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Case Document No. 3

***Unione sindacale di base* (USB) v. Italy**
Complaint No. 170/2018

RESPONSE BY USB TO THE GOVERNMENT'S SUBMISSIONS ON THE MERITS

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OBSERVATIONS

in complaint n. 170/2018 presented by

USB, c/ **ITALIA**

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The present notes reflect the observations made on the merits by the Italian Government on 05 September 2019.

The Government observes in its notes that the cause of the contract, the clear legislative qualification, the structure, the purpose and genesis of the institution excludes its qualification as a subordinate work;

in particular it notes that "socially useful work is not a fixed-term job, but a social safety net used to avoid situations of unemployment, so that a possible renewal of the relationship, which could also be linked to the realization of a project and the possibility of using the same work energy in a different context is not abuse as a driving force for the progressive reintegration of the worker into the labor market, also thanks to an important training component [...].

In the present case the doctrine of labor law correctly spoke of a legal social security relationship which is regulated by legislation aimed at guaranteeing the rights of workers based on the provisions of the art. 38 of the Constitution; this prevents the worker who is engaged in activities with the public administrations from claiming a working relationship with these administrations and their consequent rights.

In other words, the socially useful worker, carrying out his activity for the realization of a general interest, has the right to emoluments, which

cannot be recognized as remuneration, but as has already been said that they have the nature of social security ".

The aforementioned argument appears completely inapplicable to the present case, since the complainant Organization does not in any way dispute the institution of socially useful work, where this is used in a genuine way.

This does not happen however in the cases that have been examined and in the work situations subject of the complaint, where instead the workers, under the apparent shield of an assumption for carrying out socially useful jobs (for their temporary nature) have been for several years employees to replace subordinate workers who carry out ordinary and subordinate work with user organizations.

The Italian Government claims the legitimacy of an institute which is denounced for the distorted use by the Italian public administration, with the effect of making a profit on ordinary working activities paying less and depriving them of the necessary due social security coverage.

Having said this and clarified, we must reiterate that this framework, which we have described extensively, makes the complaint fully founded, based on the following considerations:

The jurisprudence of legitimacy in terms of socially useful works

On the subject of socially useful works the Court of Cassation, work section, with an important pronunciation (n. 17101 of 11.07.17- Pres. Macioce, rel. Blasutto), affirmed the following principle of law:

"*With regards to the employment of socially useful jobs or for public utility, the normative qualification of this special relationship, having a care matrix and training component, does not exclude that in practice the relationship may have the characteristics of an ordinary employment relationship with consequent application of article 2126 of the civil code and, for the purpose of qualification as an employment relationship provided in practice by a Public Administration, notes that the worker is actually included in the public organization and assigned to a service falling within the institutional purposes of the Administration* " .

In application of the principles of effectiveness and equality of European jurisprudence, the Court of Italian legitimacy has thus equated the de facto situation that arose as a result of the distorted use of socially useful labor relations, recognizing to the employees thus employed by the user agencies the same conditions as their permanent colleagues.

However, this ruling partially solved the problems of socially useful workers, since the possible recognition of the only salary differences - only referred to by art. 2126 of the civil code - compared to a comparable worker, it does not seem to solve the problem of the lack of social security and social security coverage, even in the presence of an ordinary employment relationship.

The socially useful workers, in fact, are by definition employees whose contract is not for an indefinite period, but consisting of a succession of relationships, which are usually renewed without interruption.

Such a situation - once the subordinated nature of the relationship has been recognized - must entail the acknowledgment of the occurrence of an abuse pursuant to clause 5 of the EU Directive n. 70 of 1999 and this because the use of the worker in his own tasks, therefore stable and permanent, of the user body demonstrates the absence of objective reasons.

Moreover, the current legislation (both of the LSU and of the Sicilian fixed-term workers) does not imply limits in the repetition of the relationships nor is it possible to establish a maximum duration of the relationship, as shown by the relationships still in place with the user agencies.

On the contrary, the formal formulation of the art. 2126 of the civil code, as we have already seen, stops at the remuneration aspect (and, if anything, also social security) thus excluding any protection for the abuse pursuant to clause 5, thus violating the EU Directive n. 70 of 1999.

Community jurisprudence

From a European point of view we must ask ourselves if the internal order can restrict the concept of subordination (perhaps selectively) thus ending objectively with reducing the scope of the protections prepared by the European regulation.

And therefore, coming to Italy, one wonders in particular if the parasubordination can be considered not covered by the protections prepared by the social directives.

