JUDGMENT NO 7 YEAR 2025

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 2641, first and second paragraph of the Civil Code, initiated by the Fifth Criminal Division of the Court of Cassation (*Corte di cassazione, sezione quinta penale*), with referral order of 27 February 2024, registered as No 127 in the 2024 Register of Referral Orders and published in *Official Journal of the Italian Republic* No 27, first special series of 2024.

Having regard to the entry of appearance filed by G.Z.;

after hearing Judge Rapporteur Francesco Viganò at the public hearing of 10 December 2024;

after hearing Counsels Enrico Mario Ambrosetti and Tullio Padovani for G.Z.;

after deliberation in chambers on 14 January 2025.

[omitted]

Conclusions on points of law

1.– By the referral order at issue, the Fifth Criminal Division of the Court of Cassation raised – with reference to Articles 3, 27(1) and (2), 42 and 117(1) of the Constitution, the latter in conjunction with Article 1 of the Additional Protocol of the European Convention on Human Rights (ECHR), as well as with reference to Articles 11 and 117(1) of the Constitution, in conjunction with Articles 17 and 49(3) of the Charter of Fundamental Rights of the European Union (CFREU) – questions of constitutionality regarding Article 2641(1) and (2) of the Civil Code, challenging it "insofar as it also permits confiscation of property the value of which corresponds to instrumentalities of crime."

2.– Regarding the admissibility of the questions raised, the following observations must be made.

The referring court is called upon to decide on the appeal brought by the public prosecutor at the Venice Court of Appeal before the Court of Cassation. This appeal challenges, among other things, the part of the judgment that revoked the confiscation of the sum of 963 million euros, which had previously been ordered by the Court of Vicenza against four defendants on the basis of the challenged Article 2641 of the Civil Code. This provision mandates the confiscation of a sum of money or property of value equivalent to that used in committing certain corporate crimes governed by Title XI of Book V of the Civil Code, if it is not possible to identify or seize the property actually used.

The sum originally confiscated by the Court of Vicenza was calculated on the basis of the total amount which – according to the court of first instance – had been used by the defendants in their capacity as executive managers of the bank. This sum had allegedly

been used to commit a series of acts that constituted the crimes of market manipulation (*aggiotaggio societario*) and obstruction of supervisory functions (*ostacolo alle funzioni di vigilanza*).

The Court of Appeal, considering the confiscation manifestly disproportionate to the seriousness of the offences for which the defendants were held responsible, found it to be contrary to Article 49(3) of the CFREU. Consequently, the Court of Appeal disapplied Article 2641 of the Civil Code in the specific case.

The Court of Cassation is now called upon to assess whether the public prosecutor's appeal is well founded. In particular, the prosecutor argues that the Court of Appeal erred in law by disapplying the challenged provision.

In the opinion of this Court, the questions referred by the Court of Cassation are admissible […].

[omitted]

2.2.– The Court of Cassation was entitled to refer the questions to this Court. This possibility was not hindered by the direct effect of Article 49(3) CFREU (Court of Justice EU, Grand Chamber, judgment of 8 March 2022, in case C-205/20, *NE*), which confers national courts the power to disapply any national provisions that, within the scope of application of European Union law, are not proportionate to the seriousness of the offence.

2.2.1.– As previously noted, the ruling of the Court of Appeal, which disapplied the criminal provision challenged in this instance, was appealed by the public prosecutor, who specifically contested the wrongful application of Article 49(3) CFREU. Consequently, the issue now before the Court of Cassation is whether Article 2641 of the Civil Code is in conflict with the principle of the proportionality of penalties, as enshrined in Article 49(3) CFREU.

