# SUPREME COURT OF CASSATION — SIXTH CRIMINAL SECTION

Judgment no. 34812/2026 — public hearing of 18 June 2026 — filed with the Registry on 29 September 2026

*De Pasquale and Spadaro*

Unofficial English translation

## TRANSLATOR'S NOTE

This is an unofficial working translation: the Italian text of the judgment is the authentic text. It is complete: nothing has been omitted or summarised. The numbers in square brackets, from [p. 2] to [p. 41], mark the point at which each page of the original begins, so that every passage can be cited by the page of the official text.

In the first part of the judgment (*Ritenuto in fatto*, "Facts of the case") the Court sets out the grounds of appeal in the Italian conditional mood, which signals that these are the parties' submissions and not findings of the Court; the translation renders it with reporting formulas ("it is argued", "allegedly", "according to the appeal"). The same applies where the Court reports, without adopting them, the views of others: legal scholarship, the judgments under review, witnesses.

The operative formula, "annulla senza rinvio la sentenza impugnata perché il fatto non sussiste", is rendered "quashes the judgment under appeal without remand, because the fact does not exist". Among the acquittal formulas of Italian criminal procedure it is the one that denies the offence at its root: in this judgment it means that the conduct charged does not fulfil the objective elements of the offence.

The surname of Eni's chief executive appears in the original sometimes as "Descalzi", sometimes as "De Scalzi": the translation always writes "Descalzi". Two evident slips in the original are translated as they stand and flagged with [sic]: "Amara's telephone" at p. 9, where the context indicates Armanna's telephone; the reference to Article 328(1) of the Code of Criminal Procedure at pp. 28 and 31, where the Criminal Code is meant. Other minor slips are rendered without comment.

On p. 1 the number of the judgment (34812) is stamped and the section number (952) is handwritten; on p. 33 a handwritten correction, initialled in the margin, completes a word of the text ("coloro", "those"), and the translation incorporates it. Latin expressions and words that the original leaves in a foreign language are in italics. Case citations, headnote numbers (Rv.) and dates are reproduced as in the original.

[Stamp:] 34812-26

ITALIAN REPUBLIC

In the name of the Italian People
THE SUPREME COURT OF CASSATION

SIXTH CRIMINAL SECTION

Composed of:
[omitted in the version published by the Court]
Section judgment no. (Sent. n. sez.) 952 [handwritten]
Public hearing (UP) of 18/06/2026
General Register no. (R.G.N.) 10481/2025
has delivered the following
JUDGMENT

on the appeals lodged by
[omitted in the version published by the Court]

[p. 2] FACTS OF THE CASE (*Ritenuto in fatto*)

1. The Court of Appeal of Brescia substantially confirmed the judgment by which Fabio De Pasquale and Sergio Maria Spadaro were convicted of the offence provided for by Article 328 of the Criminal Code.

According to the accusation as formulated in the charge, the defendants, magistrates of the Public Prosecutor's Office at the Tribunal of Milan and the prosecutors in charge of the so-called Eni-Nigeria trial, held before that same Tribunal:

- after receiving from Dr Paolo Storari, likewise a magistrate serving at the Milan Prosecutor's Office, jointly in charge – together with Dr Laura Pedio – of other criminal proceedings connected with those in question (the so-called 'false Eni conspiracy' proceedings), information, first oral and then documentary – the latter contained in certain emails sent by Storari, first, to the then Chief Public Prosecutor and forwarded by the latter to the defendants by email of 15.2.2021, and, subsequently, in a further email of 19.2.2021 sent to them directly by Storari – capable of demonstrating the falsity of the elements provided to the prosecution by Armanna Vincenzo, who had taken on the role of declarant against the principal defendants of the Eni-Nigeria trial;

- and also, after receiving an express request from Storari himself, conveyed by the email of 19.2.2021, to transfer into, and use in, the so-called Eni-Nigeria trial a series of documents (specified in the charge), making them available to the Tribunal and to the defence;

- allegedly unduly refused to perform acts of their office which, for reasons of justice, had to be performed without delay and, in particular, allegedly failed to file with the Public Prosecutor's secretariat, for the benefit of the defence, pursuant to Articles 358 and 430 of the Code of Criminal Procedure and Article 73 of Royal Decree no. 12 of 30 January 1941, documents (specified in the charge) acquired in the separate proceedings, named "false Eni conspiracy", relevant to the assessment of the reliability of Armanna Vincenzo himself;

- the defendants allegedly did so in contrast with the line they themselves had previously taken, when they had put before the Tribunal items of evidence in support of the alleged subornation of Armanna, which had likewise emerged in the separate proceedings referred to above (thus the charge).

As regards the civil-law rulings, the Court of Appeal limited the compensation in favour of the civil party solely to non-pecuniary (moral) damage "arising from loss of defensive *chances*".

2. The defendants have lodged an appeal, setting out 19 grounds.

2.1. The first ground alleges violation of law in relation to Article 328 of the Criminal Code, in that the Court of Appeal held that there had been a refusal to perform official acts, notwithstanding that the two Public Prosecutors had in fact taken a decision (an act) and had referred, with adequate time, the final decision to the Chief Public Prosecutor.

[p. 3] The factual premise is that: a) when the trial was "substantially over" (the trial, it is claimed, was at the stage of the so-called rejoinders (counter-replies)), the two Public Prosecutors had received a request by email (19.2.2021) from Dr Storari aimed at bringing to the knowledge of the Tribunal and of the defence certain instances of conduct summarised in a report (annotazione) of the Guardia di Finanza (Italy's financial police); b) according to the appeal, the Guardia di Finanza report in question was only a draft, contained no annexes, had not been signed by whoever drafted it and had not been filed even in the separate connected proceedings; c) the two appellants, after making their assessment, had sent on 5 March an email to the Chief Public Prosecutor, Dr Francesco Greco, and to the Deputy Chief Prosecutor, Dr Laura Pedio – who allegedly agreed with it without raising any objection – by which they informed them that they had decided not to act upon the request received, that is, upon the mooted supplementary investigative activity, unless the Chief Prosecutor indicated otherwise, thereby delegating the final decision to the latter.

Therefore, the act which, according to the prosecution's case, had been refused had in reality been adopted, having regard to the responsibility and the discretion of the magistrates in charge of the proceedings and, above all, to the fact that their conclusions had been shared by the Chief Public Prosecutor and by the Deputy Chief Prosecutor.

It is argued that, unless one were to consider that this was a compulsory act, that is, that the two Public Prosecutors, in charge of the Eni-Nigeria trial, could not adopt any act other than the one requested by Dr Storari, that is, by a Public Prosecutor other than the one in charge of the proceedings, the act was in fact performed.

It is pointed out, in this regard, that the public prosecutor in charge of the proceedings could never take on the role of mere executing agent of a person extraneous to the trial, whoever that person may be.

Therefore, it is argued, in the present case the two objective requirements of the offence of refusal to perform official acts are lacking: the refusal and the non-deferrability.

As to the first, it is noted that the refusal consists in a manifestation, in a firm, resolute and irrevocable inaction, and that such manifestation must be accompanied by the definitive expiry of a time-limit or by the loss of any possibility of protecting the interests specified by the provision.

In the present case, according to the appeal, the two defendants never expressed an absolute and immutable refusal, but merely manifested their belief that it was not necessary to perform the act requested, in view of the reasons they themselves had indicated, referring their opinion to the Chief Public Prosecutor and to the Deputy Chief Prosecutor, who agreed with it (reference is made not only to the note of 5 March, mentioned above, but also to an email from Dr Spadaro, sent also on behalf of Dr De Pasquale, to Dr Storari, in which, in reply to the latter's request, it was made clear that any final decision lay with the Chief Prosecutor).

[p. 4] It is added that the requirement of the non-deferrability of the act was not satisfied either because, with respect to the email of 5 March, the next hearing in the trial had been set for the following 17th and, therefore, the Chief Prosecutor had sufficient time to decide.

In the present case, it is argued, the material element of the fact is lacking.

2.2. The second ground alleges violation of law and defective reasoning, in that the Court of Appeal did not hold that the records specified in points 1 to 4 of the charge (these are WhatsApp messages of a Telegram chat between Armanna and another person and certain notes of the company Vodafone summarised in a report of the Guardia di Finanza) had never been “sent” to the two appellants by Dr Storari.

The content of those documents – the so-called underlying ones – was, according to the appeal, only mentioned, incorporated and summarised in the texts – in Word format – attached to the emails sent by Dr Storari on three occasions, from 14 January to 4 February 2021, to his colleagues Greco and Pedio, or in the draft report of the Guardia di Finanza which Storari himself had transmitted on 19.2.2021 to the two present appellants as well.

They were, it is argued, in reality documents drafted by Dr Storari himself, in which he indicated a series of situations considered relevant for formulating “almost a draft request for a precautionary measure for calumny” against Armanna and two other persons; it is emphasised that the records specified in the charge at points 1 to 4 never reached the present defendants.

On this issue – relevant, and raised on appeal – namely whether the two defendants had ever had at their disposal the records which, according to the prosecution's case, they then failed to file in the Eni-Nigeria proceedings, both judgments on the merits are, it is argued, silent or evasive (there is a part of the appeal devoted to demonstrating this assertion).

2.3. The third ground alleges the nullity of the judgment under appeal for violation of Articles 25 of the Constitution, 7 of the ECHR and 328 of the Criminal Code, in relation to Article 430(1) of the Code of Criminal Procedure, in that the Court of Appeal held that the Public Prosecutor was under a legal obligation to carry out supplementary investigative activity, the omission of which would constitute the offence charged.

It is argued that, according to the Court of Appeal, the obligation to file which, in the present case, had allegedly been breached derived from Articles 430(2) and 358 of the Code of Criminal Procedure.

This, it is submitted, is a legally erroneous assertion.

The appellants in fact submit that: 1) the second paragraph of Article 430 of the Code of Criminal Procedure refers exclusively to the documentation acquired at the will of the Public Prosecutor conducting the proceedings through the supplementary activity referred to in the

first paragraph of the same Article; 2) there is no correlation between Article 358 and Article 430 of the Code of Criminal Procedure, since they are provisions referable to different procedural phases.

The interpretation given by the Court of Appeal would, it is argued, conflate different aspects and, in violation of Article 25 of the Constitution and Article 7 of the ECHR, would nullify the rule laid down in the first paragraph of Article 430 of the Code of Criminal Procedure, would broaden the provision of Article 358 cit., would modify *in* [p. 5] *malam partem* the rule supplementing the criminal precept laid down in Article 328(1) of the Criminal Code.

It is emphasised that:

a) the first paragraph of Article 430 of the Code of Criminal Procedure refers to a mere faculty and not to a legal obligation, “may be carried out”:

b) the offence under Article 328 of the Criminal Code requires a mandatory and non-deferrable act, “the refusal must be undue and the act must be performed without delay”;

c) the refusal under Article 328 of the Criminal Code cannot be made out in respect of the failure to perform a discretionary act, that is, an act in respect of which the public prosecutor holds a power of his own as to the *an* and the *quando*;

d) the Court of Appeal, it is argued, wrongly denied that, in the present case, there was absolute discretion on the part of the public prosecutor, but, in reality, did not indicate which rule would be the one founding the obligation to act and limiting the provision of the first paragraph of Article 430 cit.;

e) the reference to the principle of mandatory prosecution is also improper and, likewise, the reference to Constitutional Court judgment no. 96 of 1997 is also erroneous; Article 358 cit. applies only in the phase of the preliminary investigations and is instrumental solely to the correct determinations of the public prosecutor regarding the exercise of criminal action;

f) moreover, also erroneous, it is argued, is the Court of Appeal's statement according to which, if one were to follow the defendants' reasoning, one would have to go so far as to maintain that, even where the public prosecutor becomes aware of conclusive evidence of the defendant's innocence, he would in any event not be under an obligation to “file” it, given that, on the contrary, the correct exercise of discretion would in such a case lead to the filing of that evidence (the public prosecutor would adopt the measure acquiring the evidence (Article 430(1)) and would give notice of filing to the parties (paragraph 2);

g) in the case under examination, on the one hand, discretion was exercised through assessments summarised in the note of 5 March – mentioned above – in which the factual and legal reasons were set out that suggested not proceeding with the acquisition of the material pointed out by Dr Storari, and, on the other hand, this was not conclusive evidence of innocence, the judges of the merits themselves having ruled this out;

h) the first paragraph of Article 430 cit. not only confers a discretionary power but even limits it, imposing a prohibition on its exercise in certain cases “even if it were conclusive evidence of innocence” (the reference is also to Article 430-bis of the Code of Criminal Procedure).