The question, submitted to the EU Court of Justice has not remained unanswered and precedes, not surprisingly, the new orientation of the Court of Cassation referred to in the aforementioned sentence 17101/17.

On this point, the Cgue in the sentence then rendered (15.3.2013, C-157/11, Sibilio) provided a first fundamental arrest.

The Cgue, in points 36 and 37 of the Judgment, thus reconstructs the defenses of the States:

Le Comune, les gouvernements italien et polonais ainsi que [...] l'existence d'un contrat ou d'une relation de travail définie comme telle par la législation, les conventions collectives ou les pratiques nationales en vigueur dans chaque État membre représenterait une condition essentielle pour l'application de l'accord-cadre.

The possibility was therefore advocated of selectively excluding a category of workers.

And the Court of Luxembourg continues:

Le gouvernement polonais et la Commission relèvent également, à titre subsidiaire, la faculté dont disposent les États membres, conformément à la clause 2, point 2, sous b), de l'accord-cadre, d'exclure l'application de celui-ci aux contrats ou relations de travail conclus dans le cadre d'un programme de formation, d'insertion et de reconversion professionnelles public spécifique. Selon eux, les travaux socialement utiles, qui font l'objet du litige au principal, relèvent de cette catégorie [...].

The Court considers (paragraph 42):

que la définition des contrats et des relations de travail auxquels s'applique cet accord-cadre relève non pas de celui-ci ou du droit de l'Union, mais de la législation et/ou des pratiques nationales

And then it continues:

47 Il apparaît donc, à première vue, que les travailleurs socialement utiles, dès lors qu'ils ne bénéficient pas d'une relation de travail telle que définie par la législation, les conventions collectives ou les pratiques en vigueur en Italie, ne relèvent pas du champ d'application de l'accord-cadre.

48 Il convient néanmoins de constater que, selon le Comune, qui se réfère à cet égard à une jurisprudence des juridictions nationales, le droit italien n'exclut pas que des prestations fournies dans le cadre d'un projet de travaux socialement utiles puissent, en réalité, présenter concrètement les caractéristiques d'une prestation de travail salarié. Si tel est le cas, le législateur italien ne saurait refuser la qualification juridique de relation de travail salarié à des relations qui, objectivement, revêtent une telle nature. Il appartient à la juridiction de renvoi et non à la Cour de vérifier le bien-fondé de cette appréciation du droit national.

49 Compte tenu des objectifs poursuivis par l'accord-cadre...il convient de relever que la qualification formelle, par le législateur national, de la relation établie entre une personne effectuant des travaux socialement utiles et l'administration publique pour laquelle ces travaux sont effectués ne saurait exclure que cette personne doive néanmoins se voir reconnaître la qualité de travailleur, au regard du droit national, si cette qualification formelle n'est que fictive, déguisant ainsi une véritable relation de travail au sens dudit droit.

50 En effet, les États membres ne sauraient appliquer une réglementation susceptible de mettre en péril la réalisation des objectifs poursuivis par une directive et, partant, de priver celle-ci de son effet utile (arrêt du 1er mars 2012, O'Brien, C-393/10, non encore publié au Recueil, point 35).

51 Dès lors qu'il ressort du dix-septième considérant de la directive 1999/70 que, en déterminant ce qui constitue un contrat ou une relation de travail en conformité avec le droit et/ou les pratiques nationales, et donc en déterminant le champ d'application de l'accord-cadre, les États membres doivent respecter les exigences de celui-ci, la définition de ces notions ne saurait aboutir à exclure arbitrairement une catégorie de personnes du bénéfice de la protection offerte par la directive 1999/70 et l'accord-cadre (voir, par analogie, arrêt O'Brien, précité, point 51).

The "Sibilio sentence" therefore solves the problem of clause 2 of the Directive which allows the exception to the application of the protection measure of the Directive itself in the hypothesis of relations aimed at training and replacing workers in the world of work: the question is reduced to a mere factual analysis.

And, from what has been said it seems clear that, already for the duration of the relationships, this purpose is excluded by definition and, in any case, the actual development of the same and the tasks required of the actors and by them performed in the interests of the users Municipalities the nature of the welfare services rendered is excluded.

In addition, the thesis of the existence of "particular" employment relationships to which the Directive would not apply was definitively demolished by the CGUE Fenoll ruling of 26.03.15 (in case C-316/13), where law:

15 The referring court makes reference to the Court of Justice's case-law relating to Article 7 of Directive 2003/88, and to the case-law relating to the concept of a 'worker' within the meaning of Article 45 TFEU. In that respect, the referring court raises the question whether persons placed in a work rehabilitation centre (a 'CAT') who do not have

the status of employee are covered by the term 'worker' within the meaning of EU law.

