EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

30 September 2021

Case Document No. 6

***Unione sindacale di base –settore pubblico impiego* (USB) v. Italy**
Complaint No. 153/2017

REPLY FROM USB TO THE QUESTIONS OF THE COMMITTEE

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OBSERVATIONS

In response to your communication of 8 July 2021 concerning the complaint filed by *Unione sindacale di Base (USB) v. Italy*, Complaint No 153/2017

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We reiterate all of the submissions made in the complaint filed on 10 July 2017.

By these observations, we wish to respond briefly to the questions raised in the request for clarification made on 8 July 2021.

1. Limits applicable to fixed-term contracts – maximum number of contracts and maximum term of contracts.

As the Committee will certainly be aware (see the recent ruling in decision 146/2017 of 7 July 2021 issued in relation to the complaint filed by the Italian educational staff trade union, Anief, which was published on 19 January 2021), by adopting Article 19 of Legislative Decree no. 81 of 2015, the Italian State altered

the old regime applicable to fixed-term contracts established by Legislative Decree 368/2001, which stipulated both a maximum duration of 36 months, without any need to state objective grounds justifying the subjection of the employment relationship to a fixed term, and also that contracts should be converted into permanent contracts upon expiry of that term.

Article 19 of Legislative Decree 81/2015 has subsequently been amended on various occasions (which are too numerous even simply to be summarised in this submission). It is sufficient to point out here that, as of today, the wording of the legislation following the amendments made is as follows:

"A contract of employment may be subject to a fixed term, which may not be longer than twelve months. The contract may have a longer term, which may not under any circumstances exceed twenty-four months, only where one of the following prerequisites is met:

a) temporary and objective requirements not pertaining to ordinary operations, or the requirement to replace other workers;

b) requirements pertaining to temporary, significant and non-plannable increases in ordinary operations.

(…)

1-bis. In the event that a contract is concluded subject to a term in excess of twelve months where neither of the prerequisites set forth in paragraph 1 is met, the contract shall be transformed into a permanent contract after a period of twelve months.

2. Except insofar as specified otherwise in collective agreements, and with the exception of seasonal activities falling under Article 21(2), the duration of fixed-term employment relationships between the same employer and the same worker comprised of successive fixed-term contracts concluded in order to perform tasks of the same level and category may not exceed a total of twenty-four months, disregarding any interruptions between one contract and another. For the purposes of calculating that period, consideration shall also be given to periods on assignments involving tasks falling under the same level and legal category that are performed at the same bodies under the terms of fixed-term contracts concerning the provision of employment services. In the event that the limit of twenty-four months is exceeded by one single contract or by successive contracts, the contract shall be transformed into a permanent contract from the date on which that threshold was passed.

3. Without prejudice to the provisions of paragraph 2, a further fixed-term contract may be concluded between the same parties, with a maximum term of twelve months, at the Territorial Labour Office with competence ratione loci. In the event that the procedure described is not followed, or if the time limit stipulated

in the contract is exceeded, the contract shall be transformed into a permanent contract with effect from the date on which it was concluded.

4. With the exception of employment relations with a term not exceeding twelve days, the stipulation of a fixed term within a contract shall be void unless it is documented in writing, a copy of which must be provided by the employer to the worker within five working days of the start of work. If it is renewed, the written document shall specify the requirements provided for under paragraph 1 with reference to which it has been concluded; in the event that the contract is extended, such information is only necessary where the overall term exceeds twelve months.

5. The employer shall inform fixed-term workers and the company trade union representatives, or the unitary trade union representative, concerning any vacant positions that become available within the company, in accordance with the arrangements specified in collective contracts.

As will be apparent, although the position is now worse than it was under the previous Legislative Decree 368/2001, it appears to be substantially in line with Directive 1999/70/EU.

The problem is still that this legislation does not apply to contracts of employment concluded with public sector bodies, which continue to be governed by Article 36 of Legislative Decree 165/2001 (Consolidated Act on Public Sector Employment), which prohibits the transformation of fixed-term employment relationships into permanent relationships, even in situations involving an abuse, on the grounds that Article 87 of the Italian Constitution provides that appointments to public sector employment may only be made following the successful completion of a competition.

In particular, Article 36 provides that:

"1. The public administrations shall hire staff exclusively under permanent contracts of employment for requirements related to their ordinary operations, following the recruitment procedures provided for under Article 35.

