

**Application no. 53080/13  
CASE OF BÉLÁNÉ NAGY against HUNGARY**

**Submission  
by the  
European Trade Union Confederation (ETUC)  
under Rule 44(5)**

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## Introduction

- 1 The European Trade Union Confederation (ETUC) represents the interests of workers at European level. Founded in 1973, it now represents 90 trade union organisations in 39 European countries, plus 10 industry-based federations. The ETUC's prime objective is to promote the European Social Model and to work for the development of a united Europe of peace and stability where working people and their families can enjoy full human civil and social rights and high living standards.
- 2 The ETUC considers the right to social security as fundamental social right of special importance. Indeed, this right protects workers against risks beyond their control such as invalidity<sup>1</sup> which is at stake in the present case.

## General considerations

- 3 The fundamental social right to social security has been discussed already for a long time. This is all the more true against the background of international labour standards.<sup>2</sup> However, the

<sup>1</sup> For the purpose of this submission the terms 'invalidity' and 'disability' are used as synonyms.

<sup>2</sup> See, for example, *E Eichenhofer*, Soziale Sicherheit als Menschenrecht, in: Festschrift für Rolf Birk zum 70. Geburtstag, Mohr Siebeck, Tübingen 2008, pp. 45 ff.; *ILO* (ed.), International Labour Conference, 100th Session, Social Security and the Rule of Law (General Survey), Geneva, 2011, pp. 99 – 119, in particular para. 254 on

Court has not yet recognised such a human right. Indeed, the Chamber judgment<sup>3</sup> is still relying<sup>4</sup> on this more negative approach. The following observations will therefore explore whether, in the view of the ETUC, the Grand Chamber should follow such a line of reasoning or whether it is time now to make an important step forward in the direction of a better protection of fundamental social rights by, in particular, relying on its own method of interpretation:

- 4 The following analysis will be based on the application of the interpretation principles developed in a systematic way in the *Demir and Baykara* judgment, concluding that<sup>5</sup>

[t]he Court, in defining the meaning of terms and notions in the text of the Convention, can and **must take into account elements of international law** other than the Convention, the **interpretation of such elements by competent organs**, and the **practice of European States** reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases. [Emphasis added]

Accordingly, this submission will describe the relevant international and European material (standards and case-law) as well as the practice in European states.

## Pertinent International Law and Practice

- 5 There is a widespread recognition of the right to social security as a human right at all relevant, i.e. international, European and national, levels.

### *The United Nations*

- 6 Two instruments are of particular importance.<sup>6</sup>

### **The Universal Declaration of Human Rights (UDHR)**

- 7 As early as 1948, the Universal Declaration of Human Rights (UDHR)<sup>7</sup> recognised in its Article 22 the right to social security referring in particular to human dignity. As basis of all human rights the latter is also mentioned in the Preamble of the Convention and in the Court's case-law.<sup>8</sup>

#### **Article 22**

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization

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disability pensions; *J van Langendock* (ed), *The Right to Social Security*, Intersentia, Antwerpen, 2007; *M Mikkola*, *Social Human Rights of Europe*, Karelectio Legisactio, Porvoo, 2010, pp. 32 ff.; *G Vonk/G Tollenaar* (eds.), *Social security as a public interest*, Intersentia, Antwerpen, 2010, in particular pp. 74 – 79.

<sup>3</sup> ECtHR (Second Section) 10.2.2015 – No. 53080/13 - *Bélané Nagy v. Hungary* (hereinafter the 'Chamber judgment').

<sup>4</sup> See the compilation of the Court's respective case-law in the Chamber judgment (paras. 35 ff.) and in the Dissenting opinion (under II., §§ 2 - 6).

<sup>5</sup> ECtHR [GC], 12.11.2008 (App. no. 34503/97) *Demir and Baykara v. Turkey*, § 85, ECHR 2008-V, pp. 395 ff. See, for example, *Ewing/Hendy*, *Industrial Law Journal*, 2010, 2 ff.; *Marguénaud/Mouly*, *Revue du Droit du Travail* 2009, 502 ff.; *Van Drooghenbroek*, *Rev. Trim. D. H.* 2009, pp. 811 ff.; more generally: *Dorssemont/Lörcher/Schömann* (eds.), *The European Convention on Human Rights and the Employment Relation*, Oxford, Hart Publishing 2013.

