Report on the Implementation of Directive 2013/48/EU on the Right of Access to a Lawyer in Criminal Proceedings Italy

Federica Brioschi, Carolina Antonucci

PART ONE

Introduction

On 16 November 2016, the deadline passed for the transposition into national law of the *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 [hereafter the Directive on the Right of Access to a Lawyer]*. By this date, all Member States were required to bring into force all laws, regulations and administrative provisions necessary to comply with this Directive. States should have transmitted the text of any legal measures to the European Commission, but many have not yet done so. Even when States have purported to transpose the Directive into law, this does not mean they have ensured actual implementation in practice.

This research aims to assess whether States have effectively transposed and implemented the Directive. It deeply monitors implementation and analyses whether the rights in the Directives have become a proper part of national practices.

The research has been carried out in Bulgaria, Cyrus, Hungary, Italy, Poland, Romania, Slovenia and Spain.

The adoption of EU Directives on criminal justice is a tremendously significant development, setting new norms for the rights of suspects and defendants across the EU. We hope, with the production of this research, to help support the EU Commission and the individual Member States to better understand the state of implementation in practice, and to highlight good practices and challenges in implementation.

Methodology

Country teams have used a standardized methodology to gather data and assess States' compliance with the requirements of the Directive. A comprehensive Monitoring Tool which was previously developed based on a three-stage research approach was updated and revised prior to the conduct of the research to facilitate a streamlined research approach. As with research on other directives carried out by the JUSTICIA Network, each level of analysis produced a traffic-light compliance grading. This multi-level methodology allows an assessment of both *de jure* and *de facto* implementation of the Directive to give an in-depth view of the situation in country.

Level One: The first level of analysis looked at *de jure*, structural components of the implementation of the Directive and involved desk-based analysis of relevant legal documents: the Member States' Constitution, statutes, executive orders and any associated Codes of Practice and relevant case law where case law has the power of precedent.

Level Two: This level of analysis included a survey completed by a sample of criminal defence lawyers. The Level 2 survey assesses how the law is applied in everyday practice.

Level Three: The final level of analysis is a more nuanced review of certain aspects of the Directive's implementation. This analysis was only used where standards contained within the Directive were identified as not being met, or being partially met through Levels 1 and 2 analysis. Level 3 utilised semi-structured open-ended questions of police and other officers involved in criminal proceedings, as well as lawyers and/or suspects.

The Monitoring Tool is based on a set of 28 indicators defined under 6 Standards that correspond to the regulations contained in the Directive. Each of the indicators was assessed separately through the research, with compliance being gauged largely from Level 1 and 2 analysis, with Level 3 providing an opportunity for a more nuanced understanding of particular gaps or failings in practice.
Each country is scored on their compliance with each of the 28 indicators, and these scores are calculated to give the country a final grade as to whether they have implemented, partially implemented, or failed to implement the Directive.

PART TWO

Background and Legal Context

The Italian Constitution protects the right of the person accused of a crime to be defended by a lawyer (art. 24, c.2 of the Constitution), and the freedom and secrecy of communication (art. 15 of the Constitution). The principle of fair trial is prescribed by article 111 of the Constitution, which says that the person accused of a crime has to be promptly informed of his rights and that faculties granted by the law in order to prepare his defence and inform family members as to his deprivation of liberty. As it will be later explained, the procedural code grants these rights to both suspects and accused[1] *ex* article 61 of the Code of Criminal Procedure (hereinafter c.p.p.). This article extends the rights and guarantees of the accused to the person who is undergoing preliminary investigations (c.1) unless it is otherwise prescribed. Article 335 c.p.p. defines the term "suspect" (indagato) as the person that the prosecutor places in the register of the indicted along with the crime of which he is accused (c.1).

Italian criminal legislation has an inquisitorial tradition, but since 1988 is modeled on an adversarial system, adopted with the c.p.p.. There is a distinction between investigation and trial phase, reflected

[1] Article 60 c.p.p. gives the definition of accused person (imputato), which is the person who is indicated as accused of a said crime by the public prosecutor when filing the motion to start a criminal proceeding, the motion of immediate judgement, of penal sentence, of application of the penal sanction (…).

by the "double dossier system", one for evidences collected during investigation to be used from the parties during the trial, and one for evidences collected by the judge during questioning at the trial.
Nevertheless, due to following amendments on the code and as far as the practice is concerned, the Italian penal system is mixed, thus presenting both elements of the inquisitorial tradition and elements of the adversarial one. The prosecutor interrogates the suspect in order to find elements showing whether the investigation must be pursued. Nonetheless once before the judge the matter is entirely re-examined.
Directive 2013/48/EU 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 has been implemented in Italy through the Legislative Decree 184/2016, entered into force on the 18th of October 2016 (the deadline was 27th November).
It is important to note that the Legislative Decree is composed of merely five articles and it amends the existing legislation: the Code of Criminal Procedure of 1988. As the Decree modifies only a few articles of the Code, it is possible to infer that the Legislator has considered the Italian law as already abiding by the rights that the Directive sets.
In particular, Article 1 of the Decree gives the background information regarding the implementation of the Directive and Article 5 only contains a clause that guarantees that the provisions will not result is any further expenses for the State finances. Also, Article 4 modifies Law N. 69 of 2005 that concerns the European Arrest Warrant (hereinafter EAW) and Article 3 extends the possibility to appoint an *ex officio* lawyer to person arrested under the EAW. It is only Article 2 of the Decree that amends Article 364 c.p.p. that regards the appointment and role of the defense lawyers.
The sources of the right to legal assistance are the Code of Criminal Procedure art. 386, Legislative Decree 101/2014 (application of Directive 2012/13/EU) and Legislative Decree 184/2016 with which Directive 2013/48/UE has been applied, with an amendment of the code of criminal procedure. Artt. 96 and 178 c.p.p. also apply, as well as legislative decree 184/2016, for the enforcement of directive 2013/48/UE and amendment of the code of criminal procedure.
With regard to the Italian system, it is important to point out that there is a substantial difference between a person who is suspected or accused of having committed a crime but is not subjected to a precautionary measure and a person who is suspected or accused of having committed a crime and is also deprived of liberty. The second option takes place in the cases prescribed *ex* artt. 380, 381 and 384 c.p.p.. According to these articles, there are three kinds of arrest, leading to police detention: mandatory (art. 380 c.p.p), for persons caught in flagrancy[2] of a crime which can be punished with a sentence over 5 years; facultative (art. 381 c.p.p.), for persons caught in flagrancy of a crime that can be punished with a sentence up to three years; with an arrest warrant, explaining the reasons for the provision .

Article 384 c.p.p. allows the arrest in specific cases: impossibility to identify the suspect, risk of escape of the suspect, involvement of explosives or weapons of wars, crimes related to terrorism (also international), subversion of democratic order. In these situations the police forces can arrest the suspected person without the authorization of the public prosecutor. In all the other cases that don't fall under these articles the prosecutor has to issue an arrest warrant in order to deprive of liberty an individual.
In both cases (stop and arrest), the detention must be confirmed as soon as the validation hearing is in place (at latest 96 hours after the arrest).
When an individual is arrested, the police has to follow the procedures prescribed by article 386 c.p.p.. First of all, the public prosecutor is informed of the arrest (*habeas corpus ex* art. 13 of the Italian Constitution), secondly the suspect is informed of the faculty to appoint a legal counsel as provided by article 96 c.p.p. (this information is given through the Letter of Rights, that enlists all the

[2] The meaning of "flagrancy" is explained by the art. 382 c.p.p..

other relevant rights as well). If the arrested person doesn't have a lawyer or the lawyer can't be reached, art. 97 c.p.p. provides for the *ex officio* lawyer to step in and provide legal assistance to the arrested. The right to a lawyer is absolute and cannot be waived. There are no exceptions (even criminal lawyers have to have a lawyer if they are accused of a crime). The right to be assisted by a lawyer is constitutional: it is prescribed by artt. 3 and 4 of the Constitution and by artt. 386, 364, 96, 97 and 678 of the c.p.p.. When a suspect is not informed about his right to have a defendant, any information obtained from him is not valid to be used in a trial (art. 350, c.6 and 7 c.p.p.).

