

**Application no. 43885/13**  
***Mircea POP against Romania***

**Submission**

**by**

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

**Introduction**

1. The European Trade Union Confederation (ETUC) represents the interests of workers at European level. Founded in 1973, it now represents 85 trade union organisations in 36 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 regards the right to life in general and, specifically the right to safety and health at work as one of the most important human rights. It is absolutely essential that lives are not put at risk and in particular not in the workplace. These issues are of grave concern to the ETUC which represents thousands of workers in potentially similar situations. The ETUC is concerned that states will not sufficiently protect workers' lives in potentially dangerous situations in the workplace.
3. The ETUC is aware of the fact that the Court has focussed its question to the parties on the procedural limb of Article 2 of the Convention. However, in the light of the close relationship between Article 2 and the right to private life under Article 8 of the Convention, the ETUC is of the opinion that the solution of this case should also be assessed against the responsibilities of the respondent State concerning the necessary protection of workers in relation to safety and health at the workplace.
4. This necessary background has been confirmed by the Court's recent judgment in the case *Vilnes v. Norway* (Judgment 5 December 2013 - Application no. 52806/09 and 22703/10) when the Court examined Articles 2 and 8 of the Convention at the same time (see for the general principles paras. 219 and 220).

5. On the other hand, the ETUC is also aware of the most recent judgment in the case *Binişan v. Romania*<sup>1</sup> in which the Third Section has found a violation of the responding State in relation to a negligence of a national railway company with no effective investigation into who was liable for the accident. In describing the 'Relevant Domestic Law' the Court refers to the material national legislation on safety and health<sup>2</sup>. In the present case, it therefore appears also justified, if not necessary, to clarify the relevant safety and health legislation, in particular in its international dimension.

## **Right to Life in relation to safety and health at work**

### ***General principles***

6. It will be recalled that the Grand Chamber has specifically drawn attention to the importance of international law in the interpretation of the European Convention on Human Rights (Convention):

The 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.<sup>3</sup> (Emphasis added)

7. Referring also to para. 5 above the ETUC will therefore describe the relevant safety and health background from a mainly international perspective. It will not, however, deal with all the provisions in international instruments recognising and securing the right to life because it is particularly relevant in relation to protection at the workplace.

### ***Relevant Domestic Law (Right to safety and health at the workplace)***

8. The Romanian Constitution guarantees the 'Right to life' and to 'Labour and social protection of labour' in the following terms<sup>4</sup>

#### **ARTICLE 22**

(1) The right to life, as well as the right to physical and mental integrity of person are guaranteed.

#### **ARTICLE 41**

(2) All employees have the right to measures of social protection. These concern employees' safety and health, working conditions for women and young people, the setting up of a minimum gross salary per economy, weekends, paid rest leave, work performed under difficult and special conditions, as well as other specific conditions, as stipulated by the law.

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<sup>1</sup> Judgment 20 May 2014 - Application no. 39438/05

<sup>2</sup> see paras. 44 to 46, referring to Order no. 26 of 11 January 2000 which sets out 'the health and safety regulations for the rail transport industry'

<sup>3</sup> *Demir and Baykara v Turkey* [2008] ECHR 1345, para 85.

<sup>4</sup> For the quotations of the Constitution see [http://www.cdep.ro/pls/dic/site.page?den=act2\\_2&par1=2#t2c2s0a41](http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=2#t2c2s0a41); see also Articles 34 (Right to protection of health) and 35 (Right to a healthy environment).

9. General legislative provisions are contained in the Labour Code. Its 2003 version includes the following general provisions:<sup>5</sup>

**Article 171.**

- (1) The employer shall take all the necessary steps to protect the employees' lives and health.
- (2) The employer must ensure the employees' safety and health in all work-related aspects.
- (3) If an employer turns to outside persons or services, this shall not exonerate him from liability in this domain.
- (4) The employees' obligations as regards labour safety and health shall not affect the employer's liability.
- (5) The steps concerning labour safety and health shall, by no means, cause financial obligations to the employees.

**Article 172.**

- (1) The provisions of the present title shall be completed by the provisions of the special law, the applicable collective labour contracts, as well as by the labour safety norms and regulations.

10. Concerning Occupational Safety and Health (OSH) legislation it is important to note that the relevant problem arose before the entry into force of the accession of Romania to the EU.<sup>6</sup> Therefore, EU safety and health legislation as well as framework law (Law no 319/2006 on safety and health of workers at work, entering into force according to Article 53(1) on 1 October 2006) did not yet apply. According to its Article 53(2) it appears that the following legislation was repealed by this framework law:

- Law no 90/1996 on labour protection (republished and amended)
- Decree of the Council of State no 400/1981 on setting up regulations regarding the operation and maintenance of installations, equipment and machinery, the reinforcement of order and discipline at workplace in undertakings with a sustained work activity or which operate with installations with a high level of danger

Therefore it appears that this (now repealed) legislation was in force at the time of the accident of the applicant's son.

