Corte costituzionale

JUDGMENT NO. 128 OF 2008

FRANCO BILE, PRESIDENT
ALFIO FINOCCHIARO, AUTHOR OF THE JUDGMENT

JUDGMENT No. 128 YEAR 2008

In this case the Court considered a decree-law, converted into law, ordering the expropriation of the Petruzzelli Theatre in Bari. The Court recalled its prior jurisprudence according to which decree-laws were required to satisfy the prerequisites of necessity and urgency, and that any subsequent conversion into law did not have any remedying effects on eventual defects in the decree. However, the goal stated in the preamble of the "a timely renewal of the cultural activities of public interest at the Petruzzelli Theatre in Bari" did not in itself constitute a matter of extraordinary urgency and necessity, nor was a blanket assertion that these prerequisites had been satisfied sufficient. The Court therefore declared the legislation unconstitutional.

THE CONSTITUTIONAL COURT

Composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO,
gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 18(2) and (3) of decree-law No. 262 of 3 October 2006 (Urgent measures concerning tax and financial matters) and Article 2(105) and (106) of the same decree-law, as amended on conversion by law No. 286 of 24 November 2006 (Conversion into law, with amendments, of decree-law No. 262 of 3 October 2006, containing urgent measures concerning tax and financial matters), commenced pursuant to the referral order of 23 May 2007 by the chairman of the *Tribunale di Bari* in the civil proceedings pending between Maria Messeni Nemagna and others and the Petruzzelli and Bari Theatres Symphony and Operatic Foundation [*Fondazione lirico-sinfonica Petruzzelli e Teatri di Bari*], registered as No.

665 in the Register of Orders 2007 and published in the *Official Journal of the Republic* No. 38, first special series 2007.

Considering the entries of appearance by Maria Messeni Nemagna and others as well as by Vittoria Messeni Nemagna and the President of the Council of Ministers;

having heard the judge rapporteur Alfio Finocchiaro in the public hearing of 29 January 2008;

having heard Ascanio Amenduni, barrister, for Maria Messeni Nemagna and others, Michele Costantino, barrister, for Vittoria Messeni Nemagna and the *Avvocato dello Stato* Giuseppe Albenzio for the President of the Council of Ministers.

The facts of the case

1. – Having been seized of the application for an order of specific performance, filed on 9 February 2007 by the owners of the Petruzzelli Theatre in Bari, concerning the payment by the Petruzzelli and Bari Theatres Symphony and Operatic Foundation of an indemnity equal to 25 percent of the concession fee, under the terms of the Protocol of Understanding concluded between the parties on 21 November 2002, the chairman of the *Tribunale di Bari* raised the question of the constitutionality of Article 18(2) and (3) of decree-law No. 262 of 3 October 2006 (Urgent measures concerning tax and financial matters) and Article 2(105) and (106), also of decree-law No. 262 of 2006, as amended on conversion by law No. 286 of 24 November 2006 (Conversion into law, with amendments, of decree-law No. 262 of 3 October 2006, containing urgent measures concerning tax and financial matters), with reference to Article 77(2) of the Constitution.

The referring court considers that the referral of a question of constitutionality is admissible also in summary proceedings and points out that, in the case before the court, the indemnity requested had been agreed upon in the Protocol of Understanding between the owners of the theatre and the Foundation in the event of a delay in the completion of the reconstruction of the theatre beyond the four year deadline agreed upon, obliging the Foundation to pay such an indemnity to the owners starting from the fifth year, i.e. after 21 November 2006.

The applicants would therefore have the right to demand payment, requested on the above grounds in the present application, had the legislative provision expropriating the theatre in favour of the municipality not intervened, which had the effect of cancelling the obligations flowing from the Protocol.