Once counsel has been appointed, the accused has an absolute right to meet their lawyer at any time, as for art. 104 c.p.p. modified by legislative decree 32/2014 enacting directive 2010/64. In particular, the Code provides for a full right of access by counsel to an accused who is detained during the proceedings. Therefore, the lawyer is entitled to have immediate access to the place of custody, as for art. 36 disp.att.c.p.p. The application of the directive also introduced the suspects' right to linguistic assistance when speaking to their defenders. Art. 104 c.p.p. also regulates the communication between the suspect and his lawyer: the arrested person has the right to meet his lawyer both right after the arrest and as soon as the pre-trial detention has started. The right to communicate with the lawyer can be suspended for up to 5 days upon specific decision by the judge, if the prosecutor finds that there are specific and exceptional circumstances (e.g. there is the risk that the investigation may be jeopardized) occur for doing so (art. 104 c. 3). The law does not indicate the exact circumstances and limits for the suspension of this right, which represents a compression of the right of the accused. The doctrine and the jurisprudence indicate as possible circumstances of applicability of this suspension the cases regarding organized crime and terrorism. It is also important to underline that, as the exact circumstances of suspension are not indicated in the law, the doctrine expresses concerns regarding the theoretical possibility of suspension in all cases. On the other hand, the jurisprudence (Cass. pen., Sez. I, n. 1806 of 1992) has established that the social dangerousness of the accused is not a sufficient reason to grant the suspension of this right.

Ex art 386, the police has the duty to inform the appointed lawyer or the lawyer of the arrest and to inform him/her about the accusations against suspect (who also has to receive this piece of information). The Code also sets out the statutory limit for police detention in 96 hours at most, divided as following:

- within 24 hours after the arrest the police must inform the public prosecutor of the arrest, as well as a legal representative for the arrested person. The police has to provide to public prosecutor with the report of the arrest, which has to contain the confirmation of the appointment of a lawyer, the reasons, date and time of the arrest;
- within the following 24 hours, the prosecutor must request a judge to validate the arrest;
- within the following 48 hours, the judge must have endorsed the validation of the arrest, namely must have conducted the validation hearing.

Artt. 386 and 387 c.p.p. set out the chance for arrested persons (if they wish) to inform third parties about the arrest, namely their relatives and/or consular authorities. This is a right of which all suspects are informed in writing and orally immediately after the arrest through the Letter of Right[3]. When the

[3] The introduction of the Letter of Rights in the italian system is set forth by art. 1, c.1, lett. e) of the Legislative Decree n. 101/2014 which implements the Directive 2012/13/EU on the Right to Information in Criminal Proceedings. The art. 1, c. 1, lett. e). The Decree has modified the art. 386 c.p.p. also with the provision of an exception: art. 386, c. 1-*bis*, thereof that when the Letter of Rights is not available in a language that the suspect understands, the communication of his/her rights can take place orally.

arrest involves a minor, though, informing parents or the closest relatives is mandatory, regardless of the suspect's will[4].

The right to inform consular authorities or relatives is contained in art. 386. c. 1, lett. f) c.p.p.[5]: the suspect can request the police to contact relatives or representatives of consular authorities; usually the suspects are not allowed to make the phone call themselves. Informing relatives is mandatory for police forces if the suspects or arrested persons are minors.
In the Italian law there is no provision for a right to be released on bail or on some similar conditions.

When arrested or stopped, the suspect can be questioned at the presence of his/her lawyer by the prosecutor (*ex* art 388 c.p.p.), who can delegate the police to carry out the interrogatory *ex* art. 370 c. 1. In many cases the interrogatory by the prosecutor, being not compulsory, does not take place at all. What is mandatory is that the arrested person must be heard by the judge within 96 hours from the arrest, in the presence of his/her lawyer.
The judge is in charge of the decision of validating the arrest, thus prolonging detention, or release the suspect (art. 390 c.p.p.). The decision on the deprivation of liberty is taken by the judge through the validating hearing during which the lawyer of the accused has to be present (art. 390, c.1, c.p.p.), as no hearing can take place without the presence of a defence lawyer. During the hearing the judge has to verify that the Letter of Rights was indeed given to the suspect *ex* art. 390, c.2, c.p.p.[6].

In case of arrest in flagrancy, the prosecutor can decide to proceed with a judgement called *giudizio direttissimo* (titolo III, libro VI c.p.p. article 449-452). After the arrest in flagrancy and within 48 hours from the arrest, the validation hearing and the judgement (that takes place immediately afterwards) have to be carried out (c.1). If the arrest is not validated, the judgement doesn't take place (c.2). If the arrest is validated, the judgement is carried out (c.3).

If there is no necessity to proceed with the arrest of the suspect, the appointment of a lawyer takes place when the individual assumes the status of suspect. This can happen in two cases. In the first case, upon the questioning by the prosecutor of the individual as a witness, the latter reveals elements that makes him a suspect. In this case the prosecutor has to suspend the questioning and inform the individual of his right of legal assistance and immediately proceed to the appointment of a lawyer (art. 63, c. 1 c.p.p.)[7]. The second case takes place when an investigation carried out by police forces leads to an individual. In this case the individual is listed in a register (registro degli indagati) thus assuming the status of suspect and the right to appoint a lawyer. When the individual is listed in the register, he/she receives a notification (informazione di garanzia) that lists his/her rights, including the right to appoint a lawyer. The appointment of a counsel follows artt. 96 and 97 c.p.p.. As in case of an arrested

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[4] The legal source that regulates the arrest and stop of a minor is the Code of Criminal Procedure for Minors D.P.R. n. 448/1988. Artt. 18 and 18 bis c.p.p.min. (D.P.R. n.448/1988) set out "Provisions in case of arrest or halt of a minor". According to these, officers and police agents who performed the arrest or halt of the minor have to immediately inform the public prosecutor and who exercises parental authority or potential carer. Judicial administration's juvenile social care also needs to be informed promptly. The maximum age to be regarded as a minor in criminal proceedings is eighteen years old. The regulations mentioned above make sure that every relevant phase of the proceeding is notified to the minor and to his parents or carer, in order for them to provide psychological and emotional support to the minor. Therefore, they will receive: notice of investigation; notice of the end of preliminary investigation; notice of the setting of preliminary hearing and of indictment.

[5] As modified by the art. 1, c.1, lett. e) of the Legislative Decree n. 101/2014 which implements the Directive 2012/13/EU.

[6] As modified by the art. 1, c.1, lett. f) of the Legislative Decree n. 101/2014 which implements the Directive 2012/13/EU.

[7] It is important to note that at times there are cases in which an individual is called to be questioned as a witness even if the prosecutor already has elements to accuse him/her. This stratagem is used to induce the individual to spontaneously present himself to the place of questioning. In this case, as he/she should have been considered a suspect since the very beginning of the questioning, none of the information extracted during his/her questioning can be used *ex* art 63 c. 2.

person, the lawyer can be appointed by the suspect, if he has a trusted one, or by the prosecutor *ex officio*; he will then communicate their name to the suspect. The duties of the lawyer appointed by the prosecutor, by the police or by the judge, cease if and when the accused instructs their own lawyer. As the suspect is not deprived of liberty, the access to a legal assistance is easier because there are no obstacles to the exercise of his rights as guaranteed by articles 96 to 108 c.p.p.. The lawyer appointed *ex officio* has the same powers, rights and duties as one appointed by the accused. In general no influence is exerted by the police or by the prosecutor on the work of the lawyer appointed *ex officio.* The lawyer is formally appointed by the judicial authority, from a list prepared in advance by the bar association. Some interviewees have pointed out that it may happen, that the lawyer appointed by the prosecutor, the police or the judge is not, in practice, as strongly motivated as one appointed by the defendant.
Article 98 c.p.p. also establishes that the accused and can ask to be admitted to benefit from legal aid according to the norms that regulate it. D.P.R. n.115 of 30 may 2002, which (among other things) regulates the expenses of the State regarding legal aid, establishes that legal aid is granted to all persons (citizens, foreigners and stateless) that have an income lower than 11500 euro. It is possible to benefit from legal aid during all phases of the proceedings.