<sup>6</sup> In its § 24 the Chamber judgment rightly refers also to further international material such as Article 6 of the 'The International Classification of Functioning, Disability and Health (ICF)'.

<sup>7</sup> <http://www.un.org/en/documents/udhr/index.shtml#a22>

<sup>8</sup> See, for example, ECtHR (GC) 28.1.2014, No. 35810/09, *O'Keeffe / Ireland*, § 94; 19.10.2012, No. 43370/04 e.a., *Catan e.a. / Moldavia and Russia*, §§ 77 and 136.

and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

8 The reference to the 'free development of his personality' is all the more illustrative as it links directly to the civil and political rights.

9 Moreover, Article 25(1) UDHR guarantees a more general right to security in case of, *inter alia*, disability:

(1) Everyone has ... the right to security in the event of unemployment, sickness, **disability**, widowhood, old age or other lack of livelihood in circumstances beyond his control. [Emphasis added]

10 It should be noted that in both cases the UDHR expressly provides for an individual 'right'.

### The International Covenant on Economic, Social and Cultural Rights (ICESCR)

11 In providing the UDHR with an internationally legally binding basis, the UN have adopted the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>9</sup> all three forming in UN terminology the 'International Bill of Rights'. Following the approach of the UDHR the ICESCR expressly recognises the right to social security:

#### Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

12 Very importantly, the Committee of Economic, Social and Cultural Rights (CESCR) has adopted a 'General Comment' (No. 19) on the *content* of this article<sup>10</sup> stating i.a. that the 'right to social security encompasses the right to access and maintain benefits ... in order to secure protection, *inter alia*, from (a) lack of work-related income caused by ... disability'.<sup>11</sup> Moreover, it stresses that<sup>12</sup>

[t]he right to social security has been strongly affirmed in international law. The human rights dimensions of social security were clearly present in the Declaration of Philadelphia of 1944 which called for the "extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care".<sup>13</sup> Social security was recognized as a human right in the Universal Declaration of Human Rights of 1948, which states in article 22 that "Everyone, as a member of society, has the right to social security" and in article 25(1) that everyone has the "right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control". The right was subsequently incorporated in a range of international human rights treaties<sup>14</sup> and regional human rights treaties.<sup>15</sup> In 2001, the International Labour Conference, composed of

<sup>9</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

<sup>10</sup> General Comment No. 19: The right to social security (Article 9 ICESCR) 4.2.2008, E/C.12/GC/19, <http://www.refworld.org/docid/47b17b5b39c.html>.

<sup>11</sup> *Ibid*, para. 2.

<sup>12</sup> *Ibid*, para. 6.

<sup>13</sup> [footnote 2 in the original text:] Declaration concerning the aims and purposes of the International Labour Organization (ILO), annex to the Constitution of the ILO, section III (f).

<sup>14</sup> [footnote 3 in the original text:] International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), article 5 (e) (iv); Convention on the Elimination of All Forms of Discrimination against Women, articles 11, para. 1 (e) and 14, para. 2 (c); and Convention on the Rights of the Child, article 26.

<sup>15</sup> [footnote 4 in the original text:] For explicit mention of the right to social security, see American Declaration of the Rights and Duties of Man, article XVI; Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights (Protocol of San Salvador), article 9; European Social Charter (and 1996 revised version), articles 12, 13 and 14.

representatives of States, employers, and workers, affirmed that social security “is a basic human right and a fundamental means for creating social cohesion”.