The proportionality of penalties is, at the same time, a constitutional principle that the case law of this Court has gradually developed through a combined reading of Articles 3 and 27(1) and (3) of the Constitution (for an overview, see Judgment No 112/2019, points 8.1.2. ff. of the *Conclusions on points of law*). Moreover, it is well established that any limitation on the right to property – including those resulting from confiscation measures – must comply with the proportionality principle, in order to avoid clashing with Article 42 of the Constitution and the corresponding safeguards set out in Article 1 Protocol 1 ECHR, which is applicable in national law under Article 117(1) of the Constitution (Judgment No 5/2023, point 6.2.3. of the *Conclusions on points of law*).

The referring court was therefore faced with the following alternative. On the one hand, it could decide directly on the incompatibility of Article 2641 of the Civil Code with Article 49(3) CFREU – and, consequently, either confirm or annul the ruling of the Court of Appeal on this point – possibly through a preliminary reference to the Court of Justice (as suggested by the public prosecutor bringing the appeal). On the other, it could refer the matter to this Court to assess the constitutionality of Article 2641 of the Civil Code in the light of both the national standards underlying the principle of the proportionality of penalties and Article 49(3) CFREU itself (as well as Article 17 CFREU, which protects property rights at European Union level), via Articles 11 and 117(1) of the Constitution.

2.2.2.– The referring court's decision to choose the second option accords with the principles repeatedly affirmed by our case law (starting from Judgment No 269/2017, point 5.2. of the *Conclusions on points of law*) regarding situations of conflict between national law and a European Union law provision with direct effect.

On the one hand, the issue has a "constitutional dimension" due to its connection with interests or principles of constitutional importance (Judgment No 181/2024, point 6.3. of the *Conclusions on points of law*), and Italian courts can always disapply the national law in the specific case at issue, subject to a possible preliminary reference to the Court of Justice in case of doubt regarding the interpretation or validity of the relevant European Union provision. On the other hand, they have the further option of requesting the intervention of this Court to annul the national law due to its incompatibility with European Union law (similarly, recent Judgment No 1/2025, point 3.1. of the *Conclusions on points of law*).

The two options – which offer a "combination of judicial remedies" which enriches the protection of fundamental rights (Judgment No 20/2019, point 2.3. of the *Conclusions on points of law*) – both rely on the principle of the primacy of European Union law, the protection of which can be ensured, in an "increasingly integrated" manner (Judgment No 15/2024, point 7.3.3. of the *Conclusions on points of law*), either by ordinary courts through the remedy of disapplying the incompatible national law in the specific case, or by this Court declaring it unconstitutional due to its incompatibility with European Union law.

The latter remedy, as already observed in Judgment No 20/2019, is particularly significant with regard to the protection of fundamental rights, where it is essential for national constitutional and supreme courts to be able to "make [their] own contribution to rendering effective the possibility, discussed in Article 6 of the Treaty on European Union (TEU) […] that the corresponding fundamental rights guaranteed by European Union law, and in particular by the CFREU, be interpreted in harmony with the constitutional traditions common to the Member States, also mentioned by Article 52(4) of the CFR as relevant sources" (point 2.3. of the *Conclusions on points of law*).

Ordinary courts are therefore called upon to choose the most appropriate remedy on a case-by-case basis.

2.2.3.– In the case now under examination, the referring court thoroughly explained the reasons for its decision to refer the matter to this Court. It remarked that the disapplication (either total or partial) of a penalty provided for under Italian law would lead to "uncertainties and disparities of treatment", thereby harming the principles of equality, legal certainty (which is in itself "a living and integral part of European constitutional heritage": Judgment No 146/2024, point 8 of the *Conclusions on points of law*) and predictability of judicial decisions.

Moreover, the referring court stressed that the remedy of disapplication may be difficult to reconcile with the principle of legality in criminal matters.

Indeed, this principle requires criminal provisions – including those imposing sanctions – to be clearly and precisely formulated, not only (a) to allow individuals to make reasonably *reliable predictions* about their application, and (b) to ensure the proper *separation of powers* between the legislature and the judiciary, which is especially important in criminal matters (Order No 24/2017, point 5), but also (c) to ensure, as far

as possible, *equality of treatment* among sentenced persons. This last requirement would risk being compromised if a court's discretionary power to determine the appropriate penalty (Article 132 of the Criminal Code) were not adequately constrained by clear legislative guidelines or, alternatively, by a ruling from this Court replacing, *erga omnes*, provisions deemed incompatible with constitutional and European Union principles.