Even if it is not possible to waive the right of legal representation, the suspect is entitled to repeal his lawyer whenever he does not trust him anymore, even in those cases when the suspect avail himself of free legal aid at the State's expenses because of his financial situation (art. 107 c. 4 c.p.p.). In this case, the repeal of a defender and the appointment of a new one need to be authorised by the judge, as for law 134/2001, that provides for the recourse to free legal aid. A missing or late notification to the trusted defensor of the exercise of the right to repeal and change lawyer causes, according to the jurisprudence, an invalidity as for art. 178, par. 1 lett. c) c.p.p.. This can be rectified by the suspect in vinculis if he waives to the lawyer to whom notification had not been presented and opts for the appointment of a defender ex officio.

European Arrest Warrant

Art. 29 c.p.p. (amended by art. 3 legislative decree A.G. 317) regulates the lists and registers of counsels ex officio, so as to provide for the availability of defenders who can assist detainees or arrested persons abroad in case of execution of a european arrest warrant as far as an active procedure for delivery is in place. The legal service is organised in shifts by the competent Bar association. The purpose of this provision is to facilitate the timely appointment of a defender to assist the one appointed in the State of execution.
Access to the lawyer under national law is regulated by Law n. 69 of the 22nd of April 2005, that enforced the framework decision 2002/584/GAI in national legislation, and by legislative decree 184/2016 for the implementation of the directive 2013/48.
The person subject to EAW needs to be timely informed about his right to appoint a lawyer in the issuing Member State as well; the methods and procedures of information about the accusation are those prescribed by general provisions on the matter as set out in art. 61 c.p.p. (rights and guarantees during preliminary investigations, linked to art.355 c.p.p. about the entry in the suspects' register).
As for lawyers working separately in Member States issuing and executing the EAW, the new provisions enacted by the decree following the directive modified artt. 9 and 12 of Law n.69/2005, related to the European Arrest Warrant and delivery procedures among Member States. Par. 5-bis has been added to art. 9: it ensures that the suspect under EAW is informed about his right to appoint a counsel in the Member State issuing the warrant too, whose role is to assist the appointed defender in the Member State that is executing the warrant, by providing him with useful information and consultancy with the aim of ensuring the exercise of the rights of the suspect.

According to the law, the authority of the issuing Member State, after notified of the suspect's will to appoint a defender in the proceedings that led to the issue of the EAW, provides every information needed for the purpose of making such right effective. The same notification is given to the person requested for arrest when the deprivation of liberty happens based on the court order by the Court of Appeal as for art. 9, law 69/2005.
Art. 387 del c.p.p. sets out the chance for arrested persons to inform third parties about the arrest, namely their relatives and/or consular authorities. This is a right of which all suspects are informed in writing and orally immediately after the arrest, through the Letter of Rights that enlists all the other relevant rights as well. The right to communicate with third parties can be limited or postponed if justified by referring to "mandatory exigencies".

Article 4 of Legislative Decree 184/2016 modifies Articles 9 and 12 of Law N. 69 of 2005 that concerns the European Arrest Warrant and Article 3 extends the possibility to appoint an ex officio lawyer to person arrested under the EAW. The Decree adds to Article 9, paragraph 5bis, and to Article 12, paragraph 1bis, that regard the notification of the right to legal assistance.

PART THREE

Implementation of the Directive

According to the doctrine, the law of criminal procedure regulates the proceedings that have the aim to verify whether a criminal offense was committed, whether the accused is the author, and, if this is the case, which punishments he/she should be subjected to.

An individual is regarded as a suspect when he receives the notification (informazione di garanzia set forth by artt. 369 c.p.p. and 369-bis as modified by art. 1, c.1, lett. d) of the Legislative Decree n. 101/2014 which implements the Directive 2012/13/EU) that he was listed in the register of suspects (registro degli indagati). Another way to be regarded as a suspect is from the moment of the arrest in flagrancy *ex* artt. 380 and 381 c.p.p. or as a consequence of the arrest carried out upon the initiative of the police forces in the cases set forth by art. 384 c.p.p.. Moreover, if an individual is questioned by the prosecutor as a witness, and he reveals elements that makes him a suspect, the prosecutor has to suspend the questioning, notify the individual that he has revealed information that make him a suspect, inform him of his right of legal assistance and immediately proceed to the appointment of a lawyer (art. 63, c. 1 c.p.p.).

An individual is regarded as accused of having committed a crime when the preliminary investigations are closed and the criminal proceeding is opened by the prosecutor ex art 405 c.p.p..

Standard 1: The right of access to a lawyer in criminal proceedings

Indicator 1.1: *Suspects or accused persons have access to a lawyer before they are questioned by police, other law enforcement or judicial authority.*	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	**100**

Article 24 c.2 of the Italian Constitution establishes that the right to legal defence cannot be violated at any stage of the criminal proceeding.

The law of criminal procedure formally recognizes the full guarantee of the right of suspects or accused persons to access to legal assistance.

Article 60 c.p.p. gives the definition of accused person (imputato), which is the person who is indicated as accused of a said crime by the public prosecutor when filing the motion to start a criminal proceeding, the motion of immediate judgement, of penal sentence, of application of the penal sanction (…).

Article 61 c.p.p. extends the rights and guarantees of the accused to the person who is undergoing preliminary investigations (c.1) unless it is otherwise prescribed. Article 335 c.p.p. defines the term "suspect" (indagato) as the person that the prosecutor places in the register of the indicted along with the crime of which he is accused (c.1).

The questioning is regulated by the artt. 62, 63 and 64 c.p.p.. The last article lays down the general rules of the questioning and guarantees the protection of the rights of the person who is being questioned. It forbids to resort to violence and to any treatment that might influence on the liberty of self-determination of the person (c.2). Art. 65 c.p.p. rules a specific kind of questioning (Interrogatorio nel merito): the judicial authority informs the person undergoing the investigation about the crime that he is suspected of having committed, about the proofs against him and their source, if this can be done without causing a prejudice for the investigation (c.1).

Art. 350 c.p.p. established that the suspect or accused has the right to: appoint a lawyer before police forces collect general information on the individual or on the facts (c. 2) and to be assisted by the lawyer - whose presence is obligatory - upon giving these general information (c. 3). The police cannot proceed to the acquisition of these information without the presence of the lawyer of the suspect. If the suspect or accused doesn't have a trusted lawyer or he is momentarily unable to attend his client, the police proceeds with the appointment of an *ex officio* lawyer *ex* article 97 c.4, (c.4). There is only one derogation that can be done to this rule, which is when the police has to carry out the collection of general information on the individual or on the facts in the place where they happened or as soon as possible after the event has taken place (c.5). In this case the lawyer can be absent; however, any information or document collected cannot be used during the proceedings. Even though paragraph 5 of article 350 seems to represent a shortcoming of the Directive, it is important to remember that Paragraph 20 of the preamble of Directive 2013/48/EU establishes that "for the

purposes of this Directive, questioning does not include preliminary questioning by the police or by another law enforcement authority the purpose of which is to identify the person concerned, to verify the possession of weapons or other similar safety issues or to determine whether an investigation should be started, for example in the course of a road-side check, or during regular random checks when a suspect or accused person has not yet been identified".

