

**Application no. 78117/13  
CASE OF FÁBIÁN against HUNGARY**

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

(20/09/2016)

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## **Introduction**

- 1 Referring to the President's decision to grant leave for a third party intervention the ETUC would like to start its observations by highlighting that it considers the right to social security as fundamental social right of special importance. In particular, there should be no discrimination in attributing benefits to different categories of insured persons.
- 2 In relation to the present case the Court, in its Chamber judgment of 15 December 2015, unanimously held that there had been a violation of Article 14 (prohibition of discrimination) of the Convention in conjunction with Article 1 (protection of property) of Protocol No. 1 to the Convention. The Chamber found in particular that the difference in treatment between publicly and privately employed retirees on the one hand, and between various categories of civil servants on the other hand, as regards their continued entitlement to receive an old-age pension, had not been objectively and reasonably justified. However, on 2 May 2016 the Grand

Chamber Panel accepted the Hungarian Government's request that the case be referred to the Grand Chamber.<sup>1</sup>

- 3 In its observations, the ETUC will follow the line of reasoning in the Chamber's judgment trying to demonstrate that it was fully consistent with the Court's case law. In order to avoid repetition, it will limit its comments mainly to those elements which have not yet been taken into account.

### **Additional information**

- 4 The challenged measure is the prohibition of a double allotment of remuneration and pensions (Article 83/C of the Pension Act, inserted by Act CCVIII of 2012 - the 'relevant provision'). To this newly introduced rule only narrow exceptions were allowed (but still under strict procedural conditions) in the area of public education and health care service, where the active workers are above retirement age in large proportions and the retirement of those covered by the law would have caused dramatic problems in the provision of services.
- 5 The challenged measure was a part of a broader package of measures targeting budget savings which was labelled as 'decreasing bureaucracy'. Additionally, to the challenged measure, these contained:
- (1) the introduction of mandatory retirement upon reaching pension age in public employment (except university professors and researchers),
  - (2) the prohibition to replace public servants working at institutions under ministerial control who have chosen pensions and terminated their employment (under this latter prohibition certain exceptions were permitted),
  - (3) the abolishment of early retirement and restriction of the rights of those combining work with early pension.

### ***On the impact of the relevant provision***

- 6 These measures have consequences in several respects. Concerning the number of **persons** affected, the government originally expected to affect 22.000 persons<sup>2</sup> for whom it would not be worth to continue working and who would apply for the old-age pension. However, the impact in practice appears to be much more limited with regard to the numerous exceptions. There is no data available regarding the number of those opting for pension and not replaced. On another account only 4,330 persons affected by the legislative amendment continued working while suspending their pension.<sup>3</sup> This has to be seen against the overall background of the total number of pensioners which, in 2015, amounted to 2,017,609 persons, consisting of 1,876,770 old age pensioners having reached the pension age plus 4,576 armed forces retirees (born before 1955) and 136,263 female pensioners (based on 40 year of service).
- 7 As regards the **financial consequences**, the former Minister of Economy (today President of the National Bank) announced these measures in October 2012 as a part of HUF 400 billion restriction package. The expected total gains (savings) from the measures on public employment and pension restrictions (see above para. 5) were announced at about 20 billion HUF.<sup>4</sup> Retaining by necessity public employees working in public education or health care (and

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<sup>1</sup> See press release ECHR 150 (2016) 03.05.2016.

<sup>2</sup> [http://hvg.hu/gazdasag/20121010\\_Nyugdij\\_vagy\\_fizetes\\_a\\_62\\_ev\\_alattiakra](http://hvg.hu/gazdasag/20121010_Nyugdij_vagy_fizetes_a_62_ev_alattiakra), also see: [http://hvg.hu/gazdasag/20121005\\_Matolcsy\\_csomag\\_bejelentes](http://hvg.hu/gazdasag/20121005_Matolcsy_csomag_bejelentes) ('Matolcsy package announcement').

<sup>3</sup> See below para. 8.

<sup>4</sup> See previous footnote.

supplementing their salary in order to compensate for the lost pension<sup>5</sup>) as well as the exceptions further reduced the proclaimed gains.