Article 18(2) and (3) of decree-law No. 262 of 2006, as amended by Article 2(105) and (106) of the same decree-law, introduced by conversion law No. 286 of 2006, provided – the referring court notes – that "in order to guarantee a timely renewal of the cultural activities of public interest at the Petruzzelli Theatre in Bari, starting from the entry into force of the present decree, the municipality of Bari shall acquire ownership over the entire building hosting the aforementioned theatre, including all assets and appurtenances, free of all burdens, conditions and rights of third parties", adding that "the prefect of Bari shall determine, in one or more measures, the compensation due to the owners under the terms of the law in force governing expropriations, after deduction of all sums already paid by the state and by the local authorities for the reconstruction of the Petruzzelli Theatre in Bari up until the entry into force of the present decree. The prefect of Bari shall in addition ensure the immediate taking of possession of the entire building by the municipality of Bari, which is to be transferred to municipal ownership pursuant to sub-section 105".

The chairman of the *Tribunale di Bari* finds as a preliminary matter that these provisions do not breach Articles 42 and 24, or Articles 3, 97 and 113 of the Constitution as claimed in the application for an order of specific performance. The lower courts on the other hand finds that, on the facts, it is absolutely clear that the requirements of extraordinary need and urgency have not been satisfied, which calls for a review by the Constitutional Court of the constitutionality of the decree-law under the terms of Article 77(2) of the Constitution.

The referral order notes that the case law of the Constitutional Court: *a*) allows for the review of the satisfaction of the extraordinary prerequisites of necessity and urgency of decree-laws, subject to the condition, imposed in order to safeguard political discretion, that the failure to comply with these prerequisites must be clear; *b*) has found that a review is not precluded by the conversion into law, since any defect contained in the decree-law is transformed into a defect in the conversion law, due to the fact that the

decree-law mistakenly considered the prerequisites for validity to have been satisfied, whereas in fact they were not, which means that a non-convertible instrument was converted into law.

The expropriation through legislation is provided for under the terms of a provision included in the decree associated with the finance law 2007, decree-law No. 262 of 3 October 2006, converted into law, with amendments, by law No. 286 of 24 November 2006, containing "Urgent measures concerning tax and financial matters".

However, in the opinion of the chairman of the *Tribunale di Bari,* it is clear that the legislation providing for the expropriation of the Petruzzelli Theatre by the municipality of Bari does not have any goal that is either finance-related (concerning the regulation of the state or local authority budgets) or tax-related (amending public revenue arrangements), since the goal of vesting ownership of the property directly in the local authority cannot be regarded as the most effective prospective solution for the management of the service, compared to that of its being made available by the private owners.

From a formal point of view, the referring court notes that there is no link between the preamble to the decree-law – which points out the "extraordinary necessity and urgency of initiatives of a financial nature in order to re-balance public accounts as well as measures providing for the reorganisation of certain sectors of the public administration" – and the legislation providing for the expropriation of the Petruzzelli Theatre which, according to the report accompanying the conversion law, is intended to postpone the application to the Petruzzelli Foundation in Bari of the general rules governing symphony and operatic foundations until the year 2010, as provided for under the law establishing the Foundation, in order to enable it to organise productions in the most efficient manner; in the light of this goal, it was decided simply to order the acquisition of ownership of the theatre by the municipality, in return for the payment of compensation to the owners. Ultimately, the formal link between the expropriation and the issue of public finances is not only unidentifiable, but is not even indicated in one way or another.

From a substantive point of view – the referring court notes – as far as the objective mentioned in the preamble to the legislation (i.e. "to guarantee a timely renewal of the

cultural activities of public interest at the Petruzzelli Theatre in Bari") is concerned, the goal of reorganising the activities of an operatic foundation (making provision also regarding the ownership arrangements for the building used as a theatre) is not *per se* characterised by extraordinary need and urgency, but rather amounts to an ordinary modification of the arrangements put in place for the management of cultural activities on a local level; moreover, the renewal of cultural activities does not appear to be related to the ownership of properties used for the performance of cultural activities – let alone according to a close relationship classifiable as urgent (albeit in relative terms) – and therefore to the need to pass private property into state ownership.

