THE EFFECTIVENESS OF THE RIGHT TO A DEFENCE IN ITALIAN CRIMINAL PROCEEDINGS: BETWEEN SUPRANATIONAL SAFEGUARDS AND PRACTICAL CHALLENGES *

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1. Introductory remarks

The right to a defence is one of the fundamental pillars of the rule of law and is explicitly enshrined in law as a supreme principle of the Italian legal system in Article 24 of the Constitution, according to which 'the right to a defence is inviolable at every stage and level of the proceedings'. In criminal matters, this principle takes on even greater significance, as it is directly linked to the protection of personal liberty and the guarantee of a fair trial, expressly enshrined in Article 111 of the Constitution. Even within ordinary legislation, the right to a defence is recognised and protected in Italy in various forms and in relation to different aspects of criminal proceedings (see, for example, Legislative Decree No. 101 of 1 July 2014, enacted to implement Directive 2012/13/EU on the right to information in criminal proceedings, as well as Presidential Decree No. 115 of 30 May 2002, containing the 'Consolidated Text of legislative and regulatory provisions on legal costs'). At the supranational level, these fundamental principles are reaffirmed by Article 14(3)(d) of the "International Covenant

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on Civil and Political Rights" (UN Covenant II of 1966) and Article 6 of the ECHR[1], as well as by the European Directives which have progressively clarified the minimum requirements of the right of access to a lawyer and to legal aid in criminal proceedings (see, for example, Directive 2013/48/EU on the right of access to a lawyer, and Directive 2016/1919/EU on legal aid).

Nevertheless, in our legal system, the main problem lies not in the formal recognition of the right to a defence in criminal proceedings, but rather in its practical implementation as a guarantee that can actually be exercised. It is not enough, in fact, for the legal system to recognise the accused's right to defend themselves; it is necessary to ensure that, at the various stages of the proceedings, they are actually placed in a position to exercise their right to a defence: and therefore, to give an example, to participate in the trial, to have access to the records and documents obtained during the criminal proceedings, to influence the gathering of evidence and to make informed procedural decisions, etc. It is in this regard, rather than in terms of formal proclamation, that the right to a defence is today, in many respects, vulnerable.

This paper aims to provide an overview of the effectiveness of the right to a defence in Italy, focusing, on the one hand, on the implementation of the European Directives concerning procedural safeguards and, on the other hand, on the critical issues currently encountered in relation to the various 'stages' and crucial junctures of criminal proceedings within our legal system.

2. Legislative sources and problematic issues

The European Directives on procedural safeguards and the exercise of the right to a defence in criminal proceedings were issued on the basis of a 'roadmap' adopted as part of the so-called 'Stockholm Programme' of 2009. This Programme consisted of a five-year action plan (2010–2014) whose strategic objective was the creation of a 'European Area of Freedom, Security and Justice' tailored to the needs of citizens, and which was structured around six 'pillars': 1) A Europe of rights (data protection; minority rights; victims' rights); 2) Europe of Justice (judicial cooperation in civil and

[1] In this regard, specifically on the concept of the effectiveness of the defence and, in particular, on the need to guarantee qualified legal assistance from both the defence counsel of choice and the court-appointed defence counsel, see: European Court of Human Rights (ECHR), Sannino v. Italy, 27 April 2006, Application No. 30961/03; ECHR, Pakelli v. Germany, 25 April 1983; ECHR, Daud v. Portugal, 25 April 1998, all available at *hudoc.echr.coe.int*.

criminal matters; training and mutual trust between states); 3) A Europe th s and protects (combating organised crime; strengthening cooperation and the exchange of data and information in the fight against terrorism; disaster management); 4) Access to Europe (integrated border protection and management; policy and regulations on 'visas' and access documents in general; 5) A Europe of solidarity (asylum regulations and standardised procedures for examining applications; regulations governing the flows and entry of skilled workers; family reunification); 6) International cooperation and relations with non-EU countries (strengthening cooperation with countries 'outside' the European Union to prevent irregular migration and to combat transnational and domestic crime).

Under the second pillar, the aforementioned *roadmap* was adopted, namely the 'Stockholm Programme Roadmap', which aimed to guarantee common minimum rights for persons under investigation or charged in criminal proceedings, bridging the significant differences between the legal systems of the various Member States in terms of safeguarding the right to a defence, and strengthening mutual trust and judicial cooperation within the European Union. The Roadmap set out a breakdown of procedural safeguards into six main areas, designated by the letters 'A' to 'F' and corresponding to six distinct areas of protection for the rights and prerogatives of the suspect or accused person in criminal proceedings (which were subsequently regulated, individually and separately, by specific Directives): A) Translation and interpretation: it must be ensured that every defendant is able to understand the language of the proceedings in order to fully exercise their right of defence (Directive 2010/64/EU); B) Information on rights and charges: it must be ensured that persons arrested or subject to measures restricting personal liberty receive a written notice (the so-called 'Letter of Rights') setting out their rights in the proceedings and the charges against them (Directive 2012/13/EU); C) Legal advice and legal aid: timely access to legal defence must be guaranteed, and in particular to the assistance of a lawyer, from the earliest stages of the investigation, with financial support from the State to protect those of limited means and those unable to afford legal costs (Directives 2013/48/EU – access to a lawyer – and 2016/1919 – legal aid); D) Communication with family members, employers and consular authorities: it is necessary to ensure that persons deprived of their liberty can promptly notify their loved ones or their Consulate if they are abroad (again, Directive 2013/48/EU); E) Special safeguards for 'vulnerable' suspects: specific safeguards must be provided for and implemented for 'vulnerable' groups, such as minors or people with mental

disabilities (Directive 2016/800/EU on minors); F) Green Paper on pre-trial detention: a joint study must be launched on the conditions of pre-trial detention and the maximum periods of detention prior to a final judgement.