- 8 The only available data is on savings from suspended pensions.<sup>6</sup> At their peak the amount was HUF 800 million, from the suspension of 4,330 pensions. (The wage-supplement paid to those continuing work under special permission decreases this amount.) No data has been published on vacated jobs and the respective savings. Some conclusion might be drawn from the fact of a slight increase in the number of old age pensioners in 2014 (101.8%) compared to 2013, however, this was followed by a decrease in 2015 (98.4%) compared to 2014.<sup>7</sup>

### *On new developments*

- 9 In April 2013, the Ombudsman ('Commissioner of Fundamental Rights') had submitted an action to the Constitutional Court initiating the invalidation of the relevant provision claiming its unconstitutionality based on the violation of the right to property – pension expectations earned by payment – and also of prohibition of discrimination. However, this case has not been decided yet although it has been dealt with two times in spring of 2015: once in a panel session, once in a full Court's session. The fact that no decision has been made public for more than three years is very exceptional.
- 10 Moreover, in December 2015 a legislative proposal was introduced at the Parliament by a Member of Parliament (non-governmental side) aiming at abolishing the relevant provision with effect from April 1, 2016. Although it is still pending the Government has introduced an (opposite) amendment of the relevant having entered into force on July 1, 2016. (see below para. 14)
- 11 These two elements demonstrate that the relevant provision continues to be disputed at national level.

## **Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1**

- 12 In the case at hand it is not disputed that
- the case falls in the ambit of Article 1 of Protocol No. 1,
  - the difference is based on 'any other status' and that
  - there is a legitimate aim for the relevant provision.

Therefore, the main question remains whether the discrimination is justified. Two main elements were considered by the Chamber to which the following additional arguments are adduced.

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<sup>5</sup> While these persons also constituted a part of the total 4,330 (see above, in para. 6) suspending pension.

<sup>6</sup> Suspended pensions mid-2013 through 2015 (A munkaviszony miatt szüneteltetett nyugdíjak 2013 közepe és 2015 vége között) Infogram, charts & infographics, 15/9/2016.

<sup>7</sup> Central Statistical Office (KSH), *Pensions and other benefits*, October 2014, <https://www.ksh.hu/docs/hun/xftp/idoszaki/regiok/orsz/nyugdij/nyugdij14.pdf>, p. 11, KSH, *Pensions and other benefits*, January 2016, <https://www.ksh.hu/docs/hun/xftp/idoszaki/regiok/orsz/nyugdij/nyugdij15.pdf>, p. 7.

### *Comparison public to public sector*

13 The Court was not yet in the position to take account of the further developments in the legislation. Indeed, as from 1 July 2016, a new Social Security Act<sup>8</sup> entered into force. In its Article 5,<sup>9</sup> para. (1) it defines an 'insured person' by enumerating the entitling legal relationships in its sub-paragraphs a) to k). Specifically, sub-paragraph a) defines the concept of the 'employment relationship' in the following terms:

(1) For the purposes of this Act insured persons are:

a) persons engaged in employment under contract (including Members of Parliament and spokesmen for the nationality) whether in the private or in the public sector (civil service officials, public officials, government officials, State officials, judges and law enforcement employees, employees of public prosecution), registered foster carers, persons engaged in employment under scholarship agreement or in public benefit employment, professional staff members of the Hungarian Armed Forces, law enforcement agencies, the Parliament Guard, civilian national security services, the National Tax and Customs Authority [Nemzeti Adó- és Vámhivatal], members of the Independent Police Complaints Board [Független Rendészeti Panasztestület], and contracted members of the Hungarian Armed Forces, volunteer reservists (hereinafter referred to as "employment relationship"), irrespective of whether full-time or part-time employment; ...

14 In Act LXXXI of 1997 on Social Security Pension Benefits (SSPB), the relevant provision for the case at hand, Article 83/C, para. (1), has been amended and, now, reads as follows:

Section 83/C

(1) Payment of old-age pension benefits shall be suspended from the first day of the month following the month of entering into a civil service relationship, government service relationship, State service relationship, employment relationship as an executive government official, public service relationship, judge's service relationship, service relationship in the judiciary, service relationship in the prosecution service, professional service relationship provided for in the Act on the Service Relation of the Professional Staff Members of Law Enforcement Bodies and Organizations, or service relationship of professional and commissioned members of the Hungarian Armed Forces, until the last day of the month when the relationship is terminated.