- 13 Following the description of the legal framework this General Comment No. 19 defines the normative content of Article 9 ICESCR. By referring in particular to ILO Convention No. 102 (see below para. 21), it stresses that the system of social security contains nine branches<sup>16</sup> one of which is related to the risk of disability:<sup>17</sup>
- 14 Referring to its previous General Comment No. 5 on 'Persons with Disabilities' adopted in 1994 the CESCR „emphasized the importance of providing adequate income support“.<sup>18</sup> This latter General Comment No. 5<sup>19</sup> had indeed stressed that<sup>20</sup>

[s]ocial security and income-maintenance schemes are of particular importance for persons with disabilities. As stated in the Standard Rules, “States should ensure the provision of adequate income support to persons with disabilities who, owing to disability or disability-related factors, have temporarily lost or received a reduction in their income or have been denied employment opportunities”.<sup>21</sup> Such support should reflect the special needs for assistance and other expenses often associated with disability.

- 15 The ICESCR enjoys nearly the widest possible status of *ratification*. Indeed, all COE-Member States (with the exception of Andorra but with Belarus as Non-CoE-Member State) have ratified it as did in particular *Hungary* already on 17 January 1974.<sup>22</sup> It thus forms a sound human rights basis for fundamental social rights.

### The UN Convention on the Rights of Persons with Disabilities (CRPD)

- 16 Besides the more general approach based in the ICESCR there is a more specific UN instrument, the Convention on the Rights of Persons with Disabilities (CRPD)<sup>23</sup> containing important rights for the protection of this group of persons. Article 28(1) CRPD provides for an adequate standard of living in the following terms:

#### **Article 28 - Adequate standard of living and social protection**

1. States Parties recognize the right of persons with disabilities to an **adequate standard of living** for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability [Emphasis added]

- 17 According to para. (2) 'States Parties recognize the right of persons with disabilities to social protection ... and shall take appropriate steps to safeguard and promote the realization of this right'. This provision specifies several measures.

<sup>16</sup> General Comment No. 19 (see note 10), paras. 12 ff. (footnote 8 refers also to the ILO Maritime Labour Convention confirming this approach).

<sup>17</sup> *Ibid.* para. 20 f.

<sup>18</sup> *Ibid.* para. 20.

<sup>19</sup> General Comment No. 5: Persons with Disabilities, 9.12.1994, E/1995/22.

<sup>20</sup> *Ibid.* para. 28.

<sup>21</sup> [footnote 24 in the original text:] Standard Rules (see note 6 above [Standard Rules on the Equalization of Opportunities for Persons with Disabilities, annexed to General Assembly resolution A/RES/48/96 of 20 December 1993, <http://www.un.org/disabilities/default.asp?id=26>]), Rule 8, paragraph 1.

<sup>22</sup> [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en).

<sup>23</sup> <http://www.un.org/disabilities/convention/conventionfull.shtml>.

- 18 Whereas the CRPD has not yet adopted a General Comment on Article 28 CRPD it has, in its General Comment No. 2,<sup>24</sup> referred to the above mentioned CESCR's 'General Comment No.5'<sup>25</sup> and more specifically concerning Article 28 to the "adequate standard of living and social protection for persons with disabilities".<sup>26</sup>
- 19 The CRPD also enjoys a high degree of *ratifications*. Indeed, it is also ratified by most CoE-Member States (with the exception of Finland, Iceland, Ireland, Monaco and The Netherlands, all of which have at least signed the CRPD; only Liechtenstein has neither ratified nor signed this Convention).<sup>27</sup> It is however unique, that the European Union as supranational organisation has adhered to the CRPD.<sup>28</sup> *Hungary* has ratified the CRPD on 20.7.2007.

### ***The International Labour Organization (ILO)***

- 20 Taking account of and expressly referring to the lessons learnt from World War II, the 'Declaration of Philadelphia' as part of the ILO Constitution was drawn up even before the UDHR social principles, and is based on the belief that 'lasting peace can be established only if it is based on social justice'.<sup>29</sup> In particular, it requires 'the extension of social security measures to provide a basic income to all in need of such protection' (III.f)).

