JUDGMENT NO. 112 YEAR 2019

In this case, the Court heard a referral order from the Court of Cassation concerning legislation providing for the mandatory confiscation not only of the profits of certain financial market offences but also of the "product" of the offence (i.e. the means or assets used in order to commit it), as an automatic corollary of the imposition of an administrative fine. The referring court argued that the confiscation of the "product" was out of proportion with the harm caused by the offence, and also excessively encroached upon the rights of ownership of the perpetrator of the offence. Despite a previous ruling in which the Constitutional Court had invited the legislator to amend the legislation in question, the amendment subsequently enacted had not substantively altered the rule in question. The Court ruled the legislation unconstitutional, holding that it did not comply with the constitutional requirements that sentences must be aimed at re-education and must be tailored to the individual circumstances of the case. Considering that the legislation already provided elsewhere for fines, which were moreover already severe, the additional penalty of confiscation resulted in excessive punishment, and was thus unconstitutional, and incompatible with both the ECHR and the Charter of Fundamental Rights of the European Union.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 187-*sexies* and 187-*quinquiesdecies* of Legislative Decree no. 58 of 24 February 1998 (Consolidated Law on Financial Intermediation, adopted pursuant to Articles 8 and 21 of Law no. 52 of 6 February 1996), introduced respectively by Article 9(2)(a) and (b) of Law no. 62 of 18 April 2005 (Provisions to implement obligations resulting from Italy's membership of the European Communities. Community Law 2004), initiated by the Second Civil Division of the Court of Cassation within the proceedings pending between D. B. and the National Commission for Companies and the Stock Exchange (*Commissione nazionale per le società e la borsa*, CONSOB) by the referral order of 16 February 2018, registered as no. 54 in the Register of Referral Orders 2018 and published in the *Official Journal* of the Republic no. 14, first special series 2018.

Considering the entry of appearance by D. B. and the intervention by the President of the Council of Ministers;

having heard Judge Rapporteur Francesco Viganò at the public hearing of 5 March 2019;

having heard Counsel Renzo Ristuccia for D. B. and State Counsel [*Avvocato dello Stato*] Pio Giovanni Marrone for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– By the referral order mentioned in the headnote, the Second Civil Division of the Court of Cassation raised two separate groups of questions concerning the constitutionality respectively of Articles 187-*quinquiesdecies* and 187-*sexies* of Legislative Decree no. 58 of 24 February 1998 (Consolidated Law on Financial Intermediation, adopted pursuant to Articles 8 and 21 of Law no. 52 of 6 February 1996).

1.1.– As a preliminary matter, it is necessary to order the separation of the proceedings as regards the questions concerning Article 187-*quinquiesdecies* of Legislative Decree

no. 58 of 1998, in relation to which this Court has, by a separate order, held that it is necessary to make a reference to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU), as amended by Article 2 of the Lisbon Treaty of 13 December 2007 and ratified by Law no. 130 of 2 August 2008.

This judgment therefore covers only the questions concerning the constitutionality of Article 187-*sexies* of Legislative Decree no. 58 of 1998.

2.– The referring court raises questions concerning the constitutionality of Article 187-*sexies* of Legislative Decree no. 58 of 1998, as originally introduced by Article 9(2)(a) of Law no. 62 of 18 April 2005 (Provisions to implement obligations resulting from Italy's membership of the European Communities. Community Law 2004), "insofar as it orders the confiscation of assets having equivalent value not only to the profits of the offence but also of the assets used in order to commit the offence, namely the entire product of the offence".

The referring court suggests that this provision violates: in the first place, Articles 3 and 42 of the Constitution; secondly, Article 117(1) of the Constitution, in relation to Article 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Paris on 20 March 1952, ratified and implemented by Law no. 848 of 4 August 1955; thirdly, Articles 11 and 117(1) of the Constitution, in relation to Articles 17 and 49 of the Charter of Fundamental Rights of the European Union (CFREU), proclaimed in Nice on 7 December 2000 and adapted in Strasbourg on 12 December 2007.

3.– Article 187-*sexies* of Legislative Decree no. 58 of 1998, as in force at the time the offence was committed and the constitutionality of which is questioned within these proceedings, provided in paragraph 1 that "[t]he imposition of the administrative fines provided for in this chapter shall always entail the confiscation of the product or profits of the offence along with the assets used to commit it", and in paragraph 2 that "[w]here it is not possible to confiscate a particular asset pursuant to paragraph 1, the confiscation order may relate to a pecuniary amount, assets or other benefits having equivalent value".

The referring court takes the view that the confiscation of pecuniary amounts, assets or other benefits having a value equivalent not only to the "profits" earned from the offence, but also to the "product" of the offence – which is regarded as the sum total of the "profits" and the "assets used to commit it" – is tantamount to a "punitive" sanction that is out of proportion with the harm caused by the offence, and in any case results in an excessive encroachment upon the rights of ownership of the perpetrator of the offence.