11. In conclusion, Article 171(1) of the Labour Code expressly obliged the employer to 'take all the necessary steps to protect the employees' lives and health' and clarified in para. (4) that '[t]he employees' obligations as regards labour safety and health shall not affect the employer's liability.'

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<sup>5</sup> <http://www.cdep.ro/legislatie/eng/vol58eng.pdf>; they have been republished in 2011 <http://www.ilo.org/dyn/travail/docs/1530/Labour%20Code%20-%20last%20version.pdf> (now Article 175 and 176(1)).

<sup>6</sup> See Official Journal of the European Union L 157/10 21.6.2005

## ***Relevant International Law and Practice (Right to safety and health at the workplace)***

12. The following observations are devoted to the description of 'Relevant International Law and Practice'.

### **The UN: in particular International Covenant on Economic, Social and Cultural Rights (ICESCR)**

13. From the outset, it should be noted that Romania has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides for a right to safe and healthy working conditions:

#### **Article 7**

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

...

(b) Safe and healthy working conditions;

...

14. According to the *Demir and Baykara* judgment (see above para. 6) it would appear necessary to take into account not only this element of international law as such but also the "interpretation of such elements by competent organs" which is the Committee on Economic, Social and Cultural Rights (CESCR). Although this Committee has not yet published a 'General Comment' on this article it interprets the right guaranteed in Article 7 ICESCR referring also to ILO instruments and jurisprudence, for example:

The Committee expresses its concern over the relatively high number of workplace accidents and the absence of an effective regulatory framework for occupational health and safety, despite the reinstatement of the National Workforce Safety and Health Council in 2008 and the preparation of draft regulations for the implementation of International Labour Organization (ILO) **Convention No. 184** (2001) concerning Safety and Health in Agriculture;<sup>7</sup> The Committee also encourages the State party to consider ratifying the ... **ILO Convention No. 187** (2006) concerning the promotional framework for occupational safety and health;<sup>8</sup>

The Committee urges the state party to continue its efforts to **bring its legislation on occupational safety and health in line with international standards**, including the **ILO Convention no. 167** concerning safety and health in construction, which the state party has ratified;<sup>9</sup>

[The Committee] also recommends the State party to consider ratifying ILO Convention No. 155 (1981) on Occupational Safety and Health and the Working Environment and its accompanying protocol, as well as Convention No. 176 (1995) on Safety and Health in Mines;<sup>10</sup>

The Committee draws the attention of the State party to the concern expressed by the **Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization (ILO)** regarding the transfer to local health units of the functions of the labour

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<sup>7</sup> Concluding Observations 1 December 2010 - E/C.12/URY/CO/3-4 (Uruguay), para. 11

<sup>8</sup> *Ibid.* Para. 32

<sup>9</sup> Concluding Observations 7 June 2010 - E/C.12/KAZ/CO/1 (Kazakhstan), para. 21

<sup>10</sup> Concluding Observations, 16 December 2009 - E/C.12/COD/CO/4 (Democratic Republic of the Congo), para. 22

inspectorate with regard to prevention and occupational safety and health. The Committee is concerned that such transfer may create a problem of coordination.<sup>11</sup> The Committee is alarmed by the high rate of accidents in the workplace and draws the attention of the State party to the concern expressed by the **ILO Committee of Experts** which has repeatedly drawn the Government's attention to the need to adopt legal regulations and policies on the prevention of accidents in the workplace, and in particular in the ports.<sup>12</sup> The Committee calls upon the State party to **implement the recommendations made by the ILO Committee of Experts** concerning the decentralization of labour inspection.<sup>13</sup> The Committee calls upon the State party to take effective measures to ensure that workers enjoy safe working conditions. In particular, the Committee recommends that the State party adopt measures, including legislation, on the prevention of accidents, particularly in the ports, and ratify the ILO Occupational Safety and Health (Dock Work) **Convention**, 1979 (**No. 152**). The Committee also recommends that the State party ratify the Prevention of Major Industrial Accidents **Convention**, 1993 (**No. 174**) and the Part-time Work Convention, 1994 (No. 175).<sup>14</sup>

15. Concerning Romania the Government's report (dated 15 November 2011) will be examined by a Pre-Sessional Working Group starting in May 2014. However, this report does not contain extensive information on safety and health at work. The respective references read as follows:

77. The employer is required to ensure health and safety of employees in all aspects of employment as Law No. 53/2003 on the Labour Code provides in article 171. Whereas article 176 states that employers shall organize vocational training in the field of health and safety.