Similarly, in the *travaux preparatoires* for the conversion law, the general justification for the dissimilar nature of the provision included in the decree-law is based on the assertion that all the provisions form part of the public finance initiative, since they apply to tax and financial matters with a view to re-balancing the budget: however, the provision concerning the Petruzzelli Theatre has nothing to do with this requirement. Furthermore, where an attempt is made specifically to justify the rule which provides for the expropriation of the theatre, it is recognised that the provision was introduced in order to resolve a "long-standing problem" and to protect the interest in a "better use of the property by the general public", thereby admitting not only the absence of any link with the budgetary arrangements, but also that it was in no way indispensable and urgent with regard to the declared public goal.

2. – In the constitutionality proceedings referred from the lower court, appearances were entered by Maria Messeni Nemagna, Teresa Messeni Nemagna, Chiara Messeni Nemagna, Mariarosalba Messeni Nemagna, Stefania Messeni Nemagna and Nunziata Metteo, the expropriated owners of the Petruzzelli Theatre and applicants for the order of specific performance in the proceedings before the lower court, who requested that the court accept the question raised by the chairman of the *Tribunale di Bari*.

The Messeni Nemagna family claims that the government's power to adopt decree-laws may be acted upon only where three prerequisites are satisfied: the extraordinary nature of the case, the necessity of the intervention, and the urgent need for the results.

In the case before the court, it is clear that there is absolutely no link between the "extraordinary necessity and urgency of initiatives of a financial nature", generically

mentioned in the preamble to the decree-law, and the contents of Article 18 of the decree-law, referred to in the report accompanying the draft conversion law.

The government has failed to provide any indication capable of justifying the recourse to an urgent decree, as required under Article 96-*bis* of the Regulations of the Chamber of Deputies and Article 15 of law No. 400 of 1988.

The expropriation of the Petruzzelli Theatre is argued to be discordant and inconsistent with the area of law alongside which it was included, namely within the context of provisions concerning tax and financial matters: the whole of head No. VII of the decree-law, concerning cultural heritage and the protection of the environment, regulates exclusively aspects relating to tax and financial matters, with the exception of the expropriation of the theatre, also because the award of eight million Euro for the completion of the refurbishment is simply an award of funds, and is not a financial matter.

The private parties also argue that the public interest, which the expropriation is supposed to further, had already been adequately protected through the Protocol of Understanding of 21 November 2002, drafted and overseen by the Minister for Cultural Heritage and Activities; the acquisition of ownership over the theatre has no impact on a timely renewal of such activities, since the non-material rights of the theatre were not expropriated (trade mark, ownership rights in the company, classification as a traditional theatre eligible to receive subsidies for the opera season); in February-March 2006, the municipality had in any case allocated the funds for the reconstruction work; on 7 August 2006 the invitation to tender by the Supervisory Board for the second tender was published, and hence the works were restarted without any need for expropriation.

Therefore, the decree-law and the conversion law ordered the expropriation not in the general interest, but in order to cover up the shortcomings of the public authorities, and to deny to the owners any rights of challenge the measure before the courts (except the present attempt to raise the question of constitutionality, referred by the lower court).

Further arguments were submitted, recalling the principles asserted in judgment No. 171 of 2007, as well as references to the parliamentary *travaux preparatoires* (which

show that the question of the failure to comply with the requirement of necessity and urgency was raised) and to events occurring after the promulgation of the decree-law.

3. – The President of the Council of Ministers intervened in the constitutionality proceedings referred by the lower court, represented by the *Avvocatura Generale dello Stato*, arguing that the question raised was inadmissible and groundless on the merits.

The intervener indulged in a historical *excursus*, starting with the arson attack of 27 October 1991 on the Petruzzelli Theatre, then going on to consider the numerous court actions undertaken by the family owners, which resulted in significant obstacles to the recovery of the operational status of the property, the various reconstruction grants, through to the signing of the Protocol of Understanding of 2002, which was very onerous for the public administration, and ultimately did not resolve the situation since in 2006, four years after the understanding, no reconstruction work had been undertaken and the funds allocated had in any case not been sufficient.

It was only following the promulgation of the decree-law in question that, due to the expropriation and the government's allocation of the necessary resources, the administration rapidly awarded the contract for the reconstruction work and ensured its completion. The Theatre will be able to start its activities again in 2008, acting through the Foundation created in 2003.