### **ILO Convention No. 102**

- 21 In this respect, ILO Convention No. 102<sup>30</sup> 'Social Security (Minimum Standards)' forms the fundamental framework for at least one generation of international social security standards. Concerning the *content* Part IX guarantees 'Invalidity benefits'. The specific importance is illustrated by the extensive quotations of the relevant provisions and the reference to Article 57(1)(b) in its reasoning (§ 46).
- 22 Fourteen CoE-Member states have *ratified* this Convention<sup>31</sup> recognising at the same time 'Part IX Invalidity benefits' (eleven EU-Member States, not including Hungary,<sup>32</sup> and three Non-EU-Member States<sup>33</sup>).

### **ILO Convention No. 128**

- 23 Forming part of the 'next generation' of international standards concerning social security ILO Convention No. 128 (Invalidity, Old-Age and Survivors' Benefits Convention)<sup>34</sup> develops as its

<sup>24</sup> General Comment No. 2 on Article 9 CRPD

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/2&Lang=en).

<sup>25</sup> *Ibid*, para. 6; additionally to the 'General Comment No. 5' (see above, note 19) it refers also to the Standard Rules (see above, note 21).

<sup>26</sup> *Ibid*, para. 42.

<sup>27</sup> [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en).

<sup>28</sup> Accession 23.12.2010, entering into force 22.1.2011.

<sup>29</sup> See e.g. *Bundesministerium für Arbeit und Sozialordnung / Bundesvereinigung der Deutschen Arbeitgeberverbände / Deutscher Gewerkschaftsbund* (Hrsg.), *Weltfriede durch soziale Gerechtigkeit*, Baden-Baden 1994.

<sup>30</sup> Convention No. 102, 1952, entered into force 27.4.1955.

<sup>31</sup> Footnote 2 of the Chamber judgment refers to 50 ratification; with Chad having ratified this Convention on 4.6.2015 the number has increased to 51.

<sup>32</sup> Belgium, Cyprus, Czech Republic, Denmark, France, Germany, Greece, Luxembourg, Netherlands, Portugal and Slovakia.

<sup>33</sup> Albania, Iceland und Turkey.

<sup>34</sup> Invalidity (Part II corresponding to Part IX of Convention No. 102), old-age (Part III, corresponding to Part V of Convention No. 102) and survivors' benefits (Part IV, corresponding to Part X of Convention No. 102). Adopted in 1967 it entered into force on 1.11.1969.

*content* a higher level of protection compared to ILO Convention No. 102 in relation to three branches,<sup>35</sup> including invalidity benefits.<sup>36</sup>

- 24 Beyond the *ratification* status described in the Chamber judgment at least two States<sup>37</sup> have accepted the higher standards in Convention No. 128. Moreover, two EU-Member States<sup>38</sup> as well as two Non-EU, but CoE-Member States<sup>39</sup> have not only ratified this Convention but also accepted all three parts thereof. In so far, the relevant number has increased to 18 Contracting Parties from Europe, thus bringing it closer to half of the number of CoE-Member States.

## **Council of Europe (CoE)**

### **European Social Charter**

- 25 At the level of the CoE, the (Revised) European Social Charter ((R)ESC<sup>40</sup>) guarantees the Right to Social Security in its Article 12. The importance of this right is underlined by its inclusion in the 'hard core' (Articles 20(1)(b) ESC and A(1)(b) RESC). Although acceptance is not legally required, there is nevertheless a specific incentive to do so.
- 26 Concerning the *content*<sup>41</sup> Article 12(1) (R)ESC requires that 'States must ensure this right through the existence of a social security system established by law and functioning in practice' laying down 'minimum common standards'. As regards the material scope the system should cover the traditional risks and therefore provide the following benefits: medical care, sickness benefit, unemployment benefit, old age benefit, employment injury benefit, family benefit, and maternity benefit.<sup>42</sup> However, according to the interpretation by the European Committee of Social Rights (ECSR) invalidity benefits are not covered.<sup>43</sup>
- 27 Whereas Article 12(2) ESC had required States to accept an equivalent level of protection needed for the ratification of ILO Convention No. 102, the amended version of para. (2) in the RESC refers to the European Code of Social Security (ECSS, see below para. 30). Having the same structure (in particular 'Part IX Invalidity'), the two instruments referred to differ in the level of protection as regards the ratification conditions.<sup>44</sup>

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<sup>35</sup> Other parts of ILO Convention No. 102 have been further developed by Conventions No. 121, Employment Injury Benefits Convention (1964), No. 130, Medical Care and Sickness Benefits Convention (1969) and No. 168, Employment Promotion and Protection against Unemployment Convention (1988).