[...]

20 Thus, the Court has held that Directive 89/391 must necessarily be given broad scope, with the result that the exceptions to that scope, provided for in the first subparagraph of Article 2(2), must be interpreted restrictively (see, to that effect, inter alia, judgments in Simap, C-303/98, EU:C:2000:528, paragraphs 34 and 35, and Commission v Spain, C-132/04 EU:C:2006:18, paragraph 22). Those exceptions were adopted purely for the purpose of ensuring the proper operation of services essential for the protection of public health, safety and order in cases, the gravity and scale of which are exceptional (judgment in Neidel, C-337/10, EU:C:2012 :263, paragraph 21 and the case-law cited).

[...]

24 In that connection, as regards Directive 2003/88, it should be noted that, as the Advocate General maintains in point 29 of his Opinion, that directive makes no reference to the term 'worker' as appearing in Directive 89/391, or to the definition of that term under national legislation (see, to that effect, judgment in Union syndicale Solidaires Isère, C-428/09, EU:C:2010:612, paragraph 27).

25 It follows that, as regards the application of Directive 2003/88, the concept of a 'worker' may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to EU law (judgment in Union syndicale Solidaires Isère, C-428/09, EU:C:2010:612, paragraph 28).

[...]

27 In that context, it should be recalled that, according to the settled case-law of the Court, the term 'worker' within the meaning of Directive 2003/88 must be defined in accordance with objective criteria that distinguish the employment relationship by reference to the rights and duties of the persons concerned. So, any person who pursues real, genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, to that effect, judgments in Union syndicale Solidaires Isère, C-428/09, EU:C:2010:612, paragraph 28, and Neidel, C-337/10,

EU:C:2012:263, paragraph 23).

[...]

34 According to the Court's settled case-law, neither the level of productivity of the individual concerned, nor the origin of the funds from which the remuneration is paid, nor even the limited amount of that remuneration can in any way whatsoever affect whether or not the person is a worker for the purposes of EU law (see judgments in Bettray, 344/87, EU:C:1989:226, paragraphs 15 and 16; Kurz, C-188/00, EU:C:2002:694, paragraph 32; and Trojani, C-456/02, EU:C:2004:488, paragraph 16).

Thus, the Fenoll ruling constitutes the elaboration of the European Court on the subject of a subordinate employment relationship from which it cannot be ignored, with the consequent exclusion of the legitimacy of a fixed-term relationship that the Member States can subtract from the regulation of the Directive.

No doubt, therefore, that the relations in question are to be considered for all purposes ordinary temporary work relationships, with all effects for the purposes of the provisions that are being made explicit.

On the subordinated nature of the relationship in question it seems interesting to finally examine the reasons for the judgment in Haralambidis (10.09.14, C-270/13, EU: C: 2014: 2185), which, deals with the particular figure of the President of the port authority of Brindisi which has aspects similar to those examined here.

The EU Court of Justice had to assess whether the position under discussion constituted a relationship pursuant to art. 45 of the TFEU and if therefore Italy was entitled to reserve its appointment to a worker of Italian citizenship or if this was discriminatory on the basis of the citizenship prohibited by the art. 21, paragraph 2, of the fundamental Charter of the rights of the Union.

The European judge therefore defines the concept of employed person pursuant to the aforementioned art. 45 and notes:

"The concept of 'worker' within the meaning of Article 45(1) TFEU"

26 First of all, it should be noted that it is apparent from the order for reference and, more specifically, the wording of the first question that the referring court has doubts concerning the nature of the activity exercised by the President of a Port Authority. According to that court, that activity does not appear to resemble an employment relationship,

for the purposes of Article 45 TFEU.

27 In that regard, it should be noted that the concept of 'worker' for the purposes of Article 45 TFEU has an autonomous meaning specific to EU law and must not be interpreted narrowly (see, inter alia, judgment in Commission v Netherlands, C-542/09, EU:C:2012:346, paragraph 68).

28 Any person who pursues activities that are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must this be regarded as a 'worker' within the meaning of Article 45 TFEU. According to the case-law of the Court, the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see judgments in Lawrie-Blum, 66/85, EU:C:1986:284, paragraph 17, and Petersen, C-544/11, EU:C:2013:124, paragraph 30).

29 It follows that subordination and the payment of remuneration are constituent elements of all employment relationships, in so far as the professional activity at issue is effective and genuine.

