

Decision No 650 of 15 December 2022 on the exception of unconstitutionality of the provisions of point 11 [with reference to Article 153 (1) (f²)], point 12 [with reference to Article 154 (1) (h), the phrase “up to 4,000 lei per month, included”), point 13 [with reference to Article 155 (1) (a¹)], point 14 (with reference to the phrase “pension income” in the title of Section 3 of Chapter III of Title V “Compulsory social contributions”), point 16 (with reference to Article 157³), point 17 (with reference to the phrase “as well as pension incomes” in the title of Section 4 of Chapter III of Title V “Compulsory social contributions”), point 18 [with reference to Article 168 (1) concerning the reference to Article 153 (1) (f²), Article 153 (5) concerning the reference to Article 157³, and Article 153 (7¹)] and point 19 [with reference to point (a) of paragraph (1) concerning the reference to Article 153 (1) (f²)] of Article XXIV and of Article XXV (1) (c) [with reference to points 12, 13, 16, 18 concerning paragraphs (1) and (5) of Article 168, and to point 19] of Government Emergency Ordinance No 130/2021 on certain fiscal-budgetary measures, the extension of certain deadlines, as well as for amending and supplementing certain normative acts, published in the Official Gazette of Romania, Part I, No 1262 of 28 December 2022

Summary

I. As grounds for the exception of unconstitutionality, it was argued that the provisions of points 11, 12, 13, 14, 16, 17, 18 and 19 of Article XXIV and Article XXV of Government Emergency Ordinance No 130/2021 on certain fiscal-budgetary measures, the extension of certain deadlines, as well as for amending and supplementing certain normative acts were contrary to the constitutional provisions of Article 1 (3) to (5) on the principles of the rule of law, separation and balance of State powers and quality of the law, of Article 16 (1) on equal rights, Article 44 (1) and (2) on the right to private property, Article 56 (2) on the fair distribution of tax burdens, Article 61 (1) on the role of Parliament, Article 115 (4) and (6) on the conditions for adopting emergency ordinances, Article 124 (3) on the administration of justice, Article 139 (1) on the establishment, by law, of taxes, duties and other contributions, and of Article 147 (4) on the effects of the decisions of the Constitutional Court.

The impugned texts contained in the emergency ordinance regulate, essentially, the establishment of a health insurance contribution for pension incomes exceeding 4,000 lei, as well as the obligation to pay it, incumbent upon the retirees who fall under the aforementioned category.

II. By examining the exception of unconstitutionality, the Court noted that the impugned legislative solution was regulated by emergency ordinance. According to the case-law of the Constitutional Court on Article 115 (4) of the Constitution, the Government may adopt emergency ordinances under the following conditions, cumulatively met: the existence of an extraordinary situation, whose regulation cannot be postponed, and the motivation of this urgency in the ordinance.

By analysing the preamble of the emergency ordinance, the Court found that the Government invoked two reasons justifying the issuance of the emergency ordinance regarding the regulation of the health insurance contribution for pension incomes exceeding 4,000 lei: the government program and the lack of resources in the budget of the National Single Health Insurance Fund [FNUASS] in the context of the health crisis caused by the epidemiological context (spread of SARS-CoV2 coronavirus).

In light of its case-law, the Court noted that the reference to the objectives and measures set out in the government programme does not represent *per se* a reason for issuing an emergency ordinance. The measure itself must have been adopted in response to an existing extraordinary situation. Or, the extraordinary situation may not be represented by the very existence of an objective set out in the government program, because this would lead to the issuing of an indefinite number of emergency ordinances, and to a situation in which the delegated legislator would take over all the powers of the original one. Therefore, the only extraordinary situation that the Government invokes and that can be taken into account in assessing the extrinsic constitutionality of the emergency ordinance is the lack of funds in the FNUASS budget in the context of the SARS-CoV-2 crisis. This is an objective situation, independent of the will of the Government, which does not bring into question subjective or random elements, so it can be qualified as an extraordinary situation that justifies the issuance of urgent measures to restore the balance of this budget. The alleged extraordinary situation is temporary in nature, i.e., the regulated measure would apply for the duration of the health crisis; or, the health crisis ended less than 3 months after the adoption of the emergency ordinance. Thus, the normative content