2.4. The fourth ground alleges violation of multiple provisions, in that the Court of Appeal held that the public prosecutor at the hearing has a legal obligation to file in his own case file procedural results produced by another magistrate and pointed out to him.

The reference is, in addition to Article 70 of Royal Decree no. 12 of 1941, to Articles 53 and 430 of the Code of Criminal Procedure, which, it is argued, also have a legal basis in supranational rules.

[p. 6] Article 53 cit. concerns the full autonomy of the public prosecutor at the hearing and, therefore, his independence in deciding; Article 430(1), it is argued, has a value confirming the first provision.

The Court of Appeal, it is argued, wrongly held that those documents, pointed out by Dr Storari, were useful to the defendants [in the Eni-Nigeria trial] and that the two appellants had no freedom of choice, because they were obliged; in maintaining this, the Court of Appeal "intrudes violently into the very procedural choices which had been made by the two Public Prosecutors"; it is pointed out that the judgment itself, in a contradictory manner, limited, with respect to dozens of documents cited in the Guardia di Finanza report to which Dr Storari referred, the obligation to file solely to the documents specified in the charge, thus itself ending up recognising a discretionary power of selection.

2.5. The fifth ground alleges violation of law in relation to Article 358 of the Code of Criminal Procedure, in that the Court of Appeal held that that provision, "also in the light of the reform of the so-called fair trial, applies also in the course of the trial, since the Public Prosecutor always and in any event acts in the interest of justice".

The issue is the one referred to above.

It is added that: a) as held by case-law and legal scholarship, the rule laid down in Article 358 cit. – the violation of which is not backed by any procedural sanction – does not concern the right of defence and the principle of impartiality but, rather, the correct carrying out of the determinations for the exercise of criminal action, and does not fall "among the mechanisms aimed at realising the principle of equality between prosecution and defence at every stage and level of the proceedings (Constitutional Court no. 96 of 1997); b) the rule is referable only to the phase of the preliminary investigations, to the suspect and not to the defendant, so that it is incompatible with Article 430 cit.; c) the public prosecutor's choice whether or not to carry out certain activities is not open to review.

Nor, it is argued, could different conclusions be reached by referring to Articles 111 of the Constitution and 73 of Royal Decree no. 12 of 1941, these being rules of principle which, because of their generic nature, are not capable of serving as an extra-penal rule supplementing the offence as defined by law.

2.6. The sixth ground alleges violation of law in relation to Articles 328 of the Criminal Code and 25 of the Constitution, in that the Court of Appeal held that the public prosecutor in charge of the proceedings was under an obligation to file documents and records resulting from investigations carried out by another public prosecutor in separate proceedings, which, moreover, were never transmitted.

It is argued that only the documentation relating to the supplementary investigative activity which the public prosecutor of the trial decides, at his discretion, to carry out must be filed

pursuant to paragraph 2 of Article 430 cit.: “documentation relating to the activity referred to in paragraph 1”.

[p. 7] The obligation to file arises, it is argued, only if and when the public prosecutor at trial decides to carry out supplementary activity and, therefore, not – as the Court of Appeal instead held – in respect of activity carried out by another magistrate in other proceedings.

In the present case, since the Public Prosecutor in charge of the proceedings had decided not to carry out any supplementary investigative activity, no obligation to file existed.

It is added that, with respect to investigative activity carried out in other proceedings by another magistrate, the obligation to file could have been found to exist only if the Public Prosecutor in charge had requested the acquisition from the colleague or, in the event of transmission of the results of the parallel investigation without a prior request, if the Public Prosecutor had in any event ordered the acquisition into his own file.

In this sense, erroneous, it is argued, is the statement contained in the judgment under appeal according to which there is a total equivalence between the performance of supplementary investigative activity by the public prosecutor at the hearing and the sending of records from other proceedings and, therefore, a supplementary activity carried out in practice by another public prosecutor (in this sense, legal scholarship is cited and arguments are put forward on the lack of pertinence of a judgment of the Court of Cassation relied upon by the Court of Appeal – no. 31512 of 2012 – which, on the contrary, it is submitted, would have a value confirming the defence's considerations).

2.7. The seventh ground alleges violation of law and defective reasoning as regards the finding of liability.

The premise is that, for the offence charged to exist, the official act must be “due” and the refusal must be undue; therefore, it is argued, cases in which the conduct has in any event conformed to another provision of law are irrelevant.

In the present case, according to the appeal, not only was the act not due, but there were numerous legal reasons for considering that there were other rules which did not permit the acquisition and filing of those records and the consequent filing.

In particular, already in the note of 5 March, mentioned above, the appellants had pointed out that, in addition to a series of errors and the non-decisive character of their demonstrative force, the so-called underlying records of the Guardia di Finanza draft could not be filed by them by reason of the last part of the first paragraph of Article 430 of the Code of Criminal Procedure.

On this point, the Court of Appeal, it is argued, wrongly stated that the reference in question was not pertinent because: a) the telephone had been voluntarily handed over by Armanna following an order to produce; b) Armanna had not yet been placed under investigation for the offence of calumny; c) these were investigations carried out in other proceedings concerning different charges and persons.

[p. 8] On this point, reference is instead made to the principle stated by the Joint Sections (Sezioni Unite) in judgment no. 8 of 23/02/2000, Romeo, according to which “the new items of evidence acquired by the public prosecutor after the delivery of the judgment of no case to answer (non luogo a procedere) may be used for the purposes of the revocation of the judgment

and of the subsequent application of a personal precautionary measure against the discharged defendant, provided that they have been acquired *aliunde* in the course of investigations extraneous to the proceedings already concluded, or come from other proceedings, or have been found by chance or spontaneously offered, and in any event are not the result of investigations aimed at verifying and examining in depth the elements that have emerged.

It is asserted that, in the so-called Eni-Complotto (Eni conspiracy) proceedings, investigations were instead being carried out aimed precisely at verifying and examining in depth the elements that had emerged in the Eni-Nigeria trial: therefore, not elements gathered incidentally or found by chance, but an activity falling within the last part of paragraph 1 of Article 430 of the Code of Criminal Procedure.

Also erroneous, it is argued, is the statement of the Court of Appeal according to which Armanna had not yet been placed under investigation in the Eni-Complotto proceedings, given that Dr Storari had sent to Chief Prosecutor Greco and to Deputy Chief Prosecutor Pedio a draft precautionary measure for calumny against Amara and Armanna, from which it clearly emerged that Storari himself could have requested the precautionary measure for those persons only insofar as they were entered in the register of crime reports.

From a further standpoint, it is pointed out that the two proceedings could not be regarded as different because, on the contrary, the investigations carried out in the so-called Eni-Complotto proceedings were aimed precisely at verifying and examining in depth the elements that had emerged in the Eni-Nigeria trial: in this sense, it is pointed out that the request for the handing over of the mobile phone, on which there were the chats which allegedly should have been acquired in the Eni-Nigeria trial, had arisen from the fact that on 2 November 2020 a journalist had come to the Prosecutor's Office and had produced a series of chats “which had been handed to him by Armanna and which concerned conversations between the latter, Descalzi and Granata, in which the Eni executives guaranteed him re-employment”.

Therefore, the request for the handing over of the telephone was instrumental in ascertaining the genuineness of those chats and, thus, indirectly, in bringing to light, on the one hand, the lack of genuineness of Armanna's statements in the Eni-Nigeria trial and, on the other, the calumny which constituted the offence that was the subject of the connected Eni-Complotto proceedings: it is added that checks had been carried out which were extraneous to the Eni-Complotto proceedings and to the offence of calumny but were, instead, functional to ascertaining Armanna's reliability in the Eni-Nigeria trial.

2.8. The eighth ground alleges a violation of law in relation to the finding of liability, in that the Court of Appeal held that there existed a legal obligation on the part of the [p. 9] defendants to request and file records acquired *contra legem* in the so-called Eni-Complotto proceedings.

The argument is that the present defendants have been convicted for not having filed, in the Eni-Nigeria proceedings, records which, according to the Court of Cassation, could not be filed even in the proceedings *a quo*, that is, in the Eni-Complotto proceedings.

In the so-called Complotto proceedings, counsel for Descalzi and Granata had requested that, among others, precisely the chats indicated at points 1-2-3 of the charge be filed, and the Public Prosecutor and the Judge for Preliminary Investigations had rejected that request; an appeal to the Court of Cassation had been lodged against that rejection, and the Court of Cassation, by dismissing the appeal, had made that rejection final: therefore, in the Eni-

Complotto proceedings, no chats could be acquired other than those sent by Armanna himself to the journalist.

In the present case, by contrast, according to the Court of Appeal, the full copy of the content of Armanna's telephone should have been acquired and examined and, in particular, the other chats should also have been "downloaded", namely those later sent by Dr Storari, relating not to the relations between Armanna, Descalzi and Granata, but to those between the former and other persons, as referred to in the charge.

An activity — that of extracting the chats from Armanna's mobile phone — whose acquisition in the Eni-Nigeria proceedings had been requested by Dr Storari, but which had already been held to be *contra legem* in the proceedings *a quo*.

An activity *contra legem* which, it is argued, could not have constituted the source of a legal obligation of acquisition and filing in other proceedings.

2.9. The ninth ground alleges defective reasoning as regards the misrepresentation of the evidence.

The Court of Appeal's statement concerning the lack of foundation of the defence argument that the chats indicated by Dr Storari could not have been filed "because extracted following a forensic copy still under examination" is said to be erroneous; according to the Court of Appeal, by contrast, the technical examination of Amara's telephone [sic — the context indicates Armanna's telephone] had begun on 12.11.2020 and ended the following day: "the judicial police records also state that the same technical operations were suspended in order to resume in 'full file system' mode, but that this did not mean that in March 2021 the examination was still in progress" (thus the judgment).

The appellants, by contrast, submit that the content of the records "would say the opposite"; on examination, the record of the delegated non-repeatable technical examinations of 18.1.2021 — which is attached — allegedly attests that, with regard to the devices handed over by Armanna, "the judicial authority deemed it necessary to re-perform new non-repeatable technical examinations on the same device that had been the subject of the examinations of 12.11.2020"; it is added that the record of 8.4.2021 also allegedly attests, on the one hand, that on 12 and 13.11.2020 [p. 10] "technical operations of forensic copying ... suspended on 13.11.2020" had been carried out and, on the other, that the subsequent operations performed on 18.1.2021 "were carried out with a negative outcome and will continue in the course of today".

Further, reference is made to the record of 20.7.2021, in which formal note is allegedly taken of a notice under Article 360 of the Code of Criminal Procedure, issued on 15.7.2021, concerning the examination of the device handed over by Armanna.

Lastly, in the order of 21.7.2021 appointing the technical consultant, Dr Pedio herself had deemed it appropriate to proceed with further examinations "following the conclusion on 20.7.2021 of the forensic acquisition procedures" from Armanna's telephone.

Therefore, it is argued, contrary to the assertions of the Court of Appeal, the examination of Armanna's telephone had not been completed on 13.11.2020 but on 20.7.2021: at the time when the two appellants had become aware of the existence of Armanna's chats, they had also

learned that examinations under Article 360 of the Code of Criminal Procedure were still in progress in the Eni-Complotto proceedings.

It is therefore argued that, where an extraction activity from an electronic device is in progress within a technical procedure under Article 360 cit. — an activity which cannot be brought to a conclusion because it has been suspended — the possibility of transferring the digital material of that device into another trial would not be conceivable, since the extraction activity is still in progress.

2.10. The tenth ground alleges a violation of law, in that the Court of Appeal held that there existed an obligation to file chats contained in a telephone device without, however, there having been a prior specific seizure order, as well as defective reasoning concerning the supposed fact of common knowledge (fatto notorio) of the possibility of extracting a single chat.