These are precisely the risks illustrated in the main proceedings, where, based solely on the proportionality principle under Article 49(3) of the CFREU, the trial court may decide whether to impose, partially impose, or not impose at all confiscation of a sum amounting to nearly one billion euros against four individuals.

Lastly, this Court's intervention on the proportionality of the penalty is necessary to ensure that such findings also benefit those who have received final convictions in previous proceedings. Indeed, under the current law (deemed not to be unconstitutional by Judgment No 230/2012), a change in jurisprudence favouring the defendant is not sufficient to allow for the review of final sentences. Rather, a ruling on the unconstitutionality of the criminal law is required for final sentences to be set aside under Article 673(1) of the Code of Criminal Procedure and Article 30(4) of Law No 87 of 11 March 1953 (Rules on the constitution and functioning of the Constitutional Court).

2.3.– The question raised by the referring court regarding Article 49(3) of the CFREU (through Articles 11 and 117(1) of the Constitution) is also admissible in view of the requirement – established by Article 51 of the CFREU and consistently recalled in our case law (see, among many, most recently, Judgment No 85/2024, point 2 of the *Conclusions on points of law*, and Judgment No 183/2023, point 7 of the Conclusions on points of law) – that the case under examination fall within the scope of application of European Union law.

The referring court invokes, to this purpose, the EU instruments on mutual recognition of confiscation orders cited by the referring court. However, these do not impose obligations on Member States to harmonise their legislation on the matter. Nor are the obligations arising under Directive 2014/42/EU on the freezing and confiscation of the instrumentalities and proceeds of crime in the European Union, or those under the new Directive 2024/1260 on asset recovery and confiscation, sufficient to establish that the case at issue falls within the scope of application of EU law. Indeed, these last two instruments impose substantial harmonisation obligations on Member States with regard to the relevant legal frameworks, but only for the crimes specifically mentioned, which do not include the corporate offences referred to in the provision challenged here.

Rather, the fact that the case at hand falls within the scope of European Union law is supported, at least, by the following two considerations.

On the one hand, the conduct of which the defendants are accused – which, according to the prosecution, also constitutes the offence of obstructing supervisory functions – involves violations of specific obligations under EU law, such as the prohibition on considering shares purchased with a loan granted by the bank itself as part of its Common Equity Tier 1 capital, as laid down by Article 28(1)(b) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

On the other hand, the obligations to cooperate with the ECB imposed on banks subject to its supervision – obligations whose violation, according to the prosecution,

constitutes the offence under Article 2638 of the Civil Code in the present case – are established by the European Union law instruments that created the so-called Single Supervisory Mechanism (SSM), namely Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions and Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities.

This is sufficient to conclude that the case at hand falls within the scope of EU law, making all other provisions, including Article 49(3) of the CFREU, applicable under Article 51 of the CFREU.

This, in turn, allows the referring court to invoke Article 49(3) CFREU in support of the doubts raised regarding the constitutionality of the challenged provision.

3.– On the merits, the questions are well founded in relation to the proportionality principle under Articles 3 and 27(3), as well as Articles 11 and 117(1) of the Constitution, the latter in relation to Article 49(3) of the CFREU.

[omitted]

The confiscation, both direct and by equivalent means, of property used to commit one of the offences governed by Title XI of Book V of the Civil Code, as provided for in the challenged provision, constitutes a financial penalty, and as such must comply with the principle of the proportionality of penalties (point 3.1. below).

This principle, when applied to financial penalties, is infringed when a financial penalty is disproportionate both to the objective and subjective seriousness of the crime, as well as to the economic and financial circumstances of the individual concerned (point 3.2. below).

