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Declaration of Economic Emergency

The measures adopted by the Government will have a significant economic impact on some taxpayers if they pass the review of the Constitutional Court

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KEY ASPECTS

- Temporary tax measures and strict constitutional control.
- Temporary tax of 1% on the extraction, sale, and export of crude oil and coal, with a threshold of 50,000 UVT.
- Transitional Wealth Tax Regime 2026: includes legal entities, bases, exclusions and rates.
- VAT on games of chance operated only on the internet; generating event: deposits; also non-resident responsible.
- GMF temporarily rises to 5 per thousand in 2026; adjustments in taxes on the consumption of liquor and tobacco.
- High probability of unenforceability: there is no supervening event; there are ordinary alternatives that are less burdensome.
- Refund of the taxes collected, once the unenforceability of the decrees is determined, would depend on what the Court indicates.

The draft Economic Emergency Decree

The draft Economic Emergency Decree contains a series of measures that will have a significant economic impact on certain taxpayers. Below, we summarize the collection measures contained in it, make a preliminary analysis of its constitutionality and make some proposals that could be explored to try to mitigate its impact.

It is important to mention that the considerations on which the National Government plans to justify the admissibility of the reform are not yet known. However, the critical and supervening circumstances that could lead to the declaration of economic emergency are not evident.

The problem is that, as long as the Constitutional Court does not pronounce, the Economic Emergency Decrees issued by the National Government could be applied, and the corresponding tax collected. The possibility of obtaining the refund of the taxes collected, once the unenforceability of the decrees is determined, as well as the mechanisms for it, would depend on what the Court indicates.

General Aspects of the Declaration of Economic, Social and Ecological Emergency

What is the economic emergency and what is it for?

The economic emergency gives the government to react quickly to very serious crises that affect the economy, society or the environment, or in the face of a public calamity. The idea is that, for a short time, the government can issue "legislative decrees", that is, measures with the force of law to contain the crisis and prevent it from worsening. But because it is an extraordinary power, it has strict limits and strong judicial control.

The economic emergency is a powerful but exceptional tool: **it is only activated when the ordinary is not enough**. The measures must be temporary, strictly connected to the crisis and respectful of the Constitution; and both the Court and Congress guarantee that this extraordinary power is not diverted or perpetuated.

How is it declared and what must the Government demonstrate?

To declare the emergency, the President and all the ministers sign a decree that must describe the crisis that needs to be faced, as well as justify in a clear, precise and detailed manner the way in which the measures that are imposed are necessary to resolve it. The decree must also indicate the time during which the measures will be in force (up to 30 days at a time, with a maximum of 90 days per year), and in which part of the country it applies. That decree must be sent immediately to the Constitutional Court, made public and communicated to Congress, which exercises political control.

In addition to complying with these formalities, the Government must convince the Court of three things: first, that there really is a serious and current crisis (not hypothetical), with data and evidence; second, that this situation puts the economic, social or ecological order at risk or that there is a public calamity; and third, that the ordinary tools (laws and budgetary and administrative mechanisms that already exist) were not enough or were not timely. **This last point is key: the emergency is "ultima ratio", it only proceeds when the normal is not useful or is not enough.** If the Government does not demonstrate this insufficiency, the Court can overturn the declaration, even defer the effects so as not to cause greater damage in the short term.

What does the Court examine and what are the limits?

Although the Court recognizes that the Government has a technical margin to assess the crisis, judicial control is strict. The Court verifies that intangible human rights are not violated, that the social rights of workers are not impaired, that there is no discrimination, that there is no interference with the

functioning of other branches of power and, in general, that the measures comply with the principles of purpose (they serve to avert the crisis), necessity (they are suitable and there is no less burdensome ordinary option) and proportionality (the remedy is not worse than the disease).

What can legislative decrees contain?

Each decree that develops the emergency must pass several filters. It must be directly connected to the crisis (it is not worth taking advantage of it to introduce reforms unrelated to it), have a clear and coherent motivation, and demonstrate that it is necessary and proportionate. If the decree suspends a law for "incompatibility," the justification must be especially sound: it must explain why, in that context, applying it would make it impossible to manage the crisis. In all cases, the prohibition of discrimination and the obligation to respect the Constitution and human rights treaties apply.

Are the rules more demanding if it refers to taxes and contributions in emergency?

