

Italian Constitutional Court

Legal summary

Judgment No 7/2025

ECLI:IT:COST:2025:7

**MANDATORY CONFISCATION OF INSTRUMENTALITIES OF CRIME  
IS UNCONSTITUTIONAL BECAUSE IT MAY RESULT IN EXCESSIVE PUNISHMENT**

In Judgment No 7/2025, the Constitutional Court ruled that the **mandatory confiscation of instrumentalities of crime** – whether direct or by equivalent means – **violated the principle of proportionality in criminal punishment**, as established under Articles 3 and 27(3) of the Italian Constitution, and under Articles 11 and 117 IC, in conjunction with Article 49(3) of the EU Charter of Fundamental Rights.

The referral order was deemed admissible, even though the challenged provision could have been set aside in the main proceedings by directly applying the Charter. **Italian courts have the discretion to either disregard national provisions that conflict with EU law or refer the matter to the Constitutional Court**, requesting that they be declared unconstitutional and thus removed from the legal system. The latter option has a broader systemic impact and may be considered preferable by the proceeding court, particularly when fundamental rights are at stake. This is especially true with regard to **criminal provisions**, which are subject, in the Italian legal system, to a strict principle of legality, with a view to ensuring foreseeability of the application of criminal law, separation of powers between the legislature and the judiciary, as well as equality of treatment among individuals.

Unlike other forms of confiscation, **the confiscation of instrumentalities of crime has a punitive nature**, which requires adherence to the principle of proportionality. However, since this sanction was mandatory, courts had no discretion to assess whether the punishment was **proportionate to the seriousness of the crime or the financial circumstances of the offender**.

As a result, the automatic enforcement of these fines could lead to disproportionate outcomes. Consequently, **the Court annulled the provisions mandating this form of confiscation, leaving it open for the legislature to introduce new measures** allowing courts to evaluate the proportionality of confiscation orders.

**Main proceedings**

Four bank managers were convicted of corporate financial crimes – specifically, market manipulation and obstructing supervisory functions – by the Criminal Court of Vicenza. Their sentence included an accessory penalty under Article 2641(2) of the Civil Code (the “**challenged provision**”). Article 2641 of the Civil Code mandated, among other things, the confiscation of both instrumentalities of crime (first paragraph) and property of value equivalent to such instrumentalities (second paragraph). In this case, the Criminal Court

ordered the confiscation of 963 million euros, estimating that the bank where the individuals worked had used an equivalent sum to perpetrate the crimes.<sup>1</sup>

On appeal, the Court of Appeal of Venice (Criminal Division) found that the confiscated sum was disproportionate and therefore in breach of Article 49(3) of the Charter of Fundamental Rights of the European Union ("**Charter**"), which lays down the principle of the proportionality of criminal sanctions. As a result, the Court of Appeal set aside the challenged provision and annulled the confiscation order. The prosecutor then appealed to the Court of Cassation (the "**referring court**"), arguing that disapplying those provisions constituted a judicial error.

The referring court stayed the proceedings and issued a referral order to the Constitutional Court (the "**Court**"), claiming that the challenged provision violated the Italian Constitution (IC).

## Complaints

The referring court argued that mandatory confiscation of property of value equivalent to instrumentalities of crime excessively restricted the offender's property rights, resulting in a disproportionate criminal sanction. Accordingly, it questioned the compatibility of the challenged provision with:

- **Articles 3 (Principle of equality and non-discrimination) and 27, paragraphs 1 and 3 (Principle of personal criminal responsibility and rehabilitative function of punishment) IC**, from which the Court's case law has derived the **principle of proportionality of penalties**;
- **Article 11 (Limitations of State's sovereignty and promotion of international organisations) and Article 117 (Compliance with international and EU obligations) IC**, in conjunction with **Articles 49(3) (Proportionality of criminal sanctions) and 17 (Right to property) of the Charter**;
- **Article 42 (Right to property)**; and
- **Article 117 IC**, in conjunction with **Article 1 (Right to property) of Protocol 1 to the European Convention on Human Rights**.

## Decision of the Court

The Court determined that **the referral order was admissible**. The availability of the remedy of disapplication does not preclude the possibility for Italian courts to raise a constitutionality question relating to the compatibility of Italian law with EU law provisions which have direct effect.

On the merits, the Court held that **the challenged measures violated Articles 3 and 27 IC**, as well as **Articles 11 and 117 IC, in conjunction with Article 49(3) of the Charter, because they provided for a disproportionate criminal punishment**. In light of this finding, it was not necessary to examine the alleged violation of the other IC provisions invoked.

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<sup>1</sup> Specifically, the bank made payments to third parties to fund the purchase of its own shares, while failing to fulfil its duty to disclose these transactions to financial authorities.

## Reasons for the decision

The Court's ruling addressed both the admissibility and the merits of the constitutional question.