78. Employers must provide employees access to the services of industrial health, as stipulated in article 182 of Law No. 53/2003.

79. Article 37 of Law No. 188/1999, republished with subsequent modifications, provides that public authorities and institutions have the obligation to ensure public servants normal working and hygiene conditions, such as to protect their health, as well as their physical and mental integrity.

### **The ILO: in particular ILO Conventions No. 155 and 187**

16. The most relevant ILO Conventions concerning health and safety at work have not been ratified by Romania:

- ILO Convention No. 155 concerning Occupational Safety and Health Convention, 1981,
- ILO Convention No. 187 concerning the promotional framework for occupational safety and health, 2006,

Instead, besides some 'technical' OSH Conventions like the Benzene Convention (No. 136) Romania has ratified the important Labour Inspection Convention, 1947 (No. 81).

17. Nevertheless, on the basis of the *Demir and Baykara* judgment<sup>15</sup> it will be recalled that the Committee of Experts on the Application of Conventions and Recommendations (CEACR) has

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<sup>11</sup> Concluding Observations 23 May 2000 - E/C.12/1/ADD.43 (Italy), para. 11

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

<sup>13</sup> *Ibid.* para. 24

<sup>14</sup> *Ibid.* para. 25

<sup>15</sup> See *Demir and Baykara* judgment, note 3

developed a long-standing jurisprudence on safety and health standards. Its main principles have been compiled in a recent 'General Survey'<sup>16</sup>:

100. The General Survey on labour inspection also underscores the crucial importance of providing labour inspectorates with the necessary material and human resources to ensure that they can function effectively and that, as a minimum, the workplaces under their supervision are inspected thoroughly and with sufficient frequency.

103. As emphasized in the General Survey of 2006 on labour inspection, it is essential for the credibility and effectiveness of regulatory systems that types of violations and related penalties be defined in the national legislation in proportion to the nature and gravity of the offence. In similar terms to the relevant provisions in Conventions Nos 81 and 129, Article 9, paragraph 2, of Convention No. 155 states that the enforcement system shall provide for adequate penalties for violations of the laws and regulations. As discussed during the preparatory work, the terms "penalties" in English and "sanctions" in French were considered to be synonymous and were intended to cover penal, administrative and contractual penalties, but not prohibition notices.

### **The Council of Europe: in particular Revised European Social Charter (RESC)**

18. Romania has ratified the Revised European Social Charter (RESC) and accepted paras. 1 to 3 of the relevant Article 3 ('The right to safe and healthy working conditions')<sup>17</sup>; the relevant provisions read as follows:

#### **Article 3 – The right to safe and healthy working conditions**

With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and workers' organisations:

1 to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment;

2 to issue safety and health regulations;

3 to provide for the enforcement of such regulations by measures of supervision;

19. The European Committee of Social Rights (ECSR) has developed a jurisprudence compiled in the 'Digest 2008' also concerning Article 3. In relation to para. 1 the Committee requires in particular:

#### **General objective of national policy**

The main policy objective must be to foster and preserve an culture of prevention in the areas of health and safety at national level. Occupational risk prevention must be a priority. It must be incorporated into the public authorities' activities at all levels and form part of other public policies (on employment, persons with disabilities, equal opportunities, etc.).<sup>74</sup>

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<sup>16</sup> International Labour Conference, 98th Session, 2009, Report III (Part 1B), General Survey concerning the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Safety and Health Recommendation, 1981 (No. 164), and the Protocol of 2002 to the Occupational Safety and Health Convention, 1981

<sup>17</sup> It has not accepted para. 4 ('to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions.')

The policy and strategies adopted must be regularly assessed and reviewed, particularly in the light of changing risks.<sup>18</sup>

### **Organisation of occupational risk prevention**

A culture of prevention implies that all the partners – authorities, employers and workers – will be actively involved in occupational risk prevention, working within a well-defined framework of rights and duties and predetermined structures.

The main aspects are:

– at company level: besides compliance with protective rules, the assessment of work-related risks and the adoption of preventive measures geared to the nature of risks as well as information and training for workers.<sup>19</sup>

20. Romania has been examined by the ECSR four times (in 2003, 2007, 2009 and most recently in 2013). Since the reference period for examination in Conclusions 2007 covers period of 01/01/2001 - 12/31/2004, the relevant period for the present case (October 2005) has been examined by the ECSR in Conclusions 2009 (covering the period 01/01/2005 - 12/31/2007 concluding negatively on all three provisions:

The Committee concludes that the situation in Romania is not in conformity with Article 3§1 of the Revised Charter on the ground that it has not been established that the national policy on health and safety includes training, information, quality assurance and research in a satisfactory manner.