According to the *Avvocatura Generale*, the question raised by the *Tribunale di Bari* is inadmissible. There is no interest in a declaration of the unconstitutionality of Article 18 of decree-law No. 262 of 2006, since the provision was repealed by the conversion law, No. 286 of 2006, and replaced by the new text of Article 2(105)-(106), introduced in the annex to law No. 286: the potential unconstitutionality in the light of Article 77(2) of the Constitution can only concern the decree-law, which is no longer in force.

The question is also inadmissible due to the irrelevance of the proceedings before the lower court. The contested provision does not apply in the proceedings concerning an application for an order of specific performance made by the owners of the Petruzzelli Theatre against the symphony and operatic foundation for the payment of the rent of 500.000 Euro per year under the terms of the November 2002 convention, since the four year time limit for the reconstruction of the theatre had passed: the lower court finds that the convention had lapsed under the terms of the decree-law, since its object had

ceased to exist following the expropriation. The referring court takes for granted (in proceedings concerning an application for an order of specific performance, where the parties are not able to make oral representations) that which should be demonstrated, that is the certainty, liquidity and substantive validity of the claim, as well as the existence of incontrovertible evidence in support, even though the well-known failure to restore the theatre and total inability to use the premises made it clear that there was no basis at all for the claim advanced, which should have led the court to rule that the application for an order of specific performance was *prima facie* inadmissible.

According to the public representative, the question is in any case groundless. The acquisition of the theatre by the state was necessary and coincided fully with the public interest, given that due to a variety of misfortunes a proper restoration of the theatre had not been possible, which prevented the public of Puglia from using a cultural service that is necessary and of the highest level: therefore there was an extraordinary and urgent need to set in motion a definitive solution to the question.

The Constitutional Court – the written statement continues – may review the failure to fulfil the prerequisites for recourse to decrees issued on the grounds of urgency, provided that this is "clear", as held in judgment No. 171 of 2007. The state representative claims that this is not clear in the case before the court, going on to argue that review by the court "does not substitute or overlap with the initial examination by the government, and that subsequently undertaken by Parliament on conversion, in which political considerations may be predominant". The review of the satisfaction of the prerequisites for decrees issued on the grounds of urgency must therefore be carried out with a "broad degree of elasticity": this explains why the Court has found only once (other than in judgment No. 171) that the prerequisites had not been satisfied, and this related to the special case of the repeated promulgation of unconverted decree-laws (judgment No. 360 of 1996).

Nor can it be argued that the contested provision is dissimilar from the other provisions contained in the measure, since it is forms part of a broader picture made up of provisions governing cultural heritage, which include the reorganisation of the Ministry, the establishment of the new Department of Tourism, the organisation of a public competition for 40 ministerial directors and the provision of new arrangements

for the allocation of funds by the company Arcus – all this within the context of overall arrangements containing urgent measures in support of cultural activities.

Furthermore, on other occasions extraordinary reasons have justified the recourse to legislation in order to further the public interest in the acquisition of certain properties, considered to be of fundamental importance, by the state (such as the expropriation of the Capocotta estate, the constitutionality of which was upheld in judgment No. 216 of 1990). It is also argued that expropriation was not possible under the terms of presidential decree No. 327 of 8 June 2001 (Consolidated law of legislative and regulatory provisions governing expropriations in the public interest – Text A) because it did not relate to the implementation of a public works project, and it was not even possible to make a cultural expropriation pursuant to legislative decree No. 42 of 22 January 2004 (Cultural heritage and landscape code, enacted pursuant to Article 10 of law No. 137 of 6 July 2002), which requires a declaration that the relevant interest is particularly important (which was never done for the Petruzzelli Theatre and, following its destruction, could not have been): there was not therefore any other way of fulfilling the public interest in the rapid and efficient reconstruction of the theatre, in order to return to the City of Bari and to the Nation one of its most significant cultural resources.

4. – Vittoria Messeni Nemagna intervened *ad adiuvandum* in the proceedings referred by the lower court claiming, notwithstanding the fact that she was not a party to the proceedings on the merits, that she has interests which legitimate her intervention before the Constitutional Court, and arguing that her interest – the intervener is joint holder of proprietary rights over the material and non-material assets of the theatre and cinematographic company 'Petruzzelli Theatre' – was inherently related to the substantive relationship and that the acceptance of the claim would have a direct influence on that relationship.