As is readily apparent, the 'Roadmap' in question represented a key step (perhaps even a 'turning point') in the European Union's legislative policy: for the first time, the Union did not confine itself to legislating on the fight against crime and on coordination between judicial authorities for the prevention and suppression of offences, but began to plan and implement regulatory measures that set as a priority the protection of the fundamental rights and guarantees of citizens subject to criminal proceedings.

2.1. - *European Directives on procedural safeguards and their implementation in the Italian legal system (an overview)*

Building on what was said above regarding the implementation of the key points of *the roadmap* on the right to a fair trial in criminal proceedings, let us examine the most significant legislative measures adopted by the European Union *in this area* and identify the main implementation challenges currently facing the Italian legal system.

a) Let us begin with Directive 2012/13/EU, which, as mentioned, governs the right to information in criminal proceedings[2] . The Directive requires that the suspect or accused person be informed, without delay and in a comprehensible manner, of their fundamental procedural rights and of the charges against them. Under Italian law , the provision of information to the suspect is ensured through the notice

[2] For an overview of this Directive and its transposition into Italian law, see F. CIAMPI, *'The right to information in criminal proceedings: the* "low-profile" *transposition of Directive 2012/13/EU by Legislative Decree No. 101 of 1 July 2014'*, in *Dir. pen. contemporaneo*, 2014, p. 1 ff.; and B. FORNACIARI, *'A new perspective on the right to information? Procedural notices in the light of European directives'*, in **Arch. nuova proc. pen.**, 2017, 5, p. 481 ff. A commentary on the Directive can also be found in S. ALLEGREZZA, V. COVOLO, *'Directive 2012/13/EU on the Right to Information in Criminal Proceedings'*, in **Effective Defence Rights in Criminal Proceedings. A European and Comparative Study on Judicial Remedies**, Padua, 2018, p. 51 ff. On the recent case law of the Court of Justice of the European Union *on this subject*, see M. BARGIS, *'The Court of Justice outlines the relationship between Directive 2012/13/EU on the right to information in criminal proceedings and the Framework Decision on the European arrest warrant'*, in *Sist. pen.*, 31 March 2021, and S. TRONCONE, *'The protection of the accused's right to information following a reclassification of the charge*', in *Dir. pubb. comp. ed europeo* online, 2024, 1, p. 624 ff. The possible effects of this Directive with regard to the sensitive issue of the amendment of the charge (specifically, the legal reclassification of the offence) during the trial are analysed by M. ARANCI, 'Legal *reclassification of the charge and access to plea bargaining: between domestic law and supranational considerations*', in **www.lalegislazionepenale.eu**, 24 July 2019.

regarding the right to a defence *pursuant* to Article *369-bis* of the Code of Criminal Procedure. The main issue lies in the timeliness of this process: the system allows for entry into the register of suspects to occur some time after the actual start of the investigation, thereby limiting the period during which the defence could intervene effectively. For individuals who do not understand the Italian language, the adequacy of the communication depends on the availability and quality of the translation, an aspect that is not yet systematically guaranteed in practice. On several occasions, our Supreme Court has established the legal principle that the failure to translate procedural documents containing the charge against a foreign defendant who does not speak Italian results in a general nullity of an intermediate nature[3] . Recently, the Supreme Court has also ruled on the obligation to translate documents in the stages of proceedings following the first-instance judgement, stating that the failure to translate the summons for the appeal hearing also renders the document invalid, in the sense of a general nullity of an intermediate nature[4] .

b) Directive 2013/48/EU on the right of access to a lawyer sets out the fundamental guarantees regarding legal assistance, establishing minimum European standards relating to the right to have a lawyer in criminal proceedings and in proceedings for the execution of a European Arrest Warrant (EAW)[5] . In particular, it enshrines the right to access a defence lawyer prior to any questioning and requires that such access be effective and not merely formal. This access must be guaranteed before the

[3] See, for example: Criminal Court of Cassation, Section V, 18 June 2026, No. 22670, in relation to the order for committal for trial; Criminal Court of Cassation, Section V, 17 November 2017, No. 11060, concerning the order for immediate trial (both available at *onepa.wolterskluwer.it*); Criminal Court of Cassation, Joint Divisions, 26 September 2006, No. 39298, in **Riv. pen.**, 2007, p. 663, concerning the notice of the conclusion of preliminary investigations.

[4] Criminal Cassation Court, Joint Divisions, 26 November 2025, No. 38306, in *Dir. pen. proc.*, 2026, p. 57, according to which 'Failure to translate the notice of appeal or the first-instance judgment entails, if the defendant does not understand the Italian language, the general nullity of the document with interim effect; the document will therefore be deemed null and void if the defect is raised as a defence'.