15 The comparison between the two provisions shows that there are groups who are in public service under 5(1)(a) of the Social Security Act but are not listed in Article 83/C(1). The difference therefore not only concerned (elected) ministers and mayors but also other groups. For example, there is further a differential treatment within public service concerning Parliamentary Members who are also exempted, although they are also 'employees'.<sup>10</sup>

16 Additionally, even admitting that this change in legislation would not have substantially increased the number of persons affected and that these amendments were introduced mainly for the purpose of adaptation with the new social security framework these new formulations in the personal scope show at least an uncertainty as to the coverage and therefore increase the argument for a difference (and finally unjustified discrimination) within the public sector.

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<sup>8</sup> See Section 32 of Act LXIV of 2016, effective as of 1 July 2016; translation by the COMPLEX database of Hungarian law.

<sup>9</sup> Article 5 also enumerates a few exceptional cases (e.g. parental leave, contract for buying service period, study periods in some cases) besides legal relationships aimed at gainful activity counted as 'service period'.

<sup>10</sup> For reasons of clarity it should be noted that is not related to the 2016 amendment of Article 83/C(1).

### *Comparison public to private sector*

- 17 Quite rightly, the Chamber judgment compared additionally the given situation with the situation in the private sector under several different angles and concluded that the different treatment was not justified.

### **No basic difference between private and public old-age pension systems**

- 18 In relation to the Chamber's judgment, there is an additional fundamental reason why the difference between the public and private sector is not justified. Indeed, there is no basic difference between the two systems. That means that during work, everyone is covered by the public pension insurance, he/she and the employer are obliged to pay the contribution, the general pension age as well as the length of service entitling to pension are the same as a standard for both categories (public and private sector). This is demonstrated by the relevant legislation. As quoted above (see para. 13) Article 5(1)(a) of the Social Security Act defines the concept of the 'employment relationship', as the main, broadest and general category, without any distinction between public and private sector employment. It is therefore more than justified that the Chamber judgment compared the (differential) treatment between public and private system.

### **Legislation in Council of Europe Member States on accumulation of remuneration and old-age pension benefits**

- 19 Additionally, and equally important, this element has to be taken into account when looking at the legislation in other Council of Europe (CoE) Member States (MS). Such an approach is required by the Grand Chamber's *Demir and Baykara* concluding that<sup>11</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]

- 20 According to this approach, there is a vast majority of countries which allow the accumulation of old-age pensions and earnings. Out of the 47 CoE MS data is available for 44 MS.<sup>12</sup> For the 28 EU Member States and the three EFTA MS as well as Switzerland the comparative tables provided by MISSOC<sup>13</sup> and for 12 CoE MS the comparative tables provided by MISSCEO<sup>14</sup> offer a sound basis for assessing the situation.

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<sup>11</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>12</sup> Data is not available for Andorra, Monaco and San Marino.

<sup>13</sup> Description: <http://www.missoc.org/>; comparative tables (latest update 01/01/2016): <http://www.missoc.org/MISSOC/INFORMATIONBASE/COMPARATIVETABLES/MISSOCDATABASE/comparativeTableSearch.jsp>.

<sup>14</sup> Description and link to the comparative tables (latest edition 01/01/2015): <http://www.coe.int/en/web/turin-european-social-charter/missceo-comparative-tables>.

