the statements obtained in the interview may never be used for the proceeding or at trial.[231]

[230] See *supra*, § 6.2.

[231] Regardless of this severe exclusionary rule, the potential for abuses of this provision is not purely theoretical,

6.5.1 Limitations

In Italy, no specific derogation to the right to silence exists with regard to "minor offences" (cf. Art 7(6) of the Directive), as the rules illustrated above apply to all sort of criminal proceedings. In accordance with Art 7(3) of the Directive, it is however possible for the competent authorities to collect some kind of evidence which has an existence independent of the will of the accused also without her consent.

The main reference in this case goes to Art 224-*bis* CCP, that concerns the use of compulsion by public authority to carry out activities such as the removal of hair or mucous membranes from living persons for the purpose of DNA profiling or medical examinations. In these situations, the authority can indeed proceed also without the consent of the accused, given that a judge authorizes the operation with a reasoned order, that the crime the person is accused of is of a certain severity[232] and that the exam is absolutely essential to prove the facts.

If the person, invited to appear for the purposes of such examination, fails to present herself without a legitimate impediment, the judge may order that she be accompanied, even compulsorily, to the place, day and time established. If, while appearing, she refuses to give her consent to the investigations, the judge shall order that they be carried out compulsorily at the conditions illustrated above. The use of means of physical coercion, in any case, is permitted only for the time strictly necessary to gather the identified evidence. Moreover, the act is null and void if the person subjected to the sampling or examination is not assisted by an appointed lawyer.

The Italian legal system, therefore, provides for a general prohibition to use the strategic choice of the defendant to remain silent against her and for an overall satisfactory level of protection to this fundamental right that lies at the "heart of the notion of fair trial".[233]

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as shown, e.g. by the ECtHR conviction of Italy in the *Knox* case (App no. 76577/13, 24 January 2019, §§ 147-167), already discussed above, cf. Directive 2013/48, § 5.4. On the subtle difference between "spontaneous" and "voluntary" statements of the defendant, see for all, CERESA-GASTALDO (2002), 94 ss; Id. (2000), 575.

[232] Intentional offence, committed or attempted, for which the law establishes the penalty of life imprisonment or a maximum penalty imprisonment threshold higher than three years, for the crimes referred to in articles 589-*bis* and 590-*bis* of the Penal Code and in the other cases expressly provided for by law.

[233] Cf., for all, ECtHR, *Ibrahim and o. v. UK*, 13.09.2016, App. No. 50541/08 and o., § 266. Some domestic case-law, actually, seems to accept that the silence by the defendant can be considered for the final decision, as long as inculpatory evidence is already substantial and the silence does not represent the decisive argument for the conviction (cf., e.g., Cass. sez. VI, no. 28008, 19.06.2019, Rv. 276381). The relevance of this case law law, however, could be put into question not only by a systemic reading of the Constitutional protection to the privilege, but also in light of the recent development of the jurisprudence in the CJEU *DB v Consob* case, illustrated further below.

6.5.2 Critical Issues and the Right to Silence in Punitive Proceedings

Regardless, some uncertainties persist with regard to some emerging profiles where the privilege is at stake.

A first group of problematic cases concerns some compulsory or potentially compulsory acts performed by the competent authority which do not find a clear placement in the illustrated legal framework. These are, for instance, the use of alcohol tests to check blood alcohol levels when driving cars, imposing a form of self-incriminating cooperation toward the targeted subject or, even more problematic, the potential duty of the latter to reveal the password of her electronic device. As all these situations are not currently regulated by the law, the level of protection is therefore left to a (not always straightforward) development of the case-law.[234]

Partially different considerations shall be drawn for the privilege against self-incrimination within punitive criminal proceedings, which was the subject of a very productive dialogue between the Italian Constitutional Court and the Court of Justice. Indeed, according to the current legal framework, the right to silence is not extended to the sphere of so-called punitive (administrative) law. More specifically, there is a safeguarding provision in the implementing norms of the CCP (Art 220 disp. att.) that requires the compliance with criminal procedural rules also within administrative proceedings from the moment a suspicion of a crime emerges during the latter. No specific provision can however be found in the legislation with regard to the cases in which the proceeding remains administrative (formally, but substantially is punitive) or, regardless the opposite opinion of legal scholars, [235] the case in which evidence is legitimately collected within administrative inquiries and then transferred to a criminal proceeding (e.g. in cases of double track systems).

Until the *DB v Consob* case (decided by the Constitutional court with a first order in 2019, by the CJEU in 2021 and then finally closed by the Constitutional court in the same year), the jurisprudence on the matter was also rather scarce[236] and did not properly took into

[234] On the alcohol tests, cf., e.g., Cass., sez. IV, no. 40911, 6.10.2009, Rv. 245638; on the right to remain silent concerning the password of digital devices, cf. e.g., Cass., sez. II, no. 7568, 26.02.2021, ECLI:IT:CASS:2021:7568PEN.

[235] See, for all, ORLANDI (1992), 79 ff.

[236] The reference goes, above all, to the order of the Constitutional Court no. 33 of 26.02.2002, ECLI:IT:COST:2002:33. The case concerned a tax proceeding, and specifically the constitutional legitimacy of the investigative powers under Article 51(2)(2) of Presidential Decree no. 633 of 1972, according to which the VAT offices can invite persons carrying on a business, trade or profession to appear in order to produce documents, or to provide data and clarifications relevant for the purposes of their assessment. The taxpayer is obliged to cooperate with such requests. Data provided, however, may then be used against the same, both in the assessment phase and in any subsequent sanctioning procedure. In 2002, the Constitutional Court held that

account the development of both European Courts (ECtHR and CJEU[237]) with regard to the substantial definition of criminal matter. Moreover, in certain fields of law with punitive features (*e.g.* financial market and banking supervision, competition law, tax law), the protection of the *nemo tenetur se detegere* was also (and partially still is) problematic because of explicit sets of provisions that allow or impose to sanction any person (including the accused) for the refusal to cooperate with the administrative authority, also when doing so could cause the person to incriminate herself.

This critical framework was brought to the attention of the Constitutional Court and of the Court of Justice in 2019, with specific regard to the punitive powers of the financial market authority (Consob) to punish the accused who did not provide the requested information opposing his right to silence.[238]

In what could already be considered a landmark case, the Grand Chamber, following the approach proposed by the Constitutional Court, ruled for the first time on the scope of the privilege against self-incrimination with regard to criminal (punitive) matters.[239] The Court explicitly affirmed how the privilege against self-incrimination shall apply also in proceedings which may lead to the imposition of administrative sanctions of a criminal nature.[240] Without saying that explicitly, therefore, the CJEU seemed to declare void Recital

such an obligation to provide information had no "negative consequences" in criminal proceedings against the taxpayer for the same facts, since the administrative fine attached to the to the failure to comply with the invitation to appear and produce documents or provide data, refers exclusively to the obligations incumbent on the taxpayer in the context of the tax procedure. At that time, however, the potential punitive nature of VAT assessments was not yet considered to be a decisive factor, as it is considered to be today, not been taken into account (whereas it will be, more than fifteen years later, before the Court of Justice in *Menci* - March 2018).

[237] The refernce goes to the Engel doctrine, first developed by the ECtHR (*Engel and o. v the Netherlands*, 8.08.1976, App. no. 5100/71 and o.), and more recently, applied also by the Court of Justice since the Bonda decision (*Criminal proceedings against Łukasz Marcin Bonda*, 5.06.2012, C-489/10, ECLI:EU:C:2012:319, § 36–46) and more recently confirmed also with regard to some Italian cases (cf. *Criminal proceedings against Luca Menci*, C-524/15, ECLI:EU:C:2018:197, §§ 26-33; *Garlsson Real Estate SA and o. v. CONSOB*, C-537/16, ECLI:EU:C:2018:193, §§ 28-35; *Enzo Di Puma v. CONSOB and CONSOB v. Antonio Zecca*, joined cases C-596/16 and C-597/16, ECLI:EU:C:2018:192, § 38, all of 20.03.2018).

[238] Via a request for preliminary ruling issued by the Constitutional Court, cf. order no 117 of 10.05.2019, ECLI:IT:COST:2019:117. For a complete analysis of the case, see, if you wish, LASAGNI (2020), 135 ff; ID. (2021), 1177 ff.

[239] *DB v. Commissione Nazionale per le Società e la Borsa (Consob)*, case C-481/19 of 2.02.2021, ECLI:EU:C:2021:84.

[240] ID., at § 42, ruling out that its finding may be 'called into question' by competition case law: In punitive matters, the right to silence shall preclude 'inter alia, penalties being imposed on such persons for refusing to provide the competent authority […] with answers which might establish' their liability (paragraph 46).

11 of the Directive, whose misleading wording already raised several doubts about its correct interpretation.[241] The Court of Justice actually went even further down the road, highlighting how the need to respect the right to silence could also stem from the fact that, 'in accordance with national legislation, the evidence obtained in those proceedings may be used in criminal proceedings against that person' (paragraph 44). Developing on the most advanced Strasbourg[242] jurisprudence on the matter, the Court therefore embraced the argument that the privilege against self-incrimination shall be complied with also in purely administrative proceedings, when findings of the latter could become evidence in criminal trial. Lastly, following the approach proposed by the Italian Constitutional Court, the Court of Justice affirmed that the right to silence cannot justify 'every failure to cooperate with the competent authorities, such as a refusal to appear at a hearing planned by those authorities or delaying tactics designed to postpone it' (paragraph 41). Nonetheless, the privilege does cover more than direct incriminatory statements by the accused, and also shields from requests of information (oral, but, reasonably, also of documentary nature) which may indirectly or subsequently be used as incriminatory evidence (paragraph 40).

Following this decision, the Constitutional Court declared the unconstitutionality of the sanctioning provision at stake (Art 187-*quinquiesdecies* TUF) in the part it was allowing to impose a penalty also on the accused in case of non-cooperation. Such a decision was extended to the current version of the norm (amended after the case was launched), which refers not only to the powers of Consob, but also of Banca d'Italia (in its vest as banking supervisor). In these fields, therefore, the level of protection of the privilege against self-incrimination finds full recognition also outside the realm of criminal proceedings *stricto sensu*.

Naturally, as mentioned above, the problem does not concern only the financial and banking market. The Constitutional Court, in its last decision on the matter, explicitly called for the legislator to provide a coherent statute for the protection of the right to silence within punitive proceedings. Unfortunately, the recent legislative implementation of Directive 343/2016 did not touch upon the subject, so the recommendation of the Constitutional Court on the matter remains pending at the time of writing.

6.6 The Right to be Present at Trial

The current Italian legislation on the right to be present at trial has not been deeply influenced by the Directive. As anticipated, internal safeguards, set up in 1988, have been

[241] Cf. LASAGNI (2019), 247.
[242] Cf. ECtHR, *Chambaz v. Switzerland*, 5.04.2012, App no. 11663/04, §§ 50-58.

later frequently reformed as a response to the multiple cases that the European Court for Human Rights (ECtHR) decided against Italy on the specific subject matter. The streak of condemnations urged the Italian legislature to amend the system, which it did in 2014.

The aforementioned 2014 reform abolished the previous *in absentia* procedure, introduced a new cause of suspension of the proceedings and reorganized the array of legal remedies. When the Directive was issued, hence, the Italian legislature did not take further actions, as it considered the new legislation to be already in full compliance with the letter and the spirit of the European provisions. The case-law, however, did not adapt as swiftly to a radically different way of ensuring the right to participate at trial, and the limits of the new system quickly emerged. Hence, a new restructuring is currently being drafted, to eliminate every uncertainty and to better implement Art 9 of the Directive.

Before examining the provisions that are currently in force, it will be helpful to quickly recall the structure of a standard Italian criminal proceeding, which is divided into three phases. The first, the preliminary investigation, is usually kept secret from the suspected person and does not normally contemplate hearings. The second phase – the preliminary hearing – begins with the arraignment and it constitutes the first contact between the parties and a sitting judge, which will establish if there is enough cause to proceed to trail. The third phase is the trial, which results in the decision on the merits of the case.

The Directive is mainly concerned with the protection of the right to participate to trial, but the Italian code of criminal procedure slightly anticipates the safeguards: the first control on the defendant's status occurs during the preliminary hearing, as the judge must first verify the regular appearance and representation of all parties.

6.6.1 Constitutional Background

Art 8 § 1 of the Directive burdens member states with the duty to make sure that suspects and accused persons have the right to be present at trial. In the Italian legal system, the same right is indirectly acknowledged by the Constitution under the general framework of the right to defense, which is proclaimed by Art 24 Const. as "an inviolable right at every stage and instance of legal proceedings". The notion of "defense" includes different facets: The right to legal assistance, the right of the accused to defend herself and, in its negative declination, the right not to participate in person.