30 With regard to subordination, it follows from Law No 84/94 that the Minister has powers of management and supervision and, where appropriate, may sanction the President of a Port Authority.

31 The Minister appoints the president of such an authority for a term of four years renewable once (Article 8(1) and (2) of Law No 84/94) and may remove him if the three-year operational plan relating to management of the port is not approved and if the balance sheet is in deficit, that is to say, in the event of bad financial management (Article 7(3)(a) and (c) of Law No 84/94). It is apparent also from the Italian Government's answer to the written questions put by the Court that the termination of the mandate of the President of a Port Authority by the Minister 'may be ordered where there are found to be important irregularities concerning management, such as to compromise the proper functioning of the entity. Those powers may involve also termination of functions where the president fails to comply with the principles of good faith and mutual cooperation'.

32 Furthermore, the Minister exercises powers of supervision in so far as he approves the decisions of the President of a Port Authority relating, in particular, to the approval of the estimated budget, possible amendments thereto and the balance sheet, and to the establishment of the technical and operational staff secretariat (Article 12(2)(a) and (b) of Law No 84/94).

33 On the other hand, as the Advocate General stated in point 32 of his Opinion, the post of President of a Port Authority lacks the features which are typically associated with the functions of an independent service provider, namely, more leeway in terms of choice of the type of work and tasks to be executed, of the manner in which that work or those tasks are to be performed, and of the time and place of work, and more freedom in the recruitment of his own staff.

34 It follows that the duties of the President of a Port Authority are performed under the management and supervision of the Minister, and therefore in a relationship of subordination, within the meaning of the case-law cited in paragraph 28 above.

35 As regards the remuneration of the President of a Port Authority, it is apparent from the Italian Government's answer to the written questions put by the Court that it is established by a Ministerial Decree of 31 March 2003. Under that decree, that remuneration is calculated on the basis of the basic salary provided for the Directors-general of the Ministry. It is therefore set by reference to that of a senior official of the public administration.

36 The remuneration is paid to the President of a Port Authority in return for the fulfilment of the tasks assigned to him by law. It therefore has the predictability and regularity inherent in an employment relationship.

37 Finally, it should be noted that, as is apparent from the order for reference, in the main proceedings, the effective and genuine nature of the functions performed by the President of a Port Authority is not contested (see judgment in Lawrie-Blum, EU:C:1986:284, paragraph 21, last sentence).

38 In those circumstances, it should be found that, in situations such as those at issue in the main proceedings, the President of a Port Authority must be regarded as a worker within the meaning of Article 45(1) TFEU.

39 That finding cannot be invalidated by the assertion of the referring court that the appointment of the President of a Port Authority cannot amount to an employment relationship within the context of the 'civil service', but is the attribution of a 'trust mission' delegated by a government authority connected with the exercise of public tasks.

40 According to established case-law, the public law or private law nature of the legal relationship of the employer and employee is of no consequence in regard to the application of Article 45 TFEU (see judgments in Sotgiu, 152/73, EU:C:1974:13, paragraph 5, and Bettray, 344/87, EU:C:1989:226, paragraph 16).

41 Moreover, the Court has previously held, in the context of an examination of the link between a member of the board of directors of a capital company and that company, that board members who, in return for remuneration, provide services to the company which has appointed them and of which they are an integral part, who carry out their activities under the direction or control of another body of that company and who can, at any time, be removed from their duties, satisfy the criteria for being treated as workers within the meaning of the case-law of the Court (judgment in Danosa, C-232/09, EU:C:2010:674, paragraph 51).

As you can see, the European Court, recalling its jurisprudence - reiterates that such relationships, beyond their denomination by the legislation of the Member States, must be considered as subordinate employment relationships.

No doubt, as amply explained in the appeal, that these characteristics occur in the case of recurrent LSU workers, again emphasizing how they receive a compensation that is closely related to the quantity of the activity performed and, therefore, has a clearly remunerative nature, according to European law .

The recognition of the subordinated nature of the report on the basis of the clear European jurisprudence drags on the inevitable necessity of recognition of the primary rights (retribution and social security) dictated by the EU Directives and, however, by the Italian legislation (adequate remuneration, vacation, 13th monthly salary, etc. .: from collective bargaining and national social security legislation.

The following documents are accluded:-

- Cass. n. 17101/17
- CGUE C- 157/11 Sibilio/Comune di Afragola
- CGUE C- 316/13 Fenoll/ Centre d'aide par le travail 'La Jouvene"/ Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon,
- CGUE C- 270/13 Haralambidis/Calogero Casilli

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