In the present case, there was allegedly only the seizure order relating to the chat between Armanna, Granata and Descalzi, and not one also covering the other chats.

According to the Court of Appeal, by contrast, the messages relating to the other chats could be acquired because, on the one hand, that acquisition “had been preceded by a measure of seizure or in any event of acquisition in due form of their container” and, on the other, the possibility of extracting individual chats from a forensic copy was a matter of common knowledge.

The defence argument is that “the other” chats could not have been acquired in the absence of a specific seizure order concerning them and that, therefore, they could be acquired neither in the Complotto proceedings, as the Court of Cassation had made clear, nor even in the other proceedings.

2.11. The eleventh ground alleges a violation of law, in that the Court of Appeal held that there existed an obligation to file the documents indicated in the charge at the stage of the replies in 2021, after the Tribunal, a year earlier, had emphasised that any request had to meet the requirement of decisiveness.

[p. 11] According to the Court of Appeal, that issue — namely, that the Tribunal had placed limits on the supplementary taking of evidence — was refuted by the “copious documentary documentation by the appellant Public Prosecutors of 21.1.2021”.

The appellants' contention is that the fact that the Public Prosecutors in the Eni-Nigeria trial had considered decisive the documents whose acquisition they had requested would in no way rule out that the same Public Prosecutors could instead consider the documents indicated in the charge not to be decisive; it is added that in February 2021 the situation had changed again, since the closing arguments phase had also ended and the rejoinders (counter-replies) were awaited.

The defendants, therefore, it is argued, did nothing more than comply with what the Tribunal had laid down, and the very wording of the charge in no way describes those documents — which, according to the prosecution, should have been acquired — as decisive, but only as pertinent.

To that effect, it is emphasised that Chief Public Prosecutor Greco himself had considered those documents not decisive.

2.12. The twelfth ground alleges the nullity of the judgment in relation to Articles 522 and 604(1) of the Code of Criminal Procedure, because the defendants were convicted for a fact different from the one described in count no. 2 of the charge, which had been entirely amended at the hearing of 20.2.2024, following the examination of Colonel Seragusa.

It had been alleged on appeal that the Tribunal had drafted its reasoning by reference to the original charge and not to the amended one.

According to the appeal, the Court of Appeal rejected the ground, on the one hand, by considering that the objection could be overcome in view of a very detailed taking of evidence and, on the other, by citing a judgment of the Court of Cassation according to which the appellate court may remedy even the complete absence of reasoning in the first-instance judgment by virtue of its own powers of full cognisance, that is to say, by drawing up the missing reasoning, even in its entirety.

In reality, it is argued, this is an erroneous reference, because the first-instance judgment was not devoid of reasoning but gave complete reasons, albeit in relation to a different fact.

The Court of Appeal should, according to the appellants, have found the nullity under Article 604 of the Code of Criminal Procedure.

2.13. The thirteenth ground alleges a violation of Article 25 of the Constitution and Article 7 of the ECHR, in that the Court of Appeal gave an unprecedented and not reasonably foreseeable interpretation of the offence of refusal to perform official acts, having convicted the defendants for failure to fulfil an obligation which, at the time of the conduct, was not provided for by law.

In the present case, it is argued, the principles of foreseeability, accessibility and knowability of the precept by the individual were violated; indeed, according to the appellants, there is not even one judgment convicting a public prosecutor of the offence under Article 328 of the Criminal Code for failing, in the course of the trial, to file supplementary investigative activity carried out in other proceedings; the discretion of the public prosecutor has allegedly never been [p. 12] denied, nor has he ever been convicted for failing to file records which he would not even have had at his disposal.

Hence, it is argued, an unprecedented and not reasonably foreseeable interpretation.

2.14. The fourteenth ground alleges a violation of law, in that the Court of Appeal held that the filing of the ‘Bigotti video’ (referred to in point 5 of the charge), which took place in July 2019, constitutes a criminally relevant refusal to perform an act, even though the trial had continued until 17 March 2021.

Unlike the others, this is an item that was filed, and it is added that the charge itself formally indicates 17.3.2021 as the final deadline for the performance of the act.

On this point too, the judgment is said to be flawed.

2.15. The fifteenth ground alleges a violation of law and defective reasoning, in that the Court of Appeal held that the filing of the ‘Bigotti video’ should have been carried out earlier; a statement which, it is argued, takes no account of the agreement reached between the parties, referred to above, and one made notwithstanding the pendency of three other sets of

proceedings — one in Messina, another in Milan and another in Rome — in which that video constituted an item of evidence.

Hence, it is argued, a refusal that was not undue, given the agreement between the parties — reached also with the Tribunal at the beginning of the trial — not to let issues specific to the Eni-Complotto proceedings "enter" the trial.

According to the Court of Appeal, by contrast, there had been no agreement; that assertion, however, is said to be contradicted by what the Court of Appeal itself states, namely that the pact had existed but had in reality subsequently "fallen through" when, on the eve of Armanna's examination, the Public Prosecutors had carried out "an extensive 430 c.p.p." [i.e. a broad supplementary investigation under Article 430 of the Code of Criminal Procedure].

A contradictory line of reasoning, it is said, on a point which also bears on whether criminal intent (dolo) can be made out.

The judgment is furthermore said to have minimised the significance of that video in the other pending proceedings; a video which, moreover, had not even been received in its entirety.

2.16 The sixteenth ground alleges defective reasoning as regards the finding of liability; the issue concerns the proof of intent: this is a ground which refers back to all the preceding arguments.

2.17. The seventeenth ground alleges a violation of law and defective reasoning on account of the erroneous application of the adverb "unduly" in Article 328 of the Criminal Code.

An adverb — the one indicated — which, it is argued, also colours the intent, because it underlines the need for awareness of acting in breach of the duties imposed; in this case too, the appeal takes up again the arguments aimed at showing that there were a series of statutory provisions which prevented the defendants from considering that there was a legal obligation to [p. 13] request and file the records indicated in the charge and that, therefore, supplementary investigative activity had to be carried out.

Also said to be erroneous is the statement of the Court of Appeal that the appellants' mistaken assessment of the extra-penal rule, that is to say, of the obligation to file, was inexcusable.

2.18. The eighteenth ground alleges defective reasoning as regards the finding that intent was proved with regard to points 1-2 of the charge.

The issue concerns the significance of the note, already mentioned, by which on 5 March the two appellants replied in writing to Dr Storari's request.

A note which, as already stated, was addressed to the Chief Public Prosecutor and to the Deputy Chief Prosecutor, and which, it is argued, the Court of Appeal wrongly regarded as reinforcing the existence of intent.

It is submitted, on the contrary, that by that note the two defendants set out the reasons why, at that time, they considered that those elements did not represent something that could truly make a contribution to the parties and that would take on decisive significance in the Eni-Nigeria trial (there is a lengthy reconstruction on this point).

2.19. The nineteenth ground alleges defective reasoning as regards the finding that intent was proved with regard to points 3-4 of the charge.

The issue is substantially the same.

3. The Presidency of the Council of Ministers, in its capacity as civilly liable party, has also lodged an appeal to the Court of Cassation.

The appeal is structured in two parts.

The first concerns whether the offence can be made out, its existence being denied in the abstract and in concrete terms.

Two grounds have been put forward.

3.1. The first alleges a violation of law and defective reasoning in relation to the finding of liability and to whether the offence charged can be made out, already in the abstract.

It is argued that the fact is no longer provided for by law as an offence; the issue concerns the relationship between Article 328 of the Criminal Code and Article 3 of Law no. 117 of 13 April 1988, which defines the so-called denial of justice, which constitutes, under Article 2 of the same Law, a source of liability for magistrates.

Article 3 provides: “the refusal, omission or delay of the magistrate in the performance of acts of his office constitutes denial of justice when, after the statutory time limit for the performance of the act has expired, the party has filed an application to obtain the measure and thirty days have elapsed to no avail, without justified reason, from the date of filing with the registry. If no time limit is provided for, thirty days must in any case elapse to no avail from the date of filing with the registry of the application seeking to obtain the measure”.

[p. 14] The appellant's contention is that there is an overlap between the case defined in Article 3 of the aforementioned Law and the case defined in Article 328(1) of the Criminal Code.

In particular, according to the appellant, it cannot be maintained that the two provisions govern different spheres and are therefore not incompatible with each other, having regard, moreover, to Article 13 of Law no. 117 of 1988, which excludes the applicability of the special rules on civil liability where the fact constitutes an offence: this, it is pointed out, would in practice render Article 3 inapplicable, because a case of denial of justice would always amount to the offence of refusal or omission of official acts.

The relationship between the two rules should instead, it is argued, be governed by the principle of speciality under Article 15 of the Criminal Code, and, therefore, in the present case the rule in Article 3 of Law no. 117 of 1988 should prevail, as the special rule.

Historical reasons, which are reconstructed in an elaborate and precise manner, are also said to point in this direction.

3.2. The second ground alleges a violation of law and defective reasoning in relation to the finding of liability and to whether the offence charged can be made out in concrete terms.

The issue, albeit in different variations, is the one already discussed; namely, that no obligation to file existed and that there was no intent.

4. The second part of the appeal concerns, by contrast, the civil aspects, and four grounds have been put forward in it.

4.1. The first alleges a violation of law and defective reasoning; the issue concerns standing to be sued (passive standing).

Law no. 117 of 1988 excludes its application where, as in the present case, the source of the magistrate's civil liability constitutes an offence; the Court of Appeal allegedly violated Article 13 of the Law in question by holding that that provision does not derogate from the general rule in Article 4 of the same Law, namely the one providing for the general standing of the Presidency of the Council of Ministers.

In particular, Article 13 of the Law provides:

“Anyone who has suffered damage as a consequence of a fact constituting an offence committed by the magistrate in the exercise of his functions is entitled to compensation from the magistrate and from the State. In such a case, the civil action for compensation for the damage and its exercise also against the State as civilly liable party are governed by the ordinary rules”.

It is argued that the provision, in referring to the ordinary rules, refers to Article 2049 of the Civil Code and that, therefore, the party against whom the claim for compensation lies should be held to be the employer, in its capacity as principal, that is, the Ministry of Justice alone.

Article 328 of the Criminal Code itself, it is argued, protects the public administration alone, which, in the present case, would be the Ministry of Justice, which, moreover, would be the victim of the offence.

[p. 15] 4.2. The second ground alleges a violation of the obligation of correspondence between what was sought and what was ruled upon, in that the Court of Appeal ordered the Administration to compensate for damage which had never been complained of, since the civil party had limited itself to requesting the assessment of pecuniary damage and of non-pecuniary damage consisting of damage to image and reputation.

Hence, it is argued, there was no reference to non-pecuniary (moral) damage from loss of defensive *chance*, and the Court of Appeal violated Article 112 of the Code of Civil Procedure.

4.3. The third ground alleges a violation of law in relation to the burden of proof.

The argument is that, even if that “evidentiary” material had been filed, the position of the civil party Falcioni would not have undergone any significant change, because it would have been documentation relating to circumstances wholly unrelated to his position.

In other words, it is argued, the *chance* should have been proved as to its existence, just as the causal link between the conduct and the defensive *chances* of the injured party should have been proved.

4.4. The fourth ground alleges a violation of law as regards the civil party's legal costs, which were charged to the defendants and to the civilly liable party to the extent of 50%, thereby, moreover, failing to rule on the costs of the first instance.

5. Seven additional grounds have been submitted by the defendants, in which the issues forming the basis of the original grounds of appeal are taken up again and further developed.

CONSIDERATIONS OF LAW (*Considerato in diritto*)

1. The appeals are well-founded.

2. It is useful to state at the outset that the subject-matter of these proceedings does not concern the assessment of the general propriety of the conduct of the two appellants, or of the non-negotiable duty of fairness and impartiality of the Public Prosecutor.

The issue concerns legality in criminal law and the statutory definition (typicality) of the offence provided for by Article 328(1) of the Criminal Code: the question is whether the conduct actually engaged in by the two defendants can be brought within the offence, as defined by law, with which they are charged.

Not every possible breach of the duty of propriety constitutes, in itself, an offence.