On this point, it should be remembered that the local authorities have reached an agreement on the creation of a symphony and operatic foundation, with the goal of promoting excellence in the musical sector and implementing an integrated management plan for certain theatres, including the Petruzzelli Theatre in Bari; accordingly, on 21 November 2002, they concluded a Protocol of Understanding with the private owners in order to ensure, on an exclusive basis, the management of artistic

activities in the public interest with an operational theatre and within the stipulated time limit of four years.

The local authorities failed to respect the obligations undertaken in the 2002 Protocol. Indeed, they prevented its implementation, acting in concert with the Supervisory Board for Puglia, before the time limit agreed upon (before which the operational theatre was to be handed over).

Nevertheless, the Petruzzelli Symphony and Operatic Foundation undertook initiatives involving the disclosure to the public of the trade mark "Petruzzelli Theatre" with the specific goal of obtaining public subsidies and sponsorship, exploiting the quality of the product of the company/theatre, in spite of the fact that they knew that they had no right to do so. In fact, the Protocol, which was implemented by law No. 310 of 2003, granted the owners the right to use the trade mark up until the expiry of the concession. Moreover, the Foundation deviously supported the pathetic and indecent expropriation initiative, which gave no grounds to cancel the relationships created in accordance with the protocol of 21 November 2002.

Previous court judgments have found, as a matter of law, not only that the registration of the trade mark Petruzzelli Theatre is legitimate and admissible in that it refers to a "company of public importance", but also that the rights ancillary to it are vested in the private owners of the building complex.

In conclusion, the right to request and obtain subsidies for the organisation and management of the Theatre's artistic activities in the public interest – the intervener argues – are vested exclusively in the private owners of the company and of the trade mark.

5. – Shortly before the hearing, Maria Messeni Nemagna, Teresa Messeni Nemagna, Chiara Messeni Nemagna, Mariarosalba Messeni Nemagna, Stefania Messeni Nemagna and Nunziata Metteo, applicants in the proceedings before the lower court, and who had entered appearances in the proceedings referred by the lower court, filed a written statement in which they responded to the arguments of the *Avvocatura Generale dello Stato*.

6. – The *Avvocatura Generale dello Stato* also filed a written statement in which it repeated its arguments and challenged the admissibility of the intervention by Vittoria Messeni Nemagna.

Findings on points of law

1. – The chairman of the *Tribunale di Bari* questions, with reference to Article 77(2) of the Constitution, the constitutionality of Article 18(2) and (3) of decree-law No. 262 of 3 October 2006 (Urgent measures concerning tax and financial matters) and Article 2(105) and (106) of the same decree-law, as amended on conversion by law No. 286 of 24 November 2006 (Conversion into law, with amendments, of decree-law No. 262 of 3 October 2006, containing urgent measures concerning tax and financial matters), insofar as they provided for the expropriation of the Petruzzelli Theatre by the municipality of Bari.

2. – The question raised concerns the said expropriation, insofar as it occurred pursuant to a legislative measure (a decree-law, subsequently converted) in the alleged absence of the extraordinary prerequisites for recourse to governmental decrees of necessity and urgency, mentioned in the constitutional provision invoked, with the resulting defect in the related conversion law.

The affair which gave rise to this question is particularly tormented.

The theatre was almost completely destroyed by fire in 1991.

Insofar as is relevant for our present purposes, it is sufficient to note that on 21 November 2002, Puglia Region, along with the province and municipality of Bari, signed a Protocol of Understanding with the owners of the theatre which provided for a grant by the above authorities of 16.5 million Euro, in addition to more than 5 million Euro – awarded from lottery funds of the Ministry for Cultural Heritage and Activities for 2003 – for definitive reconstruction work, as well as the payment of a further 500,000 Euro per year as rent, for the following 40 years starting from the fourth year after the understanding, leaving intact the family's ownership of the property. By law No. 310 of 11 November 2003 (Establishment of the "Petruzzelli and Bari Theatres Symphony and Operatic Foundation", based in Bari, as well as provisions governing public performances, symphony and operatic foundations and cultural activities), the

Petruzzelli and Bari Theatres Symphony and Operatic Foundation was established, and was charged with the organisation of performances and their gradual renewal; Article 18 of decree-law No. 262 of 2006 (associated with the finance law for 2007), converted into law No. 286 of 2006 (Article 2(105)), ordered the expropriation.