This is stated to result in a violation of the principles of constitutional and European law (the latter via Articles 11 and 117(1) of the Constitution) invoked by the referring court.

In particular, it is asserted by the referring court that the disproportionate and excessive nature of the measure is liable to violate both Article 3 of the Constitution as well as other provisions that protect private property rights under both constitutional and European law: on the one hand, Article 42 of the Constitution, and on the other hand, Article 1 of the Additional Protocol to the ECHR and Article 17 CFREU.

In addition, it is argued that the essentially "punitive" nature of the confiscation violates Article 49 CFREU, which enshrines the principle that "[t]he severity of penalties must not be disproportionate to the criminal offence"; according to the referring court, this principle could well be extended also to sanctions that are essentially "punitive", such as the one under examination.

4.– The request by State Counsel that the case file be remitted to the referring court for an assessment as to whether the questions are relevant in the light of legislation that has been enacted in the meantime – specifically, the amendments to the contested provision introduced by Legislative Decree no. 107 of 10 August 2018 laying down "Provisions to adapt national law in line with the provisions of Regulation (EU) no. 596/2014 on market abuse and repealing Directive 2003/6/EC and Directives 2003/124/EU, 2003/125/EC and 2004/72/EC" – falls to be considered before an examination of the merits of the questions, and indeed also the other objections raised by State Counsel.

The request cannot be accepted as it must be concluded without any doubt – for the reasons which will be clarified immediately below – that in the event that the provision as amended were to be applied to the specific case, it could not result in less severe effects compared to those provided for under the previous legislation, contested in these proceedings.

4.1.– Article 187-*sexies*(1) of Legislative Decree no. 58 of 1998, as in force following the amendments introduced by Legislative Decree no. 107 of 2018, provides as follows: "[t]he imposition of the administrative fines provided for in this chapter shall entail the confiscation of the product or profits of the offence". Paragraph 2 – which provides for the confiscation of pecuniary amounts, assets or other benefits having an equivalent value – has remained unchanged.

Therefore, two changes were made by Legislative Decree no. 107 of 2018 to Article 187-*sexies*(1): first, the adverb "always" preceding the verb "shall entail" has been removed; secondly, the reference to the "assets used" to commit the offence has been omitted.

4.2.– First and foremost, the adverb "always", which previously appeared in the text of the law, has been removed from the law as amended.

However – absent any consideration of the matter within the preparatory works and within Law no. 163 of 25 October 2017 itself (Grant of authority to the Government to transpose European directives and to implement other acts of European Union law - Law granting authority to implement European law 2016-2017) – this does not appear to be indicative of any intention on the part of the secondary legislator to transform a measure that had previously been unequivocally stipulated as mandatory into a merely optional measure. The term "shall entail" implies, now as before, a genuine obligation for the National Commission for Companies and the Stock Exchange (CONSOB) to proceed with confiscation, which must occur without any scope for discretionary assessments as to whether or not it is appropriate to impose the measure on a person who has been found guilty of an offence provided for under Title I-*bis*, Chapter III of Legislative Decree no. 58 of 1998.

It follows that, in this respect, the amendment has not resulted in any change to the normative content of the legislation as previously in force.

4.3.– The amended legislation has also excised the reference to the "assets used" to commit the offence.

That excision could *prima facie* have effects on the case at issue in these proceedings, as the CONSOB has expressly classified the figure of 149,470 euros that is to be confiscated as the amount equivalent to the "product" of the offence, which is in turn comprised of the sum total of the "profits" resulting from the offence and the "means used" to commit it. As such, it could be surmised that, were the 2018 amendment (which is silent as regards any retroactive effect) to be presumed through interpretation to have retroactive effect, if the "means used" to commit the offence are excised from the scope of confiscation, this will necessarily require the overall amount set by the CONSOB in this case to be recalculated.

However, a closer consideration of the sanction at issue in the proceedings before the lower court leads to a different conclusion.

As pointed out above (*The facts of the case*, section 1.4.), the CONSOB found that D. B. had purchased 30,000 shares in the company of which he was a director for a total price of 123,175.07 euros, acting on privileged information held by him concerning the imminent launch of a voluntary public tender offer for the entire company by another company of which D. B. was a shareholder. According to the findings made by the CONSOB, at the time when news of the launch of the public tender offer was given, the value of the shares purchased by D. B. – calculated on the basis of their official price on that date – rose to 149,760 euros in total; this is stated to have enabled him to realise a saving of 26,580 euros compared to the price that he would have had to pay in order to purchase those stocks at the time the public tender offer was launched.

Therefore, according to the CONSOB, the amount confiscated of 149,760 euros is equivalent to the overall value of the shares previously purchased by D. B. on the basis of the privileged information available to him, and thus constituted the "product" of his unlawful conduct; this figure is in turn determined on the basis of the official price of the shares at the time the public tender offer was launched.