3. These proceedings are structured around a constitutive premise, namely the premise according to which the two defendants were obliged to make available to the parties to the Eni-Nigeria trial those "elements" which had been referred to by Dr Paolo Storari, who was in charge, together with Dr Laura Pedio – Deputy Chief Prosecutor of the Public Prosecutor's Office at the Tribunal of Milan – of the related so-called Eni-Complotto proceedings.

[p. 16] According to that premise, the appellants were obliged to do what Dr Storari was requesting because those elements had an objective exculpatory relevance, in that they were capable of undermining the stability of the prosecution's case on which the Eni-Nigeria trial was founded and showed, instead, the contamination and, therefore, the unreliability of some important testimonial sources in that trial.

By breaching that obligation and failing to make those "documents" available to the parties, the defendants allegedly refused to perform a mandatory act which, for reasons of justice, ought to have been performed without delay.

4. What must therefore be verified is, first of all, whether, on the objective level and on the level of the typicality of the offence:

- the two defendants were obliged to acquire the "documentation" that Dr Storari had pointed out, that is, whether such acquisition was mandatory, compulsory, required;

- whether, in the present case, a criminally relevant act of refusal by the two appellants to perform that act can be made out;

- whether, if so, that refusal was undue.

These are questions that must be assessed separately.

5. As to the first of the issues indicated, namely the one concerning the mandatory character of the act which the defendants allegedly refused, the Court of Appeal explained why, in its view, the act was compulsory as a matter of law.

This is a line of reasoning on which the appellants have dwelt critically at length and which, as already stated, revolves around the interpretation of Articles 358 and 430 of the Code of Criminal Procedure, as well as of Article 111 of the Constitution; an elaborate line of reasoning,

developed by arguing in stages and through intermediate steps, which has already been described.

6. That reasoning cannot, in fact, be endorsed, for several reasons which concern not only the correct application of the criminal law with regard to Article 328(1) of the Criminal Code but, above all, the procedural rules relied on by the judges of the merits and indicated above.

In general, as regards Article 328(1) of the Criminal Code, it is not disputed that refusal necessarily implies the manifestation of the will not to perform the act; a will that may be manifested in any form: orally, in writing, solemnly or formally, but also implicitly; it must, however, always consist of conduct capable of denoting the negative will of the person acting (Sect. 6, no. 2339 of 21/01/1998, Genco, Rv. 209979).

The refused act acquires criminal relevance because it “must” be performed without delay; it is, that is to say, an act which, for reasons of justice or of public security, or of [p. 17] public order or of hygiene and health, the public agent “must” perform so as to achieve the effects proper to it in relation to the protected legal interest.

Those acts are not, that is, all those generically connected with reasons of justice, but only those which, for such reasons, “must” be carried out promptly (see Sect. 6, no. 42589 of 26/02/2009, B, Rv. 245000- 01; Sect. 4, no. 19358 of 06/03/2007, Masotti, Rv. 236609 - 01; Sect. 6, no. 5596 of 11/02/1999, Sammartino, Rv. 213899-01).

Thus, mandatory acts, to be performed without delay for reasons of justice: acts that are compulsory, at least as regards their adoption, which the public agent must necessarily perform; the mandatory character of the act exists not only in cases in which, as in the one under examination, there is a subjective prompting taking the concrete form of a request, in relation to which the conduct of the person acting constitutes an undue negative response, but also in those in which, regardless of the existence of a request or of an order, there is a substantive urgency requiring the act to be performed, made evident by facts so objective that the agent's subjective inertia takes on the significance of a refusal.

The question arises with particular significance, as in the present case, with regard to acts of criminal proceedings which are not, however, provided for in compulsory protocols; acts, that is, which are discretionary and which nonetheless appear necessary, not so much as regards the choice of performing them as such, but rather by reason of the progressive development of the proceedings, of their outcomes, and of the pursuit of the general fact-finding purposes of the criminal process.

These are procedural acts which remain discretionary in nature, in respect of which the law normally provides not for procedural invalidity but for forms of control relating to efficiency, to the functionality of the investigation, to its prospective sustainability, to the lawfulness of the public prosecutor's conduct, and to his liability, which, as will be explained, takes various forms (on this subject, Sect. 6, no. 42589 of 26/02/2009, B, cit.).

In the present case, the Court of Appeal held, as stated, that a procedural act – the filing of the records and documentation transmitted by Dr Storari – was removed from any discretionary assessment by the two present appellants precisely by reason of the pursuit of the fact-finding purposes which the trial is bound to pursue.

A procedural act which, in the Court of Appeal's view, for systemic reasons linked to the purpose of the trial, to the sacredness of its fact-finding function, to the principle of equality of the parties and to the adversarial principle, ought to have been performed in any event, in all cases, without delay; a duty linked to principles of such weight that failure to observe it would have amounted to an undue refusal.

The source of that obligation, of that self-evident mandatory character, was identified essentially in Articles 358 and 430 of the Code of Criminal Procedure.

[p. 18] 7. As regards Article 358 of the Code of Criminal Procedure, Law no. 81 of 16 February 1987, entitled “Legislative delegation to the Government of the Republic for the enactment of the new Code of Criminal Procedure”, had required the implementation in the criminal process of the features of the “accusatorial system, according to the principles and criteria” specifically indicated (Article 2(1), nos. 1-105): among these, express provision was made for the “power-duty of the public prosecutor to carry out investigations for the purposes of the exercise of criminal action and of the ascertainment of specific facts, including the elements favourable to the defendant” (Article 2(1), no. 37).

The delegating criterion was, however, incorporated through two distinct references: the public prosecutor “carries out every activity necessary for the purposes indicated in Article 326” (that is, for the determinations concerning the exercise of criminal action: Article 358 of the Code of Criminal Procedure, first clause) “and also carries out inquiries into facts and circumstances in favour of the person under investigation” (so-called investigations in favour of the suspect: Article 358, second clause).

It has rightly been pointed out in legal scholarship that, whereas the delegating law constructed in a unitary sense the power of the public prosecutor to carry out investigations for the purposes of the exercise of criminal action (a unitary sense made explicit by the phrase “including” the elements favourable to the defendant), the provision of Article 358 seems, instead, to be articulated in a multifunctional sense (to this effect, weight is given to the iteration of conjunction and adverb: “and also carries out”).

It has been highlighted that, whereas the literal sense of the delegating law clearly made it possible to place the elements favourable to the defendant, too, within a unitary function of the investigations – namely the function instrumental to the exercise of criminal action and to the ascertainment of specific facts – the Code provision seems, instead, to distinguish the activities necessary for the determinations concerning the exercise of criminal action from the inquiries in favour of the person under investigation, which are textually placed alongside the former without sharing, at least explicitly, their purposes.

It has further been lucidly observed that what the delegating law expressed in almost organic terms (through the use of the term “including”) has been translated, in the Code, into a sort of juxtaposition, thus accentuating a not insignificant divergence.

It is precisely this divergence that gave rise to, and developed, the idea that the activity of the public prosecutor, and in particular the activity in favour of the suspect, would not be geared solely to the determinations on criminal action: on this view, in carrying out investigative activity “in favour”, the public prosecutor would be fulfilling different obligations and would have as points of reference principles different from, and additional to, the issue of the exercise of criminal action.

A construction which appears in some way to confirm the prosecution's propositions adopted by the judges of the merits in the present proceedings, because it would, in theory, make it possible to construe an obligation – that of carrying out investigations in favour of the suspect – detached from the determinations relating to the exercise of criminal action and which would, instead, be underpinned by other values and principles, which, in the present case, had allegedly been violated.

[p. 19] 8. That approach, however, conflicts with the line laid down by the Constitutional Court, which, as early as judgment no. 88 of 1991, explained the meaning and scope of the principle of the tendential completeness of preliminary investigations.

On that occasion, the Constitutional Court pointed out that Articles 326 and 358 of the Code of Criminal Procedure were to be read as a unitary whole and not separately; in particular, as regards the identification of the means of proof, reference was made to a twofold fundamental function in the structure of the new process: on the one hand, “to enable the public prosecutor to exercise the various possible options” and “to induce the defendant to accept the alternative procedures”; on the other, to stem “practices of ‘apparent’ exercise of the action”, since initiating judicial scrutiny on the basis of “investigations that are too superficial, patchy or truncated” would cause an “unjustified increase in the trial workload”.

A judgment which, on the objective level, connected the performance of investigative acts in favour of the suspect with the need for investigative completeness and with the principle of mandatory prosecution laid down in Article 112 of the Constitution; a judgment which also identified, on the subjective level, the role assigned to the public prosecutor by directive no. 37 of the delegating law: not the role “of a mere accuser, but nonetheless of an organ of justice obliged to seek out all the items of evidence relevant to a just decision, ‘including the elements favourable to the defendant’”.

Thus, investigative activity in favour of the suspect finds its functional place in the requirement of completeness of investigations and in the determinations relating to the exercise of criminal action.

8.1. It is well known that this systemic framework changed profoundly in the following years as a result of the emphasis placed on the principle of non-dispersal of evidence, of the configuration of new balances, of new articulations of the role of the public prosecutor, and of the many instances of osmosis between investigations and trial (see, purely by way of example, Constitutional Court, judgment no. 24 of 1992, on hearsay testimony of the judicial police; Constitutional Court, no. 254 of 1992, on the reading of the records of statements made by the persons referred to in Article 210 of the Code of Criminal Procedure; Constitutional Court, no. 255 of 1992, on challenges (contestazioni) in the examination of witnesses).

A change of system and of perspective in the face of which Article 358 has nonetheless remained static, and this even after the subsequent introduction of the rules on defence investigations (Law no. 397 of 7 December 2000).

8.2. Legal scholarship has examined the subject in depth, also in recent times.

Without any claim to completeness, reference has been made to a compensatory function which Article 358 – in so far as it provides for the duty to carry out investigations also in favour of the suspect – is said to have pursued within the system, at least at a given time; a function

resulting from the asymmetry of the original model established by the new Code of Criminal Procedure, in which, as against the breadth of the powers which the [p. 20] public prosecutor was said to hold, there stood the weak provision of Article 38 of the implementing provisions of the Code of Criminal Procedure, on defence investigations.

From another angle, reference has been made above all to the need for sanctions arising from the fact that a violation of Article 358 of the Code of Criminal Procedure would constitute a typical instance of infringement without sanction, since non-compliance with the provision would entail no procedural consequence, no sanction (nullity, unusability): in short, an ineffective rule.

8.3. It was precisely this approach that formed the basis of the doubts as to the constitutional legitimacy of the provision under examination, for violation of, among others, Article 24(2) of the Constitution, in that the right of defence "would find its fullest expression precisely in the obligation of the public prosecutor to gather also the evidence in favour of the defendant" (Magistrate's Court (Pretura) of Messina, order of 20 April 1996, no. 610).

9. Within this frame of reference there also came, subsequently, the decision of the Constitutional Court no. 96 of 1997, by which it was made clear that:

- the obligation laid down by Article 358 of the Code of Criminal Procedure is "geared to a correct and rational exercise of criminal action", without having as its aim either the realisation of the principle of equality between the parties or the implementation of the right of defence, but is grafted onto the nature of the prosecuting authority as a public party (see Constitutional Court no. 190 of 1991) and onto the tasks which the public prosecutor is called upon to perform in the context of the determinations which, under Articles 358 and 326 of the Code of Criminal Procedure read in conjunction, he must take regarding the exercise of criminal action;

- the principle of mandatory prosecution does not, in fact, entail the obligation to exercise criminal action whenever the public prosecutor has received a crime report, but must be rationally balanced against the aim of avoiding the institution of a superfluous trial (see Constitutional Court no. 88 of 1991), and that this aim is also achieved through the obligation to carry out inquiries in favour of the person under investigation; an obligation closely linked to the rules of the Code which place the public prosecutor, at the end of the preliminary investigations, before the alternative between a request for dismissal and the exercise of criminal action, without prejudice, in any event, to the submission of the request for dismissal to judicial scrutiny as a check on the effectiveness of the constitutional principle of mandatory prosecution (thus, verbatim, that Court).