2. ((The public administrations may conclude permanent contracts of employment, training and work experience contracts and contracts for the provision of temporary employment services and may use the flexible contractual arrangements provided for under the Civil Code and other legislation governing employment relations within companies, exclusively subject to the limits and in accordance with the arrangements stipulated for the application thereof within the public administrations. The public administrations may only conclude contracts falling under the first and second sentence of this paragraph on the basis of documented requirements that are exclusively temporary or exceptional in nature,

and in accordance with the conditions and subject to the recruitment arrangements set forth in Article 35. Fixed-term employment contracts may be concluded in accordance with Articles 19 et seq. of Legislative Decree no. 81 of 15 June 2015 notwithstanding the right of precedence, which shall only apply to staff recruited in accordance with the procedures provided for under Article 35(1)(b) of this Decree. Fixed-term contracts concerning the provision of employment services shall be governed by Articles 30 et seq. of Legislative Decree no. 81 of 15 June 2015, without prejudice to any other provisions that may be laid down in national collective labour agreements.)) It is not permitted to have recourse to contracts concerning the provision of employment services in relation to the performance of senior-level and management functions. In order to prevent instances of precarious employment, the public administrations shall, in accordance with the provisions of this Article, sign fixed-term contracts of employment with successful candidates and eligible candidates from their own ranking lists within public competitions for permanent positions. It shall be permitted to apply Article 3(61), third sentence, of Law no. 350 of 24 December 2003, without prejudice to the requirement to safeguard the position held in the ranking list by successful candidates and eligible candidates for appointment under permanent contracts. ((2-bis. The references made by Legislative Decree no. 81 of 15 June 2015 to collective agreements must be deemed to relate, as far as public administrations are concerned, to national collective agreements concluded by the ARAN.))

((3. In order to combat the misuse of flexible employment, the public administrations shall, acting on the basis of specific instructions issued by the Ministry for Simplification and the Public Administration, and after providing advance notice to the trade union organisations through its dispatch to the Joint Observatory established at the ARAN, without any new or increased burden on the public finances, draw up a detailed report concerning the types of flexible employment used, indicating the particulars of the persons appointed in accordance with applicable data protection legislation, which shall be transmitted before 31 January of each year to the assessment teams and independent assessment bodies provided for under Article 14 of Legislative Decree no. 150 of 27 October 2009 and to the Department of Public Administration of the Office of the President of the Council of Ministers, which shall draw up an annual report for Parliament.

4. The public administrations shall also include information in the report provided for under paragraph 3 above concerning the use of social utility workers.

5. The violation of mandatory provisions concerning the hiring or employment of workers by the public administrations may not under any circumstances entail the establishment of permanent employment relations with the said public administrations, without prejudice to any liability or penalties. The worker concerned shall be entitled to be compensated for the loss resulting from the fact that he or she worked in breach of mandatory provisions. The administrations are obliged to recover any amounts on this basis from the directors who are responsible in the event that the breach occurred wilfully or as a result of gross negligence. Any directors acting in breach of the provisions of this Article shall also

bear liability pursuant to Article 21 of this Decree. Consideration shall be given to such violations in the assessment of the director's performance pursuant to Article 5 of Legislative Decree no. 286 of 30 July 1999.".

5-bis. ((PARAGRAPH REPEALED BY LEGISLATIVE DECREE NO. 75 OF 25 MAY 2017)).

5-ter. ((PARAGRAPH REPEALED BY LEGISLATIVE DECREE NO. 75 OF 25 MAY 2017)).

5-quater. Any ((...)) contracts concluded in breach of this Article shall be void and shall result in liability for pecuniary losses towards the State. Any directors acting in breach of the provisions of this Article shall also bear liability pursuant to Article 21. A director who is responsible for the irregular usage of flexible work may not be paid the performance-related bonus." It follows that the public administrations (and the Court of Cassation has recently held that the legislation also applies to private companies that are ultimately under public control) are allowed to make fixed-term appointments without limitation in time, without any risk of the relationships concerned being converted into permanent relationships (as occurs in Sicily: regarding this matter we refer in detail to the submissions made in the complaint of 10 July 2017).

2. The remedies stipulated in the event of a breach of the maximum limit on the duration of fixed-term contracts.

As noted above, in the private sector, fixed-term contracts may be converted into permanent contracts in the event that the maximum limit is exceeded (or if there is no objective justification, where its existence or a reference to it is stipulated as a prerequisite) by the courts following an application by the worker.

This is not possible in the public sector. However, as noted above, Article 36 of Legislative Decree 165/2001 provides for the payment of compensation in the event that a worker is employed or works in breach of the law.