The Committee concludes that the situation in Romania is not in conformity with Article 3§2 of the Revised Charter on the ground that domestic workers are not covered by occupational health and safety regulations.<sup>20</sup>

The Committee concludes that the situation in Romania is not in conformity with Article 3§3 of the Revised Charter on the ground that it has not been established that statistics on occupational accidents are reliable.

21. In the previous supervision cycle (Conclusions 2003), the ECSR had evaluated concerning the previous situation under Article 3§2 RESC as follows:

Article 3§2 of the Revised European Social Charter re-states the provisions which appeared under Article 3§1 of the 1961 Social Charter; it adds to these provisions the obligation to consult employers' and workers' organisations. Therefore, the Committee repeats the interpretation it had given under the old Article 3§1.

The Committee takes note of the information in the Romanian report.

Regulations on safety and health at work

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<sup>18</sup> Council of Europe (ed.), Digest of the Case Law of the European Committee of Social Rights, 1 September 2008, p. 33

<sup>19</sup> Ibid. p. 34

<sup>20</sup> In its assessment, however, the ECSR refers to the new legislation outside the reference period ending in 2004 ("The Committee has already noted that the Safety and Health at Work Law No. 319/2006 entered into force on 1 October 2006. According to the report, it fully implements Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work."). It does therefore not assess the legislation which was in force before and which is relevant for the case at hand.

Romanian citizens' entitlement to health and safety protection is enshrined in several sections of the Constitution (sections 22.1, 33.1, 38.1 and 2 and 39.1).

The main legislation on occupational health and safety is the Labour Protection Act No. 90/1996 which is accompanied by a series of technical regulations and standards.

The Committee notes that employers' general obligations concerning health and safety preventive measures are very well developed and reflect the Charter's requirements. However, most of the risks listed in the general introduction to Conclusions XIV-2 (pp. 37-38) are not specifically covered by Romanian law. This is confirmed by the European Commission, which has stated that major efforts are required to bring Romanian regulations into line with Community health and safety legislation and put them into practice. ...

22. This demonstrates the existence of important discrepancies with international standards already at the relevant time.

### **International law in the Romanian internal legal order**

23. Finally, it would appear important to clarify to what extent Romania is bound by international treaties. As mentioned above, Romania has ratified in particular the following international treaties (date of ratification):

- International Covenant on Economic, Social and Cultural Rights (ICESCR): 3 January 1976,
- ILO Convention No. 81, Labour Inspection Convention, 1947 6 June 1973,
- Revised European Social Charter (RESC): 7 May 1999.

In assessing the respondent State's obligations the Court has attributed important weight to the fact that it is bound by international treaties dealing with the issue at stake and the competent organ's views<sup>21</sup>.

24. Moreover, the question as to legal impact in the internal order arises. Article 11 of the Romanian Constitution clarifies the relationship between 'International law and national law' as follows:

#### **ARTICLE 11**

(1) The Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to.

(2) Treaties ratified by Parliament, according to the law, are part of national law.

(3) If a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution.

25. In conclusion, Romania is not only bound in its internal legal order by the interpretation and application of Article 2 (and 8) ECHR via international standards but also directly.

## **Conclusion**

26. The right to life guaranteed by Article 2 of the Convention is closely related to the right to safe and healthy working conditions in the case of threats, risks or any other danger to workers' lives. As demonstrated, the latter right is fully recognized in international law as a fundamental human right.

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<sup>21</sup> See *Demir and Baykara* judgment, note 3, para. 166.



27. However, there are serious discrepancies which have already been highlighted in general terms by the Third Section in the *Binişan v. Romania* judgment concerning Article 2 of the Convention:

the legal system as a whole, faced with an arguable case of negligence causing almost lethal injuries, failed to provide an adequate response consonant with Romania's obligations under Article 2 of the Convention.<sup>22</sup>

28. Moreover, it should be borne in mind that the system of OSH is primarily based on prevention as a first stage activity. This first is required not only by the relevant ILO standards but also by Article 3 (1) to (3) RESC which Romania has ratified and accepted. This has failed in the case at hand. The second stage is the (actual) infringement of the right to life. This has led to the death of the applicant's son. The final and third stage is the investigation into the causes. This demonstrates that it must be taken even more seriously than perhaps in other cases. It has a sort of a compensatory function if all other elements of the protection of workers' life and health have failed.

29. The ETUC therefore believes that right to life as protected by Article 2 of the Convention has been violated in the present case.

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<sup>22</sup> See *Binişan v. Romania*, note 1, para. 90.