The first notion is perhaps the most recognizable, as it affirms the right to be represented by a lawyer. Within the Italian system, the right is a *de facto* obligation: self-representation is never admitted in a criminal trial, therefore, if the defendant has not appointed a lawyer of her choosing, one shall be always appointed by the Court. This understanding of defense as an inviolable right could appear to be unrelated with the right to participate at trial, but a

closer look disproves such an assumption. Appointing the attorney that will litigate the case is in fact no small sign of personal involvement in the proceedings. Besides, the right to legal representation and the personal presence of the accused are historically linked: non-appearance used to be treated a sign of willful contempt of the summons of the court, and therefore the defendant who failed to appear was stripped – among other things – of the right to legal representation, according to the maxim *pro reo absente nemo loquatur*.[243]

The second feature – the right to self-defense – is strictly connected with the right to be present at trial: the defendant has the right to face her accusers and present her case directly to the Court, and she can only do so if aware of proceedings and allowed to take part. The right to be present at trial, hence, is protected by Art 24 of the Constitution: without having the right to participate, the accused could not adequately develop her/his defense.[244] To the latter end, the defendant can be examined (during the preliminary hearing: Art 421 CCP; At trial: Art 208 CPP) or she can provide spontaneous statements pertaining to the subject of the accusation (during the preliminary hearing: Art 421 CCP; At trial: Art 494 CCP).

Directly contributing to one's own trial, however, is not an obligation, nor someone can be forced to participate in person to the hearings. The Italian jurisdiction does not normally require the defendant's attendance, nor can it routinely compel her presence.[245] In fact, the choice not to personally attend the trial can be regarded as a defense in and of itself, apart from being regularly preferred out of practicality concerns. When the accused chooses not to participate, she shall be represented by a lawyer of her picking or by a Court appointed lawyer. This option is openly accepted by the Directive, that does not categorically rule out a trial by default.

6.6.2 The Willful Absence of the Accused Person

Art 8 § 2-3 of the Directive provides for the conditions that authorize a trial by default, which results in a valid and enforceable decision. The judge may proceed – despite the absence of the accused person – under two conditions: a) the suspected person must have

[243] Which roughly translates to *nobody shall speak for the absent accused.* This limitation was provided for also by the first Italian Code of criminal procedure, issued in 1865 (Article 347 CCP 1865). According to the same principle, the system did not allow to admit any piece of evidence presented in name of the accused (Article 348 CCP 1865).

[244] On this topic, see for instance Italian Constitution Court, no. 317, 4.12.1999.

[245] The Code of criminal procedure contemplates some exceptions: for instance, when the Court needs to verify that the defendant gave her/his consent to a plea deal or to a request of suspension of the trial with probation, it may order the personal appearance of the accused (Articles 446 and 464-*quarter* c.c.p.). Other examples include all acts that require the physical presence of the accused (Article 399 and 490 c.c.p.), such as the forcible collection of a DNA sample (Articles 224-*bis* and 359-*bis* c.c.p.).

been informed in due time of the trial and of the consequences of non-appearing; b) the suspected person shall be represented by a lawyer, either of her/his choosing, either appointed by the Court.

The Italian system, as fashioned in 2014, mostly complies with these requirements. The first summons that the accused should receive aims at informing her of the preliminary hearing, and it shall contain the time and location of the hearing, the charge, the request for committal to trial and "the warning that, if the accused does not appear, the provisions [on the proceedings *in absentia*] shall be applied". The accused person shall be served at least 10 days prior to the date set for the hearing (Art 419 CCP). The defendant should thereby be informed of the proceedings and of the consequences of her failure to appear. If absent during the preliminary hearing, the accused person receives a similar warning also with the decree for committal to trial, that shall be notified at least 20 days prior to the first hearing and shall indicate "the place, date and time of the appearance, with the warning that if she does not appear she shall be tried in contumacy" (Art 429 letter *f* CCP).[246] The same goes for the summons of the accused in front of the court of appeal, as Art 601 CCP expressly refers to Art 429 letter *f* CCP.

If the accused fails to appear at trial despite the regularity of the summons, the code of criminal procedure provides for three possible scenarios: the willful absence of the accused (Art 420-*bis* CCP) the absence imposed by an impediment (Art 420-*ter* CCP) and the simple failure to appear, not accompanied by a waiver or a justification (Art 420-*quarter* CCP).

The first one envisages the willful absence of the accused, that has regularly received the summons, is aware of the proceedings but has waived his right to participate (Art 420-*bis* § 1 CCP). The judge may therefore declare the accused "absent" by court order and proceed; The defendant shall be represented by a lawyer of her choosing or appointed by the court (Art 420-*bis* CCP). If the waiver is explicit, the judge may so proceed without concerns; the waiver, however, can also be tacit. The text of the Directive indirectly allows for it, and Recital 35 clarifies that the accused can decline "tacitly, but unequivocally". To reduce uncertainty, Art 420-*bis* CCP provides for some conditions that can be interpreted as a silent waiver. All of them share the same rationale: They show (or should show) that the defendant is indeed aware of the proceeding, allowing to conclude that her absence constitutes a deliberate choice. The accused will therefore be declared "absent" by court order also when, despite being initially present, she has abandoned the hearing (Art 420-*bis* § 3 CCP); when s/he has voluntarily subtracted her/himself from the summons; when she has already declared or chosen an address for service during the proceeding, has retained a lawyer, has been

[246] The reference to contumacy – the procedure by default of appearance that was in force before 2014 – is to be interpreted as a lack of coordination that the 2014 reform has not properly addressed.

arrested or placed under a precautionary measure, has personally received the summons or in any other case that would show with certainty that the accused is aware of the proceedings. Only this knowledge allows the judge to issue the order and move forward. After the accused has been declared "absent", she might appear again and at that point the court order shall be revoked.

This system has been designed to root out presumptions and make sure that the proceedings can only move forward towards a decision when the accused has been made aware of it. However, the first years of application revealed a weak spot: the declaration of an address for service by a court appointed lawyer. During the identification of a suspect, the police rutinary asks for the declaration of address for service and, normally, the person agrees to choose the address of the court appointed lawyer, which she has not yet met. Now, according to Art 420-*bis* CCP, a previous declaration of address allows to conclude that the person is aware of the proceedings. Ideally, the court appointed lawyer should take the case, get in touch with the suspected person, and update him on further developments. The suspect, moreover, should get in touch with the lawyer and keep abreast of the developments.

This scenario, however, can be altered by many variables. First, the lawyer could not be able to find the accused and establish a contact. Second, this particular kind of declaration of address occurs at the very beginning of the investigation, when prosecution is not yet certain, and the (possible) trial is still years away. While much of the case law accepted even an inconsequential declaration of address as a proof of knowledge, a minority of the case law pointed out that it was not a solid base to assume that the defendant was (or should have been) aware of the proceeding, and that her/his failure to appear was to be interpreted as an implicit waiver.[247]

The Joint Chambers (*Sezioni unite*) of the Court of Cassation recently settled the debate by clarifying that the 2014 system came to eliminate presumptions, not to reshape them.[248] Therefore, the declaration of an address for service is suitable only when it corresponds to an effective attorney-client relationship. Moreover, all the indicators listed by Art 420-*bis* CCP are to be interpreted according to the same criterion: the mere presence of one of them is not sufficient to presume that the suspect is aware of the proceedings. The judge shall evaluate the case in its entirety and establish if the arrest and the order of a precautionary measure are sufficient to assume that awareness: In particular, the two measures can be regarded as solid enough only if the procedure has been regularly followed and the defendant has been presented to a judge for arraignment. As for the retainer of a lawyer, it can be interpreted as a sign of awareness of the proceedings if it corresponds to an effective attorney-client

[247] For instance, see Cass., sez. II, no. 9441, 24.01.2017, Rv. 269221.
[248] Cass., sez. un., no. 23948, 28.11.2019, Rv. 279420-01.

relationship; the mere choice of an attorney is not enough: The lawyer, in particular, must have accepted the case.

The rules have been applied accordingly ever since, even in high profile cases. For instance, the Court of Assizes (*Corte d'assise*) of Rome had to decide whether to move forward with the Giulio Regeni murder case. The victim, a PhD student at Cambridge's Girton College, was in Egypt in 2016 to conduct a research on the local independent unions when he was abducted and tortured to death. The Italian prosecutors were able to identify four suspects, all members of the Egyptian intelligence and homeland security agency. The Italian judicial authorities tried to get a valid address to correctly deliver the summons, but the Egyptian authorities never replied to the letter rogatory and to the multiple requests, forwarded through both judicial and diplomatic channels, let alone the public appeals of various international NGOs. The judge of the preliminary hearing decided not to suspend the proceedings given that the defendants were heard multiple times during the investigation and that the agency for which they work was abreast of every development of the case brought in Italy. Moreover, the judge interpreted the Egyptian stonewalling as a deliberate attempt to avoid the Italian proceeding. At the beginning of the trial, however, the Court of Assizes chose a different interpretation: the Egyptian lack of collaboration made it impossible for the Italian authorities to deliver the summons, but that does not imply that the four accused persons certainly knew about the preliminary hearing. Hence, the Court esteemed that it was impossible to establish that the accused persons unequivocally declined to participate to the proceeding against them. As a result, the Court annulled the declaration of "willful absence", remanding the case to the judge of the preliminary hearing.[249]

The decision stemmed directly from the Joint Chambers' interpretation, and it appears to be legally unimpeachable. However, in the specific context of the case, the solution sparked wide criticism. The case has been covered by the press of numerous countries; It has been at the root of a sharp diplomatic confrontation between Italy and Egypt, with the Italian ambassador to Egypt being recalled due to the lack of cooperation; Multiple NGOs have been advocating since 2016 for a clear and transparent investigation of the facts. The claim that there is no definitive proof that the defendants have been made aware of the proceedings – although legally well founded – appeared to be bizarre, if not outright preposterous, to the public.

[249] Court of Assizes of Rome, 14.10.2021, available at https://www.giurisprudenzapenale.com/wp-content/uploads/2021/10/ordinanza-regeni.pdf.

The defective application of Art 420-*bis* CCP can constitute ground of appeal, and if the Court of appeal determines that the trial has been moving forward thanks to a faulty declaration of "absence", it shall annul the judgment rendered in first instance and remand the case file to the competent Court in the first instance.

6.6.3 The Absence due to an Impediment

The articles of the Directive do not specifically provide for specific exceptions when it comes to emergencies or *force majeure*. Recital 34, however, mentions the case establishing that if, "for reasons beyond their control, suspects or accused persons are unable to be present at the trial, they should have the possibility to request a new date for the trial within the time frame provided for in national law".

Within the Italian system, this need is met by Art 420-*ter* CCP If the accused is not present due to *force majeure*, legal impediments, or unforeseeable reasons beyond her control, the judge of the preliminary hearing shall assign a new court date and notify it with a new summons, to be served at least 10 days prior to the new date.

The judge shall assign a new court date also when it appears likely that the accused has failed to appear due to *force majeure*, legal impediments, or unforeseeable reasons beyond her control. The likelihood is freely evaluated by the judge, and her decision on the point cannot be later appealed.

As mentioned before, the right to participation is strictly connected to the notion of defense: ensuring the attendance of the accused while excluding her attorney would be inconsistent at best. Therefore, the judge shall adjourn the hearing also when the lawyer has duly notified her legal impediment (i.e.: another hearing, for another trial, that is to be held at the same time; pregnancy of the lawyer).[250] At any rate, the accused can always ask to proceed without the legally impeded attorney.

These rules apply not only to the first hearing, but also to the subsequent court dates of the preliminary hearing (Art 420-*ter* CCP) and the trial (Art 484 § 2-*bis* CCP, which refers to Art 420-*ter* CCP).

6.6.4 The "Uninformed Absence" of the Accused

The Directive allows Member States to hold trials *in absentia* and issue enforceable decisions even when the conditions of Art 8(2) are not met, despite reasonable efforts of the authorities to locate the accused. The safeguards, then, are delayed. At the moment of her apprehension, the suspected person shall be informed of the possibility to challenge the

[250] The rule does not apply when the defendant has appointed two lawyers, and only one of them has notified an impediment, or when the concerned attorney has appointed a substitute.

decision rendered in her absence. This provision explicitly allows to maintain the "default of appearance" procedures, that are widespread and well rooted in the continental tradition. The Italian system itself, prior to the 2014 reform, used to work in the same way. After 2014, however, the model changed drastically.

Art 420-*quater* CCP provides for the case in which the summons appears to be regular, but the accused has not appeared, nor has s/he waived her right to be present (explicitly or tacitly) or alleged an impediment. In other words: the accused has simply not answered to the summons, nor has shown any personal involvement in the trial.

In such a situation, the defendant might be unaware of the proceedings. Had there been solid evidence to the contrary, the judge could have declared her "absent" and moved forward pursuant to Art 420-*bis* CCP, but if there is doubt on such awareness, the judge shall order a new summons (Art 420-*quater* CCP) which shall be served personally to the accused. The judiciary police are therefore charged with finding the person and serving her the new summons. If the police succeed, the proceedings can move forward, as there will be first-hand evidence that the accused has been made aware of it; Her persisting absence will therefore be interpreted as a tacit waiver as provided by Art 420-*bis* CCP.[251]

Should the police not be able to locate the defendant, however, the doubt remains. At this point, the judge shall issue a court order that declares the absence of the accused, and that effectively suspends the proceedings. The judge, moreover, shall order new searches of the accused at least yearly. The court order shall be revoked when the accused has been found, when s/he has retained a lawyer, when it is certain that she is aware of the proceedings and when the proceedings can be simply shut down with an immediate dismissal (Art 129 CCP).