Article 386 c.p.p. establishes that at the moment of the arrest, police forces have to promptly inform - through the Letter of Rights - the arrested person of his right to appoint a trusted defendant (c.1, 1-bis). The lawyer is also promptly informed by the police of the arrest (c.2).

Article 294 c.p.p. provides time-limits regarding the questioning of the suspect. In particular, paragraph 1 establishes that if the judge has validated the arrest of a suspect without questioning him at the validation hearing, he has to question the suspect deprived of liberty (and held in prison) immediately and no more than five days after the beginning of the deprivation of liberty. Article 1*bis* establishes that if a person is undergoing another measure of deprivation of liberty (e.g. house arrest), the questioning has to take place no more than ten days after the beginning of the deprivation of liberty. Finally Article 1ter establishes that the person deprived of liberty has to be questioned within 48 hours if the prosecutor requests so upon filing the request for the deprivation of liberty. All these questioning cannot take place without the presence of the lawyer of the suspect.

From the legal analysis of Italian law, it is possible to affirm that this point of the Directive is fully implemented.

For these reasons the score for the Legal transposition is 2.

The lawyers that we interviewed confirm that the right to access to a lawyer is guaranteed in all cases and only one lawyer indicates the option "yes in the majority of cases", which does not influence the result of the survey. All the arrested people that we interviewed affirm that they had the right to access a lawyer. Only one person reports that, even though the access was guaranteed, her trusted lawyer was not contacted.

For this reason the score for the Practical Implementation is 2.

Indicator 1.2 *Suspects or accused persons have the right for their lawyer to attend (as a minimum) the following evidence-gathering or investigative acts undertaken by the authorities: at identity parades, at confrontations, at reconstructions of the scene of a crime.*	
Legal transposition score	2
Practical implementation score	1
OVERALL SCORE	**75%**

An identity parade is prescribed by articles 213 and 214 c.p.p. (ricognizione di persone) and article 361 c.p.p. (individuazione di persone). Article 214 c.p.p. prescribes that the written recording (verbale) of the identity parade records the way the act was carried out. If this is not done, the act loses its validity. The judge can also order that the identity parade be documented with photos, videos

or other instruments. Confrontations take place following articles 211 and 212 c.p.p. and involve the (contrasting) declarations that were previously given by two subjects; the judge reads the declarations of the two subjects and invites them to confirm or modify them.
Before the Directive, Article 361 c.p.p. did not include the right to be assisted by a lawyer during the identity parade; therefore, Decree Law n.184 of 2016, which gave effect to the Directive, modified this shortcoming. The Decree modified article 364 c.p.p. (that regulates the appointment and presence of the defence lawyer) providing his presence also during identity parades. The presence of the lawyer was already guaranteed at questionings, inspections, and confrontations.
Furthermore article 364 prescribes: at paragraph 2 that the person without a trusted lawyer is given an *ex officio lawyer*; at paragraph 3 that the lawyer is informed at least 24 hours before that the acts indicated at the first paragraph (see above) will be carried out; at paragraph 4 that the lawyer has the right to participate to the personal inspection only if he can immediately reach his client; at paragraph 5 are listed all exceptions, which are all cases of urgency, and all cases when there is a well-founded reason that proofs might be tampered. The prosecutor has to indicate the motivation for the application of paragraph 5.

The reconstruction of a crime scene is identified with articles 218 and 219 c.p.p.. It aims to the reproduction of a particular event in order to show if it could have happened in a particular way. The accused takes part to this particular act with his defendant. Article 364 c.p.p. already gave the right to the lawyer to take part to the perquisition, to the acquisition of documents or correspondence, to the reconstruction of the crime scene and to the seizure; however, he did not have the right to be informed prior to the act. This shortcoming can be overcome through article 114 of the law that implements the Code of Criminal Procedure, that prescribes that the police has to inform the person undergoing the investigation of her right to be assisted by a lawyer while carrying out this act.

For these reasons the score for the Legal transposition is 2.

The lawyers that we interviewed report that they usually attend confrontations because it is an act that takes place at the presence of the judge. In the case of the reconstruction of the crime scene, even if it is an act that is ordered by the judge, there are some lawyers that participate and other that don't. In the case of identity parades, as they are acts that take place in front of the police and, as the suspected or accused person is a passive subject in the procedure, the presence of the lawyer is not perceived as mandatory.

With regard to the arrested people that we interviewed, they didn't participate to any of these acts, therefore, we can't take in consideration their answers.

For this reason the score for the Practical Implementation is 1.

Indicator 1.3: *Suspects or accused persons have access to a lawyer without undue delay after deprivation of liberty.*	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	**100**

Article 386 c.p.p., (modified by art. 1, c.1, lett. e) of the Legislative Decree n. 101/2014 which implements the Directive 2012/13/EU), concerns the duties of the police in case of stop or arrest. Paragraph 1 prescribes that the police who executed the stop or arrest or was handed the arrested person, gives him the Letter of Rights, which has to be written and translated in language understandable for the arrested or stopped person. This written communication contains the following information: a) the right to appoint a trusted lawyer and the right to benefit from legal aid in the cases provided by law; b) the right to obtain information regarding the accusations; c) the right to have an interpreter and to the translation of basic written documents; d) the right to silence; e) the right to access the acts on which the arrest or stop is based; f) the right to inform consular authorities. Paragraph 1bis of article 386 provides that if the LEtter of Rights is not available in a language that is understood by the arrested or stopped person, the police has to proceed to the oral communication of the rights of the person concerned.

Article 386 c.2 prescribes that when an individual is arrested, the police has to immediately inform his lawyer of the arrest (art. 96 c.p.p.). If the arrested person doesn't have a lawyer or the lawyer can't be reached, art. 97 c.p.p. provides for the *ex officio* lawyer to step in and provide legal assistance to the arrested.
Article 293 c.p.p., modified by art. 1, c.1, lett. a) of the Legislative Decree n. 101/2014 which implements the Directive 2012/13/EU), prescribes that the officer who gives execution to the act of deprivation of liberty has to give written information to the suspect of his right to appoint a trusted lawyer and of his right to file an application to receive legal aid.

Article 104 c.p.p. regulates the consultations between the suspect or accused deprived of liberty and his defendant. Paragraph 1 establishes that the accused person has the right to consult his lawyer from the very beginning of the imposition of the measure of deprivation of liberty. Paragraph 2 establishes that in case of arrest because of flagrancy (*ex* art. 384 c.p.p.) the suspect has the right to consult with the lawyer immediately after the arrest.

The Criminal Code indicates that there are some peremptory terms that the judicial authority cannot violate and that are connected to the right to legal assistance and to the *habeas corpus* (art. 13 Constitution).
Ex art 386, the police has the duty to inform the appointed lawyer or the lawyer of the arrest and to inform him/her about the accusations against suspect (who also has to receive this piece of

information). The Code also sets out the statutory limit for police detention in 96 hours at most, divided as following:

- within 24 hours after the arrest the police must inform the public prosecutor of the arrest, as well as a legal representative for the arrested person. The police has to provide to public prosecutor with the report of the arrest, which has to contain the confirmation of the appointment of a lawyer, the reasons, date and time of the arrest;
- within the following 24 hours, the prosecutor must request a judge to validate the arrest;
- within the following 48 hours, the judge must have endorsed the validation of the arrest, namely must have conducted the validation hearing.

The right to communicate with the lawyer can be suspended for up to 5 days upon specific decision by the judge, if the prosecutor finds that there are specific and exceptional circumstances (e.g. there is the risk that the investigation may be jeopardized) occur for doing so (art. 104 c. 3). The law does not indicate the exact circumstances and limits for the suspension of this right, which represents a compression of the right of the accused. The doctrine and the jurisprudence indicate as possible circumstances of applicability of this suspension the cases regarding organized crime and terrorism. It is also important to underline that, as the exact circumstances of suspension are not indicated in the law, the doctrine expresses concerns regarding the theoretical possibility of suspension in all cases. On the other hand, the jurisprudence (Cass. pen., Sez. I, n. 1806 of 1992) has established that the social dangerousness of the accused is not a sufficient reason to grant the suspension of this right.