When decrees create, modify or eliminate taxes temporarily, the examination is even more rigorous. These measures are only valid if:

- They have a direct and specific connection with the cause of the emergency and seek exclusively to confront it or prevent it from getting bigger.
- They are temporary: as a general rule, they end at the end of the following fiscal year, unless Congress, within the following year, makes them permanent by law.
- They pass a strong test of necessity: the government must explain why this exceptional tax is essential and why ordinary alternatives such as credits, reassignments or instruments already available were not enough.
- They respect the principles of the tax system: legality, equality, equity, progressiveness, ability to pay and non-confiscatory. If they break the generality or disproportionately burden a group, they could be considered unconstitutional.
- They do not diminish workers' social rights, especially when the "contribution" falls on labor income.
- They are well motivated: with verifiable data that shows how the collection or benefit really impacts the mitigation of the crisis and why it is better than other less burdensome options.

In practice, temporary reliefs and facilities clearly focused on addressing the emergency and reactivating the economy tend to pass control, as long as they are well justified and measured. On the other hand, selective or poorly designed levies, which affect equality or progressivity, have been rejected by the Court.

Are there limits to the government's freedom of configuration in tax matters?

The government's margin of design exists, but it is narrow. The Court has admitted, above all, temporary adjustments that facilitate emergency care (exemptions, exclusions, deadlines, facilities, relief), provided that they are suitable, necessary, proportional and with an expiration date. What is not admissible is to use the emergency to make structural or permanent tax reforms, or to create taxes that break the equity or the generality of the system.

What happens if the Court declares unconstitutional the declaration of emergency or the decrees it issues and that have tax content?

If the Court overturns the declaration of emergency, the decrees that depend on it usually fall as a consequence. Even so, the Court can "modulate" the effects to avoid voids or greater damage, for example, deferring the fall so that there is an orderly splicing. In tax matters, this modulation also seeks to protect legal certainty and the ability to pay: it can, for example, allow what has already been paid to be imputed to other taxes or periods, so that those who acted in good faith are not punished.

The importance of the crisis that gives rise to the declaration of emergency being supervening

What does it mean when the crisis is supervening?

To be supervening, the crisis must arise with extraordinary intensity or rapidity, in such a way as to seriously modify the situation. It cannot be just any difficulty; nor can it be a structural problem, recognized, and that it should have been confronted with the ordinary instruments that the Constitution places in the hands of the rulers. It must originate in a new and unforeseeable event, or in a sudden aggravation of an existing situation.

Supervenence can occur in two ways: from an unexpected event[1], or from a known phenomenon that is transformed and generates a situation of objective urgency that did not exist before.

Why does survival matter?

The requirement of supervenence protects three constitutional principles:

- **Exceptionality and ultima ratio.** The emergency is designed for extraordinary scenarios. It cannot be invoked to address chronic deficits, since these must be resolved through ordinary legislative procedures. Allowing the use of exceptional measures to resolve foreseeable situations would legitimize the usurpation of legislative functions by the executive.
- **Independence of powers.** In line with the above, structural problems must be solved with laws debated in Congress, with planning, budgets and political control; they cannot be solved through decrees issued in an extraordinary manner.
- **Planning and prevention.** The National Government cannot turn its own inaction, lack of foresight or delay into a "crisis" that serves as an excuse to justify exceptional powers.

How has the Constitutional Court verified whether there has been the occurrence of a circumstance that could give rise to the declaration of emergency?

When reviewing the declarations of economic emergency that have taken place in the last 30 years, the Court has not limited itself to accepting general statements, but has demanded a neat foundation, based on verifiable data, based on which it can be established. Some examples:

- In Judgment C-145 of 2020, which analyzed Decree 417 of 2020 (first emergency due to COVID-19), the Court examined epidemiological curves, health projections, and macroeconomic estimates, to conclude that there was a sudden and unpredictable break with respect to the previous baseline, justifying the occurrence of the crisis.
- In judgments C-307 of 2020 and C-313 of 2020 (decrees issued in implementation of the aforementioned Decree 417), when applying the judgments of purpose, connection and necessity, the Court took up updated health and economic indicators to show the rapid and uncertain intensification of the crisis, reinforcing the supervening nature and the need for exceptional measures.
- In judgments C-215 of 2011 and C-216 of 2011 (which judged the enforceability of the emergency decrees issued to avert the effects of the 2010 winter wave), the Court valued technical information from IDEAM and the National Risk Management System, which showed an abrupt change compared to historical patterns, accrediting the supervening irruption of the phenomenon.
- In judgment C-252 of 2023 (declaration of emergency in the department of La Guajira): the Court contrasted historical series of malnutrition, access to water and child morbidity with recent data and

[1] An example of this are Decrees 417 of March 17, 2020 (for 30 days) and 637 of May 6, 2020 (for 30 days), which were issued on the occasion of the pandemic caused by Covid-19.

concluded that, although the situation was very serious, it responded to chronic and foreseeable deficits; A rupture or sudden aggravation that enabled the emergency was not proven. He stressed that prior inaction does not turn a structural problem into a "supervening" one.