The Italian system, therefore, does not provide for a detailed discipline of posthumous information regarding the legal remedies to the decision rendered *in absentia*. Such a decision, in fact, should not exist, for the trial should have not been allowed to move forward.

6.6.5 Exclusion of the Suspect for the Proper Conduct of the Proceedings

The Directive specifies that the right to participate to trial should not result in the irregular conduct of the criminal proceedings. Recital 40 provides for two specific examples: It may be necessary, for instance, to escort the defendant out because she is disturbing the hearing or because her/his presence would prevent the proper hearing of a witness.

The first case is regulated by Art 457 CCP, that allows the judge to have the accused escorted out if, after being admonished, "persists in behaving in a way which interferes with the regular course of the hearing". Art 457, c. 2 CCP explicitly stated that the accused shall be deemed present, and s/he is represented by her lawyer.

[251] See above, § 6.6.2.

The second case is regulated by a more complex set of provisions. The Italian code of criminal procedure contemplates a multitude of limitations to the right to directly confront vulnerable witnesses in court, but not all of them directly impact on the defendant's participation. The underage witness that is deemed too impressionable to reliably sustain a cross-examination, for instance, is examined by the judge, at the presence of the parties (Art 498, c. 4 CCP). The most protective regime, however, is dedicated to the examination of vulnerable victims, or of underage victims of particularly heinous crimes (*e.g.*: sexual exploitation, child pornography, rape, human trafficking). In these cases, the victims shall be examined by the president of the Court and/or by an expert in a separate room. Both parties can assist through a one-way mirror and can interact only through an intercom. The accused can participate, but in a severely "diminished" form.

The only case when the defendant can be straight-out excluded to examine a witness is provided by the code of juvenile justice, that applies to defendants that allegedly committed the crime when they were between the age of 14 and 18. Art 31, c. 2 d.P.R. 448/1988 states that the accused can be escorted out in her own interest, when her personality is testified to or discussed in any other way. The expulsion from the hearing, in this case, is ordered to preserve not the veracity of the testimony, but to protect the defendant-minor.[252]

6.7 Right to a New Trial

The Directive, as mentioned above, does not prohibit the proceedings "by default of appearance". Member States can therefore establish a procedure that results in an enforceable decision even if: a) the suspected person had not been informed in due time of the trial and of the consequences of non-appearance; or b) the suspected person had not been represented by a lawyer.

By allowing this kind of proceedings, however, the Directive does not forsake the rights as detailed in Art 8(2); It just permits their delayed fulfillment, as it bestows the right to a fresh determination of the case upon the convicted *in absentia*. Art 8(4) requires that the person is informed of the judgment passed against her, as well as of the legal remedies that she has at her disposal to obtain a new decision on the merits of the case. Art 9 affirms the right to a "fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed", and, this time, the Member States shall ensure the exercise of the rights of the defense, as well as the respect of the right to be present and the right to participate effectively.

[252] For more on juvenile justice, see § 8.

The Italian system does no longer allow for trials by default, and it is theoretically impossible to reach a final decision without the awareness of the accused or the presence of a defense lawyer. As detailed above, the proceedings can move along only as long as there is an explicit or tacit waiver of the right to participate; if such waiver cannot be established with certainty, the judge should order the service of a new summons, which must be delivered to no other than the accused. If the service fails and the accused is not found, the judge should suspend the proceedings. The available remedies, therefore, do not aim at re-trying a case that was deliberately discussed in the absence of the accused; the remedies target the mistaken declaration of "willful absence" of the accused, that allowed the trial fist to move forward, and then to reach a final decision. All the remedies, therefore, are accessible to the accused that shows that she was inculpably unaware of the proceedings, proving that, despite the circumstances of Art 420-*bis* CCP had been fulfilled, she had had no knowledge of the proceedings.

The requirement is particularly severe, as the remedies were conceived to be extreme measures: the authorities should only move forward when they are reasonably certain that the accused is aware of the proceedings. The system, therefore, hinges on the strict interpretation (and application) of Art 420-*bis* CCP: if the trial were allowed to proceed on a presumption of awareness rather than on an effective knowledge of the proceedings, it would be very hard for the defendant to see her/his rights restored as the proof of "inculpable unawareness of the proceedings" is extremely hard to give. Hence, the clarification of the Supreme Court is all the more important: the mere presence of one of the criteria listed in Art 420-*bis* CCP is not per se sufficient to assume the awareness of the proceedings and, therefore, the waiver of the right to participate. The judge must look closely at every situation and establish that there is sufficient evidence to assume the actual awareness of the proceeding, or order a new, personal summons.

The remedies based on this proof work differently, as they aim at re-establishing those rights that the defense has already missed due to the "inculpable unawareness of the proceedings". If the accused gains awareness of the proceedings before the preliminary hearing is over, s/he regains the ordinary evidentiary powers that are granted to the defense in such phase by Art 421, c. 3 CCP (Art 420-*bis*, c. 4 CCP). If the defendant joins the trial, s/he regains the faculty to request exculpatory evidence pursuant to Art 493 CCP, to require the renewal of the evidence that was already gathered (Art 420-*bis*, c. 4 CCP), and to apply for a special proceeding such as the plea bargain or the summary trial (Art 489, c. 2 CCP). If the defendant proves the "inculpable unawareness of the proceedings" in front of the Court of appeal, it shall annul the first instance decision and return the case to the first instance court for a new adjudication of the case. Also in this case, the defendant regains the right to

apply for a plea bargain or for a summary trial. Similarly, the Court of Cassation can annul the previous decision and send the case back, to be decided anew.

A different, special remedy applies if the accused gains awareness of the proceedings only after the decision has become final. Pursuant to Art 629-*bis* CCP, to the accused can request the rescission of the judgment rendered *in absentia* to the Court of appeal, within 30 days upon the knowledge of the decision. If she succeeds at proving the "inculpable unawareness of the proceedings", the Court shall rescind the judgement and order the transmission of the case to the first instance court for the retrial.[253]

6.7.1 Procedural Safeguards for Vulnerable Persons Suspected or Accused in a Criminal Trial

The Directive does not provide for specific safeguards concerning the participation of the vulnerable accused, but Recital 42, also referring to the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, stresses that the Member States should consider the needs of vulnerable defendants in its implementation.

The Italian criminal justice system has a separate set of safeguards for all accused persons who are not able to effectively understand or participate to the criminal proceedings. If there is any doubt regarding the defendant's ability to participate consciously, the judge shall order a psychological evaluation, to be carried out by a Court appointed expert (Art 70 CCP). If the expert finds that the defendant is temporarily incapable of participating, but that her condition is reversible, the proceedings is adjourned (Art 71 CCP), and the judge will verify the defendant's conditions every six-month, until the accused person is conscious enough to participate (Art 72 CCP). If the expert finds the condition to be irreversible, the judge shall dismiss the case (Art 72-*bis* CCP).

[253] The joint section of the Court of cassation recently had to answer a specific question regarding the possible overlap between the rescission of the judgement (Article 629-*bis* c.c.p.) and the appeal to the enforcement court (Article 670 c.c.p.), that can rule over issues concerning the validity of the enforceable decision. Article 670 CCP states that the Court can also acknowledge the mistaken application of «safeguards envisaged when the convicted person is nowhere to be found». The generic phrasing generated some confusion as to which safeguards were to be considered. The joint section of the Court of cassation clarified that the definitive decision can be only challenged through the rescission, whereas the execution court can only acknowledge the procedural errors that occurred *after* the judgment became definitive, and that can impair its valid execution: Cass., sez. un., no. 15498, 26.11.2020, Rv. 280931-01.

6.7.2 Juvenile Justice

Arts 8 and 9 of the Directive do not contain any specific provision regarding the underage defendant. Recital 43, however, emphasizes the need for special procedural safeguards for children, as they are "vulnerable and should be given a specific degree of protection".

In the Italian system, as illustrated above,[254] the proceeding against a minor is regulated by the code of criminal procedure and by d.P.R. 448/1988, which contains all the necessary tunings to adjust the ordinary legislative framework to the needs of this particularly vulnerable and "unstable" set of defendants.[255]

Also in this case, the Italian legislation anticipates the right to take part to the proceedings, as it is protected not starting from the trial, but starting from the preliminary hearing. For the adult, the choice is wise; For the minor, the choice is crucial to the system: The overwhelming majority of juvenile cases are cleared during the preliminary hearing, to reduce the unnecessary, traumatizing exposure of the child to the criminal justice system. D.P.R. 448/1998 provides for many, special mechanisms that can bring to a final decision in this phase. The participation of the minor, hence, is even more important.

The peculiar condition of the accused has several repercussions on the notion and the discipline of her right to participation. The minor is not considered to be a fully mature person, capable of taking her own decisions and of defending herself as effectively as an adult. That is why d.P.R. 448/1988 surrounds her of supporting characters, such as the parents, the persons that exercise parental authority and the social services (Art 12, d.P.R. 448/1988). All these subjects are there to give psychological assistance and to add to the minor's "self-defense": the notion of participation is therefore not limited to the sole accused, but it is extended also to those that can (or must) support her throughout the proceedings. This function is particularly clear for the subjects that exercise parental authority, which shall receive the summons as well as the accused child (Art 7, d.P.R. 448/1988). Social services must be notified of the hearing if they were previously involved in the proceedings.[256]

As for the regulation on "absence", Art 31, d.P.R. 448/1988 provides the general framework by referring to Arts 420-*bis* and 420-*ter* CCP. The minor, therefore, can waive her right to participate in an explicit or in a tacit, although clear way.[257] The judge, however, has more leeway when it comes to compelling her presence in court, as the personal consent of the accused person is fundamental to most of the diversionary options that are available

[254] See § 6.6.5. For more on juvenile justice, see Directive 2016/800.
[255] The Italian criminal justice system holds responsible children over 14. The Juvenile Court (*Tribunale dei Minori*) has jurisdiction on the suspected people that were underage when the crime occurred.
[256] See also, in this regard, Directive 2016/800, § 7.2.
[257] See above, § 6.6.2.

during the preliminary hearing. Therefore, Art 31 d.P.R. 448/1988 authorizes the judge to compel the minor's presence when she failed to appear. The rule has been largely criticized for its exceedingly large phrasing: it hardly sets limits to the judge's power, and it could be instrumentalized to override the defendant's choice not to participate. Scholars, however, suggest a cautious interpretation of this power, that should be used only when her presence is necessary to end the proceedings with one of the diversionary options that she may consent to, or when it is necessary to ascertain some traits of her personality to determine the best path forward.[258]

Arts 420-*quater* and 420-*quinquies* CCP are not directly mentioned, but they apply by virtue of the general referral made in Art 1 d.P.R. 448/1988: if the Decree does not provide otherwise, the rules of the Code of criminal procedure are to be followed. However, they shall be interpreted and applied in accordance with the personality and the educational needs of the minor (Art 1 d.P.R. 448/1988). This *caveat* seems particularly relevant in evaluating the degree of awareness of the proceedings.

So far, we have been mostly concerned with the rights and duties of the accused minor. The Decree, however, also regulates the participation of the person that exercises parental authority, and her absence is disciplined in a somewhat stricter way. She shall allege a legal impediment or be fined (Art 31, c. 4). She can also be compelled to leave the hearing in the exclusive interest of the minor, or for pressing necessities linked to the regular course of the proceedings.