**Regarding admissibility**, the Court recalled its recent case law<sup>2</sup> on conflicts between Italian law and EU law provisions with direct effect. When an ordinary court considers that Italian law breaches both the Constitution and EU law provisions with direct effect, two alternative courses of action are available:

- a) The court can directly assess whether the Italian law complies with EU law, after referring – if necessary – a preliminary question to the Court of Justice of the EU.<sup>3</sup> Had the Court of cassation followed this approach, it could have directly decided whether the Court of Appeal had correctly disapplied the national provision at issue, giving precedence to Article 49(3) of the Charter.
- b) Alternatively, the court can refer the issue to the Constitutional Court, questioning the compatibility of the challenged provisions with the relevant constitutional norms – including Articles 11 and 117 IC, both enabling the Constitutional Court itself to assess the compatibility of the challenged provision with EU law, and in particular with the Charter.

According to the Court, the second option may be preferable **when fundamental rights under EU law are at stake and the question overlaps with constitutionally protected rights or principles**. The Court emphasised that both remedies serve the primacy of EU law. However, referring a constitutional question for breach of EU law has broader systemic effects. While disapplication shapes only the outcome of the specific proceedings but leaves the provision intact, the annulment of the provision by the Court results in its permanent removal, thanks to the *erga omnes* effect of the Court's decisions.

This is especially true with regard to *criminal* provisions. The question, here, involved the principle of the proportionality of penalties, which is enshrined both in the Constitution and the Charter. In such a case, the choice to disapply a mandatory penalty would leave the criminal court without legal guidance on what sanctions to impose. This would undermine the principle of legality in criminal matters, which requires penalties to be clearly defined so that individuals can foresee the outcome of their application. Disapplication of a criminal sanction also blurs the separation of powers between the legislature and the judiciary and undermines equal treatment of convicts. In this case, had the referring court merely disapplied the challenged provisions, it would have been left with excessive discretion over whether to uphold, annul or partially uphold a confiscation order of almost 1 billion euro.

Therefore, Court of Cassation's choice to refer the question to Constitutional Court, in the present case, was fully correct and the referral was admissible.

Furthermore, the Court needed to ascertain whether the main proceedings fell within the scope of EU law. The EU norm invoked here was Article 49(3) of the Charter, and the Charter

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<sup>2</sup> Starting from Judgment N° 269 of 2017. See, among others, judgments N° 1 of 2025 and N° 181 of 2024.

<sup>3</sup> Under Article 267 of the Treaty on the Functioning of the European Union.

only binds Member States – and can therefore trump domestic norms – when they “implement” EU law.<sup>4</sup> The Court disagreed with the referring court’s view that the necessary link between the case and EU law’s implementation was found in the EU law measures providing for the mutual recognition of confiscation orders (which do not impose harmonised obligations) or in Directives 2014/42/EU<sup>5</sup> and 2024/1260/EU<sup>6</sup> (which apply to different crimes). Instead, the Court found that **EU law was engaged by the fact that the case concerned criminal conduct breaching specific EU obligations**, including misrepresentation of the bank’s Tier 1 Capital (a key measure of financial strength<sup>7</sup>) and failure to cooperate with the European Central Bank.<sup>8</sup> Since the Charter applied, its provisions could be used as standards of constitutionality for the challenged provisions.

**As regards the merits** of the constitutionality question, the Court upheld the arguments of the referring court that mandatory value-based confiscation of instrumentalities of crime can lead to imposing manifestly disproportionate sanctions.

The Court articulated its findings on three points. First, mandatory confiscation of personal assets of value equivalent to the instrumentalities of crime amounts to a **fine of criminal nature and must therefore comply with the principle of proportionality of criminal punishments**. Second, the amount of confiscation must be proportionate not only to the subjective and objective seriousness of the crime, but also to the financial conditions of the offender. Third, since the challenged provision made no reference to the seriousness of the crime and the financial conditions of the individual, **the challenged provision required Italian courts to order mandatory confiscation also when its effect was manifestly disproportionate**. These three points are more fully articulated as follows.

To correctly characterise the nature of the confiscation provided for in the challenged provision, the Court distinguished between different types of confiscation measures available under Italian legislation. Confiscation can serve different purposes: it may be imposed to *punish* criminal offenders, to *prevent* reoffending, or to *restore* the economic situation prior to the crime and prevent the accumulation of unlawfully acquired assets.

Confiscation of the *proceeds* of crime has a *restorative* function, as it aims to strip the offender of any unlawfully gained advantage. By contrast, the direct confiscation of *instrumentalities* of crime targets assets that were not directly obtained through criminal activity, resulting in a reduction of the individual’s pre-existing, presumably lawful, financial position. Moreover, confiscation of instrumentalities automatically applies to all types of

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<sup>4</sup> Article 51(1) of the Charter.

<sup>5</sup> Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

<sup>6</sup> Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation.

<sup>7</sup> Namely, 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. The Article provides that capital instruments funded directly by a bank cannot qualify as Common Equity Tier 1 instruments.

<sup>8</sup> As provided for in 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.

assets, unlike *preventive* confiscation, which is limited to the specific assets used to commit the crime and serves a practical function by reducing the risk of reoffending.

**These characteristics of confiscation of instrumentalities of crime make it impossible to classify it as a restorative or preventive measure, and instead highlight its *punitive* nature.** As the Court had explained in a previous judgment,<sup>9</sup> the mandatory confiscation of instrumentalities of crime strips the owner of their lawfully held assets solely on the grounds of their criminal use. This measure deprives such assets of the legal protection typically afforded to property rights, and is not dependent on any risk or likelihood that they might be used for criminal purposes again.