When can the qualitative aggravation of a situation lead to the declaration of emergency?

What does "qualitative aggravation" mean?

The "qualitative aggravation" of a situation occurs when it is exacerbated and ceases to be a structural problem to generate extraordinary negative effects. This abrupt change is what legitimizes the use of extraordinary measures to try to resolve the crisis.

How should qualitative aggravation be demonstrated?

In accordance with the judgments that have analyzed the enforceability of economic emergency decrees in the past, we can affirm that, in order for the Court to accept that this aggravation exists, the Government must provide evidence that allows the situation to be contrasted before and after the event that gave rise to it, using reliable and verifiable data.

The Government must also explain why this change was not reasonably foreseeable and why the ordinary mechanisms were not able to respond in a timely manner or with sufficient coverage. It is not enough to say that the problem is serious; it must be proven that there was a recent rupture that makes the normal response insufficient. Thus, if the phenomenon was foreseeable and ordinary instruments were available, the burden to justify an emergency is higher. The omission to use legal or budgetary tools does not turn a known problem into a supervening one.

Recent jurisprudence reflects this line, such as emergencies due to phenomena such as an extreme weather event or the pandemic have been endorsed when the sudden irruption or aggravation is demonstrated; in contrast, declarations based on chronic problems without proving a breaking point have been declared unenforceable.

What are the effects of not proving supervenence?

If the government does not convincingly prove that the crisis is supervening, the declaration may fall, and with it, by dragging, the development decrees. In situations in which an immediate fall causes greater damage, the Court can modulate the effects (for example, defer the unenforceability), but this does not make up for the lack of accreditation of the supervening condition, it only mitigates the practical impact of the decision.

The measures of the economic emergency decree

Temporary special tax on hydrocarbons and coal.

- A temporary tax is created on the **extraction of hydrocarbons and coal** that is caused at two times: i) on the first sale within or from the national territory, and ii) when the application for authorization to ship for export is submitted and accepted; It applies to products under tariff headings 27.01 (hard coal and similar solids) and 27.09 (crude oil) with a rate of 1%. **The taxable base** will be the value of the sale (domestic sales or from the territory) or the FOB value in pesos in export; if the FOB is in USD, it is converted with the TRM of the day of acceptance of the shipment request. When the extractor exports directly, the tax is only due once, on the export basis, avoiding chain double taxation.
- Taxpayers are those who sell or export the indicated goods and have had in the previous year aggregate ordinary net income with related parties of at least 50,000 UVT, focusing the tax on actors with greater contributory capacity. For export, payment must accompany the shipment request; for

domestic sales or from the territory, the payment is consolidated in the first five business days of the following month; Penalties are foreseen for non-submitted support, incomplete or late payment. The measure is in force once the decree is published, with application to exports as of the fifth following business day, and the resources are allocated exclusively to the emergency.

- Among the practical implications for foreign investors in the sector, companies with upstream operations or coal/crude oil trading must model 1% in prices, contracts and cash flows, and adjust compliance controls on exports to accompany the shipment request with payment, considering the rules of differences between provisional and final data. Operators with domestic sales or from the free zone that qualify as "from the territory" would also be affected, subject to the threshold of 50,000 UVT. The exemption from causation for royalties in kind received by the ANH applies only until export, at which point the tax is due.

Transitional wealth tax regime in 2026.