Following this measure, the Messeni Nemagna family filed an application for an order of specific performance on 9 February 2007, concerning the payment by the Petruzzelli and Bari Symphony and Operatic Theatres Foundation, of an indemnity equal to 25 percent of the concession fee, under the terms of the Protocol of Understanding concluded on 21 November 2002 between the parties, and requested the chairman of the *Tribunale di Bari* to raise the question of constitutionality currently before the court.

The referring court points out that the indemnity requested was due under the Protocol of Understanding in the event of a delay in the completion of the reconstruction of the theatre beyond the four year deadline agreed upon, which the Foundation to be established would be obliged to pay to the owners starting from the fifth year, i.e. after 21 November 2006.

The applicants would have had the right to payment of the sum, requested on the above grounds in the application for an order of specific performance, had in the meantime the legislative provision ordering the expropriation of the theatre by the municipality not intervened, which caused the obligations flowing from the Protocol providing for the concession of the use and management of the Theatre to the Foundation by the private owners to lapse.

3. – An intervention was made in proceedings before this court by Vittoria Messeni Nemagna – not one of the applicants for an order of specific performance in the proceedings before the lower court – who, claiming to be a joint owner of the theatre, argued in favour of the acceptance of the question raised.

By order issued during the course of the oral hearing, this court ruled that the intervention was admissible. This ruling must be upheld in the light of settled case law, given the qualified interest to intervene (holder of a right which was cancelled by the expropriation), inherently related to the substantive relationship at issue in the proceedings before the lower court (see the order read out in the hearing of 3 July 2007,

attached to judgment No. 349 of 2007; order read out in the hearing of 6 July 2006, attached to judgment No. 279 of 2006).

4. – Article 18(2) and (3) of decree-law No. 262 of 2006 provides that "in order to guarantee a timely renewal of the cultural activities of public interest at the Petruzzelli Theatre in Bari, starting from the entry into force of the present decree, the municipality of Bari shall acquire ownership over the entire building hosting the aforementioned theatre, including all assets and appurtenances, free of all burdens, conditions and rights of third parties", adding that "the prefect of Bari shall determine, in one or more measures, the compensation due to the owners under the terms of the law in force governing expropriations, after deduction of all sums already paid by the state and by the local authorities for the reconstruction of the Petruzzelli Theatre in Bari up until the entry into force of the present decree. The prefect of Bari shall in addition ensure the immediate taking of possession of the Theatre by the municipality of Bari".

This last phrase was replaced by "The prefect of Bari shall in addition ensure the immediate taking of possession of the entire building by the municipality of Bari, which is to be transferred to municipal ownership pursuant to sub-section 105" in the text of Article 2(106) of the same decree-law, as amended on conversion by law No. 286 of 24 November 2006, which otherwise, in sub-sections 105 and 106, exactly reproduces the wording of the original Article 18.

The referring court found on the facts that there was a clear failure to comply with the extraordinary requirements of necessity and urgency, which justifies the review by the Constitutional Court of the compatibility of the decree-law with Article 77(2) of the Constitution.

5. – The question is admissible, even though it was raised during summary proceedings, since they are nonetheless "proceedings" (albeit summary), which is, pursuant to Article 23 of law no. 87 of 11 March 1953, the only objective prerequisite for a reference to the Constitutional Court (judgments No. 177 of 1981 and No. 163 of 1977).

6. – The challenge made by the *Avvocatura Generale dello Stato* concerning the supervening lapse of the interest in a declaration of unconstitutionality, on the grounds that decree-law No. 262 of 2006 was repealed by the conversion law, is groundless.