Within that perspective, it is clear that the removal of the power to confiscate an amount equal to the "means used" to commit the offence (in the view of the CONSOB, the cash originally invested in order to purchase 30,000 shares, equal to 123,175.07 euros) would not in any case affect the obligation to confiscate assets having a value equivalent to the overall "product" of the conduct, consisting in the shares purchased by D. B.: the CONSOB thus calculated this figure as 149,760, which was confiscated in this case.

In other words, and more generally, owing to the ongoing obligation to confiscate the overall "product", or assets having an equivalent value, of an insider trading offence, even after the 2018 amendment it is the overall value of the financial instruments purchased by a person holding privileged information that continues to be subject to mandatory confiscation, i.e. – in the event that they have been sold in the meantime – their overall value, and not simply the economic gain realised through the financial transaction.

5.– State Counsel has also asserted that the questions raised are inadmissible in seeking to obtain – through a ruling containing an "additive-manipulative" interpretation – the introduction into Italian law of a new form of confiscation consisting only of the profits earned from the offence, which is by contrast an exclusive prerogative of the legislator.

The objection is unfounded.

In fact, this Court has ruled inadmissible a previous question concerning the constitutionality of Article 187-*sexies* of Legislative Decree no. 58 of 1998, which had sought to vest both "the administrative authorities (when imposing the sanction) and the courts (within any opposition proceedings) with the power to 'tailor' the measure 'having regard to the specific seriousness of the violation committed'", on the basis of the very same proportionality considerations concerning the sanction that are invoked in these proceedings. In that case, this Court held that the remedy sought was "'systemically novel': a fact which caused it to fall outside the scope of constitutional review, with the result that it should be considered within potential future reform packages, the choice regarding which falls exclusively to the legislator" (Judgment no. 252 of 2012). The 'creative' nature of the solution proposed in that case by the referring court essentially lay in the call to introduce an element of flexibility into the amount eligible for confiscation, having regard to the specific seriousness of the offence: this solution was however held to be irreconcilable with the 'fixed' nature of confiscation which – under applicable law – may be either mandatory or optional, but cannot be

subject to quantitative distinctions based on the discretionary assessment of the authority ordering the measure (again, Judgment no. 252 of 2012).
However, the remedy sought by the current questions of constitutionality is entirely different, in seeking to obtain not a ruling constituting an "additive-manipulative" interpretation (such as that sought by the referral order ruled on by Judgment no. 252 of 2012) but rather a ruling with partial repealing effect. In fact, the referring court essentially asks that the reference to the "means used [or rather: the assets used] to commit" the offence and to the "product" of the offence be excised from Article 187-*sexies* of Legislative Decree no. 58 of 1998, thereby retaining only the part of the provision concerning the "profits".
The ruling sought would thus simply reduce the assets liable to confiscation under the contested provision; however, confiscation would still be mandatory as regards the residual part consisting in the profits of the offence, which should be confiscated in their entirety (either directly or by way of assets having equivalent value). Therefore, it is asserted that, were the questions raised to be accepted, it would not result in any 'creative' interference with the law, and so the questions are – as regards this aspect – admissible.
6.– Finally, State Counsel asserts that the referring court erred in holding that the confiscation applied in this case amounts to confiscation of assets having equivalent value, as it must by contrast be classified as direct confiscation in that it involves pecuniary amounts.
This objection is also unfounded.
Leaving aside the fact that (as is apparent from the case file) the assets confiscated in this case were two items of real property owned by D. B. and not pecuniary amounts, it must be noted that the CONSOB expressly designated the shares purchased by D. B. as the "product" of the offence, even though they were not however directly confiscated. The assets confiscated were rather assets having a value corresponding to that of the shares purchased, specifically the value of those shares on the basis of their official price at the time the public tender offer was launched.
There is therefore no doubt that the confiscation at issue should be classified as the confiscation of assets having equivalent value to the product of the offence.
7.– Although no specific objection has been raised concerning this matter, it must finally be held – in keeping with the principles laid down in Judgments no. 269 of 2017, no. 20 of 2019 and no. 63 of 2019 – that the questions of constitutionality raised with reference to Articles 17 and 49 CFREU via Articles 11 and 117(1) of the Constitution are admissible: it is the task of this Court to assess these questions, having been requested to do so by the referring court.
8.– On the merits, the questions are well founded in relation to all of the parameters invoked.
According to the case law of this Court within the area of criminal law, any sentences that are manifestly excessive compared to the seriousness of the offence are considered to be unconstitutional, as a violation of Articles 3 and 27 of the Constitution (see below, section 8.1.). For their part, administrative sanctions that are manifestly excessive compared to the seriousness of the offence violate Article 3 of the Constitution, in conjunction with the constitutional provisions protecting the relevant rights encroached upon by the particular sanction, and – in matters covered by EU law – Article 49(3) CFREU (see below, section 8.2.). The confiscation of assets having equivalent value to the "product" of the offences provided for under Title I-*bis*, Chapter III of Legislative Decree no. 58 of 1998 and the "assets used" to commit them gives rise to sanctions that are manifestly excessive compared to the seriousness of the offences in question (see

below, section 8.3.). The risk that excessive punishment may result from the provision requiring the mandatory confiscation of the "product" of the administrative offences in question as well as the "assets used" to commit them was moreover noted by this Court and by the CONSOB itself some time ago, so much so that the legislator granted powers to the Government – by Law no. 163 of 2017 – to review the contested provision and to provide for the confiscation only of the "profits" of the offences in question (see below, section 8.4.). The declaration that the contested provision is unconstitutional in this regard is not, moreover, at odds with the obligations imposed by EU law, which require only the confiscation of the profits which the perpetrator obtained from the offences concerned (see below, section 8.5.).