However, compensation can never be a consequence of the failure to transform a fixed-term contract into a permanent contract because, as has been repeatedly held by the Court of Cassation (see judgment no. 5072/2016 of the Joint Divisions, doc. 46 annexed to the complaint), "*the loss does not therefore consist in the loss of a permanent job, because there was never any prospect of such a job: a fixed-*

term employment relationship cannot under any circumstances be converted into a permanent employment relationship because access to public sector employment cannot occur as an effect, albeit consisting in a sanction, of a situation of illegality – rather than through a public competition" (judgment cited above, paragraph 12 of the reasons). Indeed, although the appointment had been made according to a specific public competition, [that relationship could not be converted into a permanent relationship] as the public competition had not been called for a permanent position.

In particular, according to the Court of Cassation, the harm was stated to result from the loss of opportunities which the worker had purportedly suffered due to the fact of having worked on a fixed-term basis, and consisted in the lack of any opportunity to access other jobs (for example in the private sector) as a direct consequence of the conclusion of the unlawful fixed-term contract with the public administration. The burden of proving and quantifying such losses is strictly incumbent upon the worker.

As will be readily apparent to anybody, it is absolutely impossible to furnish such proof, and in effect no court rulings have been issued by any Italian courts awarding any losses of that type to a worker affected by an abuse of fixed-term contracts, including in some cases for 10 years or more.

Under these circumstances, in the wake of the order issued by the Court of Justice (*Papalia* case, order of 12 December 2013 in Case C-50/13, see doc. 27 of the complaint), the Court of Cassation (judgment no. 5072/2016 of the Joint Divisions, cited above, see para. 63 of the complaint) ruled as follows regarding the position under Italian law:

a) It held that the time limit was the same as that applicable at that time to the private sector (according to Article 19 of Legislative Decree 81/2015, cited above), namely three years as the maximum limit on the duration of fixed-term contracts (which, moreover, following the amendments to Article 19 of Legislative Decree 81/2015 mentioned above in section 1, has been lowered to 24 months since 2018);

b) It ordered that, in the event of such an abuse, the worker is entitled to receive as damages a payment amounting to between 2.5 and 12 times the last monthly contractual remuneration, without any need for the worker to furnish proof of any loss, although without prejudice to the worker's right to demonstrate any additional loss, and to quantify that loss;

c) No compensation subject to a "relaxed" standard of proof is due for contracts concluded in breach of the objective grounds justifying the inclusion of a fixed term or in the event that a single contract is concluded, even where that contract is unlawful;

d) Such losses are rendered "moot" in the event of conversion into a permanent contract (Court of Cassation, judgment 2255222557/2016: see decision 147/2021).

As will be apparent, a de facto negligible penalty (a maximum of 12 monthly salary payments) is imposed in relation to precarious employment which, as indicated in the complaint (see paras. 50 et seq.), may in some cases have lasted for longer than 15 years.

In addition, as specified in the complaint (see paras. 65 et seq.), the case law of the Sicilian courts has continued to uphold the special nature of contracts concluded by local authorities from that region.

It should be clarified at this juncture regarding this issue that the Italian Court of Cassation has become involved since the complaint was filed (see judgment no. 25673 of 17 October 2017, **Annex 1**), altering the judgments of the Sicilian Courts of Appeal, and precarious Sicilian workers are now at least entitled to the compensation as established by the Joint Divisions of the Court of Cassation in judgment no. 5072/2016.

Paradoxically however, in many cases the effect has been that, after being ordered to pay compensation, the user body simply terminates the fixed-term relationship. An example of this is a case involving employees of the Municipality of Mazara del Vallo, whose fixed-term contracts were not renewed and who were reinstated by the Court of Marsala (**Annex 2**), although the judgment was subsequently

amended by the Palermo Court of Appeal (**Annex 3**), which has in turn been appealed against. The case is now pending before the Court of Cassation.

It should be noted that the workers from Marsala occupied stable and permanent positions within the municipal administration, and were then effectively stabilised, again paradoxically, but were subsequently left without a job and without any salary from January to December 2018, as their fixed-term contracts were not renewed for that year.

3. Stabilisation processes in recent years

The intolerable situation in recent years (the situation to which this complaint relates, the one covered by decision 147/2021 and many others addressed in various complaints still pending, see, for example, nos. 141/17, 146/17,159/18, 170/18 and 200/21) has thus forced the Italian State to intervene with yet another stabilisation initiative (following Decree-Law no. 101 and Decree-Law no. 104 of 2013, para. 40 of the complaint, providing for the possibility of stabilisation, following that previously provided for under Law no. 296 of 2006 in the wake of the judgment of the Court of Justice in *Marrosu and Sardino* – see para. 9 of the complaint – and which anticipated the provisions of Law no. 107/2015 in the schools sector following the *Mascolo* judgment of the Court of Justice, see doc. 43 of the complaint).
In fact, in 2017 Legislative Decree no. 75/2017 was approved, Article 20 of which allowed a further general stabilisation for persons who had worked for the public administrations under fixed-term contracts for more than 36 months.