<sup>36</sup> As far as the quotation of Article 57(1)(b) ILO Convention No. 102 in the Chamber judgment is concerned (§ 46) it has nearly the same wording in Article 11(1)(b) of ILO Convention No. 128.

<sup>37</sup> Germany and the Netherlands.

<sup>38</sup> Finland (not having ratified Convention No. 102) and Sweden (having ratified Convention No. 102 but not accepted its Part IX).

<sup>39</sup> Norway and Switzerland (having ratified Convention No. 102 but not accepted its Part IX).

<sup>40</sup> The denomination „(R)ESC“ means that the content of the respective provision has not changed substantially between the 1961 European Social Charter (ESC) and the 1996 Revised European Social Charter (RESC).

<sup>41</sup> See for more details *Council of Europe* (Hrsg.), *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008 (Digest 2008) as well as the latest 'Conclusions' XX-2 and 2013.

<sup>42</sup> *Conclusions 2006, Bulgaria*, p. 116 (Digest 2008, note 41 above, p. 89); Parts II to VIII of ILO-Convention No. 102.

<sup>43</sup> Part IX (the same applies to Part X 'Survivors' benefits').

<sup>44</sup> The difference between ILO Convention No. 102 and the European Code of Social Security relates to the minimum requirements as to how many parts must be accepted for the ratification of these instruments (three for the Convention; six for the Code), see Explanatory Report to the RESC.

- 28 According to Article 12(3)<sup>45</sup> (R)ESC Parties undertake “to endeavour to raise progressively the system of social security to a higher level”. If States have not yet accepted invalidity benefits under para. (2) they might be required to do so under para. (3).
- 29 The general description of the status of *ratification* could be limited to the 43 CoE-Member States having ratified either the ESC or the RESC.<sup>46</sup> According to the possibility of ‘à la carte’ acceptance, it might be however be more enlightening to additionally look at the status of acceptance of the specific paragraphs of Article 12. Out of the 43 Contracting Parties only four States have not accepted Article 12 in total.<sup>47</sup> All other 39 Contracting Parties have agreed to be bound by para. (1) whereas still some 31 States have accepted para. (2).<sup>48</sup> Para. (3) enjoys an even higher degree of acceptance (34 States).<sup>49</sup> *Hungary* has only accepted para. (1).

### European Code of Social Security (ECSS)

- 30 The ECSS and its Protocol,<sup>50</sup> as well as the Revised European Code of Social Security<sup>51</sup>, set standards in the social security field on the basis of minimum harmonisation of the level of social security, providing minimum standards and permitting (or rather encouraging) the contracting parties to exceed these standards. These standard-setting instruments set out the underlying principles of what is referred to as the European social security model.<sup>52</sup> Structured according to ILO Convention No. 102 (see above, para. 21) but requiring a higher number of branches to be accepted (see above, para. 27), ECSS's 'Part IX – Invalidity benefit' contains as *content* the relevant protection of persons with disabilities.
- 31 Concerning the status of *ratifications* 21 States have ratified this instrument (out of which 18 States have accepted the obligations in respect of invalidity benefits)<sup>53</sup> whereas five States<sup>54</sup> have only signed it (i.e. not followed by a ratification). *Hungary* has neither ratified nor signed the ECSS.

### European Union

- 32 At EU level, the right to social security was first recognised by the Community Charter of Fundamental Social Rights of Workers<sup>55</sup> to which the 5<sup>th</sup> recital of the Preamble of the Treaty on the European Union (TEU) as well as Article 151 of the Treaty on the Functioning of the European Union refer. It states:

10. Every worker of the European Community shall have a right to adequate social protection and shall ... enjoy an adequate level of social security benefits. ...