21 The comparative tables in MISSOC and MISSEO show that 34 CoE MS **allow, in principle, the accumulation** of old-age benefits **with earnings** from an employment relationship in the private sector.<sup>15</sup> Indeed there are 26 countries examined in MISSOC (24 EU MS and 2 others):

1. *Austria,*
2. *Belgium,*
3. *Bulgaria,*
4. *Croatia,*
5. *Cyprus,*
6. *Czech Republic,*
7. *Estonia,*
8. *Finland,*
9. *France,*
10. *Germany,*
11. *Greece,*
12. *Hungary,*
13. *Ireland,*
14. *Italy,*
15. *Latvia,*
16. *Liechtenstein,*
17. *Lithuania,*
18. *Luxembourg,*
19. *Norway,*
20. *Poland,*
21. *Portugal,*
22. *Romania,*
23. *Slovakia,*
24. *Sweden,*
25. *Switzerland,*
26. *United Kingdom;*

and eight further countries analysed in MISSCEO:

1. *Armenia,*
2. *Azerbaijan,*
3. *Georgia,*
4. *Montenegro,*
5. *Republic of Moldova,*
6. *Russian Federation,*
7. *Serbia,*
8. *Ukraine.*

22 To these 34 one might add the further five countries which **allow at least some accumulation**, three of which are examined in MISSOC (2 EU MS and 1 other country):<sup>16</sup>

1. *Denmark:* Social Pension (Folkepension): The basic amount (grundbeløb) depends on the income gained from the pensioner's professional activity. Reduced by 30% of earnings in excess of DKK 310,000 (€41,541) per year.
2. *Iceland:* National pension (lífeyrir almannatrygginga): It is possible to combine receipt of a pension with earnings from work. The flat-rate pension amount is reduced or withdrawn if the annual income criterion exceeds a certain amount.

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<sup>15</sup> It should be noted that these rules do not necessarily apply to the case of pre-retirement arrangements (sometimes even the contrary) thus strengthening the argument that the two systems are based on the same principles (see para. 13 above).

<sup>16</sup> The following formulations are quotations from MISSOC and MISSEO.

3. *Malta*: Persons born before 1st January 1952 can receive their pension when reaching the statutory retirement age and can continue working irrespective of earnings. Persons born on or after 1st January 1952 cannot work and receive early pension until reaching statutory retirement age, after which they can do so without limit on earnings.

and two further countries analysed in MISSCEO:

4. *Bosnia and Herzegovina*: Federation of BiH - The pension is suspended to the beneficiaries entitled to a pension before 40 years of insurance record or 65 years of age, as well as to the disability and survivors' pension beneficiaries, who receive earning from employment or start to perform business regulated by the law. The pension is suspended for the period until beneficiary reaches 40 years of insurance record or 65 years of age. Republic of Srpska No special provisions
5. *Turkey*: Civil Servants first insured before 01.10.2008: If a pensioner begins to work again in any organization subject to pension fund rules or in the private sector, the pension ceases to be paid until retirement from this new occupation Civil Servants first insured after 01.10.2008: Same systems as workers. Workers first insured before 01.10.2008: If an insured person restart work and submits a request in writing, payment of pension will not be suspended. However, a specific contribution of 30% called 'Social Security Support Contribution' will be deducted from his/her salary. In the event of employment of a retired person, who is receiving pension payment from the system, social security support premiums must be paid to the Institution (The rate is %30). Workers first insured after 01.10.2008: If an insured person restart work, the pension is suspended.

23 Only five CoE MS **prohibit any sort of accumulation** three of which are examined in MISSOC (3 EU MS):

1. *Spain*: For those in full retirement: The payment of the pension is suspended if a paid professional activity is pursued when activity gives rise to inclusion in any of the Social Security Schemes.
2. *The Netherlands*: No accumulation
3. *Slovenia*: Except in case of partial pension (delna pokojnina) (see above "Partial pension"), if an insured person enters into an employment relationship or engages in self-employed activities or fulfils any other condition to participate in insurance, the pension is not paid. A retired person may continue to receive a pension while working on the basis of another legal relationship.<sup>17</sup>

and the two others by MISSCEO:

4. *Albania*: The old age pension shall be suspended during periods of employment or other economic activity. However, during a transitional period (to which no limit has currently been set) the Council of Ministers may allow those engaged in the private sector to continue to receive their monthly pension while still paying contributions for periods during which they are engaged in an economic activity
5. *The Former Yugoslav Republic of Macedonia*: Old age pension is suspended if a person receives earnings from employment/self-employment, the only exception being earnings from temporary non-labour relations contracts (e.g. contracts for services) The person (including self-employed persons) can continue to work after fulfilling the conditions for the old age pension but is not entitled to pension during this period. Increased period of employment may result in increased pension amount, which takes into account insurance period accrued after retirement and the reference earnings.