8.1.– As has been observed, the essential core of the objections raised by the referring court is the disproportionate nature of the sanction consisting in the confiscation of assets having equivalent value to the "product" of the offence of insider trading as well as of the "assets used" to commit it, along with the attendant excessive impingement on the rights of ownership of the perpetrator of the offence.

Within its case law, this Court has had various opportunities to consider whether, and subject to which limits, it is possible to review the constitutionality of the types and extent of administrative sanctions with reference to the principle that sanctions must be proportionate. However, the practically exclusive viewpoint from which those questions have been considered has only been that involving the prohibition on automatic legislative sentencing mechanisms (see below, section 8.2.2.): this prohibition is only one of the aspects that enter into consideration as regards the question now before this Court.

On the other hand, a large number of rulings – which have been much more varied in terms of the type of assessment performed by the Court – have concerned the parallel issue of the review of the choices made by the legislator concerning criminal punishment, which should be briefly discussed.

8.1.1. – According to the settled case law of this Court within the area of criminal law, the legislator is afforded broad discretion in setting the sentences that are to be imposed for each offence. As a matter of principle, that discretion covers both the manner and severity of punishment since – according to Article 25(2) of the Constitution – the legislator is entitled to select the sentences that are most suited to the purpose of protecting the legal interests covered by each provision establishing criminal offences, whilst also setting the minimum and maximum limits to such sentences.

However, that discretion is subject to a series of constraints laid down by the Constitution, which include the prohibition on imposing sentences that are manifestly excessive – the issue in this case.

8.1.2.– Within the case law of this Court, the review of the proportionality of sentences has historically focused first and foremost on the principle of equality under Article 3 of the Constitution. It has inferred from that principle the natural implication that offences that differ in terms of the harm caused attract different punishments. This means that constitutionality proceedings concerning the severity of punishments must be modelled on a triadic framework involving a comparison between the contested punishment and that imposed for other offences that are similar or even more serious, which operates as a comparator (Judgments no. 68 of 2012, no. 409 of 1989 and no. 218 of 1974 and – concerning the violation of both Articles 3 and 8 of the Constitution – Judgments no. 327 of 2002, no. 508 of 2000 and no. 329 of 1997).

8.1.3.– In other judgments of this Court (starting from Judgments no. 343 of 1993, no. 422 of 1993 and no. 341 of 1994), the focus not only on Article 3 of the Constitution but also on the principle laid down by Article 27(3) of the Constitution – and in particular

the requirement that the sentence must have a re-educative aspect – has led the Court to broaden its review also to cases in which the sentence imposed by the legislator appears to be manifestly disproportionate, not so much when compared to the sentences provided for in relation to other offences, but rather having regard – directly – to the seriousness of the conduct covered by the offence in the abstract. It is therefore no longer necessary for the referring court to rely on any specific comparator other than for the limited purpose of assisting this Court in establishing which sentence should apply in place of that ruled unconstitutional, pending the potential enactment of legislation (see, regarding this aspect, in particular Judgments no. 40 of 2019, no. 222 of 2018 and no. 236 of 2016). This is in the awareness that excessively severe sentences tend to be perceived as unfair by the person who has been convicted, and thus end up impeding his or her re-education (Judgment no. 68 of 2012).

On the other hand, the numerous rulings that have considered Article 69, last paragraph, of the Criminal Code, in terms of the need to avoid the specific imposition of excessive punishments as a result of the prohibition on allowing certain mitigating circumstances to prevail over the aggravating circumstances set forth in that provision (Judgments no. 205 of 2017, nos. 106 and 105 of 2014 and no. 251 of 2012), must be considered in the same light.

8.1.4.– The consideration, alongside Article 3 of the Constitution, also of the principle of individual criminal responsibility enshrined in Article 27(1) of the Constitution – which must also be considered in the light of requirement laid down by Article 27(3) of the Constitution that the sentence must have a re-educative function – is also the basis for the further principle that the sentence must be sufficiently tailored to the individual circumstances. This position is also established within long-standing case law of this Court, which precludes as a matter of principle any provision requiring fixed sentences (Judgment no. 222 of 2018, following Judgments no. 50 of 1980, no. 104 of 1968 and no. 67 of 1963). According to that principle – in moving from the abstract provision made by the law to the specific sentence imposed by the courts – the sentence must constitute a proportionate response also to the specific seriousness of the particular offence, considered in both objective and subjective terms. This means, at least generally, that the courts must be left some discretion when passing the specific sentence, within a minimum and a maximum specified in advance by the legislator.

