Anonymised version

Case C-477/22

Request for a preliminary ruling

Date lodged:

15 July 2022

Referring court:

Corte suprema di cassazione (Italy)

Date of the decision to refer:

12 May 2022

Appellant:

ARST S.p.A. – Azienda regionale sarda trasporti

Respondents:

TR

OS

EK

UN

RC

RS

OA

ZB

HP

WS

IO

TK

ME

SK

TF

TC

ND

THE CORTE SUPREMA DI CASSAZIONE

SEZIONE LAVORO (SUPREME COURT OF CASSATION, ITALY, EMPLOYMENT DIVISION)

[…]

gives the following

INTERLOCUTORY ORDER

in the appeal […] brought by:

ARST S.p.A – AZIENDA REGIONALE SARDA TRASPORTI, […]

– appellant –

v

TR, OS, EK, UN, RC, RS, OA, ZB, HP, […]

– respondents –

and v

WS, IO, TK, ME, SK, TF, TC, ND, […]

– respondents –

against judgment No […] of the CORTE D'APPELLO di CAGLIARI (Court of Appeal, Cagliari, Italy), filed on 10 March 2016 […];

[…] [*standard wording*]

GROUNDS FOR THE DECISION

SUBJECT MATTER OF THE MAIN PROCEEDINGS AND RELEVANT FACTS

1. The company ARST S.p.A is a local public transport undertaking in the Sardinia region. It operates passenger transport services in the region and is controlled by the regional administration.

2. WS and the other workers acting as respondents in this case ('the workers') are employees of ARST, working as drivers of road passenger transport vehicles. All of the workers are employed at the ARST depot located in the municipality of Abbasanta.

3. On 5 September 2011 the workers initiated legal proceedings before the Tribunale di Oristano (District Court, Oristano), Italy, alleging a breach of Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 ('the regulation').

4. Specifically, the workers alleged that in the period between 11 April 2007 (the date of entry into force of the regulation) and 6 December 2010, each of them, because of the shifts imposed by the employer, did not enjoy the 'regular' weekly rest period (defined in Article 4(h) of the Regulation as a rest period of at least 45 hours), with a total of 953.30 hours of rest not taken, and had exceeded the maximum driving time per two-week period of 90 hours, as laid down in Article 6(3) of the Regulation, by a total of 752 hours.

5. They asked the District Court to order the employer, ARST S.p.A, to pay them compensation and/or reparation determined on the basis of the hours of rest not taken and the hours worked in excess of the abovementioned total driving time, in a total amount calculated as EUR 13 839.60 for each driver.

6. In support of their claim, the workers submitted that they follow a shift rotation that is identical for each of them, on the basis of which the hours of rest not taken and excess driving were calculated – as illustrated in Annexes 'A' and 'B' to the application respectively – as being the same for each driver.

7. The District Court upheld the claim in its entirety (reducing the amount of compensation by 50% for only the workers TF and UN, due to their more limited period of work as drivers).

8. ARST S.p.A. lodged an appeal before the Court of Appeal, Cagliari.

9. The Court of Appeal obtained the complete schedule of the actual shifts worked by each driver during the period in question from ARST S.p.A., and reduced the amount the employer had been ordered to pay, recalculating the compensation individually, on the basis of the presence on duty.

10. That court dismissed the remainder of the appeal brought by ARST S.p.A.

11. It held that there was no foundation for ARST S.p.A.'s defence, according to which the case at hand comes within the situation described in Article 3(a) in which the regulation does not apply ('vehicles used for the carriage of passengers on regular services where the route covered by the service in question does not exceed 50 kilometres').

12. ARST S.p.A. based that argument on the fact that only on some shifts (and, in that case, only once or, very rarely, twice) did the drivers cover routes of more than 50 km.

13. ARST S.p.A had also asserted that since March 2009, two shift regimes had been established, supported by the trade unions and followed by the workers on a rotating basis: one of nine weeks, consisting of shifts covering more than 50 km, during which the rest periods stated in the regulation were applied, and the other of ten weeks, consisting of shifts covering less than 50 km, during which the regulation was not applied.

14. In rejecting those defence arguments, the appeal court stated that the sheets relating to each 'shift-route' showed that in each shift, the driver travelled more than 50 km: in some cases, that distance was covered without making intermediate stops, while in others, the distance between one stop and another was less than 50 km, but the overall journey was still much longer.

15. The Court of Appeal added that in that case it was not even clear what the route terminal was, since the drivers had to reach more than one in the course of the working day […] [*examples of route terminals*].