Article 294 c.p.p. provides time-limits regarding the questioning of the suspect. In particular, paragraph 1 establishes that if the judge has validated the arrest of a suspect without questioning him at the validation hearing, he has to question the suspect deprived of liberty (and held in prison) immediately and no more than five days after the beginning of the deprivation of liberty. Article 1bis establishes that if a person is undergoing another measure of deprivation of liberty (e.g. house arrest), the questioning has to take place no more than ten days after the beginning of the deprivation of liberty. Finally Article 1ter establishes that the person deprived of liberty has to be questioned within 48 hours if the prosecutor requests so upon filing the request for the deprivation of liberty. All these questioning cannot take place without the presence of the lawyer of the suspect.

For these reasons the score for the Legal transposition is 2.

The lawyers that we interviewed confirm that the right to access to a lawyer without undue delay is guaranteed in all cases; only one lawyer indicates the option “yes in the majority of cases”, only one lawyer indicates the option “yes in the minority of cases”, and one lawyer indicates no. All the arrested people that we interviewed affirm that they had the right to access a lawyer immediately after they were arrested.

For this reason the score for the Practical Implementation is 2.

Indicator 1.4: *Suspects or accused persons have access to a lawyer where they have been summonsed to appear before a court having jurisdiction in criminal matters.*	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	**100**

It is not possible to renounce or revoke the right to have a lawyer appointed when summonsed to appear before a court. Italian law establishes through articles 96, 97 and 369-*bis* c.2 lett a), c.p.p. that all accused persons must have a defence lawyer. Article 369bis c.2 lett.a) prescribes the impossibility to waive the right to a legal counsel. Article 391 c.p.p. regulates the validation hearing and prescribes at paragraph 1 "the necessary participation of the lawyer" of the arrested or stopped person. Paragraph 2 provides that in case of absence of the lawyer (whether trusted or *ex officio*) the judge proceeds with a new appointment *ex* article 97 c.4. While it is not possible to hold a hearing without a lawyer, the participation of the arrested or stopped person to the hearing is not mandatory (*ex* article 391 c.3).

If the individual doesn't have a trusted lawyer or he is momentarily unable to attend his client, an *ex officio* lawyer is appointed. The *ex officio* lawyer and his appointment are regulated by articles 28 - 31 of the norms of implementation of the criminal code. For this reason we have not commented Standard 6 (and all its indicators) about the possibility to waive the right to appoint a lawyer.

We did not include this question into our survey for lawyers because it is illegal to participate to a hearing without a lawyer.

Indicator 1.5: *Suspects or accused persons summonsed before to appear before a court have sufficient time to consult their lawyer before such appearance.*	
Legal transposition score	0
Practical implementation score	0
OVERALL SCORE	**0**

As already mentioned in "Part Two" of this report, there is a substantial difference between a person who is suspected or accused of having committed a crime but is not subjected to a precautionary

measure and a person who is suspected or accused of having committed a crime and is also deprived of liberty.

In fact, in the first case there isn't any limit to the possibility to access to legal assistance nor to the number or duration of the consultations between the lawyer and the client. In the second case, as the suspected or accused person is deprived of liberty, he is subjected to the authority of the police (either the judiciary or the penitentiary police).

In particular, article 104 c.p.p. does not set any specific duration of the consultation that has to be considered as sufficient before the court appearance.

For this reason, we decided to evaluate this standard only in the case of people deprived of liberty who are awaiting the validation hearing of the judgement *per direttissima*. In these cases lawyers (especially *ex officio* lawyers) report that the moment they meet their client is often 10-20 minutes before the hearing and often corresponds to their first contact with their client. Arrested people confirm that they had only a few minutes to consult with their lawyer before these particular cases of court appearance while only two of them reported that they had sufficient time to consult with their lawyer.

From further talks with lawyers, we inferred that the length of the consultation generally depends on the time that is granted by the judge (who might also push for the hearing to start as to not fall behind with the schedule), on the level knowledge of the Italian language of the arrested person (it is easier to communicate with a person who has a better level of language), and on the type of the crime that he committed (for example in cases that regard white-collar crimes the accused person has usually a longer consultation with the lawyer - generally a trusted lawyer -, while a foreigner who is accused of resistance to a public official benefits from a shorter consultation with her lawyer - generally an *ex officio* lawyer). In any case, it is important to underline that this particular problem should be further analyzed and studied in order to explain the phenomenon and consider all variables that might intervene to cause the result.

Indicator 1.6: *Suspects or accused persons have the right to meet in private with their lawyer, including prior to questioning by the police or by another law enforcement or judicial authority.*	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	**100**

Paragraph 20 of the preamble of Directive 2013/48/EU establishes that "for the purposes of this Directive, questioning does not include preliminary questioning by the police or by another law enforcement authority the purpose of which is to identify the person concerned, to verify the possession of weapons or other similar safety issues or to determine whether an investigation should be started, for example in the course of a road-side check, or during regular random checks when a

suspect or accused person has not yet been identified". Therefore, article 350 c.p.p. that prescribes at paragraphs 2 and 3 the compulsory presence of the defence lawyer also in these phases, seems to abide by the directive. Moreover, the exceptions prescribed by the same article (c.5), which are when the procedures are being carried out in the place and in the immediate moment of the facts, seem to comply with the Directive. Paragraph 6 of article 350 c.p.p. established the inadmissibility of the information collected without respecting this prescription.

Article 103 c.5 c.p.p. forbids the wiretapping of conversations or communications of lawyers, of authorized private investigators who have a defined role in the proceeding, of technical consultants and their supporting staff, and the wiretapping of conversations or communications between them and their clients. In case of violation of this right, the information gathered cannot be used during the proceeding. Therefore, this article represents a guarantee of the right to hold private consultations with the lawyer.

As previously mentioned, there is a very important distinction between a suspected or accused person who is not subjected to any restrictive measure and a suspected or accused person deprived of liberty. In fact, in the first case the right to communicate with the lawyer is not restricted in any way, as it is protected by article 103 c.p.p.. In the second case (which was the object of our interviews) there might be some restrictions of the right.
The lawyers that we interviewed affirm that the right to meet in private is generally guaranteed in all cases; one of them answers that that this right is respected in the majority of cases and one of them that this right is respected in the minority of cases. They all mention that when the meeting with their client takes place in prison, the right is usually fully respected, while when the meeting takes place at the tribunal right before the *giudizio direttissimo* (or *per direttissima*), and hence after an arrest in flagrancy or a stop, the first meeting with the lawyer is often short (15-20 minutes) and fast. The police sometimes awaits nearby. The presence of the police is indicated by some of them (especially by *ex officio* lawyers) as a form of protection: in fact they often find themselves in front of arrested or stopped people that they have never met before.
The arrested people that we interviewed confirm what is reported by lawyers and underline the shortness of the consultation.

Indicator 1.7: *Suspects or accused persons have the right to communicate with their lawyer, including prior to questioning by the police or by another law enforcement or judicial authority*	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	**100**

Please see answer to indicator 1.3.

The right of consultation with the lawyer is prescribed by the law. Article 104 c.p.p. regulates the consultations between the suspect or accused deprived of liberty and his defendant. Paragraph 1 establishes that the accused person has the right to consult his lawyer from the very beginning of the imposition of the measure of deprivation of liberty. Paragraph 2 establishes that in case of arrest because of flagrancy (*ex* art. 384 c.p.p.) the suspect has the right to consult with the lawyer immediately after the arrest.