The problem was – and still is – that stabilisation is entirely a matter for the discretion of the user body, as is confirmed in para. 10 of the observations submitted by the Italian State on 31 March 2018 ("*De toute évidence, cette disposition a pour objectif de favoriser le recrutement avec contrat à durée indéterminée*" [In any case, the purpose of this provision is to foster recruitment on indefinite-term contracts]) and not all Sicilian bodies have put their employment relations in order.

On the contrary, more specifically, in many cases the user body has terminated ongoing relationships and only stabilised those persons who have been "induced"

to sign a waiver regarding any losses suffered, in order not to lose their jobs (see the circumstances of workers from the Municipality of Agira, who are currently pursuing legal action: **Annex 4**).

These situations are in addition to the breaches already identified by the Committee in the decision concerning complaint 146/2017 of 7 July 2021 on schools, cited above, which make the circumstances of precarious Sicilian workers even more unbearable.

The Italian State, in particular in Sicily (to which the complaint related and relates), is thus still substantially in breach of its obligations, as set out in the complaint, and USB insists that the Committee issue a ruling to this effect.

4. The Sicilian legislation regarding which clarifications were sought in the communication of 8 July 2021

This Committee has also asked for observations concerning two regional legislative measures, specifically Article 77 of Regional Law (hereafter RL) no. 17 of 28 December 2004 and Article 5 of RL no. 24 of 29 December 2010.

It should be pointed out here that Sicily Region is a region governed by special statute, and that therefore it has the power under constitutional law to pass legislation in the area of employment and social security.

This explains the deluge of legislation, which will be referred to briefly below in section 5 of the following observations, with the aim of providing the Committee with a clearer account.

The two measures to which the request for clarification relates enact a rule that exempts contracts concluded by the regional authorities from the national legislation on fixed-term contracts (Legislative Decree 368/2001), now Legislative Decree 81/2015 which replaced it, and therefore also the provisions of Directive EU 1999/70.

USB has already referred to this issue in its complaint (paras. 50 to 53), and these provisions have in any case already been de facto disapplied by the Court of Cassation since the complaint was filed, by Court of Cassation judgment 25673/2917 (cited above) and Constitutional Court judgment no. 96/2019 which,

whilst ruling inadmissible a question concerning the constitutionality of Article 77 of RL 17/2004, clarified that European law is also directly and mandatorily applicable to Sicilian fixed-term contracts.

As mentioned above, this did not, however, solve the problem, as there are no plans for a general stabilisation of Sicilian workers (an issue which, to repeat, is left to the mere discretion of each public sector employer body), all of whom have been occupying stable and permanent positions within the user bodies for more than 15 years. Under the terms of Sicilian legislation, these positions should have previously been the object of competitions and allocated to staff hired under permanent contracts (see, for example, the Sicilian municipalities of Regalbuto, Barcellona Pozzo di Gotto and Agrigento referred to in para. 54 of the complaint).

5. Further developments in Sicilian legislation and the resulting implications for the situation to which the complaint relates

It should also be added, without, however, seeking to raise any new issues, as requested in this Committee's communication of 8 July 2021, that further legislative developments have had an effect on the precarious circumstances of Sicilian employees, which it appears to be appropriate to report to the Committee.

The Sicilian legislature has enacted regional legislation on various occasions to regulate precarious employment relations, above all since 2014. However, it has never drawn up organic legislation in order to deal with and definitively resolve the complex issue of Sicilian public sector precarious employment (long-term public sector precarious employment, which has been ongoing in Sicily since 1988 according to Article 22 of RL no. 36 of 21 September 1990: **Annex 5**, along with all of the legislation set out below).

Article 30 of RL no. 5 of 28 January 2014, which incorporated into regional law the provisions of Decree-Law no. 101/2013 (see above, section 1), repealed the entire body of previously applicable regional legislation (Article 30(6)), which had guaranteed ordinary regional contributions to Sicilian local authorities until 2013 in order to conclude fixed-term employment contracts, and instead provided in paragraph 7 for the establishment of an extraordinary fund to offset the financial

imbalances in local authorities resulting from the repeal of the previously applicable regional legislation in order to co-finance fixed-term contracts.