The confiscation of instrumentalities of crime and property of equivalent value, as provided for by the challenged provision, is structurally indifferent to such conditions. Its mandatory nature obliges courts to apply it even when, in the specific case, it proves manifestly disproportionate and therefore incompatible with the principle of proportionality (point 3.3. below).

This standpoint is shared by foreign and the EU legal systems, where the relevant provisions generally make confiscation of instrumentalities of crime subject to an assessment of its compatibility, in the specific case, with the principle of proportionality (point 3.4. below).

This finding makes it unnecessary to examine the further challenges concerning the violation of constitutional, conventional and European Union principles regarding the protection of property rights (point 3.5. below).

3.1.– The referring court starts by recognising the “punitive nature” of the confiscation of instrumentalities of crime, which the challenged provision, in its first paragraph, envisage as mandatory. According to the Court of Cassation, the same punitive nature extends to the confiscation of property of corresponding value, which the second paragraph mandatorily prescribes whenever it is not possible to identify or apprehend the instrumentalities themselves.

This assumption is correct, essentially for the reasons already stated in a decision concerning direct and value-based administrative confiscation of instrumentalities of crime (Judgment No 112/2019, point 8.3.4. of the *Conclusions on points of law*).

However, the fact that the confiscation under consideration here is imposed not by an administrative authority but by a criminal court as a result of a conviction for a crime requires some further clarification.

3.1.1.– As this Court has already noted in Judgment No 5/2023 (point 5.3.1. of the *Conclusions on points of law*), not all measures falling within the competence of criminal courts are subject to the same constitutional safeguards. The Constitution establishes, under Article 25(2) and (3), a distinct extension of the principle of legality in relation to penalties and security measures (*misure di sicurezza*). Even the principle of proportionality – which "applies within Italian constitutional law in relation to any act by the authorities that is liable to impinge upon the fundamental rights of the individual" (Judgment No 24/2019, point 9.7.3. of the *Conclusions on points of law*) – is applied differently when it concerns measures primarily aimed at punishing the individual for a crime they have committed, preventing a danger (as in the case of security or precautionary measures), or simply restoring the status quo ante (as in the case of an order to demolish an illegally constructed building).

This also applies to the different forms of confiscation falling under the jurisdiction of criminal courts, whose nature must "be assessed in relation to the specific purpose and object of each, with the awareness – already acknowledged in long-standing rulings of this Court (Judgments Nos 46/1964 and 29/1961) – of the wide variety of regulations and functions of confiscations envisaged within the Italian legal system" (Judgment No 5/2023, point 5.3.1. of the *Conclusions on points of law*, with additional references).

3.1.2.– As already observed in Judgment No 112/2019, the confiscation of the 'proceeds' of an offence performs the mere function of "restoring the perpetrator's previous financial position" to what it was before the crime was committed (similarly, the recent European Court of Human Rights Judgment of 19 December 2024, *Episcopo and Bassani v. Italy*, paragraph 74). This observation applies to confiscations ordered by administrative authorities as well as criminal courts. Also in the latter case, the primary aim of the measure is to deprive the offender of the financial gain obtained by the violation of criminal law, which they have no right to retain, precisely due to its inherently unlawful origin. This excludes any detrimental impact on the offender's pre-existing (legal) financial situation, which is inherently linked to sanctions of a 'punitive' nature.

On the contrary, the confiscation of instrumentalities of crime affects property not acquired through criminal conduct and which, as a rule, the offender lawfully possessed at the time of the offence. Consequently, their confiscation by criminal courts results in a worsening of the offender's financial situation prior to the offence. This certainly rules out the possibility of such a measure having a merely "restorative" nature, aimed at returning the situation to the *status quo ante*.