The approach just described has been adopted by the Court of Cassation, which has on several occasions made clear that the need to ascertain facts and circumstances in favour of the person under investigation implies an assessment on the merits, which is not only precluded in review on points of law but is, moreover, reserved "solely to the public prosecutor, who must exercise that power also as an organ of justice, that is, as a party *sui generis*", without being, in [p. 21] that capacity, bound by the indications of the defence (see, among others, Sect. 1, no. 30196 of 14/10/2025, Cosentino, n.m.; Sect. 3, no. 47013 of 13/07/2018, L., Rv. 274031 - 01).

Therefore, contrary to the assumptions of the Court of Appeal, the rule laid down by Article 358 of the Code of Criminal Procedure is a rule that pertains to the objective dimension of preliminary investigations, to the need for them to be tendentially complete for the purposes

of Article 112 of the Constitution and of the correct exercise of criminal action, but not also to the principle of equality of the parties and, more generally, to the right of defence.

10. It has moreover been convincingly pointed out that, after its original enunciation (Constitutional Court, judgment no. 88 of 1991), the principle of completeness of investigations has been developed over time in many further respects.

Reference may be made to the reform of the summary trial (giudizio abbreviato) (Law no. 479 of 16 December 1999, the so-called “Carotti” law): the public prosecutor – as the Constitutional Court had specified – in conducting the preliminary investigations, will have to take into account “that, on the basis of the evidence gathered, the defendant will be able to request, and obtain, trial under the summary procedure” and therefore will not be able “to refrain from preparing an exhaustive evidentiary picture with a view to the exercise of criminal action” (Constitutional Court, 9 May 2001, no. 115).

Reference may be made to the new rules on dismissal on the ground that the crime report is unfounded, the request for which is now linked to investigative findings that do not allow “a reasonable prediction of conviction” to be formulated (Article 408(1) of the Code of Criminal Procedure, as amended by Legislative Decree no. 150 of 10 October 2022, implementing Law no. 134 of 27 September 2021, the so-called “Cartabia” reform).

Reference may further be made to the identical decision rule reproduced for the judgment of no case to answer (non luogo a procedere) at the preliminary hearing (Article 425(3) of the Code of Criminal Procedure) and in the new pre-trial appearance hearing (Article 554-ter(1) of the Code of Criminal Procedure).

In reality, from a systematic standpoint, the principle of completeness of preliminary investigations, originally framed “for the purposes” of the exercise of criminal action and of the need not to institute superfluous trials, has, on the one hand, retained its original meaning and its connection with the exercise of criminal action but, on the other, has been enriched and filled with further specific content, because it has been framed in conjunction with the requirement that the public prosecutor's decision to exercise criminal action be linked “to the result” of the action.

In this context, the view of legal scholarship is therefore persuasive, according to which it is precisely the requirement that the exercise of criminal action be assessed in the light of the “result” underlying it that restores to Article 358 of the Code of Criminal Procedure a role of its own and a systemic coherence of its own.

It is a rule that contains a warning; a rule which finds its natural operative place in the phase of preliminary investigations and which lays down, as has been pointed out, [p. 22] a precise rule of conduct for the public prosecutor who directs the investigations and who is called upon to assess, with caution and reasonableness, the soundness, the meaning, the scope and the overall structure of the prosecution hypothesis: therein lies the need to carry out inquiries also in favour of the suspect.

A criminal action exercised without a rigorous confrontation with the favourable elements has a greater diagnostic likelihood of being demolished before the court, right from its inception.

11. That approach was substantially reaffirmed by the Constitutional Court in judgment no. 58 of 2026, in which it held unfounded the questions of constitutional legitimacy of Article 554-ter of the Code of Criminal Procedure, introduced by Article 32(1)(d) of Legislative Decree no. 150 of 10 October 2022 (Implementation of Law no. 134 of 27 September 2021, delegating powers to the Government for the efficiency of the criminal process, as well as in the field of restorative justice, and provisions for the speedy disposal of judicial proceedings), raised with reference to Articles 3(1) and (2), 111(2), 112 and 117(1) of the Constitution, the latter in relation to Article 6(1) of the European Convention on Human Rights, in so far as it does not provide that the provision of Article 422 of the Code of Criminal Procedure applies, where compatible, or, in the alternative, in so far as it does not provide that the court may order, also of its own motion, the taking of evidence whose decisiveness for the purposes of the judgment of no case to answer is evident.

11.1. It is a detailed judgment, in which that Court, also in the light of Article 111 of the Constitution, observed, verbatim, that:

- the constitutional order in force assigns to the public prosecutor a position of independence in the exercise of his functions precisely in order to enable him to fulfil his duty to exercise criminal action "*without fear or favour*": that is, sheltered from the danger of undue influences inducing him not to exercise criminal action against those who have in fact committed offences or even to prosecute innocent persons unjustly;

- the principle of mandatory prosecution is geared to the equal application of the criminal law to all members of society, in order to prevent the risk of a "discriminatory exercise of criminal action (or inaction)" (judgment no. 88 of 1991, point 2 of the *Considerato in diritto* (conclusions on points of law); on the link between mandatory prosecution and the guarantee of equality among citizens, judgment no. 84 of 1979, point 3 of the *Considerato in diritto*; on the necessity that "criminal action not be unduly omitted", judgment no. 121 of 2009, point 7 of the *Considerato in diritto*; on the link between mandatory prosecution and the independence of the public prosecutor, judgments no. 111 of 1993, point 6 of the *Considerato in diritto*, no. 88 of 1991, point 2 of the *Considerato in diritto*, as well as, while the Code of [p. 23] 1930 was in force, judgments no. 96 of 1975, point 2 of the *Considerato in diritto*, and no. 190 of 1970, point 2 of the *Considerato in diritto*);

- a non-discriminatory decision on the exercise or non-exercise of criminal action presupposes, "upstream", that the public prosecutor has carried out, in the individual concrete case, tendentially complete investigations.

11.2. Furthermore, as regards the need for completeness of investigations, it was made clear that:

- negligent investigations, or even intentionally incomplete ones, which result in the decision *not* to exercise criminal action violate the *ratio*, underlying Article 112 of the Constitution, of ensuring the equal application of the criminal law to all members of society;

- the *exercise* of a criminal action supported by incomplete investigations proves, on the other hand, as judgment no. 88 of 1991 already pointed out, to be merely "apparent", because it is from the outset incapable of leading to the establishment of the offence at trial;

- the exercise of criminal action in the absence of adequate investigations not only gives rise to an "objectively superfluous" trial (judgment no. 88 of 1991, point 3 of the *Considerato in diritto*), because it is destined for a more than probable acquittal, but even results in a trial producing needless harm to interests and rights of undoubted constitutional importance: from the avoidable waste of energy of the criminal justice system, which has limited resources with which to perform, with the necessary timeliness, its functions of protecting the conditions for an orderly and peaceful social coexistence, to the unreasonable compression of the constitutional rights (personal and economic) of defendants, whose existence is always thrown into turmoil by the pendency of criminal proceedings, which often also causes serious harm to their professional life and their relationships:

- it is precisely the hard-won and now widespread awareness of such harm to rights and interests of high constitutional importance that today makes untenable the idea of a generalised *favor actionis*, according to which, "in doubtful cases", criminal action should be "exercised and not omitted" (thus judgment no. 88 of 1991, cited several times, point 3 of the *Considerato in diritto*);

- the principle of mandatory prosecution must instead now be properly understood – in keeping with what is by now unequivocally laid down in many places of the procedural code (Articles 408(1), 425(3) and 554-ter(1) of the Code of Criminal Procedure) – as meaning that the public prosecutor has the duty to carry out, in every single case, *accurate investigations*, enabling him to assess whether the original *notitia criminis* is actually supported, at least on the current state of the file, by evidence of such solidity and coherence as to make the defendant's conviction at trial reasonably foreseeable, according to the standard of proof of beyond any reasonable doubt; only in the event of an affirmative answer will the public prosecutor have the duty to exercise criminal action: otherwise, the opposite rule of forgoing such exercise must apply (with the consequent obligation to request the dismissal of the crime report which has remained insufficiently corroborated, notwithstanding the conduct of effective and diligent investigations).

[p. 24] 11.3. In addition, as regards Article 358 of the Code of Criminal Procedure, it was emphasised that:

- the very considerations just set out imply a duty on the part of the public prosecutor himself to seek out *ex officio* also the items of evidence capable of refuting the original prosecution hypothesis (on this point, order no. 96 of 1997), as well as the duty to consider carefully the defence submissions which the person under investigation has seen fit to put to him during the investigations themselves, or after the notice of their conclusion;

- those duties derive from the need to base the exercise of criminal action on an epistemically sound prosecution hypothesis, which can be said to be such only where it has already been adequately tested against the reasonable alternative hypotheses, including those that may have been put forward by the person under investigation himself;

- only tendentially complete investigations, inclusive of the evidence in favour of the defendant, are capable of placing the latter in the best position to exercise his right to opt knowingly for an alternative procedure (thus, again, judgment no. 88 of 1991, point 4 of the *Considerato in diritto*), which is an integral part of his right of defence (*ex multis*, judgments no. 2 of 2025, point 6.1. of the *Considerato in diritto*, no. 174 of 2022, point 3.3. of the

*Considerato in diritto* and the further references therein): an outcome which the current procedural system has an evident interest in encouraging, for the sake of the overall efficiency of the system; it is, in fact, essentially on the basis of the evidentiary platform constituted by the evidence gathered by the public prosecutor that the defendant will have to make his own assessments as to whether it is advisable to have the case disposed of under the summary procedure, to request the application of the penalty under Article 444 of the Code of Criminal Procedure (plea agreement), not to oppose the criminal conviction order, or else to request the suspension of the proceedings with probation (messa alla prova); and, fundamentally, it is on the basis of that same evidentiary platform that the court will have – in the summary trial – to decide on the defendant's liability and, where appropriate, to impose a penalty, and – in the other cases mentioned – to assess whether the conditions for an acquittal or discharge under Article 129 of the Code of Criminal Procedure are met and, if applicable, whether the proposed penalty is appropriate. In any event, taking into account also the evidence in favour of the defendant, including that relating to the gradation of his possible liability, which the public prosecutor has (dutifully) sought out.

11.4. Ultimately, the Constitutional Court concludes, "mandatory" criminal action, according to the logic of Article 112 of the Constitution, is only criminal action exercised with prudence and responsibility, on the basis of complete investigations which have not neglected the items of evidence in favour of the defendant.

11.5. Thus, also in its most recent case law, the Constitutional Court has forcefully reaffirmed the principle that the public prosecutor's duty to carry out investigative activity in favour of the suspect is instrumental to the correct [p. 25] exercise of criminal action: a duty that arises and develops within the phase of preliminary investigations.

12. In the light of the reconstruction set out above, it is possible to draw certain conclusions which show that the reasoning followed by the Court of Appeal of Brescia cannot be shared, with reference to the scope of application of Article 358 of the Code of Criminal Procedure and to the possibility that that provision constituted the source of the legal obligation on the part of the two defendants to perform the act — the filing of the documentation indicated by Dr Storari — that had allegedly been unduly refused.

In particular:

a) Article 358 of the Code of Criminal Procedure lays down a specific rule of conduct which, as has been said, arises and develops within the phase of the preliminary investigations;

b) a binding rule of conduct, compliance with which by the public prosecutor is linked to the correct exercise of criminal action, that is, to the need for criminal action to be exercised only on condition that the investigations are complete and adequate with respect to the result at which it aims;

c) the error or abuse of the public prosecutor who, in the course of the preliminary investigations, exercises criminal action in breach of that procedural rule — the one laid down by Article 358 of the Code of Criminal Procedure — does not entail a specific procedural sanction, but the risk, on the one hand, of an erroneous or, worse, careless or inadequate decision regarding the exercise of a criminal action destined to be dismantled and, on the other, of the imposition of sanctions which may operate on different levels of liability, such as: 1) civil liability for damage caused in the exercise of judicial functions, under Law no. 117 of 13 April

1988; 2) disciplinary liability for breach of the Code of Ethics of the ordinary judiciary — which, in Article 13, governs the conduct of the public prosecutor in the exercise of his functions (the first paragraph of Article 13 of the Code of Ethics states that "the public prosecutor conducts himself with impartiality in the performance of his role"; the second paragraph contains a prescription which replicates and elaborates on the wording of Article 358 of the procedural code, providing that the public prosecutor "directs his investigation towards the search for the truth, also acquiring the evidence in favour of the suspect, and does not withhold from the judge the existence of facts favourable to the suspect or to the defendant"); 3) criminal liability, in compliance, however, with the typicality of the offences;

d) the public prosecutor is asked to make an assessment of a prognostic kind and, therefore, to exercise criminal action only where the body of evidence that has emerged from the investigations makes it possible to foresee, with reasonable probability, the judicial confirmation of the prosecution's case.