Moreover, as already said, the right to communicate with the lawyer can be suspended for up to 5 days upon specific decision by the judge, if the prosecutor finds that there are specific and exceptional circumstances (e.g. there is the risk that the investigation may be jeopardized) occur for doing so (art. 104 c. 3). The law does not indicate the exact circumstances and limits for the suspension of this right, which represents a compression of the right of the accused. The doctrine and the jurisprudence indicate as possible circumstances of applicability of this suspension the cases regarding organized crime and terrorism. It is also important to underline that, as the exact circumstances of suspension are not indicated in the law, the doctrine expresses concerns regarding the theoretical possibility of suspension in all cases. On the other hand, the jurisprudence (Cass. pen., Sez. I, n. 1806 of 1992) has established that the social dangerousness of the accused is not a sufficient reason to grant the suspension of this right.
Also, the Penitentiary Law regulates this subject. Article 386 c.4 prescribes that the stopped or arrested person is taken to the nearest prison and Article 36 c.1 of the law that gives execution to the Criminal Code prescribes that the lawyer has the right to access to place of detention. Therefore, it is the Penitentiary Law (Law n. 354 of 1975) that intervenes to regulate the communication, consultations, correspondence and information between the lawyer and his client with article 18. The guarantees of the consultations are listed in article 103 c.p.p. (see indicator 1.6) and article 37 c.6 of the D.P.R. n. 230/2000, which implements the penitentiary law, prescribes that the prison should provide places for the consultation between detainees and their legal counsels.

Both lawyers and arrested people affirm that this right is generally guaranteed in practice.

Indicator 1.8: *Suspects or accused persons have the right for their lawyer to be present and participate effectively when the suspect or accused is being questioned.*	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	**100**

As previously mentioned, it not possible to question a suspected or accused person without the presence of a lawyer. The lawyer has the right to fully participate to the questioning of his client.

Article 294 c.p.p. concerns the questioning of the person subjected to a precautionary measure imposed by the judge; paragraph 4 prescribes that the lawyer is obliged to take part to the questioning and is, therefore, promptly informed.

Article 388 c.p.p. concerns the questioning of the stopped or arrested person and prescribes that the trusted lawyer or the *ex officio* lawyer has to be promptly informed of it and that is obliged to participate.

All lawyers that we interviewed affirm that this right is always guaranteed in our system. Arrested people confirm this finding.

Indicator 1.9: *The participation of the lawyer when the suspect or accused is questioned is recorded.*	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	**100**

The participation of the lawyer during the questioning of the suspect or accused is recorded through a written recording called “verbale” ex articles 136 and 141bis c.p.p..

All lawyers that we interviewed affirm that this right is always guaranteed in our system. Arrested people were not able to answer to this question. We believe that the reason why they could not answer was that they did not notice that the recording of the presence of the lawyer was taking place. Therefore, we exclude the possibility that the written recording of the participation of tha lawyer did not take place.

Indicator 1.10: *The State provides general information to facilitate the obtaining of a lawyer by suspects or accused persons.*	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	**100**

Article 293 c.p.p., modified by art. 1, c.1, lett. a) of the Legislative Decree n. 101/2014 which implements the Directive 2012/13/EU), prescribes that the officer who gives execution to the act of deprivation of liberty has to give written information to the suspect of his right to appoint a trusted lawyer and of his right to file an application to receive legal aid.
Article 96 c.p.p. (along with article 293 c.1 lett a) and 386 c.1 lett. a)) prescribes that suspected or accused persons have to be informed by the authorities (also through the Letter of Rights) of their right to appoint a trusted lawyer. If he doesn't have a trusted lawyer or he can't be present, he will be given an *ex officio* lawyer *ex* article 97 c.1. Article 98 c.p.p. also establishes that the accused and can ask to be admitted to benefit from legal aid according to the norms that regulate it. D.P.R. n.115 of 30 may 2002, which (among other things) regulates the expenses of the State regarding legal aid, establishes that legal aid is granted to all persons (citizens, foreigners and stateless) that have an income lower than 11500 euro. It is possible to benefit from legal aid during all phases of the proceedings.

Interviews with lawyers found that authorities comply with this duty and add that it is generally the police who informs the suspected or accused person of her right to appoint a lawyer. This is also confirmed by the interviews with arrested people: almost all of them was informed by the police of their right to appoint a lawyer and only one of them was informed of this right by the judge.

Indicator 1.11: *The State ensures that those who are deprived of their liberty are in a position to exercise their right of access to a lawyer.*	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	**100**

Please, refer to the answer provided at indicator 1.3, 1.6 and 1.10, in particular articles 293 and 294 c.p.p. and articles 96, 97 and 98 c.p.p..

All lawyers that we interviewed affirm that this right is always guaranteed in our system. Arrested people confirm this finding.

Indicator 1.12: *The State respects the confidentiality of communication between suspects or accused persons and their lawyer. This includes respect for confidentiality of correspondence, meetings, telephone conversations and other forms of communication permitted under the law.*	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	**100**

Paragraph 20 of the preamble of Directive 2013/48/EU establishes that "for the purposes of this Directive, questioning does not include preliminary questioning by the police or by another law enforcement authority the purpose of which is to identify the person concerned, to verify the possession of weapons or other similar safety issues or to determine whether an investigation should be started, for example in the course of a road-side check, or during regular random checks when a suspect or accused person has not yet been identified". Therefore, article 350 c.p.p. that prescribes at paragraphs 2 and 3 the compulsory presence of the defence lawyer also in these phases, seems to abide by the directive. Moreover, the exceptions prescribed by the same article (c.5), which are when the procedures are being carried out in the place and in the immediate moment of the facts, seem to comply with the Directive. Paragraph 6 of article 350 c.p.p. established the inadmissibility of the information collected without respecting this prescription.

Article 103 c.5 c.p.p. forbids the wiretapping of conversations or communications of lawyers, of authorized private investigators who have a defined role in the proceeding, of technical consultants and their supporting staff, and the wiretapping of conversations or communications between them and their clients. In case of violation of this right, the information gathered cannot be used during the proceeding. Therefore, this article represents a guarantee of the right to hold private consultations with the lawyer. Article 35 of the law that implements the Criminal Code regulates the correspondence and the telephone consultations between lawyer and accused. Moreover, article 200 c.p.p. grants the lawyer the professional secrecy, meaning that he cannot be obliged to report to third parties the content of the communications between him and his client.

Both lawyers and arrested people affirm that this right is generally guaranteed in practice. In any case, even when the police officer is standing nearby, any information reported by him could not be used in the proceeding.

Standard 2: The right to have a third person informed of the deprivation of liberty.

Indicator 2.1: *Suspected or accused person who is deprived of their liberty have the right to have at least one person, nominated by them, informed of their deprivation of liberty, without undue delay, if they so wish.*	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	**100**

Article 387 c.p.p. establishes the right of the arrested person (in the case of flagrancy) to inform her relatives of the arrest or stop. This article establishes that the police has the duty to inform the relatives while the arrested person has the right to decide otherwise.

Article 386 c.p.p. c.1. lett f) lists in the Letter of Rights, which has to be given to the arrested or stopped person, that she has the right to inform her family members of the deprivation of liberty.

Article 62 c.1 of the D.P.R. n. 230/2000, which implements the penitentiary law, prescribes that immediately after a person is taken inside a penitentiary institution (whether he enters from liberty or transferred from another institute) he has to be asked if he wants to inform any relative or third person of his whereabouts.

The Italian law try to limit the interaction between Criminal Law and children (i.e. anyone under 18 years of age) and prescribes the deprivation of liberty of the minor only as a last resort. For this reason when children, who are suspected or accused of having committed a criminal offence, are arrested, the law prescribes that the holder of parental responsibility - and the eventual foster parent - should be informed without delay of their deprivation of liberty (art. 18, c. 1, c.p.p. min.). The Criminal Code for Minors also has another kind of arrest, which is called “accompagnamento a seguito di flagranza” *ex* art 18bis c.1,2,3. In this case the child who is arrested in flagrancy can be deprived of liberty only for the time that is required to be handed to the holder of parental responsibility, to the eventual foster parent or any other person indicated by him.