In both their briefs and oral arguments, the defence counsel argued that the confiscation of instrumentalities of crime has a "preventive" nature, aimed at precluding the offender's opportunities to reoffend. Its essential function would be to neutralise the potential danger posed by the offender's continued possession of the item, which could be reused to commit further crimes. Precisely this rationale has been ascribed by this Court to the confiscation of an unregistered weapon, the aim of which has been identified

– in the recently cited Judgment No 5/2023 – as the neutralising of the dangers associated with its possession (point 5.3.2. of the *Conclusions on points of law*).

However, such an interpretation might be persuasive in relation to the measure provided in Article 240 of the Criminal Code, which permits the *discretionary* confiscation of "things that were used or intended for use in committing the offence", particularly if it is assumed that courts must exercise discretion regarding *whether* to impose such confiscation, based on a consideration of the risk of reoffending through the further use of the confiscated items. However, whenever the law *mandates* the confiscation of non-inherently dangerous instrumentalities, as the provision under scrutiny does, it becomes harder to qualify it as a security measure, as no case-by-case assessment by the court is required to determine the actual existence of a risk of reoffending in connection with continued possession of the item.

As held in Judgment No 112/2019, the (mandatory) confiscation of instrumentalities must, rather, be recognised as having a genuinely "punitive" nature. Such measure results in the confiscation of property that is usually acquired and possessed lawfully by the offender, but which have been *used* unlawfully, thus losing – precisely due to the offender's decision to commit the crime – the protection that the legal system ordinarily affords to the right of property. In these instances, criminal courts are not required to assess the potential for future unlawful use as a condition for their confiscation (for similar reasoning, see Judgment No 196/2010, point 5.1. of the *Conclusions on points of law*, regarding the mandatory confiscation of a vehicle from the perpetrator of the offence of driving under the influence, which must be ordered by law even when the vehicle is severely damaged and cannot be used for the commission of further offences).

When, therefore, the confiscation in question is ordered by a criminal court, as in the case set out in Article 2641(1) of the Civil Code, it must be classified as a genuine financial 'penalty', which must be imposed in addition to the other main sanctions envisaged for the commission of the offence.

3.1.3.– The same conclusions must apply to the confiscation of the value-based equivalent of the instrumentalities.

In general, confiscation by equivalent means seeks to ensure that the offender suffers the same financial loss to their overall property as they would have if it had been possible to directly confiscate the specific items for which the law mandates confiscation. This aims to prevent the offender from continuing to benefit from the property in question once they have made its apprehension by the State impossible.

Therefore, where the confiscation of an asset or sum of money is considered a penalty, the same nature must be attributed to the relevant confiscation by equivalent means.

3.1.4.– Since both the "instrumentalities of crime" (Article 264(1) Civil Code) and the "money or property of corresponding value" to such instrumentalities (Article 2641(2) Civil Code) qualify as "penalty", they are subject to the full set of principles and constitutional safeguards governing the legislative provision, the judicial application and the subsequent enforcement of penalties.

Among these principles, the principle of proportionality between the severity of the punishment and the seriousness of the offence is relevant here. According to our case law, this principle is based on Articles 3 and 27, first and third paragraphs, of the Constitution,

as well as on the obligations arising from European Union law to which Italy is bound under Articles 11 and 117(1) of the Constitution – among which Article 49(3) CFREU, according to which "penalties must not be disproportionate to the criminal offence", is particularly relevant in this context.

3.2.– With regard to penalties which, like the confiscations in question, are of a financial nature, the necessary proportionality of the penalty must not only be related to the objective and subjective seriousness of the offence (see, among many, Judgment No 73/2020, point 4.2. of the *Conclusions on points of law*), but also to the economic and financial conditions of the person affected.

In Judgment No 28/2022, this Court referred to what had already been stated in Judgment No 131/1979: while a custodial sentence restricts personal liberty, which is the "primary good possessed by every human being", a financial penalty affects property, a good that "is not naturally inherent to the human person". This leads to the conclusion that financial penalties of the same value structurally cause *unequal suffering* to the individuals concerned. Indeed, while the impact of custodial sentences of the same duration can, in principle, be assumed to be uniform for each convicted person, the same does not apply to pecuniary penalties: a fine of the same amount may impose a heavier or lighter burden depending on the income and property of the individual concerned.