[5] On this subject, with particular regard to the development of the case-law of the *European* Court of Human Rights on this point, see N. DAMINOVA, *'The European Court of Human Rights on the "Access to a Lawyer" Directive 2013/48/EU: the Quest for a Coherent Application of the Right to Legal Assistance in Europe*', in *European Criminal Law Review*, 2021, issue 2, p. 211 ff. With regard to the recent case-law of the Court of Justice of the European Union, and with specific reference to 'vulnerable' individuals, see G. ANCONA, A.M. CANOVA, *'Unpacking Barało: Suspect Vulnerability, Procedural Rights, and the Challenge of Effective Remedies*', in *European Papers – A Journal on Law and Integration*, 2026, vol. 11, no. 1, p. 57 ff. Regarding the European Arrest Warrant and the 'dual representation' mechanism, see V.H. GLERUM, *'Directive 2013/48/EU and the Requested Person's Right to Appoint a Lawyer in the Issuing Member State in European Arrest Warrant* Proceedings', in *Review of European and Comparative Law*, 2020, no. 2, p. 7 ff.

person is questioned by the police or any other judicial authority, and in any event, no delays or undue postponements must be permitted from the moment deprivation of liberty occurs[6] . Member States are required to ensure that the defence lawyer may be present and actively participate in questioning, as well as attend other investigative procedures or the taking of evidence (such as, for example, 'confrontations' or the so-called 'judicial experiment'). In this context, the confidentiality of communications is also of essential importance, in that the Directive *in question* strictly protects the right of the suspect or accused person to meet with their defence counsel and/or to communicate with them in private (and this also applies to written and telephone communications). The confidentiality of such contacts is, moreover, regarded as a fundamental prerequisite for the realisation of a fair trial. Under Italian law, this right is formally guaranteed; however, the phase preceding the first appearance before a judicial authority – in particular, police custody and arrest in flagrante delicto – presents critical issues. The practice of 'informal questioning' or the taking of voluntary statements prior to the formal commencement of proceedings may deprive the suspect of legal representation at the very moment when their statements acquire greater evidential weight.

c) There is also Directive 2016/343/EU, concerning the presumption of innocence and the right to be present at trial. It prohibits public authorities (in particular law enforcement officers and judges) from publicly referring to the guilt of a suspect or defendant prior to a final conviction. This implies that public statements and official press releases must be limited to describing the facts in a neutral manner.

[6] In this regard, see D. VISPO, *'The defence counsel's consultations with the defendant* in custody*: between investigative requirements and the effectiveness of the right to a defence*', in *www.lalegislazionepenale.eu*, 3 January 2018, according to whom 'The consultation between the defence counsel and their client – particularly where the client is subject to a measure restricting personal liberty – is probably the first and most significant occasion on which the right to a defence is exercised'; and M. SIMONATO, *'The postponement of the consultation between a suspect* in custody *and their defence counsel: between established case law and a convention-oriented interpretation*', in **Giur. merito**, 2011, p. 1079. As regards case law, see Criminal Court of Cassation, Section II, 30 September 2014, No. 44902, at *dejure.lefebvregiuffre.it*, and Criminal Court of Cassation, Section VI, 5 October 2012, No. 44932, in *Criminal Court of Cassation*, 2014, p. 609, in which the following principle is affirmed: 'With regard to personal precautionary measures, the order of the investigating judge deferring the suspect's right to consult with their defence counsel pursuant to Article 104, paragraph 3, of the Code of Criminal Procedure, is not independently appealable nor can it be subject to review, as it does not have the form and content of an order applying a coercive measure, but may be subject to incidental review in the further course of the proceedings, should it have resulted in a breach of the right of defence which, if not remedied by the conduct of a formal consultation, renders the questioning of the suspect null and void pursuant to Article 178(c) of the Code of Criminal Procedure'."

Furthermore, Member States must ensure that suspects or accused persons are not presented in public or in court whil r subject to physical restraints (such as handcuffs, cages or shackles), unless such measures are strictly necessary for reasons of security, the risk of absconding or to protect public safety. The Directive naturally also addresses the burden of proof, stipulating that this burden must rest entirely with the prosecution and that any doubt regarding guilt must be resolved in favour of the suspect or accused person (in accordance with the principle expressed by the well-known legal maxim *'in dubio pro reo'*). In Italy, this issue is intertwined with the structural problem of statements made at press conferences following arrests or searches; however, the prohibition imposed by the Directive covers all statements and assertions made by public authorities (such as magistrates, ministers or members of the police force), for example to the national *media*.