24 In **conclusion**, out of the 44 CoE MS examined only five MS are clearly prohibiting accumulation of old-age pensions with earnings. It may be deduced that the vast majority of

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<sup>17</sup> This last sentence appears to allow some work but probably not in an employment relationship (see first sentence). That is why it has been considered as prohibiting the accumulation of pensions and earnings.

the CoE MS acknowledge the need for a protection of the property rights of the insured persons who have acquired their pension rights and - for whatsoever reasons - wish to continue (to enjoy) their (right to) work.

- 25 Nevertheless, this result might appear to be in sharp contrast with the Government's argument that in 15 OECD countries the same prohibition of simultaneous disimbursement as introduced in Hungary would apply. However, only those countries can be counted that have also the system of (shared) contributions from public employers and public employees/civil servants. Instead, all other countries which are based on no contributions from civil servants (like for example Germany) but only on budgetary means may not be calculated when searching to find comparator for the Hungarian situation. Moreover, it would have to be assessed whether the countries (still) concerned are European or Non-European OECD member countries like Australia, Canada, Japan and the United States. Summing up, it appears very questionable whether this information taken from the OECD is responding to the situation at hand.

### ***No alternative behaviour required***

- 26 It should be noted that the legislation is requiring from the right-holders that they waive either of their rights (old-age pension with right to benefits and employment with right to remuneration). *Mutatis mutandis*, this would appear to be in contrast with the Grand Chamber's judgment in the case *Andrejeva v. Latvia*:

1. Lastly, the Court cannot accept the Government's argument that it would be sufficient for the applicant to become a naturalised Latvian citizen in order to receive the full amount of the pension claimed. The prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant's personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise in dismissing the victim's claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by acquiring a nationality – would render Article 14 devoid of substance.<sup>18</sup>

### **Article 1 of Protocol No. 1**

- 27 The Chamber judgment left the question of a possible violation of Article 1 of Protocol No. 1 open because it had already found a violation of Article 14 of the Convention in conjunction with this article. In this respect, the ETUC would like to refer to its Observations in the case of *Bélané Nagy v Hungary*.<sup>19</sup> Moreover, the trend to guarantee the fundamental right to social security in national constitutions is becoming more and more widespread. Indeed, the most recent ILO study confirms that the majority of constitutions analysed in this study has at least a reference to social security rights.<sup>20</sup> Therefore, any restriction to this right should be accurately justified.

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<sup>18</sup> *CASE OF ANDREJEVA v. LATVIA* (Application no. 55707/00) 18 February 2009

<sup>19</sup> *CASE OF BÉLÁNÉ NAGY v. HUNGARY* (Application no. 53080/13) – Submission by the European Trade Union Confederation (ETUC) under Rule 44(5)

<sup>20</sup> *The right to social security in the constitutions of the world: broadening the moral and legal space for social justice*. ILO Global Study, Volume 1: Europe. The right to social security in the Constitutions of Belgium, Bulgaria, Czech Republic, Republic of Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Republic of Latvia, Republic of Lithuania, Netherlands, Republic of Poland, Romania, Russian Federation, Slovak Republic, Slovenia, Spain, Sweden, Ukraine, United Kingdom / International Labour Office – Geneva: ILO, 2016, p. 2.



## Conclusions

- 28 The core of the case at hand is whether workers can be deprived of their 'property' which they have accumulated during all their working life by paying contributions to the social security systems (in particular in relation to old-age pensions). The Court has now the opportunity to strengthen those rights of individual workers against States' objectives not to have to pay the respective benefits in particular in cases in which there is an unjustified discrimination in relation to other groups who continue to receive their benefits even if they continue to work after having reached the retirement age.
- 29 In the ETUC's view, the Chamber judgment should be upheld according to which there has been a violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1.