16. In the opinion of the Court of Appeal, a 'route' in non-urban transport identifies the total journey travelled by the driver during the working day. The 50-km limit excludes only urban drivers covering short, frequent routes from application of the regulation.

17. The appeal court also rejected ARST S.p.A.'s argument that only the time spent by the driver behind the wheel should be taken into account for the purpose of verifying compliance with the permitted two-week driving time limit referred to in Article 6(3) of the regulation.

18. It held that the maximum two-weekly limit of 90 hours stated in Article 6(3) referred to the total 'driving time'.

19. The Court of Appeal held that, according to the definition in Article 4(k) of the regulation, the 'daily driving time' means the total accumulated driving time between two daily rest periods (or between a daily rest period and a weekly rest period), while the actual duration of driving activity is defined by Article 4(j) as the 'driving time'. From those definitions, the Court drew the conclusion that the daily driving time coincides with the daily work shift.

20. ARST S.p.A. brought an appeal against the appeal judgment before the Court of Cassation, asserting two separate grounds of appeal to challenge the Court of Appeal's interpretation of the term 'route', as defined in Article 3(a) of the regulation, and of the phrase 'total accumulated driving time during any two consecutive weeks', as stated in Article 6(3) of the regulation. The workers opposed that appeal by lodging two separate cross-appeals.

THE RELEVANT PROVISIONS OF EUROPEAN UNION LAW

1. ARST S.p.A.'s appeal requires this Court to interpret Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (OJ 2006 L 102, p. 1) ('the regulation').

2. The amendments to that regulation introduced by Regulation (EU) 2020/1054 do not apply for the period to which the case relates (April 2007 – December 2010).

3. It is not disputed that the present case comes within the scope of the regulation within the meaning of Article 2(1)(b) thereof, since ARST S.p.A. is engaged in the carriage of passengers by road using vehicles which are constructed or permanently adapted for carrying more than nine persons including the driver, and are intended for that purpose. Transport is carried out within the territory of the EU (in the Italian region of Sardinia).

4. The two questions of interpretation submitted to this Court concern the following respective issues:

— Article 3(a) of the Regulation, which states that:

'This Regulation shall not apply to carriage by road by:

(a) vehicles used for the carriage of passengers on regular services where the route covered by the service in question does not exceed 50 kilometres';

— Article 6(3) of the Regulation, which states that:

'The total accumulated driving time during any two consecutive weeks shall not exceed 90 hours.'

5. There are no relevant provisions of national law.

6. In Italian law, D.Lgs 19 novembre 2007 n. 234 (Legislative Decree No 234 of 19 November 2007), which entered into force for employees on 1 January 2008, implemented Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons

performing mobile road transport activities. No breaches of that legislation have been reported.

7. Nevertheless, L. 14 febbraio 1958, n. 138 (Law No 138 of 14 February 1958) continues to regulate the working hours of the staff of public passenger transport vehicles operating on non-urban lines in cases where the exemption under Article 3(a) of the regulation applies.

FIRST QUESTION REFERRED FOR A PRELIMINARY RULING

1 The first question relates to the interpretation of Article 3(a) of the regulation.

2 It is undisputed in this case that the road transport activities carried out by ARST S.p.A. are a 'regular passenger service', according to the definition provided in Article 4(n) of the Regulation; this case concerns a service for the carriage of passengers open to all at specified intervals along specified routes, with passengers being able to get on and off at predetermined stopping points.

3 The question put to this Court arises from the fact that ARST S.p.A. operates the service on several different routes and the driver covers more than one route on the same working day and using the same vehicle.

4 The company ARST S.p.A. maintains that the 'route' – to which the exemption threshold of a maximum of 50 km refers – is the route of each individual journey and cannot be cumulated with that of other journeys. The two lower courts, on the other hand, upheld the argument asserted by the workers, and added together the kilometres covered by all the journeys driven by the driver in the same working day to calculate the 'route'.

5 The Court stated that the judgment given by the Court of Justice on 9 September 2021 in Case C-906/19, in relation to the request for a preliminary ruling on the interpretation of Article 3(a) of the regulation referred by the Cour de cassation (Court of Cassation) of France held that (paragraphs 32 and 38 of that judgment) the expression 'vehicles used' for the carriage of passengers on 'regular services' where the route covered by the service in question does not exceed 50 kilometres relates only to vehicles used exclusively for such transport (unless the vehicle is used for that purpose only occasionally), so that the regulation applies to vehicles used for routes of both less than and more than 50 kilometres.