With regard to the right to be present at trial, the most significant issue in the Italian legal system concerns the so-called trial *in absentia*, as amended following the Cartabia reform (Legislative Decree 150/2022), which requires a rigorous assessment of whether the defendant has knowingly waived their right to be present. The primary objective of the reform, in fact, was precisely to move beyond the old system of presumptions, replacing the criterion of 'formal' – and, indeed, presumptive – knowledge with that of 'actual' knowledge (as far as possible) of the proceedings in progress. It must be noted, however, that the practice of applying this provision has not yet been fully established[7] .

d) Directive 2016/800/EU (Procedural safeguards for children under investigation or accused) now constitutes the European legal framework for one of the 'traditional' categories of vulnerable individuals deserving of 'enhanced' protection, namely children. It provides for a number of specific safeguards: a confidential meeting with the defence lawyer prior to questioning, assistance from the holder of parental responsibility, an individual assessment of the child, restrictions on pre-trial detention, and the right to education. Under Italian law, juvenile criminal proceedings are

[7] For an in-depth analysis of trials 'in absentia' following the Cartabia reform, see: G. MANTOVANI, *'The Cartabia Reform': Who Are Trials* in Absentia *For?*, in *www.lalegislazionepenale.eu*, 30 May 2023; A. CONTI, *'The Absent Defendant in the Light of the Cartabia Reform. Initial Observations on Legislative Decree No. 150 of 10 October 2022'*, in *Arch. pen.*, 2023, 1, p. 1 ff.; G. CORETTI, *'Persisting ambiguities in the new rules governing trials* in absentia', *ibid.*, 2023, 2; F. DEMARTIS, *'Trials* in absentia *in the light of the Cartabia reform*', in *Altalex*, 11 April 2023. On procedural and practical aspects, see recently R. FEGGI, *'Trials in absentia and failure to serve the order for direct summons on the defence* counsel', in **Ius penale**, 28 July 2026 (note on Cass. pen., Section II, 9 April 2026, No. 15380).

governed by Presidential Decree 448/1988, which is structured as a fully-fledged procedural 'sub-system' tailored in many respects to the needs of the child and to the pursuit of rehabilitative and resocialisation objectives. The regulatory framework thus introduced is centred on the fundamental premise that a child cannot be treated in the same way as an adult defendant, in terms of procedural and prison treatment, as they are a developing individual whose personality is susceptible to significant changes over time. With this in mind, the 1988 reform was essentially based on three key principles: 1) appropriateness and flexibility: the judge has broad discretionary powers to identify the most suitable solution for the individual juvenile defendant; 2) minimising the impact of the prison system and *the principle of last resort*: contact with prison must be avoided so as not to traumatise the minor or produce a 'criminogenic' effect, disrupting educational activities and social and family relationships that are essential for personal growth and the development of character; consequently, custodial sentences are imposed only in the most serious cases; 3) absolute priority given to the aims of rehabilitation and social reintegration: the objective is to foster a sense of responsibility in the minor and to implement personalised educational programmes, which may also include voluntary work or activities of social utility, but which must not, under any circumstances, compromise the minor's educational and training needs[8] . Directive 2016/800/EU, however, requires a degree of individualisation and formalisation of safeguards that Italian practice does not always fully meet, particularly with regard to the systematic assessment of the child's best interests at every stage of the proceedings[9] .

(e) Finally, Directive 2016/1919/EU on legal aid at the State's expense requires that this form of legal aid be guaranteed prior to questioning. The Italian system, governed by Consolidated Law No. 115/2002, offers formally broad coverage, with an income threshold currently set at €13,659.64 (Ministerial Decree of 22 April 2025).

[8] On the characteristics and difficulties in applying the 'juvenile rehabilitation programme', see, most recently, A. GAUDIERI, *A 'substitute' ruling by the Constitutional Court on the composition of the court in matters concerning the 'juvenile rehabilitation programme'*, in *Riv. it. dir. proc. pen.*, 2025, p. 621 ff.; and A. ZAPPULLA, *Juvenile rehabilitation programme: the Constitutional Court salvages what can be salvaged by reshaping the institution*, in *Riv. it. dir. proc. pen.*, 2025, p. 1434 ff.

[9] On this topic, see M. MIRAGLIA, *'Implementation of EU Directives on access to a defence lawyer and on safeguards for accused and wanted minors: progress, challenges and further scope for action*', in *www.lalegislazionepenale.eu*, 11 December 2025; L. POLITO, *'Restorative justice and juvenile proceedings in the context of the so-called "Cartabia Reform"*, in **Arch. pen.**, 2022, 1, p. 1 ff.; A. MALINCONICO, L. MARTINS, *Directive (EU) 2016/800 and Presidential Decree 448/1988: parallels and points for reflection*, in *Dir. e giust. minorile, Quarterly Journal*, 2017, 1–2, p. 98 ff.

Operational challenges relate to certain specific issues: delays in the payment of fees to defence lawyers, the complexity of the eligibility procedures for foreign nationals – who are required to provide consular proof of income – and, at a structural level, the risk of the legal profession gradually withdrawing from the defence of the indigent, as documented by the Union of Italian Criminal Bar Associations (UCPI) in numerous reports[10] . Indeed, in recent years, the UCPI has been opposing with ever-greater determination any legislative proposal or initiative aimed at introducing cuts or reductions to lawyers' fees, and proposes to remove the 'inequalities in application' between judicial offices and the bureaucratic and procedural complexities that make it, in practice, extremely difficult for lawyers to obtain the fees due from the State. In other words, fewer and fewer qualified professionals are willing to make themselves available for legal aid by registering on the relevant lists, and this ultimately harms the most vulnerable, who risk being unable to access legal assistance of the same standard and dignity as those who can afford a solicitor at their own expense.