A new body of rules was enacted in this area by the Sicilian legislature by Articles 3 and 4 of RL no. 27 of 29 December 2016, according to which the region grants regional contributions for the purpose of extending fixed-term contracts and "socially useful activities" [ASU] (workers formally hired to perform Socially Useful Activities, who have also been appointed under fixed-term contracts by the various local authorities in order to provide training and retraining services, but who are underpaid and do not receive social security contributions, in spite of the fact that they are currently performing the tasks of ordinary workers at the bodies to which they are assigned) for the purpose of stabilising precarious employment relations. The new provision in some sense appears to anticipate Legislative Decree no. 75 of 25 May 2017 itself (see above, section 3) by introducing the principle of extending employment relations for the purpose of stabilisation; however, that principle has never been implemented by the local authorities, as employment relationships have been extended without interruption, although without any effective and definitive stabilisation.

Legislation on ASU workers was enacted once again in Article 11 of RL no. 8 of 9 May 2017, which reiterated the plans for reducing the number of Sicilian public sector precarious workers. However, it was never applied effectively and specifically owing to the lack of structural financial cover and due to the difficulties for local authorities in ensuring the economic and financial sustainability of measures to stabilise precarious employment over the short, medium and long term owing to the prevailing public finance constraints.

Another legislative provision enacted was Article 26 of RL no. 8 of 8 May 2018, which applied Legislative Decree 75/2017 in regional law, providing for an extraordinary twenty-year contribution until 2038 to local authorities that launched procedures for stabilising fixed-term workers. This financing measure, which was adopted without any specific structural financial cover, as is demonstrated by Article 26(8) as well as the complex procedure for annual disbursements, which is dependent upon ongoing changes in the regional budget, has created considerable

problems for the local authorities (in particular, for authorities experiencing financial difficulties, and in view of the multi-year financial rebalancing plan adopted). These authorities have launched and concluded the process for stabilising precarious employment relations (all part-time for 18-24 hours per week) with extremely low salaries, in all instances far lower than 1 000 euros per month.

This aspect was not altered even by Article 22 of RL no. 1 of 22 February 2019 on procedures for stabilising precarious employment relations, which left the regional co-financing method unchanged. The Sicilian legislature subsequently enacted RL no. 33 of 28 December 2020, Article 1(11)(a) of which reduced by more than 20 million euros the extraordinary fund intended to finance all measures to lift Sicilian public sector workers out of precarious employment. This provision created a number of problems for Sicilian local authorities in terms of the co-financing of employment relations, the extension for 2021 as well as the stabilisation of those employment relations.

Finally, Article 36 of RL no. 9 of 15 April 2021 was approved by the Sicilian legislature in order to address the specific issue of Sicilian ASU workers, around 4 500 in number, working in local authorities throughout the region. These also include ASU workers in the Region's Cultural Heritage Department, who for some years have been working in museums and at archaeological sites; these workers welcome visitors and act as custodians and guides at sites of regional interest and receive basic remuneration of 595 euros per month. According to Sicilian practice, following the challenge to the provision by the President of the Council of Ministers before the Constitutional Court, the applicability of the contested provision has been suspended pending a ruling by the Court.

According to that challenge, Article 36 violates Articles 3, 81(3) and 117(2)(e) and (l) and (3) of the Constitution on the "co-ordination of the public finances", and is also ultra vires in terms of the powers vested in Sicily Region under Article 14(q) of the Special Statute approved by Royal Legislative Decree no. 455 of 15 May 1946.

As regards this last aspect, it should be noted that, in para. 110 of the *Mascolo* judgment of 24 November 2014, the Court of Justice clarified that: "*110 In this connection, it should be borne in mind that, whilst budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and, therefore, cannot justify the lack of any measure preventing the misuse of successive fixed-term employment contracts as referred to in clause 5(1) of the Framework Agreement (see, by analogy, judgment in Thiele Meneses, C-220/12, EU:C:2013:683, paragraph 43 and the case-law cited)*".

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In view of the overall points set out above, it is apparent that the Italian State and Sicily Region have clearly violated the provisions of the European Social Charter and EU law on fixed-term employment relationships, having intentionally held thousands of Sicilian workers in precarious employment and for more than 20 years, and in still allowing a large number of workers to remain in such a situation.

FOR THESE REASONS

We trust that the complaint will be accepted and are willing to provide any further clarification.

Enclosures:

1. Judgment 25673/2017 of the Italian Court of Cassation
2. Judgment no. 247/2018 of the Court of Marsala
3. Judgment no. 30/2020 of the Palermo Court of Appeal
4. Application by workers from the Municipality of Agira
5. Sicilian legislation referred to in section 5 of the Observations, presented in chronological order of citation.
6. Application to the Constitutional Court challenging Article 36 of RL 9/21 Rome, 3 September 2021

Sergio Galleano