The issue, contrary to what is stated in the judgment under appeal, is not connected with the principle of equality of the parties or with the right of defence, but rather with the need to build a system of efficiency and of guarantees in which the judge is [p. 26] called upon, in turn, to apply rigorously the new decision rule underlying the judgment of no case to answer in all cases in which the public prosecutor has not made proper use of the identical rule operating for the request for dismissal.

A weak criminal action, because exercised without carrying out investigations in favour of the suspect and, therefore, incomplete, leads, almost as a matter of course, to a judgment of no case to answer at the preliminary hearing.

13. Within this frame of reference, the Court of Appeal's proposition, according to which it is precisely the provision of Article 358 of the Code of Criminal Procedure that would ground the mandatory character of the act of supplementary investigation which the defendants allegedly refused to perform, reveals its objective lack of foundation.

Indeed, if Article 358 cit. lays down a binding rule of conduct, but one that is functional to the correct exercise of criminal action and to the pursuit of the result underlying it, in the sense described above, that statutory provision, on closer inspection, cannot constitute the source of an objectively different obligation, namely the one relating to the performance of supplementary investigative activity which, according to the approach adopted by the judges of the merits, would in turn be compulsory, undifferentiated, all-encompassing, subject to compulsion even during the closing arguments at trial.

A functional and unsystematic expansion, not permitted by the provision relied upon, which has in reality been used improperly in order to render — distorting its function — non-discretionary (bound) and compulsory a further procedural option, which is also, as will be explained, discretionary: the option relating to the performance of supplementary investigative activity.

The appellants, precisely by reason of the *ratio* and the purposes underlying Article 358 of the Code of Criminal Procedure, were in no way obliged, under that provision, to carry out supplementary investigative activity in that phase of the trial.

14. The results are no different when one also examines the other statutory reference, Article 430 of the Code of Criminal Procedure, relied upon by the Court of Appeal in order to regard as mandatory, as required, within the meaning of Article 328 of the Criminal Code, the act which the defendants allegedly refused.

15. Once the preliminary investigations have been concluded, the filing of the request for committal for trial does not create a bar to the conduct of further investigations, either for the public prosecutor or for the private parties: all the parties, in the course of the preliminary hearing, may carry out "additional investigative activity", by virtue of Article 419(3) of the Code of Criminal Procedure; once the order committing for trial has been issued, the parties may carry out "supplementary investigative activity", under Article 430 of the Code of Criminal Procedure.

Article 430 of the Code of Criminal Procedure is structured in two paragraphs, the second of which is ancillary to the first.

[p. 27] The first paragraph of Article 430 of the Code of Criminal Procedure confers on the public prosecutor a faculty — "may" carry out supplementary investigative activity — and, above all, establishes what the public prosecutor may not do: he may not perform acts "for which the participation of the defendant or of his counsel is provided for".

Under Article 430(2), any investigations carried out must be immediately filed with the public prosecutor's secretariat, with the parties being entitled to inspect them and obtain copies; in order to make this possibility known, Article 18 of the implementing regulation of the Code of Criminal Procedure requires the magistrate's secretariat to give notice of the filing to defence counsel without delay.

There is no doubt that supplementary investigative activity — since it is carried out, by definition, outside the hearing — is, on the one hand, not subject to compulsion and, on the other, not subject to restriction, because its performance is left to the exclusive choice of the person who holds the investigative power (on this subject, see, among others, Sect. 2, no. 6816 of 05/02/2026, Ambrisi, Rv. 289482 - 01; Sect. 4 no. 4913 of 15/01/2020, Visentini, Rv. 278434 - 01).

Since it is an activity that takes place when the frame of reference, constituted by the charge, has already been defined and incorporated in the order committing for trial, supplementary activity under Article 430 of the Code of Criminal Procedure is subject to a logical limit, essentially constituted by its pertinence to the subject-matter of the accusation as outlined in the charge.

The view that supplementary investigative activity, taking place after the order committing for trial, can only move within the perimeter of the charge, as specified by the requests already made by the public prosecutor, is persuasive.

It is the public prosecutor who, in the exercise of his own autonomy and assuming the related responsibility, decides whether to carry out supplementary investigative activity under Article 430(1) of the Code of Criminal Procedure.

On this subject, it has been convincingly pointed out that the impartiality of the public prosecutor, which is connected with the duty of fairness, takes different forms depending on the phases of the investigation and of the trial; the public prosecutor must be "more impartial"

when, in the phase of the preliminary investigations, he is essentially more “alone”, that is, without a continuous exchange with the defence (hence the rule laid down by Article 358 cit.), whereas, by contrast, in any further progression of the proceedings and, in particular, in the course of the trial, his role as a party is accentuated.

This does not mean that the general duties of impartiality and fairness of the public prosecutor, and the rules of conduct deriving from them (acquisitions in favour of the person under investigation, filing of the related records), are limited and confined to specific phases of the proceedings or of the trial, because, on the contrary, they always characterise the action of the public party, from the moment the investigations are initiated until the conclusion of the trial; those absolute duties are then filled with specific content through the rules of procedure, which, however, [p. 28] are inspired by the discretionary nature of the public prosecutor's action and by its not being subject to restriction or to compulsion.

16. The first paragraph of Article 430 of the Code of Criminal Procedure confers a discretionary power on the public prosecutor and does not impose an obligation to carry out supplementary investigative activity such as to make his refusal relevant for the purposes of Article 328(1) of the Code of Criminal Procedure [sic — Criminal Code].

Nor does the mandatory character of that activity derive from Article 358 of the Code of Criminal Procedure, whose function has been discussed, for the reasons that have been set out.

The second paragraph of Article 430 lays down a consequential rule: if the public prosecutor decides to carry out supplementary investigative activity, he must then, immediately, file the related documentation and notify the parties.

A provision, that of Article 430 of the Code of Criminal Procedure, which operates on two distinct levels; what is compulsory is not, in fact, the performance of supplementary investigative activity, but “only” the conduct following the discretionary decision to carry out such supplementary activity.

17. Much has been debated in the course of the proceedings on the merits as to who holds the power to decide whether or not to carry out supplementary investigative activity, that is, whether that decision lies only with the public prosecutor “of the trial”, or may also be taken by another public prosecutor, perhaps, as in the present case, of the same office and in his capacity as the prosecutor in charge of other proceedings connected with the proceedings *ad quem*, that is, with those in which the documentation of the supplementary activity should be filed.

The Court of Appeal, having erroneously affirmed the mandatory nature of supplementary investigative activity on the basis of Articles 358 and 430 of the Code of Criminal Procedure, essentially held that such activity may also be carried out by another public prosecutor, that is, by a magistrate other than the one in charge of the proceedings, and that the latter, to whom the records would have to be transmitted, would nonetheless be obliged to file “automatically” the records received, under Article 430(2) of the Code of Criminal Procedure.

That reasoning would be supported, according to the Court of Appeal, by certain judgments delivered by this Court and, in particular, by Sect. 2, no. 31512 of 24/04/2012, Barbaro.

18. This, too, is an erroneous legal approach.

18.1. It has been correctly pointed out in legal scholarship that it would be objectively unreasonable to hold that, with regard to records and documents coming from sources external to the proceedings and to the trial — that is, from other judicial offices, from administrative offices, from associations, from individual citizens — the public prosecutor conducting the proceedings does not hold that same power of discernment and assessment which indisputably [p. 29] belongs to him in the course of the investigations, and is instead obliged, unconditionally, to "pour" into the trial *ad quem* everything that is transmitted to him.

The rules of conduct, impartiality, the need to assess fairly and to decide whether to carry out supplementary investigative activity can pertain only to the public prosecutor in charge of the proceedings, that is, to the magistrate who has responsibility for those proceedings.

It would be objectively peculiar to hold that supplementary investigative activity may be carried out by another public prosecutor of the same office — perhaps in charge of a file concerning connected facts — and that, with regard to that activity, the public prosecutor in charge of the proceedings *ad quem* is only, and always, an organ obliged to mere reception, that is, one that can do nothing other than file all the material transmitted to him.

It has already been said that the duties of impartiality and fairness of the public prosecutor, their sphere, their content — beyond the area of the investigations (preliminary and supplementary) — are delineated and given concrete effect through the rules of procedure, and that the resulting rules of conduct are not automatic and unconditional but take their inevitable shape, case by case, in the light of the considered assessments that the magistrate conducting the proceedings makes, in the exercise of his discretionary choices, and of the intelligibility of his considerations.

Faced with external communications or requests of various kinds, the public prosecutor conducting the proceedings is called upon to assess — under his own responsibility — their significance; the prosecutor in charge of the proceedings is not a mere recipient, an empty container that can be filled on the basis of the assessments of others, even where those are assessments made by the prosecutor in charge of proceedings concerning connected offences.

There is, however, a need for coordination of investigations, for transparency and for timely information to those responsible for the office: this point will be discussed below.

18.2. In this context, the reference made by the Court of Appeal to the "Barbaro" judgment, mentioned above, in order to justify the possibility that supplementary investigative activity may be materially carried out by a public prosecutor other than the one in charge of the proceedings, as well as the assertion that the latter is obliged to take it in, must also be regarded as objectively inapposite and erroneous.

It is useful to quote part of the reasoning of the judgment in question:

"the legislature has established that the documentation relating to the activity referred to in paragraph 1 of Article 430 of the Code of Criminal Procedure must be 'immediately' filed with the Public Prosecutor's secretariat.... The term 'immediate' (like the obligation of notice, which must take place 'without delay') highlights the need for the parties to the proceedings to be notified promptly, so as to allow the examination of the material acquired and the preparation of any necessary defences. It must therefore be stated that (bearing in mind that the question is raised in relation to the activity of the prosecution) the Public [p. 30] Prosecutor

would be under an obligation to file the supplementary investigative act at the moment when it was formed or came to be at his disposal. Procedural reality, however, does not allow the formulation of rigid theoretical principles, since account must be taken of concrete situations in which the prosecuting authority is not in a position to proceed to the 'immediate' filing of the supplementary investigative act, whether because the latter requires further and indispensable examination through the performance of further investigative acts, or because the Public Prosecutor may find himself in objective conditions in which an 'immediate' filing is impossible, having, for example, to examine a voluminous body of evidentiary material made available to him by another authority. .... the adverb 'immediately' must be correlated with the concrete situation in which the Public Prosecutor finds himself operating; he may find himself in objective difficulty in immediately identifying the acts to be filed [Cass. Sect. IV 6.11.2007 Rv 238950; most recently see Cass. Sect. II 4.5.2011 no. 236211; to this may be added the different and not uncommon situation in which supplementary investigative activity develops through the performance of several distinct acts, not contemporaneous, but structured and connected with one another, with the consequence that it is reasonable that the 'immediacy' of the filing may coincide with the performance of the last act of the segment of supplementary investigation carried out, since it is not possible, for the most varied reasons (not least that relating to investigative secrecy), to proceed to an immediate piecemeal filing of the individual acts at the moment each of them is performed. .....".

And then "the materials deriving from supplementary investigative activity may have an endogenous or exogenous genesis with respect to the so-called main trial, depending on whether those materials are formed directly within the file used by the Public Prosecutor for the exercise of the criminal action that resulted in the trial, or outside it, that is, in different criminal proceedings, opened either at the same office of the Public Prosecutor or at the Prosecutor's Offices of other Tribunals; in this second case, the act of supplementary investigation consists in the acquisition into the file of the Public Prosecutor of the so-called receiving trial, of the records and acts which were formed *aliunde* (that is, in other and different proceedings which constitute an 'exogenous' source of material relevant, in evidentiary terms, to the receiving trial)" (thus the judgment, verbatim).