All lawyers that we interviewed affirm that this right is always guaranteed in our system both in the case of adults and minors. All arrested people except one confirm that a third person was informed of the deprivation of liberty.

Standard 3: The right to communicate, while deprived of liberty, with third persons.

Indicator 3.1: *Suspected or accused person has the right to communicate, without undue delay, with at least one third person, such as a relative, nominated by them.*	
Legal transposition score	1
Practical implementation score	1
OVERALL SCORE	**50%**

It is important to underline that it is not clear since when the right to communicate with a third person (such as a relative) should be implemented. The Italian law clearly provides to the person deprived of liberty with the right to communicate with a relative only when he is held in a penitentiary institution as a result of a decision of a judge. From this we can infer that before the decision of the judge, the suspect or accused person deprived of liberty has only the right to have a third person informed of her deprivation of liberty and only after the judge orders the deprivation of liberty, the person has the right to communicate with a relative. In particular article 18 of the Penitentiary Law, other than regulating the communications between the lawyer and his client, also regulates the communications, meetings, telephone calls, correspondence and information between the person deprived of liberty and her relatives. Meetings and telephone calls with third people other than relatives have to be authorised by the Surveillance Magistrate as provided by article 31 c. 1 of the Penitentiary Law.

We decided to rate the Legal transposition with a 1, as the normative framework could be clearer.

With regard to the interviews with lawyers, their answers vary. On the one hand the majority of them answered that this right is always guaranteed, while a less than half of them answered that this right is not guaranteed or that it is guaranteed only in the minority of cases. Their comments led us to negatively judge the respect of this right. In particular, we were told that this right is in fact not prescribed by the law, that its respect doesn't take place and that it depends on the circumstances of the individual case. One lawyer answered that this communication with a third person is possible in all cases, but it can take place after the questioning of the judge, hence confirming our interpretation of the Legal transposition.

With regard to the arrested people that we interviewed, it is important to notice that some of our interviewees were arrested because of the order of a judge and were at the presence of their relatives. One interviewee affirmed that she didn't remember the moment when she was told of her right to communicate with third people. Others, who were excluded from these circumstances, were able to exercise this right.

For this reason we decided to rate the Practical Implementation of this right with a 1.

Standard 4: The right to communicate with consular authorities.

Indicator 4.1: *Suspected or accused person, who is a non-national and who is deprived of their liberty, has the right to have the consular authorities of their State of nationality informed of the deprivation of liberty without undue delay, if s/he so wishes.*	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	**100**

Article 386 c. 1 lett f) and art. 293 c. 1 lett f) c.p.p. give the right respectively to the arrested or stopped person and to the person undergoing a precautionary measure ordered by the judge to inform consular authorities of the deprivation of liberty.

Article 35 of the D.P.R. n. 230/2000, which implements the penitentiary law, prescribes that contacts between foreign detainees and consular authorities of their home country be favoured by the administration.

Article 62 c.3 of the D.P.R. n. 230/2000, prescribes that immediately after a foreign person is taken inside a penitentiary institution his whereabouts are communicated to the consular authority according to the existing provisions.

Article 2 c. 7 of Legislative Decree n. 286/1998 (Consolidated Act on Immigration) establishes that the judicial authority, the police and any other public official is obliged to inform (following the procedure indicated by the executing law) the nearest consular or diplomatic authority of the Country of which the person belongs to in the cases regarding for example their personal liberty and their removal from the territory. An exception is represented by asylum seekers, political refugees and all those who have obtained international protection.

From the study of the Italian normative framework, we can infer that the Directive is respected.

Both lawyers and arrested people affirm that the communication of the this right is given to the arrested person. For this reason we decided to rate the Practical implementation of the Directive with a 2.

Indicator 4.2: *Suspected or accused person, who is a non-national and who is deprived of their liberty, has the right to communicate with the consular authorities of their State of nationality, if s/he so wishes.*	
Legal transposition score	2
Practical implementation score	
OVERALL SCORE	**100**

Please, see the answer for the Indicator 4.1.

As none of the lawyers that we interviewed has ever had a case regarding this particular provision and none of the arrested people that we interviewed decided to benefit from this right, we decided to avoid the to rate the practical implementation of this provision.

Indicator 4.3: *Suspected or accused person, who is a non-national and who is deprived of their liberty, and who has two or more nationalities, has the right to choose which, if any, consular authorities are to be informed of deprivation of liberty.*	
Legal transposition score	1
Practical implementation score	
OVERALL SCORE	**50%**

The Italian law does not have a specific provision for the case when a person deprived of liberty holds more than one nationality; however, as the person deprived of liberty has the right to inform the consular authorities, it is possible to infer that she also has the right to choose which consular authority to inform of the deprivation of liberty. Having said this, it would be important for the Italian law to better specify this right.

As none of the lawyers that we interviewed has ever had a case regarding this particular provision and none of the arrested people that we interviewed decided to benefit from this right, we decided to avoid the to rate the practical implementation of this provision.

Indicator 4.4: *Suspected or accused person, who is a non-national and who is deprived of liberty, has the right to: a) be visited by their consular authorities; b) converse and correspond with them; c) have legal representation arranged for them by their consular authorities.*	
Legal transposition score	2
Practical implementation score	
OVERALL SCORE	**100**

Please, see the answer for the Indicator 4.1 for the general normative framework regulating this issue. Moreover, it is important to note that Italy ratified with Law n. 804/1967 the Vienna Convention on Consular Relations (1963). Article 36 of the Convention on "Communication and contact with nationals of the sending State" establishes:

1.With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Therefore, relatively to what is asked in indicator 4.4, it is possible to add that:

a) right to be visited by consular authorities: article 18 of the Penitentiary Law (Law n. 354/1975) regulates the possibility for the detainee to meet "third persons". This provision clearly doesn't exclude consular or diplomatic personnel. Moreover, the aforementioned Regulation that gives execution to the Penitentiary Law (D.P.R n. 230/2000), establishes with article 35 that, in case of foreign detainees, the administration should favour contacts between foreign detainees and consular authorities of their home country. For this reason, the detailed regulation of meetings between consular authorities and foreign detainees could be a ministerial internal regulation (circolare) whose content can be found in the internet site of the Ministry of Justice that explains the regulation of all meetings with consular and diplomatic

authorities.[8] Moreover, these meetings, that don't have any limit of time nor number, are not subtracted from those that are reserved for the family.

b) conversation and correspondence with consular authorities: article 18 of the Penitentiary Law (Law n. 354/1975) which regulates the correspondence and telephone calls (with regard to conversations, please refer to letter a)) does not exclude the possibility to communicate with diplomatic or consular authorities. Moreover, article 18ter, which sets the limits and and controls on correspondence, expressively prescribes at paragraph 2 the prohibition to apply limitations and controls in the case of correspondence from and to diplomatic and consular authorities of the State of nationality of the foreigner. The means of communication of the detainee are regulated by article 38 of the regulation that gives execution to the Penitentiary Code (D.P.R n. 230/2000).

c) have legal representation arranged for them by their consular authorities: this right is prescribed directly by the Vienna Convention of 1963 ratified by Italy in 1967.

As none of the lawyers that we interviewed has ever had a case regarding this particular provision and none of the arrested people that we interviewed decided to benefit from this right, we decided to avoid the to rate the practical implementation of this provision.

Standard 5: The right of access to a lawyer in European Arrest Warrant (EAW) proceedings

As none of the lawyers that we interviewed has ever had a case regarding this particular provision and none of the arrested people that we interviewed decided to benefit from this right, we decided to avoid the to rate the practical implementation of Standard 5.