- The decree expands the universe of taxpayers for 2026 to include legal entities and de facto companies taxpayers who file income tax, in addition to the base already provided for individuals and other taxpayers of the Tax Statute (ET).
- The generating event for 2026 is the possession of the assets as of January 1, 2026 for a value equal to or greater than 40,000 UVT, based on liquid assets (gross assets minus debts on that date).
- Exclusions are enshrined: for natural persons, the first 12,000 UVT of dwelling; for all taxpayers, the net equity value of shares/participations in national companies, even when held through trusts, funds or insurance, in the certified proportion; and exclusions for certain public assets and foreign financial institutions (active credit and international leasing operations, and their returns), among others.
- For foreigners residing in Colombia for less than five years, liquid assets located abroad are excluded. For non-residents with a permanent establishment or branch in Colombia, the taxable base is limited to the assets attributable to the permanent establishment (PE)/branch in accordance with article 20-2 of the Statute of Workers, supported by an arm's length study.
- For taxpayers of numerals 1 to 5 of article 292-3 ET, the marginal rate is progressive: 0% up to 40,000 UVT; 0.5% between >40,000 and 70,000; 1% between >70,000 and 120,000; 2% between >120,000 and 240,000; 3% between >240,000 and 2,000,000; and 5% on the excess of 2,000,000 UVT.
- For the new numeral 6 (legal persons and de facto companies), the scale is 0% up to 40,000 UVT; 0.5% between >40,000 and 70,000 UVT; and 1% from >70,000 UVT. The decree specifies that previous references "and 2026" do not apply for that year, so this transitory paragraph applies. For compensation funds, employee funds and trade associations, the base is limited to assets and debts linked to activities taxed on income.
- Points of attention for foreign investment and structures with PEs.
  - Foreign vehicles with a PE or branch in Colombia must prepare, by January 1, 2026, the attribution study of assets under full competition, with an inventory of functions, assets, personnel and risks, since the assets/liabilities attributable to the PE for wealth tax purposes derive from this.
  - Newly resident foreign individual investors should review the exclusion rule for assets outside Colombia if their tax residence in the country is less than five years. The exclusion of the net equity value of shares in Colombian companies can be strategic for asset holding structures in Colombia.

VAT on games of luck and chance operated exclusively on the internet.

- The decree subjects to VAT the games operated exclusively by internet both from Colombia and from abroad, eliminating the exemption of letter e) of article 420 ET from the business day following the publication. The **generating event** is the user's deposit (cash, transfers or cryptoassets) to credit their account and be able to bet; **the base** is the deposit divided by 1.19, applying the general rate of article 468 SW. Non-resident operators will be liable for VAT under the regime of providers from abroad when

the user has tax residence, domicile, PE or headquarters of activity in Colombia, with registration and compliance analogous to other digital services. The resources are affected by the emergency, and a rule is provided for the allocation of the collection within the balance to be paid by those responsible with income from these operations.

Tax on Financial Movements (GMF) in 2026.

- For the taxable year 2026, the GMF is set at 5 per thousand, which implies a transitory increase in the rate applicable to debits and operations reached by the tax.

Excise taxes on liquor and cigarettes/tobacco and similar in 2026.

- For 2026, the generating event is specified and the tariff structure is updated. In liquors, wines and the like, the taxable event is consumption in the departmental jurisdiction, with a specific component of $750 per alcohol content per 750 cc and an ad valorem of 30%.
- In cigarettes, manufactured tobacco and related categories, the generating event is redefined and PTC, electronic systems with and without nicotine and vapes are expressly included; Responsible subjects include producers, importers and jointly and severally distributors, as well as direct responsible transporters and retailers without support of origin.
- The taxable base is mixed: a specific tax per unit (or ml for derivatives/imitators) and an *ad valorem* on the retail price certified by DANE; DANE is empowered to certify prices and reporting obligations are imposed. In tariffs, for packs and PTC, the specific is $11,200 for 20 units, and 10% *ad valorem*; for picadura, snuff and chimu, $891 per gram and an *ad valorem* of 10% calculated on the specific tax; for derivatives/imitators (e.g., vaping liquids), the specific is $2,000 per ml and ad valorem of 30%.

Validity and allocation of resources

- Except where indicated, the decree would be in force from its publication in the Official Gazette; VAT on online games is in force from the next business day; the new extractive tax applies immediately, with a window of five business days for shipment requests; and several adjustments apply exclusively to the taxable year 2026.
- All the resources of the measures are used exclusively to finance the expenses of the General Budget of the Nation related to the emergency.

Preliminary comments on the enforceability of the decree

Based on the jurisprudence of the Constitutional Court on states of economic emergency, the current scenario as we understand it – budget deficit derived from predictable fiscal and political decisions, without new or unforeseeable shocks, and use of the emergency to create taxes that Congress did not approve through ordinary channels – offers solid grounds for the Court to declare the emergency unenforceable. Based on what was indicated in the first part of this note, these would be the arguments that would support its decision.