3. Key issues at each 'stage' of the proceedings

3.1. - *The preliminary investigation stage and defence investigations*

One of the stages in which the effectiveness of the right to a defence is put to the test is that of the preliminary investigations, both because of the asymmetry that characterises the powers of the prosecution and those of the defence, and because of the absence of a genuine adversarial process[11] . As regards the first aspect, if one

[10] The Supreme Court has also ruled on several occasions on the sensitive issues concerning compliance with procedures and income limits for access to legal aid. For example, see: Criminal Cassation, Section IV, 10 July 2026, No. 29484; Ibid., Section II, 17 April 2026, No. 29172; Ibid., Section IV, 20 May 2026, No. 21276; Ibid., 28 April 2026, No. 16637, all available at *onepa.wolterskluwer.it*;

[11] On the practical issues raised by this 'asymmetry', see I. PALMA, *'Is the seizure of computer equipment on the initiative of the public prosecutor or the judicial police incompatible with EU safeguards?*', in *Cass. pen.*, 2026, p. 2111 ff.; E. CRIPPA, *'Insufficient safeguards for house searches*', in *Riv. it. dir. proc. pen.*, 2025, p. 1595 ff.; L. FILIPPI, *'The public prosecutor is not obliged to conduct investigations in favour of the suspect because this is not a requirement under penalty of nullity*', in *Ius penale*, 10 December 2025; W. NOCERINO, *'On the procedures for obtaining images from CCTV cameras*', in *Cass. pen.*, 2024, p. 2422 ff. With regard to case law, see, in particular, Cass. pen., Section VI, 3 June 2026, No. 25576, in *onepa.wolterskluwer.it*, according to which 'Statements made to the judicial police by the suspect pursuant to Article 350, paragraph 7, of the Code of Criminal Procedure, in the absence of a defence counsel and the notices required under Articles 63 and 64 of the Code of Criminal Procedure, provided that their spontaneity is established – understood as the absence of coercion, inducement or solicitation – with both the time elapsed since the offence and the subjective reasons that led

examines the investigative powers granted to the public prosecutor and compares them with the tools available to the defence counsel through defence investigations, it becomes clear that, despite the reference to the principle of 'equality of arms' ( ), significant asymmetries persist in terms of resources, timeframes and access to information, which may affect the defence's ability to build its own line of evidence as early as this stage. This is all the more so given that, in practice, certain prerogatives granted to the defence are subject to de facto restrictions that undermine their effectiveness. Consider, for example, Article *391-quater* of the Code of Criminal Procedure, which would allow the defence counsel to request any document held by the public administration. However, quite a few public administrations systematically refuse to hand over such documents, with the result that the defence is forced to seek the intervention of the Public Prosecutor in order to obtain them. This leads to the prosecution automatically becoming aware of the defence strategy and, consequently, the defence losing the power to withhold any administrative document that might prove detrimental to the suspect.

There is also a significant imbalance between the powers of the prosecution and those of the defence when it comes to access to premises (Articles *391-sexies* and *391-septies* of the Code of Criminal Procedure). The conditions are, in fact, more stringent, particularly for private premises or those not open to the public, for which specific judicial authorisation is required[12] . Furthermore, there are differences in the timeframes for issuing authorisation and the limits on challenging such orders: in practice, this may restrict the defence's ability to conduct an effective search for evidence on an equal footing with the public prosecutor, as required by Articles 24, 111 and 112 of the Constitution and Article 6 of the ECHR.

Finally, with regard to access to the preliminary investigation file, the right to a

the declarant to speak being irrelevant'.

[12] On the relationship between the rules governing access to private premises and those governing access to documentation in the context of defence investigations, see Criminal Cassation, Section II, 12 October 2005, No. 42588, in **Arch. nuova proc. pen.**, 2006, p. 178, which affirms the principle that 'With regard to defence investigations, it must be ruled out that Article 391-septies of the Code of Criminal Procedure, in providing for the possibility of the defence counsel, upon a reasoned authorisation order from the judge, to access private premises or those not open to the public, also confers upon that defence counsel the power to inspect and make copies of records or documents held there, as the defence counsel may have access, pursuant to Article 391-quater of the Code of Criminal Procedure, only to documentation held by the public administration; whereas, with regard to documentation held by private individuals who refuse to produce it, the defence counsel may only submit a request, pursuant to Article 367 of the Code of Criminal Procedure, for the adoption of a seizure order'.

defence suffers a significant *blow*. This refers above all to the fact that the defence is granted the right to inspect the documents contained in the investigation file held by the public prosecutor and to obtain copies of them (including in digital form) only from the date of the notice of conclusion of the preliminary investigation. From that notice, a very short time limit begins to run for preparing written submissions or requesting the questioning of the suspect. And it is indeed true that this is a standard time limit. It is equally true that, in the case of complex investigations lasting months, if not years, with thousands of pages to consult, it is unrealistic to assume that the defence is able to acquire a full and thorough understanding of the investigation documents in order to carry out a detailed review and mount an adequate defence. Whilst this is true, there are grounds for doubting the compatibility of this model with the need for timely and comprehensive preparation of the defence strategy, whilst the prosecution enjoys an information advantage at the crucial stage when the lines of the future trial are being defined.

