

***Decision No 648 of 14 December 2022 on the objection of unconstitutionality of the Law approving Government Ordinance No 16/2022 amending Law No 227/2015 on the Fiscal Code, repealing certain legislative acts and other financial and fiscal measures, and of Article I (68) (with reference to the insertion of paragraphs.(5<sup>6</sup>)-(5<sup>9</sup>) into Article 146 of Law No 227/2015 on the Fiscal Code) and Article I (107) (with reference to Article 457 of Law No 227/2015 on the Fiscal Code) of Government Ordinance No 16/2022, published in Official Gazette of Romania, Part I, No 1219 of 19 December 2022***

## **Summary**

**I. As grounds for the objection of unconstitutionality,** it was argued that the Law approving Government Ordinance No 16/2022 amending and supplementing Law No 227/2015 on the Fiscal Code, repealing certain legislative acts and other financial and fiscal measures was adopted in breach of Article 1 (5) of the Constitution, since Government Ordinance No 16/2022 lays down rules relating to areas among those referred to in Article 73 (3) of the Constitution, although the law approving it is of an ordinary nature.

It was pointed out that the provisions of Article I (68) of Government Ordinance No 16/2022 and those of paragraphs (5<sup>6</sup>)-(5<sup>9</sup>), inserted into Article 146 of the Fiscal Code, applied to income relating to August 2022, thus breaching the principle of legal certainty enshrined in Article 1 (5) of the Constitution, in the light of the principle of foreseeability of the tax law, established by Article 4 of the Fiscal Code. In order to comply with this principle, legislative amendments in tax matters may not enter into force before 1 January, in the year following that in which the amending legislative act is adopted.

Another complaint of unconstitutionality concerns the infringement of Articles 41 and 56 (2) of the Constitution. In accordance with Article I (68) of Government Ordinance No 16/2022, for part-time employment contracts, health insurance (CAS) contributions and pensions are paid not at the value of the hours actually worked, but by reference to the gross minimum wage per economy for a full-time contract. However, the constitutional principle of fair distribution of the tax burden requires that the contribution of higher earners be differentiated.

In addition, Article I (107) (with reference to the amendment of Article 457 of the Fiscal Code) establishes that, for residential buildings and related annexed buildings, the building tax/duty is to be calculated by applying a rate of at least 0.1 % to the value of the building. It was argued that the legislative solution which does not provide for a maximum tax rate limit, but only a minimum limit, is contrary to the provisions of Articles 139 (2), 56 (2) and 1 (5) of the Constitution. Since primary legislation does not also set the maximum limit the tax rate may reach, it may be determined arbitrarily by local or county councils by means of legal acts that are inferior to the law, since owners are unable to reasonably predict the conduct they must adopt and may be arbitrarily overtaxed without any reasonable justification. In addition, regulatory administrative acts adopted in the execution of laws are strictly limited to the framework established by the acts on the basis of and in the execution of which they were issued, without it being possible to supplement the law.

**II. Having examined the objection of unconstitutionality,** the Court held that it is possible for an organic law to include, for reasons of legislative policy, rules of the nature of ordinary law, but without those rules being of an organic law nature, since otherwise the areas reserved by the Constitution to organic law would be extended. An ordinary law may therefore amend provisions of an organic law if they relate to matters which are not directly related to the regulatory scope of the organic law. The Court found that Government Ordinance No 16/2022 amends and supplements provisions of the Fiscal Code which do not contain rules specific to organic laws. It is true that the system of part-time individual employment contracts is regulated in Articles 103 to 107 of the Labour Code, which is an organic law, but the text criticised does not amend these general rules of the Labour Code, but rather introduces fiscal rules on the calculation of the CAS. Article 73 (3) (p) of the Constitution refers to those legal rules governing general principles relating to employment relationships. As the contested provisions do not alter the general legal regime for property ownership or regulate offences in the field of taxation and economic matters, the provisions of Article 73 (3) (m), (o) and (h) of the Constitution were also not infringed.

With regard to the infringement of the principle of foreseeability of the tax law, the Court held that Article 1 (5) of the Constitution is infringed only where, by using an inappropriate legislative technique which does not meet the requirements of clarity, precision, foreseeability and accessibility of the legal rule, the legislator has infringed certain rights, freedoms or principles of constitutional status. The review of constitutionality of laws and ordinances relates to the provisions and principles of the Constitution, does not constitute a verification of the compatibility of laws or Government ordinances between themselves.

As regards the regulation of the taxation of persons carrying out activities under a part-time employment contract, the Court held that, according to the explanatory memorandum to the draft law in question, the amendments to Article 146 of the Fiscal Code are intended to discourage employers who, in an attempt to reduce the tax burden, conclude part-time employment contracts in situations where the work carried out would involve normal working hours. The contested legislative solution is an option for the legislator, which is an expression of fiscal and budgetary policy, without undermining any constitutional principle. From the perspective of employees, the change in the basis for calculating social contributions appears to be such as to protect their interests, in the sense of incentivising the conclusion of regular employment contracts and ensuring the minimum wage level for all employees, regardless of the type of employment contract (regular/part-time). Individuals still have the possibility to enter into part-time employment contracts, with employers considering whether such contracts should be concluded on the basis of the nature of the work carried out and its real economic content.

Analysing the criticisms of unconstitutionality relating to Article I (107) of Government Ordinance No 16/2022, the Court held that the establishment by law of a tax must comply with at least four criteria: fairness, proportionality, reasonableness and non-discrimination. The cumulative fulfilment of these four criteria makes the establishment of a tax constitutionally legitimate. The Court noted that, in accordance with Article 139 (2) of the Constitution, local taxes and charges are to be determined by local or county councils, within the limits and in accordance with the law. It cannot be inferred from the interpretation of Article 139 of the Constitution that the legislator has a constitutional obligation to set a maximum limit of those taxes and charges. Therefore, with regard to the method of calculating the building tax, both the regulation of a fixed rate or the regulation of a variable rate on the basis of assessment (the taxable value of the building or the value of the building) and the introduction or non-introduction by law of a maximum rate of tax on buildings do not constitute questions of constitutionality of the statutory provision, but constitute the exclusive choice of the legislator, which falls within its broad discretion in tax matters.

The Court pointed out that the decisions of the local councils on the rate of the building tax/duty are administrative acts of a regulatory nature of public authorities and, according to Article 126 (6) of the Constitution, they are subject to judicial review by administrative courts. In addition, an irrevocable/final judicial decision annulling an administrative act of a regulatory nature in whole or in part also has effect in respect of individual administrative acts issued on the basis thereof which, on the date of publication of the judicial decision for annulment, are challenged in cases pending before the courts. Therefore, with regard to the allegation that the municipal councils may apply the contested provisions improperly, the Court found that there are legal remedies against regulatory administrative acts setting the rate of the building tax.

**III. For all these reasons,** the Court unanimously dismissed, as unfounded, the objection of unconstitutionality and found that the provisions of the Law approving Government Ordinance No 16/2022 amending Law No 227/2015 on the Fiscal Code, repealing certain legislative acts and other financial-fiscal measures and Article I (68) (with reference to the insertion of paragraphs.(5<sup>6</sup>)-(5<sup>9</sup>) into Article 146 of Law No r.227/2015 on the Fiscal Code) of Government Ordinance No 16/2022 were constitutional in relation to the criticisms made. By a majority of votes, the Court dismissed as unfounded the objection of unconstitutionality and found that the provisions of Article I (107) (with reference to Article 457 of Law No 227/2015 on the Fiscal Code) of Government Ordinance No nr.16/2022 were constitutional in relation to the criticisms made.