Whilst it may be true that the appendix to the conversion law No. 286 of 2006, containing the amendments to the decree-law, concludes with the express repeal of Articles 3-47 of the decree, it must however be remembered that Article 2(105) of the same decree-law, as amended by the conversion law, reproduces *verbatim* Article 18 of decree-law No. 262 of 2006, adding only that the "entire" building is subject to expropriation; moreover, the new text in any case forms part of the "amendments made on conversion to decree-law No. 262 of 3 October 2006" (as per the title of the appendix, referred to in Article 1(1) of law No. 286 of 2006 in the legislative measure which converted the decree) and, in particular, that sub-section 104 provides that the expropriation shall have effect "from the entry into force of the present decree": thus the expropriation takes effect from the date of the decree issued on the grounds of urgency.

7. – The other challenge by the *Avvocatura Generale*, claiming that the contested provision is inapplicable, and hence that the question is irrelevant, is also groundless.

In reality the contested provision is a negative condition for the validity of the claim, as averred by the private party in its application for an order of specific performance, in which it specifically requests the court to raise the question of constitutionality.

As regards the absence of certainty, liquidity and substantive validity of the claim (averred by the representative of the President of the Council of Ministers), prerequisites for the validity of the application for an order of specific performance – due to the well-known failure to reconstruct the theatre and the fact that the premises were totally unusable – it is negated in the very same referral order, which makes it clear, albeit in summary form, that the right to compensation arose solely due to the expiry of the four year period following the conclusion of the Protocol of Understanding, irrespective of the conclusion of the reconstruction work and a declaration that the theatre is safe to use.

8. – The question of constitutionality is well founded on the merits.

8. 1. – In a recent judgment (judgment No. 171 of 2007), in ruling unconstitutional a decree-law, converted into law with amendments, on the grounds that it failed to satisfy the requirements contained in Article 77(2) of the Constitution, this court found, recalling a previous decision (judgment No. 29 of 1995), that the prior existence of circumstances which render recourse to an exceptional instrument, such as a decree-law,

necessary and urgent is a prerequisite for the constitutional validity of the adoption of the measure in question, such that any clear failure to satisfy that requirement constitutes first and foremost a breach of constitutional law by the decree-law adopted outwith the applicational scope provided for under the Constitution.

The same judgment also specified that constitutional review "must occur on a different level" than the exercise of legislative power, in which "political considerations could prevail", since it has "the goal of preserving the framework of legislative sources and, by extension, respect for the values which the court is charged to protect through this task"; it added that "during constitutional review, the failure to comply with the prerequisites for the constitutionality of the recourse to a decree issued on the grounds of urgency" must "be clear", and that, "following conversion this failure to satisfy the prerequisites translates into a procedural defect within the relevant law". The court thus held that the conversion law cannot have any remedying effect, since "the assertion that a conversion law could in any case remedy the defects contained in a decree would *de facto* entail the conferral on Parliament of the power to modify through ordinary legislation the constitutional division of competences between itself and the government as regards the production of primary legislation".

8.2. – In the light of the above, it is necessary to verify, on the basis of the internal and external aspects of the contested provisions, whether or not it there has been a clear failure to satisfy the prerequisite that there be an extraordinary need for necessary and urgent measures.

The headnote of the decree is entitled "Urgent provisions concerning tax and financial matters" and the preamble reads as follows: "Considering the extraordinary necessity and urgency of initiatives of a financial nature to re-balance public accounts as well as measures for the reorganisation of sectors of the public administration [….]".

There is no connection between the preamble and the expropriation measure for the Petruzzelli Theatre, which is barely mentioned in the report accompanying the conversion law, as well as the postponement until 2010 of the application of the general provisions governing symphony and operatic foundations to the Petruzzelli Foundation in Bari, as provided for in the law establishing the Foundation, in order to enable the Foundation to organise productions in the most efficient manner, and of the conferral of

an extraordinary subsidy for the completion of the restoration work. Ultimately, the formal link between the expropriation and the issue of public finances is not only unidentifiable, but is not even indicated in one way or another.