Indicator 5.1: *The requested person has the right of access to a lawyer in the executing State upon arrest pursuant to the European arrest warrant, without undue delay.*	
Legal transposition score	2
Practical implementation score	
OVERALL SCORE	**100**

Law n. 69/2005 modifies the implementation of the decision 2002/584/GAI concerning the EAW. In particular, article 9, c.4 of the said law establishes that also in the case of the EAW the procedural rights contained in Titolo I of Libro IV of the c.p.p. (which are the usual procedural rights and safeguards that apply to all criminal cases) also apply to the cases falling under the EAW.

Articles 10 and 12 respectively prescribe that the judicial authority and the police have to inform the person involved in the EAW that she has the right to appoint a trusted lawyer, that if she doesn't have one, an *ex officio* lawyer will be appointed, and that it is not possible to waive the right to be defended by a lawyer (*ex* article 97 c.p.p.).

[8] https://www.giustizia.it/giustizia/it/mg_3_8_14.page

For this reason, as far as the appointment of a lawyer, for a more complete answer, it is necessary to refer to the answer provided at indicator 1.1.

Indicator 5.2: *The requested person has the right to meet and communicate with the lawyer representing them.*	
Legal transposition score	2
Practical implementation score	
OVERALL SCORE	**100**

Law n. 69/2005 modifies the implementation of the decision 2002/584/GAI concerning the EAW. In particular, article 9, c.4 of the said law establishes that also in the case of the EAW the procedural rights contained in Titolo I of Libro IV, articles 272-315 of the c.p.p. (which are the usual procedural rights and safeguards that apply to all criminal cases) also apply to the cases falling under the EAW. For this reason, please refer to the answers provided at indicators 1.3 and 1.7.

Indicator 5.3: *The requested person has the right for their lawyer to be present and to participate during a hearing of a requested person by a judicial authority.*	
Legal transposition score	2
Practical implementation score	
OVERALL SCORE	**100**

It is not possible to renounce or revoke the right to have a lawyer appointed when summonsed to appear before a court. Italian law establishes through articles 96, 97 and 369-*bis* c.2 lett a), c.p.p. that all accused persons must have a defence lawyer. This is true also when it concerns the person falling under the case of the EAW; in fact, article 10 (Beginning of the proceeding) of Law n. 69/2005, that modifies the implementation of the decision 2002/584/GAI concerning the EAW, establishes at paragraph 1 that the hearing takes place at the Court of Appeal within five days from the execution of the EAW at the presence of the trusted or *ex officio* lawyer *ex* article 97 c.p.p.. Only at the presence of the lawyer, the President of the Court of Appeal or the delegated magistrate can question the person

undergoing the precautionary measure in a language understood by her and inform her of the content of the EAW, of the execution procedure and of the possibility to consent to be handed over to the requesting authorities.

Article 10 c. 2 establishes that the lawyer has to be informed at least 24 hours before the hearing.

Indicator 5.4: *Any participation by a lawyer in a hearing regarding the European arrest warrant is recorded.*	
Legal transposition score	1
Practical implementation score	
OVERALL SCORE	**50%**

Article 14 of Law n. 69 /2005 prescribes at paragraph 1 that the consent of the person to be handed over to the requesting authorities has to be recorded in the written recording (verbale) of the hearing. As previously mentioned, the defence lawyer has to necessarily take part to this proceeding; therefore, his presence is necessarily recorded. Moreover, it is anyway important to take in consideration that, as previously mentioned, all hearings are recorded through a written recording (verbale) that includes all names of participants to the hearing.

Indicator 5.5: *The authorities of the executing State inform requested persons, without undue delay, of their right to have a lawyer appointed in the issuing Member State.*	
Legal transposition score	2
Practical implementation score	
OVERALL SCORE	**100%**

Articles 9 c.5-*bis* and 12 c. 1-*bis* of Law n. 69/2005, as modified by art. 4 of the Decree Law n.184 of 2016, which gave effect to the Directive, establish that the authorities of the executing State have the duty to inform the requested person, without undue delay, of her right to have a lawyer appointed in the issuing Member State. Article 9 c.5bis establishes that, at the moment of the execution of the

measure decided by the Court of Appeal (which has the competence in cases regarding the EAW) the police force that executes the EAW has to inform the requested person of the right to appoint a lawyer in the issuing State. Article 12 c.1bis establishes that even in the case of arrest the same procedure *ex* article 9 c.5bis applies.

Indicator 5.6 *The authorities in the executing State promptly inform the authorities in the issuing State of the requested person's wish to exercise their right to appoint a lawyer in the issuing State.*	
Legal transposition score	2
Practical implementation score	
OVERALL SCORE	**100%**

Article 9 c. 5-*bis* of the Law n. 69/2005 as modified by art. 4 of the Decree Law n.184 of 2016, which gave effect to the Directive, establishes that the President of the Court of Appeal has to immediately inform the competent authority of the issuing State of the requested person's will to have a lawyer appointed in the issuing State.

Standard 6: Waivers

It is not possible to renounce or revoke the right to have a lawyer appointed when summonsed to appear before a court. Italian law establishes through articles 96, 97 and 369-*bis* c.2 lett a), c.p.p. that all accused persons must have a defence lawyer. Article 369bis c.2 lett.a) prescribes the impossibility to waive the right to a legal counsel. Article 391 c.p.p. regulates the validation hearing and prescribes at paragraph 1 "the necessary participation of the lawyer" of the arrested or stopped person. Paragraph 2 provides that in case of absence of the lawyer (whether trusted or *ex officio*) the judge proceeds with a new appointment *ex* article 97 c.4.

Indicator 6.1: *Other than in cases where the presence of a lawyer is mandatory, the suspected or accused person can waive their right of access to a lawyer.*	
Legal transposition score	
Practical implementation score	
OVERALL SCORE	

Indicator 6.2: *The suspected or accused person is provided, orally or in writing with clear and sufficient information in simple and understandable language about the content of the right of access to a lawyer and the possible consequences of a waiver.*	
Legal transposition score	
Practical implementation score	
OVERALL SCORE	

Indicator 6.3: *The waiver, whether given orally or in writing, is noted, together with the circumstances in which it was given.*	
Legal transposition score	
Practical implementation score	
OVERALL SCORE	

Indicator 6.4: *The suspected or accused person has the right to revoke the waiver at any point of the criminal proceedings and they are informed about this possibility.*	
Legal transposition score	
Practical implementation score	
OVERALL SCORE	

Conclusion

As we showed in the research, we did not rate Standard 6, as it isn't applicable in our system. With regard to Standards 4 and 5, it is important to highlight that it was not possible to answer to Level 2 and 3 of the research because our interviewees had never come across the EAW and the right to communicate with consular authorities. Standard 3 (that concerns the communication with third people) is the most problematic standard, as it is only partially implemented. Furthermore, we wish to point out that Indicator 1.5 (Suspects or accused persons summonsed before to appear before a court have sufficient time to consult their lawyer before such appearance) is probably the most problematic phase of the national legal framework; for a further analysis, please refer to the comment above. Finally, even if it does not fall under the scope of this research, we would like to emphasise that from the interviews that we collected, one of the problems that emerged was the necessity to better meet the requirements of Directive 2010/64/EU on the right to translation and interpretation of the criminal proceedings.

Nevertheless, as it was pointed out at the beginning of this research, the Italian legal framework meets the vast majority of the requirements set by the Directive.

	Level 1	Level 2 and Level 3	Overall Standard Compliance
Standard 1 (12indicators)	Score 22 out of 24 (92%)	Score 21 out of 24 (88%)	90%
Standard 2 (1 indicator)	Score 2 out of 2 (100%)	Score 2 out of 2 (100%)	100%
Standard 3 (1 indicator)	Score 1 out of 2 (50%)	Score 1 out of 2 (50%)	50%
Standard 4 (4 indicators)	Score 7 out of 8 (88%)	Score 2 out of 2 (100%)	94%
Standard 5 (6 indicators)	Score 11 out of 12 (92%)		92%
Standard 6 (4 Indicators)			
Final grading regarding adherence to the directive.			85,2%