There is no supervening event or "qualitative aggravation"

The Constitution reserves the emergency for supervening and exceptional crises, not for chronic or foreseeable problems. An underfunded budget, known since the formulation of the Medium-Term Fiscal Framework and the draft General Budget of the Nation, is not a new or unforeseeable fact. On the contrary, it is the result of fiscal policy decisions, collection estimates, and the normal dynamics of the budget and tax process in Congress. The Court has been consistent in demanding evidence of a break from the baseline: a breaking point that qualitatively alters the situation. If "there are no new, unforeseeable economic elements" that are affecting the economy, the factual and evaluative assumption that enables the declaration fails.

The crisis is attributable to ordinary decisions and democratic dynamics, not to an external shock

The Court also verifies that the urgency is not the product of inaction itself or of failed ordinary options. Here, the deficit comes from: (i) the approval or issuance of a budget with shortcomings noticed; and (ii) the non-approval of a financing law by Congress. None of these facts is an external "shock"; these are normal events of the democratic process. Turning a legislative defeat or optimistic planning into a "crisis" distorts the exceptionality of Article 215 and confuses seriousness with supervenence. Inaction or risky fiscal design do not transform a foreseeably serious problem into a supervening event.

Failure to comply with the sufficiency budget: the emergency is not "ultima ratio"

The Court requires proof that the ordinary instruments were non-existent or inappropriate. In fiscal and budgetary matters, there is a wide menu of ordinary tools: deferrals and freezing of spending, cuts and prioritizations, transfers within the budget, adjustments to the Annual Cash Plan, use of liquidity buffers, credit operations within authorized quotas, management of liabilities and future validities, regulatory and administrative packages for expenditure efficiency, and, of course, the possibility of presenting a bill again with limited and consensual contents. If the government does not explain why these alternatives are not sufficient or are late, the subsidiarity trial fails. Exceptionality does not replace the burden of demonstrating reinforced need.

Deviation of purpose and connection: "tax reform" cannot be carried out by exceptional means

Article 215 of the Political Constitution allows tax measures only if they are directly and specifically connected to the cause of the emergency and aimed exclusively at averting it or preventing its extension. "Covering a general budget deficit" that was known and that derives from the failure of an ordinary financing law is not a supervening cause; it is a structural and permanent motivation. Using the emergency to create taxes aimed at closing a global deficit is equivalent to a tax reform through the back door, exceeding the required purpose and connection. The Court has invalidated extraordinary measures when they pursue structural objectives or unrelated to the shock that supposedly causes the emergency.

Violation of the democratic fiscal principle and the separation of powers

The ordinary tax design corresponds to Congress. The emergency does not authorize the Executive to replace the Legislator because a project did not reach the votes. The Court has stressed that states of emergency cannot be used to disrupt the functioning of other branches or to circumvent democratic debate. Turning exceptionality into an alternative way of fiscal policy in the face of legislative defeats violates the democratic principle, the reservation of law in tax matters and the separation of powers clause.

Lack of proportionality and sufficient technical motivation

Proportionality requires a balance between suitability, necessity and burdens. Creating new taxes of general scope to correct a projected deficit, without proving why cuts, prioritizations or less burdensome ordinary measures are not enough, is disproportionate. In addition, the evidentiary standard during the emergency is high: traceable technical motivation is required, with up-to-date data demonstrating the rupture and urgency. In the scenario described, that motivation would be lacking because there is no "novelty" to document or windows of time that make the ordinary route ineffective.

Specific rule in tax matters: reinforced scrutiny that is not passed here

Even if the existence of a crisis were to be accepted, emergency tax measures only pass control if they are temporary, strictly connected with the supervening event, necessary in a reinforced sense and respectful of equality, equity and progressiveness. Financing an overall deficit of the GNP without a new shock breaks that specific connection. The Court has been especially strict with taxes created in states of emergency that pursue broad or structural purposes.

Alternatives

The declaration of unenforceability of the economic emergency decrees does not imply the immediate refund of the taxes collected during their validity. Sometimes, constitutionality decisions have had effects for the future; in others, the refund has been allowed through compensation mechanisms, which make the process delayed. It is therefore important to analyse how to minimise the impact of emergency measures, in order to minimise their impact on taxpayers as much as possible.

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