6.8 BIBLIOGRAPHY

ALLEGREZZA, Silvia (2017): "Commento all'art. 48", in Carta dei diritti fondamentali dell'Unione europea, edited by R. Mastroianni, O. Pollicino, S. Allegrezza, F. Pappalardo, O. Razzolini (Giuffrè, Milano), 946

AMODIO, Ennio (2001): "Giusto processo, diritto al silenzio e obblighi di verità dell'imputato sul fatto altrui", Cass. pen., 12, 3587

BRUTI LIBERATI, Edmondo (2018): 'Riprese e fotografie di persone arrestate. Commento alla circolare emanata dal procuratore della Repubblica di Napoli il 19 dicembre scorso sulla "Diffusione e pubblicazione di immagini di persone tratte in arresto o sottoposte a fermo di polizia giudiziaria", Questione Giustizia, available at

[258] See CESARI (2021), 154.

https://www.questionegiustizia.it/articolo/riprese-e-fotografie-di-persone-arrestate_08-01-2018.php

CAIANIELLO, Michele (2021): "Right To Remain Silent and Not to Incriminate Oneself in the European Union System", available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3743329

CERESA-GASTALDO, Massimo (2000): "Premesse allo studio delle dichiarazioni spontanee rese alla polizia giudiziaria dalla persona sottoposta alle indagini", in *Riv. it. dir. e proc.* pen., 2, 544

CERESA-GASTALDO, Massimo (2002): Le dichiarazioni spontanee dell'indagato alla polizia giudiziaria (Giappichelli, Torino)

CESARI, Claudia (2021): "Le indagini preliminari e l'udienza preliminare", in *Procedura penale minorile*, edited by M. Bargis, 4th ed, (Giappichelli, Torino), 145-167

DANIELE, Marcello (2002): "La testimonianza "assistita" e l'esame degli imputati in procedimenti connessi", in Il giusto processo tra contraddittorio e diritto al silenzio a cura di R E Kostoris (Giappichelli, Torino), 196

DELLA TORRE, Jacopo (2017): "Commento all'art. 48", in Carta dei diritti fondamentali dell'Unione europea, a cura di R. Mastroianni, O. Pollicino, S. Allegrezza, F. Pappalardo, O. Razzolini (Giuffrè, Milano), 923

GIALUZ, Mitja (2008): "art. 24 Cost.", in Commentario breve alla Costituzione, edited by S Bartole, R Bin, CEDAM, Padova, 2008

GIOSTRA, Glauco (1994): 'Giornalismo giudiziario: un ambiguo protagonista della giustizia penale', Critica del Diritto, 1, 1994

GREVI, Vittorio (1998): "Il diritto al silenzio dell'imputato sul fatto proprio e sul fatto altrui", Riv. it. dir. e proc. pen., 04, 1129

ILLUMINATI, Giulio (1991): 'La presunzione di non colpevolezza', § 2, *Enc. Giur.* XXVII, Roma, Treccani

LAMBERIGTS, Stijn (2016): "The directive on the presumption of innocence. A missed opportunity for legal persons?", EUCRIM, 1-36

LASAGNI, Giulia (2019): *Banking Supervision and Criminal Investigation. Comparing the EU and the US Experiences* (Springer/Giappichelli)

LASAGNI, Giulia (2020): "Prendendo sul serio il diritto al silenzio. Commento a Corte cost. ord. n. 117 del 10 maggio 2019", Riv. Trim. Dir. pen. cont., 2, 135-163

LASAGNI, Giulia (2021): "La Corte di giustizia riconosce il diritto al silenzio nei procedimenti amministrativi punitivi (e la Corte costituzionale conferma)', *Giur. Comm*., 2021, 6, 1177

MACCORA, LINGIARDI, IPPOLITO, CESQUI, ROSSI, GIUNTI, GIORGI, PIGNATONE, DE CATALDO, PETRELLI, GUGLIELMI, GIORGI, LECCA, CALANDRA, SPATARO, DEIDDA, FERRARELLA, BRUTI LIBERATI, FASSONE (2018): 'Objective The duty of communication', Questione Giustizia, Rivista Trimestrale, 4, available at qg_2018-4.pdf (questionegiustizia.it)

MANES, Vittorio (2017): 'La "vittima" del "processo mediatico": misure di carattere rimediale', Riv Trim Dir Pen Cont, 3, 114

MAZZA, Oliviero (2004): L'interrogatorio e l'esame dell'imputato nel suo procedimento (Giuffrè, Milano)

MARCHESI Diletta, PANZAVOLTA Michele (2021): Keep silence for yourself: The protection of the right to silence in the Italian criminal justice system, New Journal of European Criminal Law 2021, Vol. 12(3) 365–388

NEHL, Hanns Peter (2014): "art. 48 (Administrative Law)", in The EU Charter of Fundamental Rights, edited by S. Peers, T.K. Hervey, J. Kenner, A. Ward (Hart Publishing, Oxford), 1277

ORLANDI, Renzo (1992): 'Atti e informazioni della autorità amministrativa nel processo penale. Contributo allo studio delle prove extracostituite' (Milano, Giuffrè)

ORLANDI, Renzo (2002): “Dichiarazioni dell’imputato su responsabilità altrui: nuovo statuto del diritto al silenzio e restrizioni in tema di incompatibilità a testimoniare” in Il giusto processo tra contraddittorio e diritto al silenzio, edited by R E Kostoris (Giappichelli, Torino), 153

PATANÈ, Vania (2006): Il diritto al silenzio dell’imputato (Giappichelli, Torino)

ROSSI, Nello (2021): ‘Il diritto a non essere “additato” come colpevole prima del giudizio. La direttiva UE e il decreto legislativo in itinere’, Questione Giustizia, *Il diritto a non essere “additato” come colpevole prima del giudizio. La direttiva UE e il decreto legislativo in itinere* (questionegiustizia.it)

SCAPARONE, Metello (1981): “Rapporti civili (art. 24-26)”, in Commentario della Costituzione, edited by G Branca (Zanichelli, Bologna-Roma, 1981), 82

TASSINARI, Davide (2012): *Nemo tenetur se detegere*: la libertà dalla autoincriminazione nella struttura del reato (Bononia University Press, Bologna)

7 Directive (EU) 2016/800: Procedural Safeguards for Juvenile Defendants*

7.1. Introduction

The Italian legislator, with some exceptions, decided not to bring into force any laws to comply with the Directive 2016/800 on procedural safeguards for children who are suspect or accused persons in criminal proceedings (hereinafter Directive).[259]

This is because the Italian legal system, even before the Directive was issued, ensured these categories a fairly high standard of protection.[260] In fact, Law no. 69 of 22 April 2005 contains special provisions for the event a child is subject to European arrest warrant proceedings and the Decree no. 448/1988 (together with its implementing regulation contained in the Legislative Decree no. 272/1989) provides for special regulation that applies when a child is a suspect or accused person in criminal proceedings.

Moreover, Art 1, c. 1 Decree no. 448/1988 extends all the provisions ruled in the Code of Criminal Procedure also to the proceeding against children, unless otherwise provided. Therefore, for what is not in the Decree no. 448/1988, the same rules and safeguards envisaged for adults also apply to minors. However, the article foresees that these provisions shall be applied in accordance with the personality and the educational needs of the child.

Although in some case the Italian system offers a higher level of protection, for more than one provision of the Directive the *de facto*/indirect implementation cannot be said to be entirely satisfactory. As will be explained later, it is the case of Art 4(1)(b)(ii- iii); Art 4(2); Art 6(6)(a); Art 7(2-3); Art 7(4)(a-b-c); Art 7(7); Art 8(1-2); Art 17; Art 19. The compliance of Art 6 (in particular, of paragraph 4 (a-b) and (c-i) and paragraph 7) with the standards of the Directive remains at this stage doubtful and may vary depending on different interpretative options (see § 7.7).

As previously mentioned, the Italian legislator adopted only few measures in the field covered by the Directive: in particular, the Legislative Decree no. 184/2016 transposed, even if only partially, Art 6(4)(c)(i), and the Legislative Decree no. 121/2018 regulating the execution of sentences against juvenile offenders.[261] It should be pointed out that, before the

* The Chapter has been drafted as followed: Vanessa Maraldi, § 7.1, 7.2, 7.3, 7.4, 7.5 and 7.6; Isadora Neroni Rezende, § 7.7 and 7.8; Marianna Biral, § 7.1 and 7.9; Irene Milazzo, § 7.10; Laura Bartoli, § 7.11; Antonio Pugliese, § 7.12; Giulia Lasagni, § 7.13, 7.14, 7.15 and 7.16.

[259] For a critique of the Directive, BUZZELLI (2017) 4 ff.

[260] CAMALDO (2016) 4574; CONTI (2019) 99 ff.

[261] CARACENI – COPPETTA (2019).

entry into force of the latter law, convicted children were subject to the penitentiary order law provided for adults (and its implementing regulation contained in the Decree no. 230/2000) pursuant to Art 79, Law no. 354/1975.

Nevertheless, also in this case, Art 1, c. 1 Legislative Decree no. 121/2018 extends all the provision of the Law no. 354/1975 and the Decree no. 230/2000 to children, unless otherwise provided.

Finally, there are some provisions of the Directive that have not been expressly or indirectly transposed: Art 4(1)(a)(i-iii-iv); Art 4(1)(b)(i-iv-v-vi); Art 4(1)(c); Art 7(8-9); Art 8(3)(b); Art 9(1); Art 13(1).

7.2. Subject Matter, Scope and Definitions

The scope of the Decree no. 448/1988 regulating the Italian juvenile criminal justice system is broader than that of the Directive. In fact, the special provisions of the Italian Decree shall apply not only to persons below the age of 18 when they became suspects in criminal proceedings but even to persons below the age of 18 when they committed a crime, even if the trial begins when they are older. In addition, Italy has chosen not to adopt the alternative offered by the Directive of not applying it to persons over 21 years old.

As provided for in the Directive, the Italian Decree applies in all proceedings concerning a minor within the jurisdiction of the criminal court. According to the Supreme Court, the Juvenile Court is also competent to judge crimes otherwise falling within the jurisdiction of the Justice of Peace if committed by a minor but must in such cases impose the relevant sanctions provided for by Legislative Decree no. 274/2000 like home stay obligation or community service.[262]

The Supreme Court also specified that the violation of the functional and exclusive jurisdiction of the Juvenile Court entails the absolute nullity of the sentence, which can be detected in every state and degree of judgment. The Court also reiterated that it is the ordinary judge who has jurisdiction to know the permanent crime whose conduct was initiated when the subject was a child but ended after she reached the age of majority. Art 3, c. 1 Decree no. 448/1988, in order to identify the criterion of jurisdiction of the Juvenile Court, appears to make clear reference to crimes "committed" by children under the age of eighteen, thus requiring, in the case of a permanent crime, the necessary consideration of the time of offence's termination.[263]

[262] See Cass., Sez. V, no. 15723, 02.03.2018, Rv. 273727.
[263] Cass., Sez. III, no. 54996, 19.10.2016, Rv. 268706.

Instead, in the event that a person is accused of the commission of a plurality of crimes motivated by continuation, some of which were committed when she was a child and others after reaching the age of majority, the proceedings must be split, so as to assign the jurisdiction for the first episodes to the Juvenile Court and the jurisdiction for the other episodes to the ordinary court.[264]

The Juvenile Criminal Judge (in particular the Judge for preliminary investigations at the Juvenile Criminal Court) is also competent for the validation of the prevention measure of the obligation to sign imposed by the administrative authority (the questor) jointly with the ban on access to the place where specifically designated sporting events are held, as well as to those, specifically indicated, interested in the stopover, in the transit or transport of those who participate or assist in the manifestations themselves.[265]

Finally, the Decree no. 448/1988 also applies to children who were not initially suspects or accused person but become suspects or accused persons during questioning by the police or by another law enforcement authority. In fact, according to Art 67 CCP at any stage and instance of proceedings, if there are reasons to believe that the accused is a child, the judicial authority shall forward the case file to the Public Prosecutor attached to the Juvenile Court. Then, regarding the case in which the age of the child is uncertain, the Italian legislation seems to be in accordance with the last paragraph of the article 3 of the Directive. The Art 8 Decree no. 448/1988, in addition, orders that when it does not know if the person has reached the majority age or the age requested for the chargeability, the judge shall ask the opinion of an expert. If even the report does not resolve the doubts, that person shall be presumed to be a child.

7.3. Right to a Medical Examination

In the Italian legislation there is not a specific disposition which provides the right for children who are deprived of liberty to request a medical examination. However, Art 11, co. 7 Law no. 354/1975 provides that, upon entering the prison (according to the Art 23, c. 1 Decree no. 230/2000, no later than the following day), each detained or confined person (adults and children) shall undergo a general medical examination that will be recorded. In the Decree no 448/1988 there is not express mention about a judge's duty to consider the results of this medical examination. However, she receives these acts and can anyway consider them during the entire proceeding. In addition, according to Art 9 of this Decree, at

[264] Cass., Sez. V, no. 16751, 19.02.2018, Rv. 272686.
[265] Cass., Sez. I, no. 1165, 21.02.1996, Rv. 204609.

any time the judge or the public prosecutor can request expert's opinions about the personal conditions of the child.

Nonetheless, the medical examination with a view to assessing the general mental and physical condition of the person is not provided for arrested people. In fact, at the time of the arrest, they are only informed of their right to access emergency medical assistance (Art 386, c. 1, let. g CCP).

Anyway, according to Art 70 CCP, parties can anytime request and the judge on her motion can order ascertainment about the suspected or accused person's mental health if there are doubts about her ability to participate consciously in the trial.

Contrary to the child and her lawyer, the holder of parental responsibility cannot request this or any other ascertainment on her own motion. For this aspect, therefore, the Italian legislation is not in line with the Directive which instead allows this option.

Lasty, in Italy medical examination may be carried out whenever required. In fact, detained and confined persons are also entitled to receive full information about their state of health during detention and at the time of release (Art 11, c. 7 Law no. 354/1975).

7.4. Limitation of Deprivation of Liberty and Alternative Measures

Articles 10 and 11 of the Directive seem fully, although indirectly, implemented by the national legislation. In fact, children are subject to the same rules as adults, appropriately adapted to their particular condition. For example, before the police officers arrest a child caught in the act of committing a crime for which the arrest is possible, they shall take into account the seriousness of the offence and the age and personality of the child (Art 16, c. 1 and 3 Decree no. 448/1988). Then, in ordering the precautionary measures, the judge shall take into account, in addition to the criteria indicated for the adult in the Art 275 CCP, the need not to interrupt the ongoing educational processes (Art 19, c. 2 Decree no. 448/1988). According to the Supreme Court, falls into this category the specific therapy or socialization treatments aimed at resolve situations of mental disorder or dysfunction of the evolutionary process, but not the mere attendance at school and the practice of sports activities[266].

Moreover, the duration of the precautionary measures is reduced by half if the offence was committed by children under the age of eighteen and is reduced by one third if the offence was committed by children under the age of sixteen.