<sup>45</sup> In the context of the present case, para. (4) of Article 12 ((R)ESC) is only relevant indirectly (see, for example, concerning the right to retention of accrued rights for invalidity benefit, Conclusions XIV-1, Finland, p. 230 (Digest 2008, note 41 above, p. 94).

<sup>46</sup> Out of the 47 CoE-Member States only four (Liechtenstein, Monaco, San Marino and Switzerland) have ratified neither the ESC nor the RESC.

<sup>47</sup> RESC: Albania, Azerbaijan and Ukraine; ESC: Croatia.

<sup>48</sup> Out of those States 23 Contracting Parties to the RESC have accepted the higher level of protection guaranteed by the ECSS.

<sup>49</sup> 26 and 8 States in relation to the RESC and ESC, respectively.

<sup>50</sup> Ratified by 6 and signed (not followed by a ratification) by 7 CoE-Member States.

<sup>51</sup> It has not yet entered into force.

<sup>52</sup> [http://www.coe.int/t/dg3/socialpolicies/socialsecurity/default\\_en.asp](http://www.coe.int/t/dg3/socialpolicies/socialsecurity/default_en.asp).

<sup>53</sup> Belgium, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, *Ireland*, *Italy*, Luxembourg, Netherlands, Norway, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, Turkey and the *United Kingdom* (the three States highlighted in *italics* not having accepted Part IX on invalidity benefits).

<sup>54</sup> Austria, Latvia, Lithuania, Moldova and Slovakia.

<sup>55</sup> <http://www.eesc.europa.eu/resources/docs/community-charter—en.pdf>.

- 33 The directly legally binding character of this right was achieved by the Charter of Fundamental Rights of the European Union (Article 6(1) TEU) recognising the right to social security as fundamental social rights in the following terms :

**Article 34 - Social security and social assistance**

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

**Interim conclusions**

- 34 In respect of the international human rights protection, the recognition of the fundamental right of social security in general and the right to invalidity benefits is nearly total at international and European level.<sup>56</sup> Even independently of Article 22 UDHR there are several legally binding obligations stemming, *inter alia*, from Article 9 ICESCR (containing also invalidity benefits) accepted by all CoE-Member States (with the exemption of Andorra). Moreover, the CRPD (and its pertinent Article 28 on social security) enjoys also a very high level of ratification by CoE-Member States. Concerning relevant ILO standards the ratification is higher than described in the Chamber judgment. Indeed, beyond the 14 ratifications of Convention No. 102 mentioned, four further CoE-Member States have accepted the higher level of protection as guaranteed by Part II (Invalidity benefits) of ILO Convention No. 128. Finally, the high number of acceptances (by between 30 and 39) of CoE-Member States in relation to the relevant paragraphs of Article 12 (R)ESC (Right to Social Security) is to be noted particularly. The somewhat lower degree of acceptances in relation to the ECSS cannot be considered as contradicting this conclusion because it protects not only the basic principles but guarantees in particular a higher level of protection compared to ILO Convention No. 102. *Hungary* is bound in particular by Article 9 ICESCR, Article 28 CRPD and Article 12(1) RESC.

**European States' practice**

- 35 Having analysed the first two elements according to the *Demir and Baykara* judgment (i.e. the international standards and relevant case-law of the competent supervisory bodies, see above, para. 4) the third element still remains to be examined. The pertinent information may be found in the data collection MISSOC<sup>57</sup> (for the EU) and MISSCEO<sup>58</sup> (for mainly the CoE) thus allowing comparison in relation to the national level. For the branch 'Invalidity' the situation may be described as follows:
- 36 Beyond the thirteen *EU Member States* having ratified either ILO Convention No. 102 (accepting also its Part IX)<sup>59</sup> or ILO-Convention No. 128 (accepting also its Part II)<sup>60</sup> the

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<sup>56</sup> Therefore, the description in note 2 of the Chamber judgment does not appear to be sufficient even in relation to ILO standards.

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[http://www.missoc.org/MISSOC/INFORMATIONBASE/COMPARATIVETABLES/MISSOCDATABASE/comparativeTablesSearchResultTree\\_de.jsp](http://www.missoc.org/MISSOC/INFORMATIONBASE/COMPARATIVETABLES/MISSOCDATABASE/comparativeTablesSearchResultTree_de.jsp).