In particular, regarding the goal, mentioned in the preamble to the measure, of guaranteeing "a timely renewal of the cultural activities of public interest at the Petruzzelli Theatre in Bari", the reorganisation of the activity of an operatic foundation, which also impinges upon the proprietary arrangements concerning the buildings used as a theatre, does not in itself constitute a matter of extraordinary necessity and urgency, but rather amounts to an ordinary amendment to the arrangements put in place for the management of cultural activities on a local level. Furthermore, the renewal of cultural activities does not appear to be related to the ownership of properties used for the performance of cultural activities – let alone according to a close relationship classifiable as urgent (albeit in relative terms) – and therefore to the need to pass private property into state ownership

Similarly, in the *travaux preparatoires* for the conversion law, the general justification for the dissimilar nature of the provisions included in the decree-law is based on the assertion that all the provisions form part of the public finance measure, in that they apply to fiscal and financial matters with a view to re-balancing of the budget: the provision concerning the Petruzzelli Theatre has nothing to do with this requirement. Where an attempt was made to give a specific justification for the rule providing for the expropriation of the theatre, it was necessary to recognise that the provision was introduced in order to resolve a "long-standing problem" and to protect the interest in a "better use of the property by the general public", thus admitting not only the absence of any relationship with the budgetary measure, but also the lack of any element of indispensability or urgency with regard to the stated public goal.

This assertion is not sufficient justification for the necessity of and urgent need to introduce this measure which, according to the principles set out in judgment No. 171 of 2007, cannot be established by the blanket assertion that the prerequisites mentioned have been satisfied, nor can it simply be affirmed that the legislation is reasonable.

The court therefore finds that Article 18(2) and (3) of decree-law No. 262 of 2006, and Article 2(105) and (106) of the decree-law, as amended on conversion by law No. 286 of 2006, are unconstitutional.

on those grounds

THE CONSTITUTIONAL COURT

declares that Article 18(2) and (3) of decree-law No. 262 of 3 October 2006 (Urgent measures concerning tax and financial matters) and Article 2(105) and (106) of the same decree-law, as amended on conversion by law No. 286 of 24 November 2006 (Conversion into law, with amendments, of decree-law No. 262 of 3 October 2006, containing urgent measures concerning tax and financial matters) are unconstitutional.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 16 April 2008.

Signed:

Franco BILE, President

Alfio FINOCCHIARO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 30 April 2008.

The Director of the Registry

Signed: DI PAOLA

Annex:

order read out in the hearing of 29 January 2008

ORDER

Whereas in the present constitutionality proceedings, raised by the Section Chairman of the *Tribunale di Bari* during the course of the proceedings commenced pursuant to the application for an order of specific performance filed on 9 February 2007 by Maria Messeni Nemagna, Teresa Messeni Nemagna, Chiara Messeni Nemagna, Mariarosalba

Messeni Nemagna, Stefania Messeni Nemagna and Nunziata Metteo, expropriated owners of the Petruzzelli Theatre, concerning the breach of contract by the Petruzzelli and Bari Theatres Symphony and Operatic Foundation under the terms of the Protocol of Understanding concluded on 21 November 2002 between the parties, an intervention was made by Vittoria Messeni Nemagna who, whilst not a party to the merits proceedings, claimed to have an interest to participate in proceedings before the Constitutional Court;

whereas, according to the case law of this Court, only the parties to the main proceedings may participate in constitutional review proceedings (in addition to the President of the Council of Ministers and, in challenges to regional legislation, the President of the Regional Council), and derogations may be granted only in favour of persons with a qualified interest that is directly related to the substantive relationship at issue in the proceedings (order read out in the hearing of 3 July 2007, attached to judgment No. 349 of 2007; order read out in the hearing of 6 July 2006 attached to judgment No. 279 of 2006);

whereas the intervener has such an interest, having averred, *inter alia*, a legal right (ownership of the trade mark) which could be irrevocably harmed by a decision of this Court;

whereas the special characteristics of the procedural stage during which the question of constitutionality was raised would not have allowed for the participation of the intervener in those proceedings.

on those grounds

HE CONSTITUTIONAL COURT

rules that the intervention by Vittoria Messeni Nemagna is inadmissible

Signed: Franco BILE, President