3.2. - *Preliminary hearing and the compilation of case files for the trial*

Within the framework of the Italian legal system, the preliminary hearing and the rules governing the preparation of case files for the trial are central to safeguarding the right to a defence, as this marks a pivotal juncture and acts as a filter between the investigative phase and the trial phase[13] . However, in practice, the preliminary hearing's role as a filter prior to committal for trial is undermined due to the preliminary hearing judge's (GUP) lack of rigour in exercising control, which ultimately reduces the preliminary hearing to a mere formality, thereby weakening the right to a

[13] On this subject, see, amongst others, V. MAIELLO, *'Investigations and the preliminary hearing in the context of criminal law'*, in **Riv. it. dir. proc. pen.**, 2023, p. 625 ff.; F. TONDIN, *'The new rule of reasonable expectation of conviction'*, in **Cass. pen.**, 2023, p. 404 ff.; F. VERGINE, *'The reform of the preliminary investigation phase and the preliminary hearing'*, in **Il Processo**, issue 3, 1 December 2021, p. 635 ff. The case law on this point is, of course, very extensive. By way of example only, see Cass. pen., Section VI, 15 October 2025, No. 37949, in *altalex.com*, 4 December 2025, concerning the limits on the preliminary hearing judge's power to reclassify the charge; in a substantially similar vein, Criminal Court of Cassation, Section VI, 23 September 2025, No. 33679, in *Dir. pen. proc.*, 2025, p. 1480. On the long-standing issue of the selection of documents to be included in the case file for the trial, see, in particular, Criminal Court of Cassation, Section III, 21 February 2025, No. 15448, in *CED Cass.*, 2025, rv. 287801-01, according to which 'Documents obtained abroad and transmitted to the Italian authorities pursuant to the OECD Convention may be used even without the prior authorisation of the party that provided them'; as well as Criminal Cassation, Section V, 19 December 2025, No. 12615, in *CED Cass.*, 2026, rv. 289753-01, which affirms the principle that 'Consent to the inclusion of documents in the trial file may be inferred from the party's procedural inaction'.

defence. This is also evident from the court schedules, which schedule preliminary hearings so close together (usually 15 minutes apart) as to clearly indicate that the discussion on this point is severely compromised.

Even the compilation of the case file for the trial can pose pitfalls for the effective exercise of the right to a defence. At this stage, in fact, by agreement between the parties, documents from the Public Prosecutor's file or from the defence's own investigation may be included. Hence the possibility that such agreements may affect the evidential structure of the trial, allowing documents formed outside the adversarial process to be admitted to the trial, even if they are sometimes affected by defects which case law considers to be remedied by the defence's consent to their inclusion. Moreover, it is not uncommon for defence counsel not to be fully aware of the evidential consequences of such choices and, above all, of the fact that their consent may amount to an effective and informed waiver of the safeguards of the adversarial model.

3.3. - *Trial, testimony and the adversarial principle*

As the Italian criminal trial is governed by the principle of adversarial proceedings, it is clear that the trial, dedicated to the taking of witness evidence, constitutes its core. However, there are cases in which exceptions are made to the principle of adversarial proceedings, which raises issues of compatibility with the principles of due process set out in Article 111 of the Constitution and Article 6 of the ECHR. The reference is, first and foremost, as already noted, to the rules governing the agreed inclusion of documents from the preliminary investigation in the trial file, pursuant to Articles 431 and 493 of the Code of Criminal Procedure. The focus is on the significance of the defence counsel's consent – including that of a court-appointed defence counsel – as a waiver of the right to adversarial proceedings in the gathering of evidence, and the limits beyond which such a waiver cannot extend without infringing constitutional and convention-based guarantees.

No less problematic, from the same perspective, is the issue of reading out, during the trial, non-repeatable documents and statements made outside the adversarial process[14] . These procedures conflict with the case law of the European Court of

[14] On this topic and the numerous related issues, see L. SURACI, **L'atto irripetibile**, Padua, 2012; P. BRONZO, **Il fascicolo per il dibattimento**, Padua, 2017; M. MONTAGNA, *'L'incontrollabile espansione* dell'irripetibilità', in **Proc. pen. e giustizia**, 2020, issue 4, p. 809 ff.; C. CESARI, *'Dichiarazioni irripetibili e metodo dialettico: i problemi di una coesistenza* difficile', in G. DI CHIARA (ed.), **Eccezioni al contraddittorio e giusto processo. Un itinerario attraverso la giurisprudenza**, Turin, 2009, p. 227 ff. In case

Human Rights, according to which a conviction cannot be based exclusively or decisively on statements which the defendant has not been able to cross-examine, unless there are adequate 'compensatory safeguards', which are not always present in the Italian legal system. This refers to the verification of reliability and the necessary external corroboration required to support evidence obtained unilaterally. In judicial practice, there is no shortage of cases in which pre-trial statements have carried decisive weight regardless of such compensatory safeguards, thereby curtailing the defendant's right to cross-examination and to present counter-evidence.

3.4. - *Special procedures and alternative forms of settlement: probation, summary proceedings*

The effectiveness of the right to a defence within the context of special procedures and alternative forms of proceedings deserves separate consideration, with particular attention to the suspension of proceedings with probation and summary proceedings[15].