From these premises, Judgment No 28/2022 held that some mechanism for adjusting pecuniary penalties to the different financial situations of sentenced persons is constitutionally required. "From the point of view of 'substantive' rather than merely 'formal' equality", this Court explained (point 6.2. of the *Conclusions on points of law*), "the assessment that this Court is called upon to carry out on the manifestly disproportionate nature of financial penalties must consider the real impact that the same fine would have on different people" (from a comparative law perspective, regarding the need to consider economic and financial circumstances when assessing the manifest proportionality of a pecuniary penalty established by a law, and, in any case, the offender's actual ability to pay, see the Supreme Court of Canada Judgment of 14 December 2018, *Regina v. Boudreault*, 3 SCR 599).

An essential condition for ensuring the compatibility of pecuniary penalties with the principle of proportionality is that the authority responsible for their enforcement enjoys a certain degree of *discretion* in their application, in order to prevent the imposition of penalties that the affected individual cannot pay or that have, at any rate, an unduly severe impact on their living conditions. Such discretionary power is generally granted by law to a court or an administrative authority when enabling them to impose financial penalties: see, for example, Article 133-*bis* of the Criminal Code regarding pecuniary penalties, Article 11 of Law No 689 of 24 November 1981 (Amendments to the criminal system) concerning administrative penalties, and Article 194-*bis*(1)(c), of the Consolidated Law on Finance regarding penalties for the administrative offences it covers.

3.3.– Article 2641 of the Civil Code does not comply with these principles insofar as it provides for *mandatory* confiscation of instrumentalities, as well as money or property of corresponding value to them.

3.3.1.– The flaw in the challenged provision does not lie – as the defence argued, particularly during its oral submissions – in the illogicality of the provision for value-based confiscation of instrumentalities, due to the alleged nature of direct confiscation of

the property as a security measure. As previously noted (above, point 3.1.3.), the confiscation by equivalent means at issue shares the same punitive nature that characterises the confiscation of instrumentalities under the challenged provision. Therefore, it cannot, in principle, be considered illogical for property or money of corresponding value to the instrumentalities to be confiscated when the State is unable to forfeit the instrumentalities themselves.

The flaw in the confiscation of both instrumentalities and property or sums of money of corresponding value, as currently governed by Article 2641 of the Civil Code, lies in its mandatory nature: this requirement obliges courts to apply the measure even when, in some cases, it proves disproportionate.

The first and second paragraphs of that provision, in fact, require courts to impose a financial burden on the individual, the extent of which depends solely on the value of what was actually used in committing the crime. As a consequence, the amount to be confiscated does not bear any connection to the actual financial gain obtained from committing the offence; and criminal courts are not required by such a provision to assess, in each specific case, whether the individual concerned actually has the resources to comply with the confiscation, or what impact such a confiscation may have on their future life.

As a result, this mechanism is inherently prone to producing disproportionately severe penalties.

3.3.2.– These inconsistencies become even more evident given the current state of the law — whose constitutionality is not in question here —, which permits confiscation by equivalent means to be imposed on persons other than the owners of the instrumentalities of crime, provided they are criminally liable (or jointly liable) for the offence. This happens, in particular, when value-based confiscation is imposed on a natural person acting on behalf of a legal entity, using property or sums of money owned by the latter that would have been subject to direct confiscation as instrumentalities of crime but cannot be confiscated by the State for whatever reason. This effectively makes the natural person responsible for covering any insufficiency in the legal entity's property in relation to the State's claim for confiscation.

3.4.– The conclusion reached is consistent with the solutions adopted in other legal systems and in European Union law.