18.3. Therefore, contrary to what is stated in the judgment under appeal:

a) if the act or document reaches the public prosecutor in charge of the proceedings from a different public prosecutor, in charge of different proceedings, the activity of supplementing the investigation is not the activity carried out by the different public prosecutor, but becomes "supplementary" only if there is, on the part of the public prosecutor in charge of the proceedings, an act of reception (formal taking-in), of acquisition of the transmitted material, which thereby "enters" the different, receiving trial;

b) that act of reception is not, in turn, automatic, but follows from an evaluative and selective activity of the public prosecutor in charge of the proceedings;

[p. 31] c) that evaluative activity is subject, as has been said, to a logical limit, essentially constituted by the "pertinence", the specific content, the usefulness of the elements that have emerged — through the activity of the other public prosecutor — with respect to the "frame", constituted by the charge; a limit which relates to, and is affected by, the stage of development of the trial, the meaning, the scope of the supplementary activity that is intended to be carried out, the relationship between supplementary activity and the facts to be proved;

d) the public prosecutor in charge of the proceedings, at the outcome of that assessment, decides whether, and what, to acquire.

The supplementary activity is not carried out by the "different" public prosecutor — the natural person — who, in reality, merely transmits the records and documents that he thinks may have significance in the other proceedings; those documents are, however, scrutinised by the public prosecutor in charge of the different proceedings, who decides whether, and what, to "acquire", so that only at the outcome of that discretionary appraisal do the limits of the obligation to file what has been acquired come to be defined, under Article 430(2) of the Code of Criminal Procedure.

18.4. It follows that the act which the two appellants allegedly refused was not an act which, within the meaning of Article 328(1) of the Code of Criminal Procedure [sic — Criminal Code], "had to" be performed for reasons of justice, that is, an act which could not but be performed by reason of Dr Storari's assessments, because, in reality, it was a typically discretionary act which, as such, necessarily entailed the making of technical assessments by the two appellants, the prosecutors in charge of the Eni-Nigeria proceedings.

It was an act in respect of which the public prosecutor in charge of the investigations, preliminary and supplementary, was required to make assessments — for which he assumed responsibility — of relevance, of pertinence, of genuineness, of congruence.

Therefore, the reference to Article 430 of the Code of Criminal Procedure made by the judges of the merits in order to construct the procedural obligation on the part of the two defendants to perform the act *de quo* — the filing of the documentation received from Dr Storari — must also be regarded as legally erroneous.

19. It is now possible to verify, from another standpoint, whether, in the present case, there is an act of refusal, criminally relevant, within the meaning of Article 328(1) of the Criminal Code.

It has already been said that the refusal, which may be expressed in any form, must denote a clear manifestation of the will not to perform the mandatory act.

The issue concerns the activity of coordinating investigations within the same office, how that activity was carried out in the present case, the conduct actually adopted by the defendants and that of those who directed the Prosecutor's Office; an issue which assumes importance because the records and documents transmitted by Dr Storari concerned an offence connected with the one that was the subject of the Eni-Nigeria proceedings.

[p. 32] It is not disputed that the appellants not only replied to Dr Storari but, on 5 March 2021, informed the Chief Public Prosecutor and the Deputy Chief Prosecutor — who was, moreover, jointly in charge of the connected proceedings — of their assessment — whether correct or mistaken — that they did not see fit to proceed with the acquisition of those records and of those documents, referring the decision, however, to Dr Greco and Dr Pedio.

19.1. It is useful to refer to the declarations made by Dr Francesco Greco, then Chief Public Prosecutor at the Tribunal of Milan, and by Dr Laura Pedio, then Deputy Chief Prosecutor at that Prosecutor's Office and jointly in charge, together with Dr Storari, of the so-called Eni-Complotto proceedings.

It emerges from the judgment under appeal that Dr Greco:

- had received from Dr Storari "a deluge of mile-long emails — put together — with a technique of cutting and pasting the files named 'falsità' [falsehoods]…";

- had found the material "rather complicated and… practically impossible to read for someone who had little time available" and that he had had difficulty in taking a position;

- had considered that material "marginal stuff, not decisive", still "*in fieri*" with respect to the Eni-Nigeria trial, which was based predominantly on documentary evidence;

- had in any event "forwarded everything to De Pasquale";

- had received, after a few days, a memorandum from the two defendants "containing a detailed examination of the situation and that he had "entered it in the register of correspondence (protocol)";

- had not considered it appropriate to call a meeting;

- had considered that there were "legal problems" with the acquisition in the Eni-Nigeria trial of the documentation transmitted by Dr Storari (see p. 21 et seq. of the judgment under appeal).

As regards Dr Laura Pedio, who was placed under investigation — for "not having promptly entered in the register of suspects the name of Vincenzo Armanna for the offence of calumny committed to the detriment of the Eni executives Descalzi and Granata, and this in order to avoid possible repercussions on the Eni-Nigeria trial" — and whose position has been dismissed, it emerges from the judgment under appeal:

- that, at the time, Armanna's contribution was "under scrutiny in investigative activities still in progress and that the time was not ripe for taking a precautionary initiative" in the Eni-Complotto proceedings, as had, by contrast, been envisaged by Dr Storari;

- that, in particular, after examining the draft prepared by Dr Storari, she had expressed a negative opinion on the request for a precautionary measure, "making use of the discretionary power" which she derived from her role as Deputy Chief Prosecutor;

- that she had not changed her opinion on the matter, "not even on reassessing it with hindsight";

[p. 33] - that she had not noticed that in the email sent by the present appellants on 5.3.2021 "not all the issues raised by Dr Storari had been addressed" (see p. 23 et seq. of the judgment under appeal).

19.2. The declarations of Dr Greco and Dr Pedio, unless one wished to hypothesise a general collusion to the detriment of Dr Storari and a generalised violation of the duties of fairness and propriety in which — in some way — even those who had responsibility for the Prosecutor's Office would not have been uninvolved, weigh against the prosecution's thesis accepted by the Court of Appeal.

The two defendants assessed that material and considered that it should not be acquired, informed of this the heads of the Office, to whom they referred the decision; the Chief Public Prosecutor and the Deputy Chief Prosecutor, the latter jointly in charge of the so-called Eni-Complotto proceedings, made assessments substantially overlapping with those of the present

appellants, and it is not at all clear why, according to the Court of Appeal, De Pasquale and Spadaro should have regarded their assessment as not shared.

Greco and Pedio had been informed and remained silent, raised no objection, asked for nothing, did not consider that the matter should be examined further, called no meeting, did not ask for explanations either before or even afterwards.

In the Eni-Complotto proceedings, which were at the investigation stage, delicate assessments were under way and, therefore, also from the standpoint of the coordination of investigations, it is not clear why it should be asserted that the two defendants arbitrarily, and for ulterior purposes, decided not to proceed.

On this point, the judgment under appeal is essentially assertive and one-sided.

It has already been stated that what was allegedly refused was an act in respect of which the public prosecutor in charge of the investigations, preliminary and supplementary, had to make assessments of relevance, of pertinence, of genuineness, of congruence of the materials to be used for his discretionary determinations.

The decision to “involve” the heads of the Office weighs against the prosecution's case accepted by the judges of the merits because, quite apart from its intrinsic correctness, it represents an act not of refusal but of objective, due, transparency; an act which reveals that the defendants did not act according to a logic of hiding, of improbable concealment, of self-referentiality, but sought a physiological dialogue with the heads of their office.

The conduct of the defendants cannot be separated from that of the heads of the Office, who were fully involved and did nothing to express any disagreement on their part with the decision not to acquire and file the records transmitted by Dr Storari, or to point out, contrary to the conclusions reached by the appellants, the need to acquire them.

This is, moreover, a frame of reference which must in some way also be linked to what emerges from the judgment under appeal in relation to the [p. 34] declarations made by Dr Marco Tremolada, Presiding Judge of the panel before which the Eni-Nigeria trial was held at first instance, who stated that:

- Armanna's credibility had already been undermined and compromised in the course of the trial;

- the documentation proving the “fraudulent conduct of the declarant”, if acquired, would only have “facilitated the effort expended on the reasoning” to certify the unreliability of Armanna himself.

Thus, on the one hand, an assessment by the defendants, who referred the decision to the Chief Public Prosecutor, and which was substantially endorsed by him and by the Deputy Chief Prosecutor, jointly in charge of the so-called Eni-Complotto proceedings, and, on the other, an assessment by the Presiding Judge of the adjudicating panel that that documentation was not decisive.

That documentation which Dr Storari had pointed out was not self-evident and would not have changed the fate of the trial.

The typicality of the offence cannot change as a result of an undifferentiated retrospective assessment, which is affected by the level — greater or lesser — of the review that one may wish to exercise over the discretionary nature of the appraisal entrusted to the public agent.

19.3. That being so, it is not even clear why, according to the Court of Appeal, an act of refusal could be made out on the objective plane.

It has already been stated that to refuse an act means to manifest the will not to perform it; it has already been stated that refusal is a subjectively imputable omission, unequivocally referable to an act which must be performed without delay and which the agent unduly decides, instead, not to perform.

In the present case, the defendants considered — rightly or wrongly — in the exercise of their own discretionary activity, that they should not proceed with the acquisition of those records and of those documents, and referred the decision to the Chief Public Prosecutor and to the Deputy Chief Prosecutor, who endorsed it.

Therefore, that act was not mandatory, it did not concern evidence of decisive self-evidence, and the defendants, on closer inspection, refused nothing, because they did not express a clear manifestation of will not to perform the act, having referred the decision to others who, in fact, shared it.

20. The issue is intertwined with the requirement that the refusal, relevant for the purposes of Article 328(1) of the Criminal Code, be undue.

20.1. This is an element of the offence which is construed in different ways.

According to one interpretative line, the expression would constitute a requirement of special unlawfulness, by which relevance would be attributed only to those forms of refusal which, on the one hand, find no justification in the law and in the administrative rules governing the [p. 35] duty to act and, on the other, conflict with laws and administrative rules regulating competences and forms.

According to another line, it would instead be a superfluous element, because it would not contribute to identifying the typical fact but would merely restate expressly the content of unlawfulness of the conduct, already delineated by the provision.

This Court, in this regard, has explained that the adverb “unduly” inserted in the text of the provision, by qualifying the omission of official acts as an offence of so-called express or special unlawfulness, characterises the mental element, not in the sense of entailing the requirement of a specific intent, but in order to emphasise the need for awareness of acting in breach of the duties imposed (Sect. 6, no. 33565 of 15/06/2021, Esposito, Rv. 281846; see also Sect. 6, no. 2274 of 15/11/1984, filed 1985, Bertoli, Rv. 168219; Sect. 6, no. 8534 of 09/06/1982, Contu, Rv. 155315).

20.2. In reality, it is an element which already characterises the objective typicality of the offence.

Whether one wishes to refer to the first of the orientations indicated or, instead, wishes to adopt the second of the lines described, in the present case not only can no criminally relevant refusal be made out, in the sense indicated above, but such a refusal, even if one wished to hypothesise it, would not be undue in character.

Reasoning according to the second approach, it has already been stated that the conduct attributed to the defendants is not arbitrary and is not accompanied by awareness of omitting to perform an act which, on the contrary, should have been performed.

The defendants, whether or not one shares their view, considered that that supplementary investigative activity was neither mandatory nor even necessary, and this on the basis of a belief which was in fact shared both by the Chief Public Prosecutor and by the Deputy Chief Prosecutor.

Article 328(1) of the Criminal Code does not criminally punish the generic negligence, the lack of caution or the poor institutional sensitivity of the public official, but the knowing refusal to perform an act which is objectively mandatory and which the public agent knows he must adopt.

No different results are reached even if one wishes to adopt the first line, mentioned above.

It emerges from the documents annexed to the appeal that, following the technical examination carried out in the Eni-Complotto proceedings, aimed at verifying the veracity only of the chats exchanged between Armanna, Descalzi and Granata, the latter two had asked in those proceedings to be allowed access to the entire content of the telephone handed over by Armanna and, therefore, also to the other chats; a request for access to the content of the very chats which Dr Storari later asked to have acquired in the Eni-Nigeria trial.