8.2.– It is necessary at this stage to assess whether, and as the case may be, subject to which limits, these principles can be considered to be applicable also to the issue of administrative sanctions, which arises in this case.

8.2.1.– On numerous occasions, this Court has extended some of the guarantees laid down by the Constitution in the area of criminal law to administrative sanctions that are essentially ‘punitive’ in nature.

This has occurred, in particular, in relation to a series of corollaries of the principle of *nullum crimen, nulla poena sine lege* laid down by Article 25(2) of the Constitution, such as the prohibition on retroactive changes to the criminal law that are to the detriment of the guilty party (Judgments no. 223 of 2018, no. 68 of 2017, no. 276 of 2016, no. 104 of 2014 and no. 196 of 2010), the requirement that the *actus reus* must be stated with sufficient clarity (Judgments no. 121 of 2018 and no. 78 of 1967), as well as the retroactivity of any subsequent changes to the criminal law that are to the benefit of the guilty party (Judgment no. 63 of 2019).

However, no such extension of guarantees has occurred in relation to the principles on criminal responsibility laid down by Article 27 of the Constitution (Judgment no. 281 of 2013 and Order no. 169 of 2013). These principles – starting from the requirement that the penalty must have a re-educative function – in fact appear to be closely related to the

logic of custodial sentences, or at least sentences that impinge upon individual freedom, around which the system of criminal sentencing is still constructed. Moreover, this logic is still more or less directly apparent also in cases in which different types of sentence are imposed, as a remedy of last resort in the event of non-compliance with obligations attendant to sentences.

8.2.2.– Nevertheless, it cannot be doubted that the principle that sentences must be proportional with the seriousness of the offence is also applicable to administrative penalties in general.

As mentioned above, this Court has already invoked that principle on numerous occasions – also in relation to measures that were expressly found not to be 'punitive' in nature (such as in the case ruled on by Judgment no. 22 of 2018) – as a basis for ruling automatic sentencing mechanisms unconstitutional, which have been considered not to be consistent with this principle precisely because it requires that "the sentence must be appropriate for the specific case"; this appropriateness "can only be achieved through a particular assessment of the specific acts by which the offence was committed" (Judgment no. 161 of 2018; see also, *ex multis*, Judgments no. 268 of 2016 and no. 170 of 2015).

8.2.3.– Besides, the principle that the sentence must be proportional has the potential to be applied beyond the horizon of automatic legislative mechanisms. This is demonstrated specifically by the case law in the area of criminal law referred to above, the core principles of which can be extended also to administrative sanctions; however, the basis in law for this principle is not Article 3 in conjunction with Article 27 of the Constitution, but rather Article 3 in conjunction with the relevant constitutional provisions establishing protection for the relevant rights encroached upon by the particular sanction.

Therefore, the referring court did not err in identifying the combined provisions of Articles 3 and 42 of the Constitution as the basis in domestic law for the principle that any sanction that impinges upon the rights of ownership of the perpetrator of the offence (such as the confiscation at issue in this case) must be proportional. It also did not err in identifying Article 1 of the Additional Protocol to the ECHR and Article 17 CFREU as the respective bases for the principle concerned within the ECHR and EU law insofar as related to a pecuniary sanction.

8.2.4.– In matters covered by EU law, Article 49(3) CFREU may be added to the foundations in law mentioned above.

Although the text of that Article refers to "penalties" and "the offence", the Court of Justice of the European Union has recently held that principle to be applicable to any sanctions – whether criminal and administrative, the latter also being 'punitive' in nature – imposed following the commission of a market manipulation offence for the purposes of verifying whether the different principle of *ne bis in idem* has been respected (Court of Justice, judgment of 20 March 2018 in Case C-537/16, *Garlsson Real Estate SA* and others, paragraph 56). This is in keeping with the Explanation on Article 49 CFREU, where it is clarified that "[p]aragraph 3 states the general principle of proportionality between penalties and criminal offences which is enshrined in the common constitutional traditions of the Member States and in the case-law of the Court of Justice of the Communities": this case law has been developed exclusively in relation to the administrative sanctions applied by the Community institutions.