3.4.1.– In Germany, for example, the confiscation of "objects used or intended for the commission or preparation of a criminal act" is *discretionary* under Section 74 of the Criminal Code. Section 74c governs the also discretionary confiscation of property or money of corresponding value, applicable whenever these cannot be confiscated because they have been sold, consumed or otherwise made unavailable for confiscation.

Section 74f(1) further provides that courts cannot order most confiscations — including the two forms mentioned — when they would be *disproportionate* to the crime committed and the degree of guilt that has been shown by the person concerned. Lastly, Section 74f(3) provides that, in any case of discretionary confiscation, the court may limit it to a portion of the property that can be confiscated.

Therefore, the German legal system preserves the discretion of courts in determining whether and to what extent property should be confiscated, in accordance with the general principle of proportionality.

In the United States, the Supreme Court has, since the 1990s, considered the prohibition on "excessive fines" under the Eighth Amendment of the Constitution applicable to most confiscations (*Alexander v. United States*, 509 U.S. 544 [1993], concerning criminal confiscation, and *Austin v. United States*, 509 U.S. 602 [1993], concerning civil confiscation). More recently, this prohibition has been held binding on individual states under the Fourteenth Amendment (*Timbs v. Indiana*, 586 U.S. 146 [2019]). Significantly, this case law has developed precisely in relation to the confiscation of property used in committing a crime, where their total confiscation is particularly likely to produce disproportionate outcomes in specific cases. It is therefore the court's responsibility to ensure that the confiscation does not result in excessive financial harm to the individual and does not appear, therefore, "grossly disproportionate to the gravity of the offense" (*Bajakajian v. United States*, 524 U.S. 321, 334 [1998]), in breach of the Eighth Amendment.

3.4.2.– Similar considerations must be made regarding EU law.

Article 4(1) of Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union provides that, with regard to the offences it lists (which, incidentally, do not include those to which the provision under review here refers), Member States must adopt "the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities", or property of corresponding value. The obligation, therefore, concerns the establishment of a legal mechanism *enabling* the State to proceed with the confiscation (either in full or in part) of property. It does not, however, require *mandatory* confiscation.

Recital 17 of the Directive further clarifies that "[w]hen implementing this Directive in respect of confiscation of property the value of which corresponds to instrumentalities, the relevant provisions could be applicable where, in view of the particular circumstances of the case at hand, such a measure is *proportionate*, having regard in particular to the value of the instrumentalities concerned. Member States may also take into account whether and to what extent the convicted person is responsible for making the confiscation of the instrumentalities impossible".

Comparable provisions can now be found in Directive 2024/1260 on asset recovery and confiscation, which replaces Directive 2014/42/EU and must be transposed by 23 November 2026. Article 12 of the new directive, also applicable to offences other than those under consideration in this case, likewise requires States to adopt the "necessary measures to enable the confiscation, either wholly or in part", of instrumentalities or property of corresponding value. But Recital 27 explicitly reiterates the *caveat* set out in Recital 17 of the previous directive: the provisions on confiscation by equivalent means may be applied only where the measure is proportionate.

Actually, the explicit reference to the principle of proportionality in Recital 27 is, strictly speaking, superfluous, given that this principle is already enshrined in Article 49(3) CFREU, which has general and binding effect on the implementation of all European Union law and, as such, applies to any form of confiscation governed by Union instruments.

3.5.– From all this, it follows that the specific provision challenged by the referring court, namely the mandatory requirement, under Article 2641(2) of the Civil Code, for the confiscation of a sum of money or property of corresponding value to the instrumentalities of crime, is incompatible with all the norms invoked by the referring

court as the basis for the principle of proportionality, both at the national and supranational levels. More precisely, the provision violates Articles 3 and 27(3) of the Constitution, as well as Articles 11 and 117(1) of the Constitution in relation to Article 49(3) CFREU.

In view of this conclusion, it is not necessary to examine the remaining challenges concerning the alleged disproportionate restriction of the individual's rights to property resulting from the confiscation in question.