As well as for adults, the judge's orders applying precautionary measures limiting personal liberty can be reviewed by another juvenile judge (Arts 309 and 310 CCP and Art 25 Legislative Decree no. 272/1989) or at any time modified and revoked (Art 299 CCP).

[266] Cass., Sez. III, no. 8703, 16.01.2019, Rv. 275857.

According to Art 275, c. 3 CCP,[267] precautionary detention in prison shall be ordered only when other coercive or disqualifying measures, even if applied jointly, are inadequate. The Decree no. 448/1988 provides for specific measures that can be applied during the proceeding to a suspected or accused child instead of pre-trial detention (prescriptions, homestay, community placement). After the final judgment, there is also the possibility for the convicted child to request specific alternative measures (probation under social services supervision, probation with home detention, home detention, semi-freedom) if the imprisonment does not exceed four years (Art 11, c. 2 Legislative Decree no. 121/2018).

Prior to the entry into force of the latter law, this option was anyway permitted by Art 656, c. 5 CCP. The paragraph 9, let. a of this article, however, do not allow the prosecutor to order the suspension of the execution against those convicted for the crimes referred to in Art 4-*bis* Law no. 354/1975, as well as in Arts 423-*bis*, 572, c. 2, 612-*bis*, c. 3 of the Italian Criminal Code (CP).

The Constitutional Court removed this obstacle that prevented these children (not instead for adults) the access to the alternative measures.[268]

The Constitutional Court recently further expanded access to alternative measure by declaring unconstitutional article 2, c. 3 Legislative Decree no. 121/2018.[269] On the basis of this provision, the Juvenile Sentence Supervision Court could not grant alternative measures to detention, prize permits or assignment of outside work to children and young adults convicted of a series of crimes listed in Art 4-*bis*, c. 1 Law no. 354/1975 (crimes committed for the purposes of terrorism, mafia association, sexual violence, etc..) who have not complied with certain requirements (e.g.: cooperating with justice after conviction).[270]

7.5. Specific Treatment in the Case of Deprivation of Liberty

Art 12 of the Directive seems to be fully implemented in the national legislation. In fact, in Italy there are penal detention institutes reserved for children. For some aspects, the Italian legal system is even more safeguarding: the children who are kept in police custody are always held separately from adults, without exception (Art 20, c. 1-*bis* Legislative Decree no. 272/1989). Moreover, the children are separated from person under the age of twenty-five and defendants are separated from convicted persons (Art 15 Legislative Decree no.

[267] Which applies also to the children pursuant to the general clause of Art 1 of the Decree 448/1988.
[268] Constitutional Court, no. 90 of 28.04.2017, ECLI:IT:COST:2017:90. For a comment on the decision, see APRILE (2017) 2743 ff.; COPPETTA (2017) 906 ff..; DELVECCHIO (2018) 201 ff.
[269] Constitutional Court, no. 263 of 06.12.2019, ECLI:IT:COST:2019:263.
[270] For a comment on pronunciation, CARACENI (2020) 237 ff. and COPPETTA (2019) 3207 ff.

121/2018). However, the special rules and procedure laid down for children also apply to those who, during the execution, have reached the age of 18 but not 25 years and to those who begin the execution of detention measures after the age of 18 (Art 24, c. 1 and 2 Legislative Decree no. 272/1989).[271]

As for paragraphs 5 and 6 of the Article 12 of the Directive, the Italian legislator has expressly transposed them in the Legislative Decree no. 121/2018 which contains many rules aiming to foster children's empowerment, education and full psyco-physical development, preparation for free life, social inclusion and the prevention of further offences, including through the use of education, vocational training, education for active and socially useful, cultural, sporting and leisure activities.[272]

Art 58 Decree no. 230/2000 already provided for the right of all prisoners (adults and children) to practice their religious confession.

Finally, in Art 19 Legislative Decree no. 121/2018 the legislator regulates visits by parents of children in the juvenile detention institute. They shall also support the child in the execution of the issued alternative measure.[273]

7.6. Right of the Child to be Accompanied by the Holder of Parental Responsibility during the Proceedings

According to Art 12 Decree no. 448/1988 the holder of parental responsibility can always assist the child during all the proceeding. Instead, people other than parents can assist the child only if the Judge allows it. If the child is alone, she is anyway assisted by the juvenile services. Therefore, Art 15 of the Directive seems fully implemented by national norms, which also provide for a penalty in case the holder of parental responsibility does not appear without a legal impediment to the hearings regarding the child (Art 31, c. 4 Decree no. 448/1988).

7.7. Right to be Assisted by a Lawyer

At the outset, it should be highlighted that a literal interpretation of the Directive suggests that its provisions may require higher standards of protection than those generally enshrined in Directive 2013/48. In some instances, indeed, the two Directives use different wording to refer to the right to access a lawyer. Directive 2016/800 provides that children *shall be*

[271] For a detailed view of the organization of juvenile penal institutions, DODARO (2019) 95 ff.; FILOCAMO (2019) 275 ff.
[272] See CASTROGIOVANNI – SEMINARA (2019) 245 ff.
[273] See GUAZZALOCA (2019) 299 ff.

assisted by a lawyer when certain investigatory acts are performed, while Directive 2013/48 only requires Member States to ensure that suspects and accused persons *have a right* to have their counsel present during these activities. In addition, Art 6(7) Directive 2016/800 foresees that 'where the child is to be assisted by a lawyer […] but no lawyer is present, the competent authorities shall postpone the questioning of the child, or other investigative or evidence-gathering acts […] for a reasonable period of time in order to allow for the arrival of the lawyer, or, where the child has not nominated a lawyer, to arrange a lawyer for the child'.

If such differences in wording actually meant to point out to a double protection standard for children and adults respectively, some gaps in the Italian legislation could be detected. For instance, it could be considered that Art 6(4)(b) may not be fully implemented in the national system. Art 364 CCP, which regulates questionings and other investigative activities performed by the public prosecutor, requires indeed the court-appointed or the retained lawyer to be informed at least 24 hours before the hour set for the activity. However, the provision also indicates that the lawyer has merely a right to be present during the activities, thereby implying that his or her presence is not mandatory for the validity of the latter. If the lawyer has been duly informed and she chooses not to appear, the investigative act can be regularly performed without his or her presence: no obligation of postponing the act or appointing a court-appointed lawyer pursuant to Art 97, co. 4 CCP is imposed on the proceeding authority. As the CJEU has not taken a stance on this issue yet, however, it is questionable whether these differences in wording, taken alone, can serve as a strong basis for acknowledging a double standard of guarantees. Therefore, at the current state of the art, the Italian system could be deemed to be substantially compliant with the European prescriptions.

As already observed in the analysis of the Directive 2013/48, also the right of the child to privately consult with the lawyer before questioning may not be considered *prima facie* as fully implemented in the domestic legal order.[274] Generally, when the police or the Public Prosecutor collect summary information from the suspect, the latter is entitled to appoint a lawyer before the questioning begins. However, the Code of Criminal Procedure does not include any provision which *explicitly* grants the suspect a right to also consult with the lawyer before the questioning. This right is usually ensured, in the practice, by the procedural mechanism that leads up to the questioning, as the suspect not *in vinculis* is notified beforehand a summons to appear mentioning her right to access a lawyer. However, when the child acquires the status of suspect during the interview (Art 63 CCP), there is a risk that her right to privately consult with a lawyer is unduly restricted: the police may indeed keep on questioning the child without allowing her to have specific timeframe to privately meet

[274] See § 5.3 of the report on the Directive 2013/48 for a more detailed analysis.

with the lawyer and agree on a defensive strategy. It should be noted, however, that a comprehensive analysis of the Italian system allows to overcome this gap. The jurisprudence has indeed reconducted this scenario to a violation of the right to defence, allowing for the application of the procedural sanction foreseen at Art 178, c. 1, let. c CCP.[275]

Finally, we observe that the right to be assisted by a lawyer when the child brought before a competent court or judge to decide on detention is not fully implemented in the Italian system (see Art 6(6)(a) of the Directive). When the child is subject to a precautionary measure indeed, the hearings of re-examination, appeal and appeal before the Court of Cassation against the order of provisional detention do not foresee the necessary presence of the lawyer (Arts 309, c. 8, 310, c. 1 and 2, 311, c. 1 and 5 CCP). This problematic gap may also concern the chamber hearings of appeal proceedings, where the presence of the lawyer is not mandatory pursuant to Art 127 CCP. In such a framework, the Court of Cassation has considered that the absence of the lawyer in these hearings only integrates an intermediate nullity (Art 178, co. 1, let. c CCP) and not an absolute one – which, pursuant to Art 179 CCP, exclusively applies to instances of necessary participation of the lawyer.[276] This means that the child that has been sentenced to detention in appeals hearing without the presence of the lawyer has more limited chances to raise a potential nullity. Specifically, the Court has pointed out that, in chamber proceedings with non-essential participation of the lawyer, the submission of a request for postponement for legal impediment by the lawyer clearly expresses a desire of the latter for an "active" participation in the proceedings.[277] Consequently, when the lawyer's request of postponement for legal impediment has been unduly rejected and the child that has been sentenced to detention without the presence of the counsel, a timely raising of the nullity may result in the annulment of the appeal sentence.

Lastly, Art 6(7) considers the following scenario: it has to be carried out an investigative or evidence gathering act in relation to which the assistance of the lawyer has to be guaranteed, but the lawyer is not present. Where it happens, the Directive prescribes the postponement of the investigative activity for a reasonable period of time in order to allow for the arrival of the lawyer or, where the child has not nominated a lawyer, to arrange one for the defendant.

Within the Italian system, Art 97, c. 4 CCP ensures that, where an investigative act have to be executed and the (either retained or court-appointed) lawyer have not been found or

[275] Cass. pen., sez II, no. 9494/2018 and related observations in § 8.3 of the report on the Directive 2013/48.
[276] Cass., Sez. II, no. 8473, 26.02.2019, ECLI:IT:CASS:2019:8473PEN. For an overview of the Italian system of procedural nullities, see § 5.11 of the report on the Directive 2013/48.
[277] *Id.*

have left the defence, the defendant is provided with a new one.[278] The prescription applies only in case the presence of the lawyer is deemed for the act to be considered valid, for instance where the suspect is questioned by the police but not where the questioning is carried out by the public prosecutor or where identity parades, confrontations and reconstructions of the scene crimes take place.[279]
The fact that the mechanism of substitution does not apply to all investigative acts nor, more importantly, to all questionings, with the effect that in some situations the child takes parts to the activity without her lawyer being present, seems to determine an implementation void. In this sense, attention should be paid to Recital 27 in which it is stated that 'when this Directive provides for the assistance by a lawyer during questioning, a lawyer should be present'.

7.1.1. Derogations

Article 6(8) allows Member States to temporarily derogate from the application of the rights provided for in Art 3, albeit only during the pre-trial stage and only due to some compelling reasons. In this regard, the Italian system does not show deficiencies or particular gaps of protection.
As addressed in literature, the extent of the derogation clause set at European level is not clearly formulated[280], following that the exceptions provided for by the Italian legislation are certainly covered.
In this sense, giving that the wording of Art 6(8), which calls for a case-by-case decision made by a judicial authority and deemed as compelling reasons for limiting the right to access to a lawyer the need to avert serious consequences for life, liberty or physical integrity of a person or to prevent a substantial jeopardy to criminal proceedings, is nearly the same of that used in Arts 3(6) and 8 Directive 2013/48, the arguments forwarded when examining that piece of legislation can be recalled here.[281] As for the obligation, on the part of the judge, to take into account the child's best interest when deciding to derogate from the rights guaranteed by Art 6(3), it has to be remembered that, at national level, such requirement

[278] According to the case-law, it is not necessary that the nominated substitute is not registered in the list of lawyers qualified to represent children in front of juvenile court. See Cass., Sez. V, n. 15050, 4/2/2019, Rv. 275102-01.
[279] See §§ 5.4 and 5.5 of the report on the Directive 2013/48.
[280] Giving rise to "significant derogation of the right to be assisted by a lawyer". In such terms, RAP – ZLOTNIK (2018) 123. See also GIOSTRA (2016).
[281] See § 5.6.

applies at every stage of the proceedings thus affecting every and each decision adopted by the judicial authority (Art 1 Decree no. 448/1988).[282]

7.8. Individual Assessments

Art 7 of the Directive enshrines children's right to an individual assessment in criminal proceedings. The child who is a suspect or accused shall be individually assessed, with specific regard to his or her personality and maturity, his or her economic, social and family background, and any specific vulnerabilities that he or she may have.

The individualization of decisions affecting children suspected or accused in criminal proceedings has been one of the pillars of the 1988 Italian reform of the juvenile criminal system. This principle informs various provisions of the Decree no. 448/1988, which effectively reflect the rationale behind Art 7 of the Directive. For instance, Art 1, c. 1 Decree no. 448/1988 includes a general clause, which offers a heuristic criterion for the application of both the provisions of the Decree and the Criminal Procedure Code in juvenile criminal proceedings. Those provisions should indeed be applied 'in accordance with the personality and the educational needs of the child'.