Article 49(3) CFREU itself has moreover recently been invoked by the Joint Civil Divisions of the Court of Cassation as a basis for the assertion that also any forms of compensation that have a prevalently deterrent function, such as '*punitive damages*' that may be ordered within a foreign judgment, must in any case comply with the

proportionality principle as a prerequisite for recognition under Italian law (Court of Cassation, Joint Civil Divisions, judgment no. 16601 of 5 July 2017).
8.2.5.– In some judgments to which the private party has rightly drawn the Court's attention, the European Court of Human Rights has ruled unlawful – with reference to Article 1 of the Additional Protocol to the ECHR – administrative confiscations of the full amount of any cash not declared to customs authorities, and not only the amount of the customs duty evaded. This is precisely due to the manifestly disproportionate nature of such measures in the light of the nonetheless legitimate aims pursued by the State, having regard to the specific seriousness of the relevant offences considered, taking account also of the fact that the confiscations in question applied in addition to the pecuniary sanctions imposed due to the failure to declare the amounts (ECtHR, judgments of 31 January 2017 in *Boljević v. Croatia*; of 26 February 2009 in *Grifhorst v. France*, paragraphs 87 et seq; of 5 February 2009 in *Gabrić v. Croatia*, paragraphs 34 et seq; of 9 July 2009 in *Moon v. France*, paragraphs 46 et seq; and of 6 November 2008 in *Ismayilov v. Russia*).
8.3.– It is therefore on the basis of these principles that it is necessary to review the constitutionality of the contested provision, which requires the confiscation – either directly or by way of assets having equivalent value – of the "product" or alternatively the "profits" of the offences provided for under Title I-*bis*, Chapter III of Legislative Decree no. 58 of 1998, in addition to the "assets used" to commit the offences.
8.3.1.– According to the consolidated approach under the criminal law, from which the terminology used in the contested provision is derived, the "product" of an offence consists in "the empirical result of the offence, that is the things created, transformed, adulterated or acquired by means of the offence" (Court of Cassation, Joint Criminal Divisions, judgment no. 26654 of 27 March 2008). In other words, the "product" is comprised of all material things that, from a purely causal perspective, 'result' from the commission of the offence. The "product" of the offence may be a forged document, a tape containing a recording of an illegally intercepted conversation, or an item purchased by a person who knew it to result from a criminal act.
According to this logic, the "product" of an offence such as the abuse of privileged information – the essence of which involves the purchase and/or sale of financial instruments by a person in possession of information that is still reserved, the subsequent release of which to the public could cause the price of those instruments to change – must be comprised of the totality of the instruments purchased, i.e. the full amount obtained from their sale (Court of Cassation, First Civil Division, judgment no. 8590 of 6 April 2018).
8.3.2.– By contrast, the "profit" is the economic benefit earned by committing the offence. In cases involving the purchase of financial instruments, the profit thus consists in the economic result of the transaction, valued at the time when the privileged information held by the actor came into the public domain; more specifically, it is calculated by deducting the cost actually incurred by the perpetrator in order to conclude the transaction from the value of the financial instruments purchased, thereby quantifying the effective 'gain' (in financial terms, the 'capital gain') or, as was the case here, the 'cost saving' that the actor achieved through the transaction.
In situations in which financial instruments are sold on the basis of privileged information, the "profit" earned must be considered to consist in the 'loss avoided' as a result of the subsequent fall in the price of the instruments following the release of the information; it will thus be calculated based on the difference between the proceeds of the sale of the financial instruments and their subsequent (diminished) value. An interpretation of Article 187-*sexies* of Legislative Decree no. 58 of 1998 in a manner

consistent with EU law also points towards this conclusion, having regard in particular to Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC: point 2(b) of Article 30 of that Regulation requires the Member States to make provision for "the disgorgement of the profits gained or losses avoided due to the infringement insofar as they can be determined".

8.3.3.– Finally, as regards the "assets used" to commit the offence, in cases involving market abuse these must consist in the amounts of money invested in the transaction, or in the financial instruments sold by the perpetrator, and by no means the traditional *instrumenta sceleris*, which in general amount to items that will be inherently dangerous if left in the hands of the guilty person, such as the moulds of the picklock or the counterfeiter of coins.

8.3.4.– It follows from the above that whilst the confiscation of the "profits" of a market abuse offence performs the function merely of restoring the perpetrator's previous financial position, the confiscation of the "product" – consisting in the full amount of the financial instruments purchased by the perpetrator, or the full amount obtained through their sale – in addition to the "assets used" to commit the offence – consisting in the amounts of money invested in the transaction, or in the financial instruments sold by the perpetrator – will end up worsening the financial position of the perpetrator.

These forms of confiscation thus take on a 'punitive' aspect by encroaching upon the rights of ownership of the perpetrator of the offence to an extent that is greater (and as a rule much greater) than the mere confiscation of the unfair economic benefit obtained from the offence.

Moreover, taking this starting point, the Supreme Court of the United States has recently held that a "disgorgement" order functionally similar to that at issue here, which had been applied by the Security Exchange Commission [*sic*.] (SEC) in a market abuse case, was 'punitive' and not merely restorative in nature; this is precisely because such a measure – which covers the full proceeds of the unlawful transaction – is generally greater than the economic benefit that the perpetrator drew from the transaction (Supreme Court of the United States, judgment of 5 June 2017, *Kokesh v. Security Exchange Commission* [*sic*.]).