As regards probation in ordinary proceedings, the main issues concerning the right to a defence relate to the conduct of the chamber hearing, during which the judge is required to assess with particular care the voluntary and informed nature of

law, the Supreme Court has repeatedly ruled on the compilation of the trial file and the inclusion of non-repeatable documents: see, in particular, most recently, Criminal Cassation, Section V, 23 January 2026, No. 16668, at *onepa.wolterskluwer.it*; Ibid., 19 December 2025, No. 12615; Ibid., 3 February 2026, No. 8575, according to which 'Reports of surveillance, observation and monitoring drawn up by the judicial police constitute non-repeatable documents and, as such, may be included in the trial file even in the absence of the parties' consent (In its reasoning, the Court specified that such reports reproduce a situation subject to change, the recollection of which in court, through the testimony of the judicial police officer, presents a real risk of loss of relevant information)'; Id., 29 April 2025, No. 23193, in which the following principle is affirmed: 'With regard to "hearsay" evidence, where such statements have been taken with the agreement of the parties pursuant to Article 431(3) of the Code of Criminal Procedure, it is the responsibility of the party concerned to request the examination of the direct source; consequently, should this not occur, the statement thus taken is fully admissible' (all available at *dejure.lefebvregiuffre.it*).

[15] The literature on this subject is extensive and cannot be summarised here. By way of example only, we refer the reader to: E.M. CATALANO, *'Suspension of proceedings with probation or punishment without trial?'*, in *Arch. pen.*, 2025, 3, p. 1 ff.; E. MATTEVI, *'The suspension of proceedings with probation following the Cartabia reform: substantive aspects'*, in *Dir. pen. proc.*, 2023, 1, p. 45 ff.; V. BOVE, *'Probation may be granted a second time if the offence is ongoing'*, in *Riv. it. dir. proc. pen.*, 2022, p. 1345 ff.; M. MIRAGLIA, **Probation for adult defendants. Analysis and prospects for a different procedural model**, Turin, 2020; F. ZACCHÉ, *'Application for and Waiver of the Summary* Trial', in *Riv. it. dir. proc. pen.*, 2023, p. 1423 ff.; DE GIORGIO, L. DEGL'INNOCENTI, **The Summary Trial**, Milan, 2023; M.L. DI BITONTO, *'Proceedings by decree and summary proceedings: past and present'*, in *Cass. pen.*, 2023, p. 1812 ff.; R. BRICHETTI, L. PISTORELLI, **Summary Proceedings: Theoretical and Practical Aspects**, Milan, 2005.

the defendant's choice. Here too, there is a risk that this scrutiny remains merely formal and that the defendant is not fully informed of the substantive and procedural consequences of their choice.

The summary trial is certainly more problematic, insofar as it constitutes a reduction in, if not a waiver of, the adversarial evidential process. The mechanism of defence investigations, which is intended to 'compensate' *from the outset* for the lack of an oral preliminary hearing, is not always adequately utilised by the defence. Furthermore, the need for procedural speed leads many investigating judges to deny the possibility of abbreviated proceedings conditional upon the defence taking evidence deemed decisive. Hence the tendency to 'trade off' the significant reduction in sentence provided for by opting for the summary procedure against a less secure evidential framework, particularly as consent to the choice of procedure entails, according t ly to case law, a remedial effect on certain irregularities characterising the preliminary investigation. This reflects a recurring balancing act within the Italian procedural system between the need for procedural efficiency and the guarantees afforded to the defence.

4. Concluding remarks

The review carried out paints a picture of a legal system in which the right to a defence is underpinned by a broad and multi-layered regulatory framework, shaped by the interplay between the Constitution, the European Convention on Human Rights and EU law. This wealth of sources does not, however, justify equating the formal compliance of the system with the actual effectiveness of the protection afforded. The critical issues examined show that the decisive discrepancy arises when the guarantee must translate into the actual ability of the suspect or accused to understand the charges, consult with their defence counsel, examine the evidence gathered, challenge its interpretation and contribute to the formation of the evidence. It is therefore in terms of the conditions under which these rights are exercised, rather than in terms of the mere enunciation of rights, that the robustness of the procedural model is now measured.

From this perspective, effectiveness is not an additional quality of the defence, but rather defines its legal substance. The right to a defence is not a static sum of individual rights distributed throughout the proceedings; it is a power that develops over time, the usefulness of which depends on the stage at which each right can be exercised. Late notification of the charges, access to the case file granted only once key decisions have already been taken, or technical assistance provided after

statements have been taken cannot always be compensated for by the subsequent opening of a window of opportunity for the defence. Missed procedural opportunities can have effects that ripple from one stage to the next, and which the retrospective recognition of the guarantee is unable to fully remedy. It follows that the review cannot be confined to the regularity of individual acts, but must encompass the entire defence process and any accumulation of disadvantages throughout the proceedings. From this perspective, the timeliness and quality of legal assistance, effective access to the case files and equality of arms form a functionally unified whole. Equality does not require an impossible parity between the powers of the prosecution and those of the defence, particularly during the investigation phase; it does, however, require that the asymmetry inherent in that phase be mitigated by appropriate checks and balances designed to offer the person subject to the proceedings a reasonable opportunity to present their own perspective without being placed at a substantial disadvantage.