<sup>58</sup> Situation on 1 January 2014: Comparative tables of social protection systems in 12 member states of the CoE (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Moldova, Montenegro, the Russian Federation, Serbia, "the former Yugoslav Republic of Macedonia", Turkey and Ukraine) and 3 observer states, 22<sup>nd</sup> ed. [http://www.coe.int/t/dg3/socialpolicies/socialsecurity/MISSCEO/tables\\_en.asp](http://www.coe.int/t/dg3/socialpolicies/socialsecurity/MISSCEO/tables_en.asp).

<sup>59</sup> See above, note 32.

<sup>60</sup> See above, note 38.



MISSOC collection leads to the conclusion that all EU-Member States<sup>61</sup> (including Hungary)<sup>62</sup> have provided for invalidity benefits in their social security legislation.

- 37 Concerning the remaining nineteen *CoE-Member States* (not Parties to the EU) five have ratified either ILO-Convention No. 102 (accepting also its Part IX)<sup>63</sup> or ILO-Convention No. 128 (accepting also its Part II).<sup>64</sup> Beyond these States, MISSCOE contains the description of ten further States<sup>65</sup> having provided for the branch of invalidity benefits in their social security legislation. Concerning the remaining four States, i.e. Andorra,<sup>66</sup> Liechtenstein,<sup>67</sup> Monaco<sup>68</sup> and San Marino<sup>69</sup> it would appear that they also guarantee a protection in the form of invalidity benefits at national level.
- 38 In conclusion, most probably all, but at least 43 out of the 47 CoE-Member States have either accepted in their social security systems invalidity benefits at international or national level.

### Consequences of the application of the *Demir and Baykara* method

- 39 Having applied the *Demir und Baykara* method to the problem in the present case it was demonstrated that the overwhelming majority, if not the totality, of CoE-Member States have accepted the protection against the risk of invalidity by means either of international ratifications and/or national legislation within their social security system. It is thus obvious that a European consensus has emerged. Accordingly, Article 1 of Protocol No. 1 should be interpreted as containing the fundamental social right to social security in general and invalidity benefits in particular.
- 40 Against this conclusion several arguments might be advanced. They are however not convincing. First, it might be argued that such a conclusion would not respect Hungary's international ratification status characterised by not having ratified or accepted in particular Part IX of ILO Convention No. 102.<sup>70</sup> Against the background of the Court's jurisprudence, this argument is not pertinent as the interpretation of the Convention does not rely on the status of ratification of an individual country, i.e. the State concerned by the application.<sup>71</sup> This criticism is even less convincing taking into account that Hungary has ratified in particular the ICESCR

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<sup>61</sup> This means that also those EU Member States which have not accepted pertinent international standards have enshrined the protection against the risk of invalidity at national level (Austria, Bulgaria, Croatia, Estonia, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Romania, Slovenia, Spain, Hungary and the United Kingdom).

<sup>62</sup> According to MISSOC: Law LXXXI of 1997 (törvény a társadalombiztosítási nyugellátásokról) ("SSPB"); Law CXCI of 2011 (törvény a megváltozott munkaképességűek ellátásairól és egyes törvények módosításáról), see also § 18 of the Chamber judgment.

<sup>63</sup> See above, note 33.

<sup>64</sup> See above, note 39.

<sup>65</sup> All States mentioned in note 58 with the exception of Albania and Turkey already mentioned in note 33).

<sup>66</sup> Le régime andorran de sécurité sociale, V. Invalidité, [http://www.cleiss.fr/docs/regimes/regime\\_andorre.html#invalidite](http://www.cleiss.fr/docs/regimes/regime_andorre.html#invalidite).

<sup>67</sup> *European Commission* (ed.), *Your social security rights in Liechtenstein* (July 2013), p. 11 ff. Chapter V: Invalidity benefits; [http://ec.europa.eu/employment\\_social/empl\\_portal/SSRinEU/Your%20social%20security%20rights%20in%20Liechtenstein\\_en.pdf](http://ec.europa.eu/employment_social/empl_portal/SSRinEU/Your%20social%20security%20rights%20in%20Liechtenstein_en.pdf).