Moreover, the Italian legislator made sure that the psychological needs of the child involved in the proceedings were accounted for in the national system. Art 12, c. 1 of the Decree no. 448/1988 foresees that 'at any stage or instance of the proceeding, emotional and psychological support of child defendants shall be ensured by the presence of their parents or any other appropriate person indicated by the child and admitted by the proceeding authority'. Additional support is also provided, pursuant to Art 12, c. 2 by the juvenile services of the Ministry of Justice referred to in Art 6 of the Decree.

Despite this satisfactory framework, some of the provisions of the Decree seem not to be fully compliant with the standards of the Directive. Specifically, Art 9 – which ultimately consecrates the principle of individualization in the domestic system – seemingly offers a lower standard of protection in some respects. If Art 9 provides that individual assessment is mandatory for any decision concerning a child suspected or accused in a criminal proceeding, it does not require such assessment to be necessarily carried out by experts or qualified professionals, as provided by Art 7(7) of the Directive instead. In fact, Art 9 Decree no. 448/1988 foresees the possibility that the information concerning the personality and the background of the child is provided only by his parents or other persons closely involved in his or her life. This has been confirmed by the Court of Cassation in the context of the assessment of the imputability for lack of maturity of the child defendant. In this case indeed,

[282] See § 7.1.

the Court has appreciated that the investigation on the child's personality does not necessarily require a psychiatric assessment, as the examination of the child's mental maturity can legitimately be performed through the evaluation of experts or persons who have had relations with the accused, on the basis of all the elements that can be inferred from the facts and, among them, from the manner in which the criminal act was committed.[283] While the wording of Art 9 highlights only a partial implementation of the Directive's standards, legal scholars have also observed that in the judicial practice the individual assessment is nearly always provided for by the experts of the juvenile services of the Ministry of Justice that have come in contact with the child.[284] This assessment is generally carried out at the earliest stage of the criminal investigations[285] and in any case before indictment, considering that the Public Prosecutor is required by national law to ground her decision to prosecute on individualized information concerning the personality and the background of the child (cf. Art 7(5) of the Directive).

In addition, Art 9 does not provide any indication on the extent and detail of the individual assessment, as foreseen by Art 7(3) of the Directive. In the domestic system indeed, it is generally agreed that for the purposes of the individual assessment judicial authorities may have recourse to all kinds of evidence foreseen by the CCP. They may also rely on evidence that are not explicitly provided by the law, as long as the requirements of Art 178 CCP are met[286]. No criteria are set with respect to the depth and breadth of the assessment. This gap in the national legislation may ultimately lead to situations where assessments are not carried out meticulously enough, although the circumstances of the case required to do so. We should also consider that no national provision requires the judicial authority to update this assessment according to changing circumstances of the case, as mandated by Art 7(8) of the Directive. Nonetheless, legal scholars have pointed out that, in the practice, the direct observation of the child's behavior throughout the proceedings is generally taken into account by the judicial authority.[287] This attitude is also reflected in some decisions of the Court of Cassation highlighting the relevant factors to be taken under consideration when deciding whether the child should have access to probation. The Court has stated that decisions on probation fall within to the margin of appreciation of the judges of first and second instance, who consider the possibility of re-education and integration of the subject into social life.

[283] Cass., Sez. V, no. 14200, 20.03.2018, ECLI:IT:CASS:2018:14200PEN.
[284] CAMON – CESARI – DANIELE – DI BITONTO – NEGRI - PAULESU (2019) 974.
[285] PATANÈ, (2015) 67.
[286] LANZA (2020) 471; PATANÈ, (2016) 143.
[287] PATANÈ (2015) 67; LANZA (n 28) 471 (merely referring to the need for updating the assessment throughout the proceedings).

The relevant decision is the result of a prognostic judgement – unquestionable by the Court of Cassation if supported by adequate motivation – conducted on the basis of multiple factors, relating both to the crime committed and the personality of the defendant, which he or she manifested even after the commission of the criminal fact.[288] Confessions or lack of contestation of the facts may also be relevant for the purposes of granting probation, provided that these elements are combined with other contextual factors (e.g. the willingness of the child to cooperate with the juvenile services) that show her repentance for the facts.[289]

On a different perspective, it should also be noted that Art 9 of the Decree offers a higher standard of protection in the sense that is does not foresee any derogation to the right of the child to an individual assessment. The lack of an individual assessment grounding the decisions on the suspect or accused child always results in a procedural sanction, and the legal doctrine has outlined different solutions in this regard. On the one hand, it has been considered that when in the course of the proceedings a measure concerning the child is taken without any individual assessment, the concerned decision may be considered as affected by an intermediate nullity (*nullità intermedia*). On the other, scholars have also suggested that the decision violating the right to an individual assessment may, as lacking in motivation, be affected by the nullity referred to in Art 125, c. 3 CCP.[290]

Finally, concerning the individual assessment for the adoption of precautionary measures entailing the provisional detention of the child, the Italian system may not fully satisfy the standards of protection laid down at Art 7(4)(b) of the Directive. Indeed, while the individual assessment is explicitly required for the arrest *in flagrante delicto* (Art 16, c. 3 Decree 448/1988), the same is not specifically demanded for the case of temporary detention (*fermo*) of the child suspected of a crime. When the temporary detention is enforced by the police and not the prosecutor, this gap seems not to be filled by the general provision of Art 9 of the Decree, which only concerns the individual assessments carried out by the judge and the prosecutor. Against this backdrop, we should nevertheless take into account that the legal doctrine considers that the temporary detention can be applied in the same cases and with the same modalities foreseen for the arrest *in flagrante delicto* under Art 16 of the Decree. This would mean that the need to perform an individual assessment prior to the restriction of liberty should apply in this case as well, despite the lack of an explicit reference to this requirement[291]. A systematic interpretation may further reinforce this argument. Indeed, Art 18 of the Decree, in detailing the enforcement requirements to be fulfilled after the arrest *and*

[288] Cass., Sez. I, no. 37018, 12.07.2019, Rv. 276940-01.
[289] Cass., Sez. III, no. 43810, 14.01.2017, Rv. 270844; Cass., Sez. I, no. 40512, 09.05.2017, Rv. 270982.
[290] Cf. CAMON and o (2019) 974; PATANÈ (2015), 140-141; LANZA (n 28) 470.
[291] Lanza (n 28) 485-386.

the temporary detention, prescribes that an individual assessment of the children's personality and background should be performed when deciding whether to place them in their house while waiting to have a contact with the Public Prosecutor. The wording of Art 18 highlights a unitary consideration of the arrest and the temporary detention in the juvenile criminal justice system, even if the provision only concerns the requirements to be satisfied *after* the application of the measures. All in all, these considerations can only give a mixed picture of how the right to an individual assessment is upheld when the child is subject to a restriction of liberty, so that the compliance of the Italian system with the Directive cannot be accurately assessed.

7.9. The Right of the Child to Have the Holder of Parental Responsibility Informed

Art 5 of the Directive prescribes that the holder of parental responsibility is provided, as soon as possible, with the information (given in writing, orally or both) that the child has the right to receive in accordance with Art 4. The rationale of the provision is to ensure that the child receives all the support needed in order to understand the content and scope of her rights as well as the dynamics and the issues at stakes within the proceedings in which she is involved. Besides, the precept is probably intended to guarantee also an affective and psychological support to the minor-aged person.

This Article has not been explicitly transposed as the Italian system already provided a high standard of protection in this regard.

Within the national legal framework there is a number of precepts intended to state and regulate the pivotal role of the holder of parental responsibility in terms of strengthening the child's defense rights. Against this framework, Art 7 Decree no. 448/1988 plays a central role. It is stated that notice of investigation and decree for committal to court hearings shall be served to the person who hold the parental responsibility so that she is able to help and advise the child.

In the vast majority of cases, this person is the father or the mother (or both) of the child; however, in certain circumstances, such as death or unavailability of the child's parents, the parental responsibility is held by a guardian appointed by the competent authority (*giudice tutelare*). In these cases, the notice shall be served to the appointed guardian, even though the provision contains no clear reference in this sense.

The provision mentions the notice of investigation and the decree for committal to court hearings. As for the former, it is widely deemed that the obligation covers both the notice referred to in Art 369 CCP (notice of investigation) and that referred to in Art 369-*bis* CCP (notice to the suspect about his rights of defense), albeit the second is not explicitly

mentioned by the law. Since the aim of Article 7 is to guarantee to the child the needed defense support, and provided that the principles of subsidiarity and adequacy (Art 1 Decree no. 448/1988) prevent the child from receiving a worst treatment as compared to that reserved to the adult defendant, it would be unreasonable not to serve the holder of parental responsibility with the notice explaining defense rights. In relation to the decree for committal to court hearings, the breadth of the expression leads to believe that the obligation applies to every hearing held during the proceedings.

As the premise for the notice is the hampered capacity of the minor to manage her defense, the reaching of the age of eighteen during the proceedings makes it unnecessary following that its omission has no consequences. Apart from this case, where Art 7 Decree no. 448/1988 is violated, the act in relation to which the notice is required is affected by a nullity under Arts 178, c, 1, let. c and 180 CCP. The approach undertaken at the national level is in line with that of the European legislator. In the Directive it is explicitly stated (at Art 2(3)) that provisions apply also to persons who were children when they become subject to the proceedings but have subsequently reach the age of eighteen, with the exception of some rules, among which Art 5.

The mandatory notice provided for in Art 7 Decree no. 448/1988 is not accompanied by an obligation, on the part of the holder of parental responsibility, to take part to the acts of the proceedings. However, in case she does not participate to the preliminary hearing or the trial in the absence of a legitimate impediment the judge may apply a monetary sanction.

In this context, Art 18, c. 1 Decree 448/1988 needs to be mentioned too. It prescribes an immediate notice to the holder of parental responsibility in case the child is arrested or subjected to temporary detention (fermo). Also in this case, the information, which is aimed at guaranteeing the child with all the necessary defense support in a particularly thorny moment, it is prescribed under penalty of nullity.

As for the affective and psychological support, which is referred to in Art 12 Decree no. 448/1988, it has to be ensured at every stage of the proceedings. It is basically assured by the presence of the child's parents (who may or not be also the holders of parental responsibility) or of another appropriate adult, nominated by the child and accepted as such by the judge. The Public Prosecutor and the judge may accomplish procedural acts without the presence of such person where this is in contrast with the child's best interest or where binding procedural needs occur. The breadth of the clause has been criticized in literature since it could give rise to an extensive use of the ban with the effect of weakening a guarantee which has constitutional roots (in particular, the guarantee is related to Art 31(2) of the Constitution). In any case, no conflict with the Directive seems to arise, since the wording of the exceptional clause provided for within the European document is virtually identical,

focused on the 'child's best interest' and circumstances which might 'jeopardise the criminal proceedings' (Article 5(2)).

7.10. Right to Information

The Italian legal system does not provide for a specific legal framework concerning the right to information within juvenile criminal proceedings.

By virtue of Art 1, c. 1 Decree no. 448/1988, Art 4 of the Directive is *de facto* implemented only in relation to those information rights set up by the CCP for adults[292]. This is the case, in particular, of the right to a lawyer (Art 4(a)(ii)); to legal aid (Art 4(a)(v)); to medical assistance (Art 4(b)(ii)); and to limitation and review of the deprivation of liberty (Art 4(b)(iii)). For details on the national legislation and case-law relating to the right to information on these safeguards, reference should be made to the implementation of Directive 2012/13.

The right to information of the unaccompanied minor on the right to a lawyer and to legal aid also finds explicit implementation into Art 76, c. 4-*quater* Decree no. 115/2002.

Art 4 of the Directive lacks instead any transposition with regard to all the remaining prerogatives listed, i.e.: the right to have the holder of parental responsibility informed (Art 4(a)(i)); to protection of privacy (Art 4(a)(iii)); to be accompanied by the holder of parental responsibility during stages of the proceedings other than court hearings (Art 4(a)(iv)); to an individual assessment (Art 4(b)(i)); to be accompanied by the holder of parental responsibility during court hearings (Art 4(b)(iv)); to appear in person at trial (Art 4(b)(v)); to effective remedies (Art 4(b)(vi)) and to specific treatment during deprivation of liberty (Art 4(1)(c)). Therefore, even if these rights are overall ensured by the Italian legal system, the minor is not previously informed of his entitlement to benefit from them.

7.11. Right to be Present at Trial

See Directive 2016/343, § 6.6.

7.12. Right to Legal Aid

Even before the enactment of the Directive, the Italian legislation was already committed to guaranteeing legal aid to juvenile accused. An initial reference can be found in Art 24 of

[292] See, in this sense, on the applicability to minors of the information duties under Arts. 386 and 293 CCP, BARGIS (2017) 108 and 126-127. On the extension of the informative notices under Arts 369 and 369-*bis* CCP, see CIAMPI (2010) 358-364.

the Constitution, on the right of defence for indigent persons, which does not limit this right to adult defendants only. It will be necessary to specify the conditions under which even juvenile defendants are guaranteed the examined right, but already here it is important to point out that this is not limited to adult defendants. In addition to Art 24 of the Constitution, the Italian legal system has a specific law on legal aid, Decree no. 115/2002 (DPR 115/2002, on which see below, § 8). This provides for an income limit to have access to legal aid, which is constantly updated. In the case of minors, it is necessary to present the family members' tax documents. However, Arts 116 and 118 Decree no. 115/2002 grant an additional margin to minor accused when an office defender is appointed. In these cases, the State advances the costs and fees to the minor's office defender and then has the right to recover the amount paid if the judge establishes that the income limits for admission to legal aid are exceeded. In these cases, therefore, it is the State itself that must take action to verify the existence of the conditions for the restitution of the sums, since the minor or his family members do not have to submit any application for admission to legal aid (on the contrary, in the case of an adult, she must take action to prove the existence of the income requirements for admission to legal aid and in any case to avoid the restitution of any sums paid by the State).