4.– As to the *remedy*, it must first be highlighted that the referral order by the Court of Cassation, although formulated in relation to the first and second paragraphs of Article 2641 of the Civil Code, actually concerns only the provision in the *second* paragraph regarding the confiscation of sums or property of corresponding value to the property used in committing the crime (whose confiscation is required under the first paragraph). Therefore, the provision referred to in the second paragraph is the only one relevant in the main proceedings.

The flaw found in this provision, as noted above, lies in the mandatory nature of the confiscation. This compels courts to apply the confiscation measure even when, in the specific case, its effect would be disproportionate to the seriousness of the offence and the economic and financial situation of the individual concerned.

However, regarding the possibility of a ruling replacing the current mandatory confiscation of money or property of corresponding value to the instrumentalities with discretionary confiscation, this Court deems it appropriate to leave such an option to the legislature's judgment. The Parliament is in the best position to determine whether to grant courts discretion in determining whether and to what extent property should be confiscated, with a view to ensuring full compliance with the principle of proportionality in the specific application of this confiscation. In any case, a confiscation that is flexible as to its amount does not exist in the Italian legal system and would constitute a "systemic novelty" (as already noted in Judgments Nos 146/2021, point 5.2. of the *Conclusions on points of law*, and 252/2012, point 4. of the *Conclusions on points of law*). Consequently, it cannot be adopted by this Court as a constitutionally adequate solution to replace the one declared unconstitutional.

On the other hand, as recently observed, "the need for a manipulative ruling, replacing the challenged penalty with one compliant with the Constitution, inevitably arises only when the void of punishability resulting from a confiscation ruling, which cannot be filled by expanding existing penalty provisions, creates an unsustainable lack of protection for the legal interests safeguarded by the affected provision (Judgment No 222/2018): for example, when it results in the diminished protection of fundamental rights of the individual or of interests of particular importance to the whole community in relation to serious forms of aggression, potentially leading to the violation of constitutional or supranational obligations to protect those interests" (Judgment No 185/2021, point 3. of the *Conclusions on points of law*). In the absence of such a situation, the intervention of this Court "may well be limited to the total or partial removal of the challenged provision" (Judgment No 46/2024, point 4.2. of the *Conclusions on points of law*; similarly, Judgment No 51/2024, point 4. of the *Conclusions on points of law*).

In the case under examination, the mere removal of the part of the provision referring to value-based confiscation of the instrumentalities does not create any intolerable lacuna in the protection of the interests safeguarded by the criminal provisions,

as the mandatory direct or value-based confiscation of the proceeds remains in place for any natural or legal person found to have effectively derived benefits from the crime.

The challenged Article 2641(2) of the Civil Code must therefore be declared unconstitutional insofar as it provides for the mandatory confiscation of a sum of money or property of corresponding value to that used in committing the crime.

5.– Since the flaw identified equally affects, for precisely the same reasons, the provision on the direct confiscation of the property used in committing a crime, as set out in the first paragraph of the same provision, this declaration of unconstitutionality must, under Article 27 of Law No 87/1953, be extended to the provision in Article 2641(1) of the Civil Code but only to the wording "and the property used to commit it".

The court's discretion, in compliance with the principle of proportionality, to order the direct confiscation of the "property used in committing the crime", in accordance with the general provision under Article 240 of the Criminal Code, referenced by Article 2641(3) of the Civil Code, remains unaffected. This includes the confiscation of sums of money used to commit a crime to be applied to those who effectively possess them.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) *declares* that Article 2641(2) of the Civil Code is unconstitutional insofar as it provides for the mandatory confiscation of a sum of money or property of corresponding value to that used in committing a crime;

2) *declares*, in accordance with Article 27 of Law No 87 of 11 March 1953 (Rules on the constitution and functioning of the Constitutional Court), that Article 2641(1) of the Civil Code is unconstitutional with sole regard to the wording "and the property used to commit it".

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 14 January 2025.

Signed: Giovanni Amoroso, President

Francesco Viganò, Judge Rapporteur