8.3.5.– Under the current system of sanctions for market abuse, the (predominant) 'punitive' component attendant to the confiscation of the "product" of the offence and the "assets used" to commit it is added to the penalty resulting from the other sanctions provided for under Legislative Decree no. 58 of 1998, including in particular the administrative fine. The legislation providing for this fine is also exceptionally severe, in providing for a maximum fine (at present) of five million euros, which may be increased by up to three times where particular circumstances obtain, or, if greater, by to up to ten times the profits earned or the losses avoided as a result of the offence.

8.3.6.– In the opinion of this Court, the combination of an exceptionally severe fine, which may nonetheless be tailored to the specific seriousness of the offence and the financial circumstances of the perpetrator, with another sanction that is also 'punitive' in nature (specifically, the confiscation of the product along with the assets used to commit the offence, which moreover does not enable the administrative authority and, later, the courts to increase or reduce the relevant amount) will necessarily lead in practice to the imposition of manifestly disproportionate sanctions.

Such an outcome is emblematically illustrated in the case before the lower court, in which the perpetrator of an insider trading offence was punished by a fine of 200,000 euros in addition to the confiscation of assets having equivalent value to the full value

of the shares purchased by taking advantage of privileged information, amounting to a further 149,760 euros, as against a financial benefit from the operation of 26,580 euros. Ultimately, the 'punitive' element of the overall sanction in this case – resulting from the total of the fine and the confiscation of the amount in excess of the profit earned from the transaction – is equal to thirteen times that profit: such a coefficient must inevitably be manifestly excessive having regard to the legitimate purposes of general and special prevention pursued by the legislation prohibiting insider trading.

8.4.– Having ruled inadmissible a question concerning the constitutionality of Article 187-*sexies* of Legislative Decree no. 58 of 1998 within a previous case, this Court has moreover already recognised that the issue of the "excessive consequences that may result under particular circumstances from a rule providing for the mandatory confiscation not only of the profits but also of the instruments used in order to commit the offence" is an "inherently real and perceived problem, which must be referred to the legislator" (Judgment no. 252 of 2012), although the Court did not consider on that occasion that it was able to implement its own remedy directly in consideration of the particular manner in which the remedy sought in that case had been framed (see above, section 5).

The warning issued by this Court did not pass unheeded by the CONSOB which – as was correctly recalled by counsel for the private party – reminded the legislator, in its Annual Report for 2012, that it would be appropriate to reform "the current law on mandatory confiscation (Article 187-*sexies*), which is liable to be […] particularly punitive and out of proportion with the actual seriousness of the offence established", suggesting the introduction of a sliding scale of coefficients for establishing the severity of the sanction so as to ensure that it is commensurate in each case with the specific seriousness of the offence.

The legislator then took action on that recommendation by enacting Law no. 163 of 2017, Article 8(3)(g) of which granted authority to the Government to review Article 187-*sexies* of Legislative Decree no. 58 of 1998 "in such a manner as to ensure that confiscation is appropriate, by providing that it may apply to the profits as defined under Regulation (EU) no. 596/2014, including in terms of assets having equivalent value": this wording does not contain any reference to the "product" of the offence or the "assets used" to commit it, which were evidently considered to be harbingers of excessive punishment.

In view of the subsequent willingness of the Government to issue a decree that excised the part providing for the confiscation of the "assets used" to commit the offence, but not the reference to the "product" of the offence, during questioning by the Joint Justice and Finance Committees of the Chamber of Deputies on 17 July 2018, the CONSOB commissioner called for the adoption by the secondary legislator of the "position already expressed by Parliament and endorsed by the CONSOB", by providing for "the confiscation only of the profits resulting from the violation involving the abuse of privileged information and market manipulation as provided for under Articles 187-*bis* and 187-*ter*" of Legislative Decree no. 58 of 1998.

However, the secondary legislator did not act on that suggestion, and hence the new version of Article 187-*sexies* of Legislative Decree no. 58 of 1998, as amended by Legislative Decree no. 107 of 2018, once again provided for the confiscation of both the "profits" as well as the "product" of the offence, thereby leaving within the new provision the faults that had already affected that previously in force.

Since the current question of constitutionality differs in structure from that decided on by Judgment no. 252 of 2012, this Court is now able to remedy that unconstitutionality