of the emergency ordinance referring to the impugned legislative solution is not in a factual congruence with the extraordinary situation invoked and it is undeniable that, once the invoked extraordinary situation ceases, the measure ordered as a consequence thereof will also cease. However, the Court did not examine this aspect in relation to Article 115 (4) of the Constitution, as it is included in the review of the compliance of the impugned legislative solution with Article 47 (2) and Article 53 of the Constitution. Regarding the urgency of the regulation, the Court found that it was indeed imperative to identify resources/funds to balance the FNUASS budget deficit, and that this structural problem needed to be addressed in a boosted and expedited manner. The Court cannot dismiss the statement in the preamble of the emergency ordinance regarding the lack of funds in the FNUASS budget, an objectively quantifiable state, so the logical consequence was to balance it by adopting measures directing financial resources towards this budget line. The Court underlined that, when conducting this analysis, it limited itself to considering the need to balance the FNUASS budget by identifying financial resources, without addressing the issues of intrinsic constitutionality. Moreover, the Court found that the regulation of the impugned legislative solution was motivated in the preamble of the emergency ordinance. Therefore, as the three cumulative conditions necessary for issuing the emergency ordinance with reference to the impugned legislative solution have been met, no violation of Article 115 (4) of the Constitution was found.

With regard to the pleas of unconstitutionality referring to Article 115 (6) of the Constitution, the Court noted that the legislation under review affected the amount of the pension payable, by reducing it through the deduction of a percentage share thereof, directed towards the FNUASS budget.

In its case-law, the Court established that it could be inferred that the prohibition on adopting emergency ordinances is total and unconditional in the case of constitutional laws and in the case of measures aimed at the forced transfer of goods into public property. In the other areas covered by the text, emergency ordinances cannot be adopted if they affect (the legal meaning of the concept held by the Court: “to suppress”, “to affect”, “to prejudice”, “to harm”, “to injure”), if they have negative consequences, but, instead, they can be adopted if, through the regulations that they contain, they have positive consequences in the fields in which they intervene.

In relation to this case, the Court found that the regulation of the health insurance contribution for retirees in respect of their pensions was a measure implicitly leading to a reduction of those pensions. Or, the reduction of pensions, whether contributory or service, by considerable sums of money, affects the right to a pension viewed *lato sensu*. If the case-law of the Court has already held that the suspension of the payment of pensions (whether contributory or service), when obtaining incomes of a different nature, represented an impairment of the fundamental right to a pension, all the more so the reduction of the pension by levying a contribution (even if directed to the FNUASS budget) for an indefinite period in time (practically permanent) represented an impairment thereof. Thus, it follows that the emergency ordinance cannot reduce the amount of the pension payable, either by imposing taxes or by introducing other contributions, because such a measure leads to an inevitable reduction in the amount of the pension. However, the fundamental right to a pension can be affected in at least two ways: the cessation or suspension of pension payment and the reduction of its amount. To the extent that the Government appeals, through the emergency ordinance, to one of these two right affecting elements, this measure affects the right to a pension provided for in Article 47 (2) of the Constitution, thus in violation of Article 115 (6) of the Constitution.

Consequently, by imposing, through an emergency ordinance, the payment of a health insurance contribution to retirees enjoying pensions that exceed 4,000 lei, the Government, violated Article 115 (6) of the Constitution, with reference to the prohibition to affect the rights, freedoms and duties provided for by the Constitution, in this case, the right to a pension – provided for and safeguarded by Article 47 (2) of the Constitution.

III. For all these reasons, by a majority vote, the Court upheld the exception of unconstitutionality and found that the provisions of point 11 [with reference to Article 153 (1) (f²)], point 12 [with reference to Article 154 (1) (h), the phrase “up to 4,000 lei per month, included”), point 13 [with reference to Article 155 (1) (a¹)], point 14 (with reference to the phrase “pension income” in the title of Section 3 of Chapter III of Title V “Compulsory social contributions”), point 16 (with reference to Article 157³), point 17 (with reference to the phrase “as well as pension incomes” in the title of Section 4 of Chapter III of Title V “Compulsory social contributions”), point 18 [with reference

to Article 168 (1) concerning the reference to Article 153 (1) (f²), Article 168 (5) concerning the reference to Article 157³, and Article 168 (7¹)] and point 19 [with reference to point (a) of paragraph (1) concerning the reference to Article 153 (1) (f²)] and of Article XXV (1) (c) [with reference to points 12, 13, 16, 18 concerning paragraphs (1) and (5) of Article 168, and to point 19] of Government Emergency Ordinance No 130/2021 on certain fiscal-budgetary measures, the extension of certain deadlines, as well as for amending and supplementing certain normative acts were unconstitutional.