The above-mentioned discipline is a manifestation of the favor minors that is indeed often expressed in the domestic legal system (the same criminal trial for juvenile defendants is characterized by this peculiar feature) and expresses the legislator's will to guarantee the juvenile defendant the widest access to a lawyer.

7.13. Audiovisual Recording of Questioning

No specific transposition of this provision was carried out after the entry into force of the Directive in regard to this significant right of juvenile defendants. The analysis, therefore, takes into account only pre-existing legislation.

In this sense, it is relevant that, until recently, currently no specific provision was established in the Italian legal system requiring the audiovisual recording of questioning of juvenile defendants. According to Art 1, c. 1 Decree no. 448/1988, this would have been one of the cases in which the regulation on juvenile defendants could be integrated by the rules of the criminal procedure code that refers to adult proceedings. However, no CCP provision existed, which made it compulsory the audiovisual recording of the defendant’s statement.

In this regard, therefore, Italian law was not in line with the Directive. The only enforceable obligation was that of recording questioning through the mean of written minutes. Art 20-*bis* Legislative Decree no. 272/1989 provides indeed only for a more traditional recording method, that is ordinary recording obligations. Accordingly, in particular in case of arrest and temporary detention, or where the juvenile, found *in*

flagrantia, is brought to a police station, police shall draw up a report, including also: the identity of the subjects who held the parental authority, of the caregiver (if any), and of the person indicated by the latter to which the child shall be delivered.[293]

Transposition of Art 9 of the Directive in the Italian legal system could therefore be considered partial, as recording was always guaranteed, but not in the most safeguarding form (audiovisual) required by the EU law.

However, a significant improvement in this respect is expected to be brought by the so-called "Riforma Cartabia",[294] a comprehensive reform carried out (also) with concern to the criminal procedure law in light of the EU Recovery Plan. The new legislation explicitly introduces the necessary audio and video recording of the interview of a minor or of a mentally ill or vulnerable person (Art. 373 CCP). Unless there is a technical unavailability and it is not possible to postpone the interview because of urgency reasons, the violation of this rule is sanctioned by an exclusionary rule for the statements released. A mandatory rule (again, unless a technical unavailability occurs) should also be enforced with regard to the statements given to the counsel during defensive investigations (Article 391-ter CCP) by a person that is vulnerable, mentally ill, or a minor. In this latter case, however, only audio recording is requested.

7.14. Timely and Diligent Treatment of Cases

No specific provision exists in the Italian legal system which aims at guaranteeing a speedy trial when it comes to juvenile defendants. Actually, the problem of speedy trials is critical in Italy also with regard to proceedings involving adults and represents an unfortunately common ground for conviction of the Italian State before the Court in Strasbourg.[295]

Lastly, it might be worth mentioning that, alike adults, children may request the application of the so-called special proceedings (*procedimenti speciali*), which may have also the effect of speeding up the treatment of the cause. This, however, is a choice that relies entirely on the defendant and is not specifically designed for cases of juvenile justice.

[293] The report shall also mention the warning provided for in Art 18-*bis*, c. 3 of the same Legislative Decree, that is to [keep the juvenile at the disposal of the judicial authority for the carrying out of the proceeding.
[294] Law no 134 of 27 September 2021, as its delegated decrees.
[295] See, *ex multis*, *Bottazzi v Italy,* 28 July 1999, App. no. 34884/97. See also below, § 9.16.7.

7.15. European Arrest Warrant Proceedings

The entry into force of the Directive did not brought changes to the regulation of EAW proceedings involving juvenile defendants. Consequently, no specific provision can be found in the Law no. 69/2005, that implements in Italy the European Arrest Warrant Framework Decision,[296] with regard to the procedural rights recognized to juvenile defendants.[297]

The clause of Art 1, c. 1 Decree no. 448/1988 combined to that of Art 39, c. 1 Law no. 69/2005 should ensure that the same rights recognized to juvenile defendants in internal proceedings apply also to EAW proceedings. However, this is explicitly so only for those rights which are common to juvenile and adult defendants, listed in Art 6 (right of assistance by a lawyer) and, partially, Art 4 (right to information) of the Directive.

No explicit reference is made, instead, with regard to the rights provided for by Article 5 (Right of the child to have the holder of parental responsibility informed) and 8 (Right to a medical examination) of the Directive. In this regard, the transposition of Directive 2016/800 could be considered partial.

It should also be recalled, though, that at certain conditions juvenile defendants are exempted from surrender through the EAW thanks to a mandatory ground for refusal (see below, Art 18, c. 1, let. i Law 69/2005.

7.16. Remedies

No specific remedy has been introduced in the Italian legal framework to address violations of the rights included in the Directive after its entry into force.

However, to some extent, previously existing legislation already provided for some remedy in case of certain violations of the rights contained in this Directive. This is true, although most of these provisions (all, actually, with the exception of Art 7 Decree no. 448/1988 and the newly reformed Art 373 CCP) are not specifically tailored to juvenile defendants, but rather refer to adults (and are applicable to juvenile defendants in light of the equivalence clause of Art 1 Decree no. 448/1988).

In this regard, it could be considered that Art 19 of the Directive is indirectly but only partially implemented in Italy.

Specifically, remedies are recognized (or not) as follows.

[296] Law no. 69 of 22 April 2005, *Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri.*

[297] With the only exception to the reference to a ground for refusal based on the particularly young age of the arrested person (under 14-year-old), cfr. Art 18, c. 1, let. i) Law no. 69/2005.

7.16.1. Remedies to Violations of Information Rights

Different considerations can be drawn with regard to potential violations of the information rights.

With regard to the right to be informed of: the accusation, of the right to be assisted by the lawyer, of the right to legal aid, of the right to a medical examination, and of the limits of the deprivation of liberty, the applicable remedies are the same established for adult defendants.[298] On the other side, with regard to the right to have the holder of parental responsibility informed of the defendant's: right to privacy, right to be accompanied by holder of parental responsibility, right to be present at trial, right to an effective remedy and right to a specific treatment, no tailored remedy exists. Indeed, as illustrated above,[299] these information rights have not been really implemented by the Italian legislator.

Lastly, no specific remedy exists in case the information rights are provided in a language that, although spoken by the defendant, is substantially not comprehensible by the latter (e.g. because of the precise technical wording, that would require legal expertise to be substantially understood).[300]

7.16.2. Remedies to Violations of Right of Access to a Lawyer

It is worth reminding that, under Italian law, no distinction is made between children and adults when it comes to the right of access to a lawyer *ex* Art 364 CCP. Therefore, remedies concerning this profile are the same provided for adult defendants.[301]

This equivalence clause, however, does not necessarily ensure an adequate level of protection for juvenile defendants. For instance: The national legal system provides for the right to have the lawyer present during questionings performed by the Prosecutor, but the attendance of the lawyer is not mandatory.

As argued above, this regime is in line with Directive 2013/48 for adults;[302] nonetheless, this lower level of protection might be considered as critical when it comes to juvenile defendants.

In particular, this might occur should the protection granted in this regard under Directive 800/2016 be considered as requiring a higher level of protection, specifically making it compulsory for minors to be always assisted by a lawyer. Should this be the case, cases as the prosecutorial interview mentioned above might indeed be seen as not adequate to the

[298] See above, Directive 2012/13, § 4.5.
[299] Id.
[300] Cf. above Directive 2012/13, § 4.2.2.
[301] Cf. above, Directive 2013/48, § 5.11.
[302] Cf. above, Directive 2013/48, § 5.4.

standards of the Directive, and so would be the lack of specific remedies to address such gaps.

7.16.3. Remedies to Violations of Right to an Individual Assessment

The right to an individual assessment is provided for under Italian law in the terms illustrated above,[303] but no specific sanctions are established in case of breaches of such obligations. Regardless, according to some legal scholars, if a measure concerning the child is taken in the course of the proceedings without any individual assessment, the concerned decision may be considered impaired by a nullity of general nature (*nullità generale*) due to the violation of defence rights (cf. Art 178, c. 1, let. c CCP).[304] According to other scholars, such decision should be affected instead by the special nullity referred to in Art 125, c. 3 CCP, due to the violation of the duty to state reasons.[305]

Lastly, no obligation for periodical updates of the individual assessment is provided for by Italian law; therefore, no remedy exists in case such an update is not carried out. Equally lacking is any provision allowing persons holding parental responsibility to require such an assessment.

7.16.4. Remedies to violations of right to a medical examination

As illustrated above,[306] medical examination is provided for as a right under Italian law, but no specific sanctions are established in case of breaches of such obligations. Complaints in this regard cannot therefore be effectively raised within the system. If the breach amounts also to a violation of Article 3 ECHR, a claim could be raised before the Court in Strasbourg.[307]

7.16.5. Remedies to Violations of Right to Audiovisual Recording

For a long time, Italian law did not establish mandatory audiovisual recording of interviews, neither for adult, nor for juvenile defendants. Even in case of detained defendants, Art 141 *bis* CCP only offered a non-mandatory option.[308] The situation is however changed with the implementation of the so-called "Cartabia Reform", which, as illustrated above,

[303] Cf. above, § 7.8.
[304] CAMON and o (2019) 974; PATANÈ (2015), 66. For an explanation of the nullity sanction under Italian law, see above under Directive 2013/48, § 8.
[305] Compare CAMON and o (2019) 974; PATANÈ (2015), 140-141; LANZA (n 28), 470.
[306] Cf. *supra*, § 7.3.
[307] See, for all, HARRIS - O'BOYLE – BATES – BUCKLEY (2018), 265 ff.
[308] VARRASO (1999) 1429-1430.

introduced an explicit exclusionary rule in Art 373 CCP in case of unjustified non-recording of the interviews involving a minor.[309]

7.16.6. Remedies to Violations concerning the Deprivation of Liberty

No specific remedy exists for violations concerning the deprivation of liberty of juvenile defendants. Also in this case, therefore, reference goes to the vast range of remedies provided for adult defendants to challenge the application of pre-trial detentive measures, and namely: the *riesame* (Art 309 CCP) and the appeal before the Supreme court (Art 311 CCP).

7.16.7. Remedies to Violations of Right to a Timely Treatment

As a way to introduce an effective remedy against unreasonable length of the proceedings, in 2001 a dedicated regulation had been introduced, known as *Legge Pinto.*[310] This piece of legislation, available also to juvenile defendants, grants the right to a reparation for damages suffered because of the excessive length of the proceedings. To obtain such reparation, a request shall be submitted to the competent Court of Appeals. Legal scholars, however, have risen several doubts over the capacity of such procedure to really provide an effective remedy, especially with regard to defendant which may be in need of legal aid.[311]

7.16.8. Remedies to Violations of the Right to Privacy

Regardless of a specific prohibition to publish or in any way reveal pictures or identifying information concerning minors involved in criminal proceeding (Art 13 Decree no. 448/1988), no specific remedy has been established in the Italian criminal procedure code to ensure potential violations are effectively remedied.

Violations of Art 13 Decree no. 448/1988 that could entail the criminal liability of the person(s) who disseminated news or pictures identifying the minor without the consent of the holders of parental responsibility, might be however punished in accordance with Art 615-*bis* of the Italian Criminal Code.

7.16.9. Remedies to Violations the Right to be Accompanied by Holder of Parental Responsibility

If the holder of the parental responsibility is not notified of the investigation and of the decree for committal to court hearings (*rinvio a giudizio*), the act in relation to which the notice should have been issued is affected by nullity, in accordance with Arts 178, c. 1, let. c and 180 CCP.

[309] Cf. *supra*, § 7.13.
[310] Law no. 89 of 24 March 2001.
[311] Cf., *e.g.*, BARONE (2020) 1122 ff.

7.16.10. Remedies to Violations of Right to be Present at Trial

As for adults,[312] violations of the right to be present at trial can be raised through the specific remedy of the *rescissione del giudicato*, provided for by Art 629-*bis* CCP. The critical issues raised with regard to this tool, therefore, are applicable also in this context; above all, that the burden of proof imposed on the convicted to activate the remedy excessively restricts the effectiveness of the right to a re-trial.