The central importance of the substantive conditions for the exercise of these rights emerges with particular clarity in cases where the legal system attaches preclusive or remedial effects to a choice made by the defendant or their defence counsel. Consent to the admission of evidence obtained outside adversarial proceedings, a request for a summary trial, an application for the suspension of proceedings with a probation order, and a waiver of the right to attend the trial are based on different rationales, but they all presuppose that the decision is made freely, in full knowledge of the facts and unequivocally. The formal validity of the expression of will does not, therefore, exhaust the issue. It must be verified that the person concerned has received comprehensible information, has been able to consult in private with a suitably qualified defence counsel, has had the necessary time, and has been placed in a position to understand the evidential and procedural consequences of their choice. Here, therefore, lies a further reason why legal defence cannot be regarded as an ancillary service nor as a form of protection relating solely to the private interests of the accused. Through the formulation of alternative hypotheses, the search for exculpatory evidence, the scrutiny of sources of evidence and cross-examination, legal defence contributes to the quality of the decision in terms of fact-finding. The adversarial process also represents a method of ascertaining the truth, as well as an individual guarantee; any curtailment of it therefore affects the reliability of the findings and, consequently, the legitimacy of the exercise of punitive power.

The analysis also confirms that the effectiveness of the defence has an organisational and economic dimension which the discussion of safeguards cannot overlook.

The timeframes set for the examination of complex case files, the actual availability of interpreters and translations, the procedures for accessing documents, the management of hearings, the timeliness of payments and the adequacy of legal aid are not variables external to procedural law. They are conditions through which the constitutional guarantee takes shape or is undermined. The public duty does not, therefore, end with the appointment of a defence lawyer: it requires a framework capable of ensuring that legal assistance is actually available and professionally adequate. In this light, the sustainability of legal aid for the indigent concerns the overall structure of the trial, since the degree to which these guarantees are effective cannot depend on the financial resources of the person concerned.

This same approach leads us to interpret vulnerability not only in categorical terms, but also in relational terms. Being a minor, language difficulties, mental or cognitive conditions, and lack of means identify situations requiring specific precautions; the actual degree of vulnerability depends, however, on the interplay between the individual's characteristics and the way in which the proceedings are organised. Furthermore, various factors may accumulate, transforming a right recognised in the abstract into one that is difficult to exercise. The principle of procedural equality therefore requires us to move beyond the notion that uniformity of procedure alone ensures equal protection. Individualised assessments and proportionate adjustments serve to ensure equal opportunities to understand, participate and defend oneself.

These conclusions take on particular significance within the European judicial area. The directives on procedural safeguards set common minimum *standards*. Mutual trust between Member States – which is necessary for the functioning of mutual recognition and judicial cooperation – also depends on their implementation. To determine whether this trust is well-founded, it is necessary to examine individual proceedings and consider the point at which the defence lawyer becomes involved, the conditions under which they can carry out their duties, access to case files in good time, and the practical opportunities available to challenge the charges. The Italian case confirms the value of an outcomes-oriented European assessment, extended to cover practices and the practical conditions under which rights are exercised. If the gap between proclaimed guarantees and those actually enjoyed arises primarily in practice, it can only be identified by examining the experiences of those going through the proceedings and those acting in a defence capacity. The perceptions and accounts provided by suspects, defendants, convicted persons and lawyers must be analysed in the light of comparable indicators relating to the timing of the first access to a defence

lawyer, the continuity and quality of legal assistance, the possibility of obtaining timely access to case files, the existence of effective conditions of equality, and awareness of procedural waivers.

In terms of possible responses, the picture outlined suggests that expanding the range of safeguards is not always a priority. It is more urgent to ensure that those already recognised are effectively enforceable, by guaranteeing early defence intervention, timely and comprehensible access to case files, time limits commensurate with the complexity of the case, effective oversight of waivers, and protective measures capable of intervening before any disadvantage becomes irreversible. Subsequent remedies also retain an essential role, but they cannot be the sole response when the infringement has affected the formulation of the defence strategy or the choice of procedure. In other words, the perspective of effectiveness requires an assessment not only of whether a right is provided for and whether its violation is sanctioned in theory, but also of whether the system is capable of preventing the prejudice or of effectively remedying its effects.

The decisive criterion can therefore be formulated in terms that are, all things considered, straightforward. A defence is effective when it can influence, at the relevant stage, the course and outcome of the proceedings. This presupposes that the accused is treated as a person who is aware of the proceedings, capable of understanding, making choices and challenging the case with the assistance of a qualified professional, and not as a passive recipient of pre-determined procedures. The protection of the right to a defence thus safeguards, alongside individual liberty, the quality of the investigation and the legitimacy of the criminal decision. It is this, ultimately, that national legislation and practices must be measured against.

ABSTRACT

This paper was drafted as part of a 'Justice' research project (acronym CRIDE) on the effectiveness of the right to a defence, funded by the European Commission. It aims to provide an overview of the situation in Italy regarding the implementation of European Directives on defence rights and guarantees, analysing weaknesses and critical issues from both a theoretical and practical perspective in relation to the various stages of criminal proceedings.

KEYWORDS

Right to defence – Procedural safeguards – Stockholm Programme – Implementation of EU Directives – Stages of criminal proceedings

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This paper was drafted as part of the 'Justice' research project (acronym CRIDE) on the effectiveness of the right to a defence, funded by the European Commission. It aims to provide an overview of the situation in Italy regarding the implementation of the European Directives on defence rights and guarantees, analysing weaknesses and critical issues – from both a theoretical and a practical perspective – in relation to the various stages of criminal proceedings.

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