That request was rejected by the Deputy Chief Prosecutor, Dr Pedio, and also, following an objection, by the Judge for Preliminary Investigations; it was pointed out, [p. 36] on that occasion, that the full forensic copy of the smartphone contained information different from and additional to that for which the examination had been ordered and, therefore, "not only not pertaining to the matter to be proved, but to be dutifully kept away from duplication and external disclosure"; in particular, it was noted that the object of the examination ordered in the Eni-Complotto proceedings was only that relating to those specific chats (see annexes 4 and 5 to the appeal).

The Court of Cassation, by judgment no. 22795 of 22/03/2022, in turn dismissed the appeals lodged by Granata and Descalzi against the order of the Judge for Preliminary Investigations of Milan referred to above.

Thus, with regard to the Eni-Complotto proceedings, and to the object of the evidentiary examination which had led to the acquisition of that handset, it was correctly held that that examination could not be extended also to the other chats which that telephone contained.

In other words, the principles developed in the field of evidentiary seizure were correctly applied, according to which the object of the seizure is not the container of the sensitive data (the telephone) but, rather, only the data which are extracted from the mobile phone and which perform the function of establishing the offence being prosecuted (see, for all, Sect. 6, no. 34265 of 22/09/2020, Aleotti, Rv. 279949 - 01 and, extensively, in the reasoning).

The object of the seizure is not the handset, nor even the so-called *copia mezzo* (instrumental copy), that is, the forensic copy which reproduces the entire content of the electronic device, but only the data which are extracted from that copy because they are considered relevant for the purposes of proving the offence.

This, only this, guarantees the proportionality of the measure, the concrete verifiability of the link of pertinence between what is "taken" and the offence being prosecuted, which it is intended to prove through the seizure.

Therefore, those chats which Dr Storari was forcefully requesting be acquired into the Eni-Nigeria proceedings could not be acquired, for the reasons indicated, in the Eni-Complotto proceedings: they could not be accessed in those proceedings except by means of a further order explaining the reasons why, also with respect to those additional chats, it was necessary to proceed, and why their content would have been relevant to the crime which it was intended to prove.

It follows that the content of those additional chats, access to which was correctly not permitted in the Eni-Complotto proceedings, could not be automatically poured into the Eni-Nigeria proceedings either, because that acquisition would in any event have lacked a legal basis; that is, a new authorising order was needed, extending cognisance of, and access to, the data of that telephone.

On this point, the statement of the Court of Appeal, according to which the acquisition of those data would have been procedurally proper by reason of the original order of the Public Prosecutor [p. 37] conducting the proceedings, an order having the "container" as its object, is seriously flawed (see p. 93 of the judgment under appeal).

The content of those chats could not be regarded as automatically acquirable, and the refusal attributed to the defendants cannot be held to be "undue" because, in reality, on the basis of what has been set out, that decision was in conformity with the principles and the statutory rules governing evidentiary seizure.

Conversely, the acquisition of the content of those chats, as instead requested by Dr Storari, would have been undue.

21. In the light of the reconstruction carried out, the following conclusions may be drawn:

- the act which, according to the prosecution's case, the two appellants allegedly refused was not a mandatory act, that is, a compulsory one, either under Article 358 of the Code of Criminal Procedure or even under Article 430 of the Code of Criminal Procedure;

- it was not an act which, for reasons of justice, had necessarily and automatically to be performed without delay, but concerned procedural acts which were not provided for in compulsory protocols and whose "necessity" did not relate to the choice in itself of performing them — which was broadly discretionary — but rather to the prospective dimension and to the pursuit of the fact-finding purposes of the criminal process;

- it was an act which involved delicate discretionary assessments, pertaining to the public prosecutor in charge of the trial;

- supplementary investigative activity is not subject to compulsion and not subject to restriction, and concerns the public prosecutor in charge of the proceedings, and cannot technically be performed by a different prosecuting magistrate — as a natural person — who may certainly point out, to the former, records and documents which he considers may be useful for establishing the facts which are the subject of the other proceedings — possibly connected — without it being possible, however, to derive from such an initiative the adoption of a non-discretionary (bound) act and, above all, without its being possible to exclude the

existence, vested in the public prosecutor in charge of the proceedings, of an autonomous power of assessment;

- there was no criminally relevant act of refusal, no imputable omission, no clear manifestation of will not to perform the act on the part of the two appellants, because the decision was substantially referred to the Chief Public Prosecutor of Milan and to the Deputy Chief Prosecutor of that same office, who in fact endorsed the appellants' belief;

- the failure to acquire the chats pointed out by Dr Storari not only did not concern decisive items of exculpatory evidence, but was not undue.

22. These are conclusions which are dispositive on the logical-legal plane, which in themselves reveal the erroneous application of the criminal law by the Court of Appeal and make it possible [p. 38] not to address the numerous further issues which were also raised in the appeals (the defendants' alleged lack of actual availability of the records indicated in points 1 to 4 of the charge, the existence of intent, the claim that the technical examination of Armanna's telephone in the proceedings *a quo* had not been completed, the time limits which had allegedly been set by the Tribunal of Milan on acquisition).

22.1. The considerations set out must be reiterated also with regard to the so-called 'Bigotti video', dated 28 July 2014, which the Milan Public Prosecutor's Office allegedly had at its disposal in April 2017; it is not disputed that that video was relevant in several proceedings, nor that some defence counsel were aware of it as early as February 2018, nor even that that video was subsequently produced at trial, at the request of the defence teams, in July 2019, that is, well before the final deadline indicated in the charge, "17 March 2021", namely two years before the decision in that trial.

The prosecution's thesis is that the criminally relevant refusal would consist in the fact that that video was made available to the parties not immediately — that is, already during the preliminary hearing, bearing in mind that the summons to trial was issued on 20/12/2017 — but only when its production was requested at trial by the defence teams of the defendants [in the Eni-Nigeria trial].

What is charged is the alleged delay with which that video was made available.

22.2. In this case too, however, quite apart from the possible configurability of procedural invalidities — which, in reality, do not appear ever to have been raised in the course of the trial — and from further legal questions which might have suggested not proceeding immediately with the production of that video, what is not clear is why, if that video had been so relevant, none of the defence counsel, who had had that video at their disposal since February 2018, had requested its acquisition.

On that specific question, Dr Tremolada himself clarified in the present proceedings that the defence teams expressed on this point, in the course of the Eni-Nigeria trial, a "veiled complaint and then... in closing arguments also explicit".

It follows that on this point too it is not at all clear why there would have been an act of undue refusal, since it has not been made explicit either why that video should necessarily have been filed earlier or even why that acquisition had not been requested by the defence counsel who had had that video at their disposal for some time.

23. The judgment under appeal must therefore be quashed without remand because the fact does not exist, with the consequent revocation of the civil-law rulings.

24. As regards the appeal lodged by the Presidency of the Council of Ministers, in its capacity as civilly liable party for the criminal offence charged against the defendants, it has already been stated that [p. 39] it is also structured through the raising of complaints overlapping with those put forward by the defendants in relation to the aspects involving the finding of liability.

The lack of standing to be sued of that party must, however, be noted as a preliminary matter.

24.1. Law no. 117 of 13 April 1988, on compensation for damage caused in the exercise of judicial functions and on the civil liability of magistrates, provides, in Article 2, that anyone who has suffered unjust damage as a result of conduct, an act or a judicial measure carried out by the magistrate with intent or gross negligence in the exercise of his functions, or by reason of a denial of justice, may bring an action against the State to obtain compensation for the damage.

The subsequent Article 4 contains, in relation to that type of civil wrong, a specific procedural regime: it in fact establishes the “exclusive” standing to be sued of the President of the Council of Ministers and the possibility of bringing the action for damages only when the ordinary means of appeal or the other remedies provided against precautionary and summary measures have been exhausted and, in any event, when the modification or revocation of the measure is no longer possible or, if such remedies are not provided for, when the instance of the proceedings in the course of which the fact that caused the damage occurred has been concluded.

Where, on the other hand, the wrongful act alleged to have caused the damage consists, as in the present case, of an offence committed by the magistrate in the exercise of his functions, the relevant regime is that laid down by the subsequent Article 13, according to which the civil action for compensation for damage against the magistrate and the State, as civilly liable party, and its exercise are governed by the ordinary rules.

24.2. According to one interpretative option, the action for compensation for damage caused by the offence committed by the magistrate in the exercise of his functions should likewise be brought, pursuant to Article 4(1) of Law no. 117 of 1988, against the President of the Council of Ministers, and not against the Minister of Justice (see Sect. 6, no. 13450 of 28/09/2000, Galdieri, Rv. 217627).

To that effect it has been argued, on the premise that, since the damage relates to the exercise of judicial functions, it is not the Minister of Justice (whose institutional sphere would be limited to the organisation and functioning of the services relating to justice) who could be called upon to answer for it, but rather the entity which represents the political and governmental synthesis of the State-community, given the “constitutional, even before institutional, significance of the ‘Justice function, administered in the name of the people’, which must be informed by impartiality and independence”.

24.3. This is an interpretative option on whose justificatory basis it is necessary to reflect.

The Court of Cassation has already explained, persuasively, that the two provisions under examination cannot be read as overlapping, that is, by holding applicable, [p. 40] also in the case of an action for compensation for damage deriving from the offence committed by the magistrate in the exercise of his functions, the regime laid down by Article 2 of the law under examination for the case in which the source of the damage consists of conduct not classifiable as an offence and characterised by intent or gross negligence (Sect. 6, no. 8551 of 28/01/2026, Tecnoconsult s.r.l., Rv. 289684 - 01).

That would, in fact, be an interpretative solution substantially abrogating the meaning and scope of the reference to the ordinary rules contained in Article 13 and, in particular, to the rule laid down in Article 2049 of the Civil Code, which provides for the concurrent liability of the employer for the wrongful act committed by its own employee.

Therefore, where the civil action seeks compensation for the damage caused by the offence committed by the magistrate in the exercise of his functions, standing to be sued lies with the employer of the perpetrator of the offence, that is, the Minister of Justice, and not with the Presidency of the Council of Ministers.

Article 4 of Law no. 117 of 1988 must, in fact, be correctly understood as a regime which concerns only the action for damages deriving from a civil wrong of the magistrate (that is, conduct, an act or a judicial measure characterised by intent or gross negligence in the exercise of the judicial function, or a denial of justice).

In that case, by way of derogation from the ordinary regime and, in particular, from the direct liability of the perpetrator of the wrong, provision is made for the sole standing to be sued of the Presidency of the Council of Ministers, without prejudice, in any event, to the magistrate's right to intervene at any stage and instance of the proceedings pursuant to Article 105 of the Code of Civil Procedure (see Article 6).

That conclusion finds objective support in the textual element derivable from Article 13 of the law cit., which, with reference to the damage deriving from an offence committed by the magistrate in the exercise of his functions, refers, instead, only to the ordinary rules.

In that case, therefore, the civil action may be brought directly against the magistrate, as well as against the civilly liable party, to be identified, pursuant to Article 2049 of the Civil Code, as the Minister of Justice.

It must, therefore, be affirmed that the action for compensation for damage caused in the exercise of judicial functions by a fact constituting an offence committed by a magistrate in the exercise of his functions must be brought against the Minister of Justice and not against the Presidency of the Council of Ministers.

24.4. It follows that the lack of standing to be sued of the civilly liable party, the Presidency of the Council of Ministers, must be declared.

[p. 41] ON THESE GROUNDS (P.Q.M.)

Quashes the judgment under appeal without remand, because the fact does not exist. Declares that the civilly liable party, the Presidency of the Council of Ministers, lacks standing to be sued. Revokes the civil-law rulings.

So decided in Rome, on 18 June 2026.

The Judge Rapporteur, author of the judgment — Pietro Silvestri [signed] The Presiding Judge — Gaetano De Amicis [signed]

[Stamp:] FILED WITH THE REGISTRY ON 29 SEP 2026 — THE JUDICIAL OFFICER Dr Giuseppina Cirimele [signed]