When it comes to minors, however, the impact on European Arrest Warrant proceedings may be considered as less significant, in light of the already-mentioned mandatory ground for refusal provided for by Art 18, c. 1, let. i Law no. 69/2005.[313]

7.17. BIBLIOGRAPHY

APRILE, Ercole (2017): 'Per i minorenni non opera la preclusione alla sospensione dell'esecuzione delle pene detentive per gravi delitti', *Cass. pen.*, 8, 2737

BARGIS, Marta (2017): 'Procedura penale minorile' (2nd edn, Torino, Giappichelli)

BARONE, Federica (2020): 'La "Legge Pinto" nell'applicazione giurisprudenziale', *Responsabilità Civile e Previdenza*, 4, 1122

BUZZELLI, Silvia (2017): "La disciplina sovranazionale", in M. BARGIS (ed) *Procedura penale minorile* (2nd edn, Torino, Giappichelli)

CAMALDO, Lucio (2016): "Garanzie europee per i minori autori di reato nel procedimento penale: la direttiva 2016/800/UE in relazione alla normativa nazionale", *Cass. pen.*, 4572

CAMON, Alberto – CESARI, Claudia – DANIELE, Marcello – DI BITONTO, Maria Lucia – NEGRI, Daniele – PAULESU, Pier Paolo (2019): 'Fondamenti di procedura penale' (Padova, Cedam)

[312] Cf. above, Directive 343/2016, §§ 6.6-6.7.
[313] See above, § 7.15.

CARACENI, Lina - COPPETTA, Maria Grazia (eds) (2019): 'L'esecuzione delle pene nei confronti dei minorenni' (Torino, Giappichelli)

CARACENI, Lina (2020): 'Tanto tuonò che piovve: incostituzionali gli automatismi ostativi alla concessione delle misure penali di comunità per i condannati minorenni. I riflessi di Corte cost., 6 dicembre 2019, n. 263 sull'assetto complessivo del d. lgs. 2 ottobre 2018 n. 121', *Riv. it. dir. proc. pen.*, 1, 237

CASTROGIOVANNI, Rosalia - SEMINARA, Emma (2019): 'L'intervento educativo e l'organizzazione degli istituti penali per minorenni', in L. CARACENI – M.G. COPPETTA (eds), *L'esecuzione delle pene nei confronti dei minorenni* (Torino, Giappichelli) 245

CIAMPI, Stefano (2010): 'L'informazione dell'indagato nel procedimento penale' (Milano, Giuffrè)

CONTI Andrea (2019): "Le garanzie processuali del minore: un confronto tra l'ordinamento europeo e la disciplina italiana", in *Minorigiustizia*, 2, 96

COPPETTA, Maria Grazia (2017): 'Cade per mano della Corte Costituzionale un altro automatismo esecutivo nei confronti di condannati minorenni', *Giur. cost.*, 2, 906

COPPETTA, Maria Grazia (2019): 'Incostituzionale il regime ostativo alla concessione dei benefici penitenziari ai minorenni: un epilogo annunciato', *Giur. cost.*, 6, 3207

DELVECCHIO, Francesca (2018): 'La sospensione delle pene detentive brevi per imputati minorenni: verso il tramonto degli automatismi legislativi', *Dir. pen. proc.*, 2, 201

DODARO, Giandomenico (2019): 'Nuovo ordinamento penitenziario minorile e fonti sovranazionali. Affinità e divergenze', in L. CARACENI – M.G. COPPETTA (eds), *L'esecuzione delle pene nei confronti dei minorenni*, 95

FILOCAMO, Fulvio (2019): 'Il principio di territorialità dell'esecuzione e l'organizzazione degli istituti penali per minorenni', in L. CARACENI – M.G. COPPETTA (eds), *L'esecuzione delle pene nei confronti dei minorenni*, 275

GIOSTRA, Glauco (2016): 'Dall'Unione europea la prima direttiva sui diritti dei minori indagati o imputati' [18 July 2016] *Il Penalista*, < https://ilpenalista.it/articoli/news/dall-unione-europea-la-prima-direttiva-sui-diritti-dei-minori-indagati-o-imputati> Accessed 1 July 2021

GUAZZALOCA, Bruno (2019): 'La tutela dell'affettività dei minorenni detenuti: la corrispondenza, i colloqui e la novità delle visite prolungate', in L. CARACENI – M.G. COPPETTA (eds), *L'esecuzione delle pene nei confronti dei minorenni*, 299

HARRIS, David - O'BOYLE, Michael - BATES, Ed - BUCKLEY, Carla (2018) 'Law of the European Convention on Human Rights' (4th edn, OUP)

LANZA, Enrico (2020): 'Il processo penale minorile', in A. MANGIONE and A. PULVIRENTI (eds) *La Giustizia Penale Minorile: Formazione, Devianza, Diritto e Processo* (3rd edn, Milano, Giuffrè) 463

PATANÈ, Vania (2015): ʿL'intervento dell'imputato minorenne nelle varie fasi del procedimentoʾ in E. ZAPPALÀ (ed), *La giurisdizione specializzata nella giustizia penale minorile* (Torino, Giappichelli), 59

PATANÈ, Vania (2016): ʿAccertamenti sulla personalità del minorenneʾ in G. GIOSTRA (ed), *Il processo penale minorile* (4th edn, Milano, Giuffrè) 133

RAP, Stephanie - ZLOTNIK, Daniella (2018): 'The right to legal and other appropriate assistance for child suspects and accused', *European Journal of Crime, Criminal Law and Criminal Justice*, 26, 110

VARRASO, Gianluca (1999): 'Interrogatorio in vinculis dell'imputato: tra istanze di difesa, esigenze di garanzia, ragioni di accertamento', *Riv. it. dir. proc. pen*, 1387

8 Directive (EU) 2016/1919: Legal Aid*

8.1 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,[314] 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").[315] 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.[316]

8.2 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

* The drafting of the report for Directive 2016/1919 is broken down as follows: Antonio Pugliese is the author of §§ 8.1 to 8.7 and 8.10; Giulia Lasagni is the author of §§ 8.8 and 8.9.

[314] Which constitutes a supplementary act with respect to what is contained in Directives EU/2013/48 and EU/2016/800, cf. CRAS (2017), 35 ff; see also Council Resolution concerning a *Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings*, in OJ C 295, 14.12.2009; for the practical footprint, see also FT-Toolkit-on-Legal-Aid-Directive.pdf (fairtrials.org). The Directive in question, for its part, completes a course of action begun with the Commission's Green Paper "Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union", of 19.02.2003, available at Microsoft Word - en 75-3.doc (europa.eu).

[315] Legislative Decree of 7 March 2019, no. 24: "Attuazione della direttiva (UE) 2016/1919 del Parlamento europeo e del Consiglio, del 26 ottobre 2016, sull'ammissione al patrocinio a spese dello Stato per indagati e imputati nell'ambito di procedimenti penali e per le persone ricercate nell'ambito di procedimenti di esecuzione del mandato d'arresto europeo".

[316] DRI (2019), 1209 ff; CAMALDO (2016); VIGONI (2017), 224 ff; POSTIGLIONE (2017); CANESTRINI (2017), 839 ff.

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.

8.3 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 her should emerge. From that moment on, the person is warned of the possibility that investigations may be carried out against 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.

8.4 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.[317]

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

8.5 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 11.746,68. 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.[318]

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.[319]

[317] On which see below, § 8.10.

[318] In accordance with Art 76, DPR 115/2002.

[319] Cass., Sez. Un., no.14723, 19.12.2019, where it is affirmed that on the subject of legal aid, the falsity or

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 she has undergone a significant and supervening decrease of income, such as to bring it, in practice below the income threshold established by the law.[320]

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 ultra-valence 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,[321] 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.[322]

8.6 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.

incompleteness of the declaration in lieu of certification provided for by Art 79, paragraph 1, letter c), DPR 15/2002, does not entail, if the actual income does not exceed the legal limit, the revocation of the admission to legal aid, which can only be ordered in the cases expressly governed by Arts 95 and 112 DPR 115/2002.

[320] Cass., sez. IV, no. 37007, 10.04.2019, ECLI:IT:CASS:2019:37007PEN.

[321] The Surveillance Court is competent to hear questions relating specifically to the enforcement of the sentence. Established by Law 354 of 26 July 1975, it deals with the granting and revocation of alternative measures or penalties to detention in prison.

[322] Cass., sez. IV, no. 13152, 19.03.2019, ECLI:IT:CASS:2019:13152PEN.

8.7 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.

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.

8.8 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.[323]

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 counselors 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).

[323] Cf. HEARD e SHAEFFER (2011), 270 ff; GRISONICH (2019), 213 ff.

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.
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, she 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.[324]
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 she possesses sufficient expertise, at least two-years professional working-time and had not been targeted before by disciplinary sanctions[325] 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*,[326] and not specifically to provide legal aid services. Also in this sense, therefore, the implementation of the Directive in this regard is deficient.

[324] See also GRISONICH (2019), 227 ff.
[325] In accordance with Art 91, DPR 115/2002.
[326] Cf. Art 16, Law of 31 December 2012, no. 247 defining the regime applicable to the legal profession (*Nuova disciplina dell'ordinamento della professione forense*), and the subsequent Legislative Decree of 30 January 2015, no. 6, as well as the National Bar Counsel, *Regolamento per la tenuta e l'aggiornamento dell'elenco unico nazionale degli avvocati iscritti negli albi disponibili ad assumere le difese di ufficio* of 12.07.2019, as amended on 20.03.2020.

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 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 herself fulfils the condition to access to that service). The same goes for the potential replacement of the defence lawyer.[327]
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.

8.9 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

[327] Cf. Art 96 ff CCP.

claims has the right not to pay for legal costs, therefore, risks not to be able to afford to concretely exercise this remedy.[328]
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.[329] Waiting for the Court of Justice to take a clear position on the matter,[330] the Italian legal system does not therefore raise transposition issues with regard to this profile.

8.10 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,[331] access to legal aid service is subject to a mean test, i.e. income threshold. In case of minors,[332] 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 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).[333]

[328] Cf., among others, GRISONICH (2019), 229; PELOSO (2016), 92.
[329] Cf., most recently, ECtHR, *Umoru v. Italy*, App. no. 37442/19, § 43.
[330] The notion of effective remedy has not yet been addressed by the Court with regard to the criminal law matter.
[331] Cf. § 8.5.
[332] Cf. above, Directive 2016/800, § 7.12.
[333] Cf. Art 118, DPR 115/2002.

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.[334]
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,[335] 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.[336]

8.11 BIBLIOGRAPHY

CAMALDO, Lucio (2016): "La direttiva 2016/1919/UE sul gratuito patrocinio completa il quadro europeo delle garanzie difensive nei procedimenti penali", *Dir. pen. cont*.

CANESTRINI, Nicola (2017): "La direttiva sull'ammissione al patrocinio a spese dello stato per indagati e imputati nell'ambito di procedimenti penali e per le persone ricercate nell'ambito di procedimenti di esecuzione del mandato d'arresto europeo"*, Cass. Pen*., 2, 839

CRAS, Steven (2017): "The Directive on the Right to Legal Aid in Criminal and EAW Proceedings. Genesis and Description of the Sixth Instrument of the 2009 Roadmap", *Eucrim*, 1, 34-45

[334] Cf. Art 76, c. 4-*quater*, DPR 115/2002.
[335] Cf. § 8.5 and Constitutional Court, no. 1 of 11.01.2021, ECLI:IT:COST:2021:1.
[336] Art 76(4ter) of DPR 115/2002 contains a favourable provision for the victims of certain crimes. These are, to simplify, crimes that are also felt by the community to be particularly alarming. One example is sexual violence or ill-treatment within family contexts. Here, the legislator has adopted a criminal policy choice aimed at encouraging effective recourse to the courts by those who are victims of one of the crimes listed in Article 76(4ter). In fact, at least some of these offences are characterised by the imposition of a state of perpetual subjugation of the victim (think of ill-treatment in the family), or capable of producing a state of closure or even of deep shame (think of sex crimes). This was recently affirmed by the Constitutional Court, in its judgment no. 1/2021, which noted that the special vulnerability of the offenders of the offences taken into consideration by Art 76(4ter) "is based on significant experience and countless victimological studies (...) for what is stated here, the benefit is not linked to a presumption of lack of wealth of the persons affected by the offences indicated by the provision (...) and has quite other justifications". For these persons, the Italian legal system guarantees admission to legal aid regardless of income requirements.

DIPAOLA, Laura (2016): *Difesa d'ufficio e patrocinio dei non abbienti nel processo penale* (Milano, Giuffrè, 3a ed.)

DRI, Francesca (2019): "Vizi e virtù dell'attuazione della Direttiva 2016/1919/UE sul patrocinio a spese dello Stato: una prima lettura", *Processo penale e giustizia*, 5, 1209

GRISONICH, Elisa (2019): "L'attuazione della direttiva 2016/1919/UE: un timido intervento in materia di patrocinio a spese dello Stato", *Dir. pen. cont.*, 5

HEARD, Catherine e SHAEFFER, Rebecca (2011): "Making Defence Rights Practical and Effective: Towards an EU Directive on the Right to Legal Advice", *NJECL*, 2, 3, 270-281

PELOSO, Caroline (2017): "L'approvazione della direttiva 2016/1919 sul patrocinio a spese dello Stato: la battuta finale nel cammino verso la mappatura dei diritti procedurali fondamentali", *www.lagislazionepenale.eu*, 1-30

POSTIGLIONE, Miriam (2017): "Verso un effettivo diritto al patrocinio a spese dello Stato", in *www.eurojus.it*

VIGONI, Daniela (2017): "Novità sovranazionali. La direttiva (UE) 2016/1919 in materia di patrocinio a spese dello Stato", *Proc. pen. giust.,* 2, 224