by a ruling with partial repealing effect, which is capable of resolving the excessive consequences of the contested legislation.
8.5.– Moreover, there is no obstacle to this Court's ruling within EU law, which does not require the confiscation of the "product" of the offence and of the "assets used" to commit it.
In fact, as mentioned above, Regulation no. 596/2014 as currently in force only requires the Member States – in point 2(b) of Article 30 – to make provision for "the disgorgement of the profits gained or losses avoided due to the infringement insofar as they can be determined".
As is apparent also from the different language versions of the text ("*the disgorgement of the profits gained or losses avoided*" in English; "*la restitution de l'avantage retiré de cette violation ou des pertes qu'elle a permis d'éviter*" in French; "*den Einzug der infolge des Verstoßes erzielten Gewinne oder vermiedene Verluste*" in German; "*la restitución de los beneficios obtenidos o de las pérdidas evitadas*" in Spanish), the Regulation without doubt alludes only to the 'economic benefit' (in terms of a loss avoided or a gain) obtained by concluding a transaction under conditions of information asymmetry and in breach of a duty to refrain from trading – by virtue of the possession of privileged information – with operators on the market for financial instruments in general.
9.– It follows from the above that the provision requiring the mandatory confiscation of the "product" of the administrative offence along with the "assets used" to commit it is unconstitutional due to the violation of Articles 3, 42 and 117(1) of the Constitution, the last-mentioned in relation to Article 1 of the Additional Protocol to the ECHR, as well as of Articles 11 and 117(1) of the Constitution in relation to Articles 17 and 49(3) CFREU.
However, the referring court appears to circumscribe the remedy sought to a declaration that only the provision requiring the confiscation of assets having equivalent value is unconstitutional. Nonetheless, it must be considered in this regard that the manifestly disproportionate effect of such confiscation – which is clarified with precision by the referral order – is not dependent on the fact that the measure concerns directly the assets or money obtained from the transaction or used within the transaction, or assets or money having equivalent value, but rather on the very provision for an obligation to confiscate the "product" of the offence and the "assets used" to commit it.
Article 187-*sexies* of Legislative Decree no. 58 of 1998, as originally introduced by Article 9(2)(a) of Law no. 62 of 2005 must therefore be declared unconstitutional insofar as it provides for the mandatory confiscation, either directly or by way of assets having equivalent value, of the "product" of the offence and of the "assets used" in order to commit it and not only of the "profits".
10.– This declaration that the legislation is unconstitutional must be extended pursuant to Article 27 of Law no. 87 of 11 March 1953 (Provisions on the Constitution and the operation of the Constitutional Court) to Article 187-*sexies* of Legislative Decree no. 58 of 1998, as in force following the amendments introduced by Article 4(14) of Legislative Decree no. 107 of 2018, insofar as it provides for the mandatory confiscation, either directly or by way of assets having equivalent value, of the "product" of the offence and not only of the profits, due to the violation of all of the parameters invoked in the referral order.
Notwithstanding the provisions of the parent statute Law no. 163 of 2017 (see above, section 8.4.), which authorised the Government to review Article 187-*sexies* of Legislative Decree no. 58 of 1998 by limiting the confiscation provided for thereunder only to the "profits as defined under Regulation (EU) no. 596/2014", Legislative Decree

no. 107 of 2018 by contrast confirmed the mandatory confiscation, alternatively either of the "profits" or the "product" of the offence, excising only the reference to the "assets used" to commit it, which had been present within the previous version.
In this way, the secondary legislator reiterated, albeit in part, a provision that features the same flaws under constitutional law as the previous legislation. Also this provision must therefore be ruled unconstitutional on a consequential basis, with regard to this aspect.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

1) *orders* the separation of the proceedings launched by the Second Civil Division of the Court of Cassation by the referral order mentioned in the headnote, reserving for a separate ruling the decision on the questions concerning the constitutionality of Article 187-*quinquiesdecies* of Legislative Decree no. 58 of 24 February 1998 (Consolidated Law on Financial Intermediation, adopted pursuant to Articles 8 and 21 of Law no. 52 of 6 February 1996), raised with reference to Articles 24, 111 and 117(1) of the Constitution, the last provision in relation to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955, and Article 14(3)(g) of the International Covenant on Civil and Political Rights adopted in New York on 16 December 1966, ratified and implemented by Law no. 881 of 25 October 1977, and with reference to Articles 11 and 117(1) of the Constitution, in relation to Article 47 of the Charter of Fundamental Rights of the European Union (CFREU), proclaimed in Nice on 7 December 2000 and adapted in Strasbourg on 12 December 2007;
2) *declares* unconstitutional Article 187-*sexies* of Legislative Decree no. 58 of 1998, as originally introduced by Article 9(2)(a) of Law no. 62 of 18 April 2005 (Provisions to implement obligations resulting from Italy's membership of the European Communities. Community Law 2004), insofar as it provides for the mandatory confiscation, either directly or by way of assets having equivalent value, of the product of the offence and of the assets used in order to commit it and not only of the profits;
3) consequently, pursuant to Article 27 of Law no. 87 of 11 March 1953 (Provisions on the Constitution and the operation of the Constitutional Court), *declares* unconstitutional Article 187-*sexies* of Legislative Decree no. 58 of 1998, as in force following the amendments introduced by Article 4(14) of Legislative Decree no. 107 of 10 August 2018 laying down "Provisions to adapt national law in line with the provisions of Regulation (EU) no. 596/2014 on market abuse and repealing Directive 2003/6/EC and Directives 2003/124/EU, 2003/125/EC and 2004/72/EC", insofar as it provides for the mandatory confiscation, either directly or by way of assets having equivalent value, of the product of the offence and not only of the profits.
Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 6 March 2019.