<sup>68</sup> *Caisses Sociales de Monaco*, Assurance invalidité, <http://www.caisses-sociales.mc/Accueil/Chomeur/Chomeur/Residence-a-Monaco/Assurance-invalidite2/%28parent%29/1533>.

<sup>69</sup> Le régime sanmarinois de sécurité sociale, E. Invalidité, vieillesse et décès (survivants), [http://www.cleiss.fr/docs/regimes/regime\\_sanmarin.html](http://www.cleiss.fr/docs/regimes/regime_sanmarin.html).

<sup>70</sup> And even less Convention No. 128 with its Part II, the same applies to Article 12(2) and (3) RESC and the ECSS (see above para. 31).

<sup>71</sup> See *Demir and Baykara / Turkey* (see above, note 5), denying the relevance of the lack of acceptance (see § 86) of Articles 5 and 6 ESC by Turkey but mentioning at the same time the ratification of ILO-Conventions No. 87 (see §§ 125 and 152) and No. 98 (see § 147) with a similar content.

with its Article 9 guaranteeing the right to social security and has introduced the relevant national social security legislation containing the branch of invalidity.

- 41 Second, the right to protection of property is considered as mainly preventing the State from interfering with this right (negative obligation) whereas this provision does not contain positive obligations. Generally speaking, the Court has elaborated ample jurisprudence as to those two kinds of obligations. However, it has recognised that there is no clear-cut division between negative and positive obligations.<sup>72</sup> Moreover, the present case concerns (less the question of positive obligations but more) the alleged violation of the negative obligation to protect the applicant from the withdrawal of her invalidity pension.
- 42 Finally, it might be argued that the protection of property cannot be related to social security rights. This argument is not convincing either. From the outset, it should be recalled that the Court has acknowledged such a right exists as long as it is guaranteed at the national level. If there is no general refusal (but instead at least a partial recognition) by the Court the final solution should be found by methods of interpretation, hence the need for (further) interpretation of Article 1 of Protocol No. 1. Consequently, any interpretation would have to follow the *Demir and Baykara* approach. Applying this approach to the present case would lead, as it has been demonstrated above, to the conclusion that the material scope of this provision includes the right to social security in general and the right to invalidity benefits in particular.
- 43 Generally speaking, this approach would allow the Court to find a more convincing solution to the present case. Indeed, applying this approach would prevent the reasoning from being criticised (as was done by the dissenting judges in respect of the majority's Chamber judgment) to have departed from existing case-law without openly acknowledging it. Moreover, it would be in line with the general interpretation principles developed or reinforced by the Court in *Demir and Baykara*.
- 44 Most importantly, the time appears ripe to strike a fair balance between 'rich' people whose property rights (such as real estate or the like) are normally protected under Article 1 of Protocol No. 1 on the one hand, and working people on the other hand who often only have 'social security' rights for which they have normally contributed throughout their professional life as workers. Even if they had not contributed to a specific branch of social security, this would mean - at least in the case of the (in particular work related) invalidity or disability - that they have lost (at least part of) their ability to work and respective income without having been effectively protected against such risks or without getting back their normal health status. In order to ensure at least such a financial protection, the interpretation outlined in this submission would offer a sound legal basis for such a new approach.

## Conclusions

- 45 Based on the *Demir and Baykara* approach, it has been demonstrated that the material scope of Article 1 Protocol No. 1 should include the right to social security in general and the right to invalidity benefits in particular.
- 46 If this approach were to be adopted by the Grand Chamber, it would still have to be considered whether the further conditions of Article 1 Protocol No. 1 have been fulfilled before eventually arriving at the conclusion that this provision has been violated. In this respect, it would appear that the reasoning in the Chamber judgment<sup>73</sup> is convincing.

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<sup>72</sup> ECtHR 16.9.2014, No. 58171/09, *Szkórits / Hungary*, § 36.

<sup>73</sup> See §§ 40 ff. of the Chamber judgment.