By analogy to direct confiscation, value-based confiscation of instrumentalities of crime (which is ordered when the instrumentalities themselves cannot be identified or recovered) serves **the same purpose, i.e. to impose an economic loss**. Therefore, it must respond to the principle of proportionality applicable to all criminal punishment, derived from Articles 3 and 27(1) and (3) IC, but also from the supranational obligations binding Italy, in particular Article 49(3) of the Charter, under which “[t]he severity of penalties must not be disproportionate to the criminal offence”.

To assess the proportionality of criminal fines, it must be considered that **their severity can vary depending on the individual’s financial situation**. The same penalty is more burdensome for a less well-off person and less so for a wealthier one.<sup>10</sup> For this reason, pecuniary sanctions must be tailored to the individual’s circumstances to ensure substantive – rather than merely formal – equality of treatment. To achieve this, the issuing authority must have discretion in determining the amount of the sanction to prevent manifestly excessive consequences.

**The challenged provision failed to uphold these principles.** Its main flaw was in the *mandatory* nature of the penalty, which was determined solely by the value of the instrumentalities of the crime. Courts were required to issue a confiscation order regardless of any potentially disproportionate effects. This incongruity was further exacerbated in cases where the sanctioned individuals did not own the instrumentalities of the crime but were held personally responsible for its commission, as is often the case with corporate crime convictions such as that of the main proceedings. In these cases, the individuals responded with their personal assets if the corporation’s assets are insufficient or impossible to seize.

**The Court reinforced this conclusion through a comparative analysis**, finding that similar approaches are adopted in various foreign legal systems and in EU law. In Germany, the principle of proportionality is upheld by granting courts discretion in determining whether to order confiscation and what assets to confiscate.<sup>11</sup> Similarly, U.S. federal and state courts have established that the Eighth Amendment’s prohibition against excessive fines also applies to prevent disproportionate confiscation orders.<sup>12</sup> Likewise, while EU law requires Member States to provide for the possibility of court-ordered confiscation (albeit in relation to crimes other than the corporate offences at issue in the main proceedings), it does not

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<sup>9</sup> This conclusion had already been reached in Constitutional Court, Judgment No 112/2019.

<sup>10</sup> Constitutional Court, Judgment No 28/2022.

<sup>11</sup> Article 74f of the German Criminal Code.

<sup>12</sup> *Alexander v United States*, 509 U.S. 544 [1993]; *Bajakajian v United States*, 524 U.S. 321 [1998]; *Timbs v Indiana*, 586 U.S. 146 [2019]

mandate automatic confiscation. Instead, it explicitly incorporates proportionality as a necessary requirement for such measures,<sup>13</sup> as reflected in Article 49(3) of the Charter.

In conclusion, **mandatory value-based confiscation of instrumentalities of crime** provided by the challenged provision was considered **incompatible with the principle of the proportionality in criminal punishment**, as enshrined in Articles 3 and 27(3) IC, as well as Article 49(3) of the Charter, which serves as a constitutional standard of review through Articles 11 and 117 IC.

The same rationale applies to the mandatory confiscation of the instrumentalities themselves, under Article 2641(1) of the Italian Civil Code. Therefore, the Court also annulled this provision of its own motion.

The Court declined to replace the annulled provisions with a new norm aligned with the Constitution. The conditions necessary to issue one such ruling were not met. Specifically, **the mere annulment of the challenged provisions did not create an intolerable void in legal protections** (*insostenibile vuoto di tutela*<sup>14</sup>) that would threaten individual or collective rights and require the Court to fill it. On the contrary, the provisions mandating the confiscation of crime proceeds (restorative confiscation) remain in effect, as do the provisions allowing preventive confiscation relating to the assets used to commit the crime, subject to an assessment of proportionality.

For these reasons, rather than issuing a ruling that would effectively rewrite the law – transforming the court’s obligation to order punitive confiscation into a discretionary power, thus introducing a systemic innovation (*novità di sistema*<sup>15</sup>) – **the Court left it open to Parliament to take action to this end.**

Type of proceedings	Constitutional review by referral order
President of the Court	Giovanni Amoroso
Judge rapporteur	Francesco Viganò
Composition of the Court	Giovanni Amoroso (President), Francesco Viganò, Luca Antonini, Stefano Petitti, Angelo Buscema, Emanuela Navarretta, Maria Rosaria San Giorgio, Filippo Patroni Griffi, Marco D’Alberti, Giovanni Pitruzzella, Antonella Sciarrone Alibrandi

<sup>13</sup> Directive 2014/42/UE Recital 17; Directive 2024/1260/EU, Article 12 and Recital 27.

<sup>14</sup> Constitutional Court, Judgment No 222/2018.

<sup>15</sup> Constitutional Court, Judgment No 146/2021, point 5.2, and No 252/2012, point 4.

Delivery of the judgment	4 February 2025
Challenged measures	Article 2641, paragraphs 1 and 2, of the Italian Civil Code