6 The case examined by the Court of Justice concerned the obligation of the driver of the vehicle to insert the driver card in the recording equipment, which was also required on days when the vehicle was used for the transport of passengers on regular scheduled services where the route does not exceed 50 km.

7 In the present case, however, it is the very definition of the vehicle's 'route' that is in dispute, because, as stated above, drivers cover different journeys using the same vehicle on the same working day.

8 There is therefore doubt as to whether the term ‘route’ used in Article 3(a) of the regulation refers to the journey set by the transport undertaking for the purposes of payment of the ticket, as would seem to be inferred from the literal reference in Article 3(a) of the regulation to the ‘regular’ route (‘… regular services where the route …’), or, rather, whether it refers to the kilometres travelled by a driver on board the vehicle during a working day, even if that covers several journeys, as would appear to be required by the purpose of the regulation, to ‘improve social conditions for employees who are covered by it, as well as to improve general road safety’.

9 Other solutions are also conceivable, such as the maximum distance travelled by the vehicle from the starting point. This is suggested by recital 24, which indicates the vehicles exempt from application of the regulation under Article 3(a) – (as stated in Article 15 of the regulation, drivers of vehicles governed by national rules) – as ‘vehicles used for the carriage of passengers on regular services where the route covered does not exceed 50 km’.

10 In any event, in the present case – whatever the interpretation of the term ‘route’ – it is not disputed that the company operates regular passenger services on certain journeys exceeding 50 km. The Court must therefore establish whether the exemption under the regulation may be applied to individual ARST S.p.A. vehicles (those used exclusively for passenger transport on routes of less than 50 kilometres) or whether ARST S.p.A.’s entire transport service comes within the scope of the regulation because it is also carried out using vehicles used for journeys exceeding 50 kilometres.

11 The first question referred to the Court of Justice is as follows:

‘Must Article 3(a) of Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 be interpreted as meaning that the term ”route” not exceeding 50 kilometres refers to the kilometres covered by the journey (line) identified by the transport undertaking for payment of the ticket, or to the total number of kilometres covered by the driver in the daily work shift, or to the maximum distance on the road reached by the vehicle in relation to the starting point (radius); or, in any event, by means of what other criterion should the kilometres of the route be calculated?

In any event, may the undertaking organising the transport be exempt from application of the regulation in respect of those vehicles it uses exclusively to cover journeys of less than 50 km, or is the undertaking’s entire transport service subject to application of the regulation, by reason of the fact that it uses other vehicles to cover journeys exceeding 50 km?’

SECOND QUESTION REFERRED FOR A PRELIMINARY RULING

12 The second question submitted to this Court concerns the definition of ‘driving time’ in Article 6(3) of the regulation.

13 The company ARST S.p.A. is arguing that the maximum two-week driving time refers only to actual driving activity. The workers, whose argument was upheld by both lower courts, assert that the duration of the entire work shift should be considered.

14 The Court states that Article 4 of the regulation contains three definitions of ‘periodo di guida’ (driving time/driving period): [1]

under point (k), the ‘daily driving time’ (‘periodo di guida giornaliero’) (the total accumulated driving time between the end of one daily rest period and the beginning of the following daily rest period or between a daily rest period and a weekly rest period);

under point (l), the ‘weekly driving time’ (‘periodo di guida settimanale’) (the total accumulated driving time during a week);

under point (q), the ‘driving period’ (‘periodo di guida’) (the accumulated driving time from when a driver commences driving following a rest period or a break until he or she takes a rest period or a break. The driving period may be continuous or broken).

15 Lastly, Article 4(j) defines ‘tempo di guida’ (‘driving time’) as the duration of driving activity recorded (automatically or semi-automatically by the recording equipment as defined in Annex I and Annex IB to Regulation (EEC) No 3821/85, or manually as required by Article 16(2) of Regulation (EEC) No 3821/85).

16 According to the arguments put forward by ARST S.p.A., the ‘driving period’ (‘periodo di guida’) is nothing more than the sum of the ‘driving times’ (‘tempi di guida’).

17 Recital 17 seems to bear this out. According to that recital, in order to improve social conditions for employees who are covered by it, as well as to improve general road safety, the regulation lays down provisions on maximum ‘driving times’ (‘tempo di guida’) per day, per week and per period of two consecutive weeks.

18 In the same vein, Article 6(4) of the regulation states that daily and weekly driving times include all ‘driving’ time both on the territory of the Community or of a third country.

[1] *Translator’s note: The terms ‘driving time’/‘driving period’ and ‘tempo di guida’/‘periodo di guida’ are used inconsistently as between the Italian and English language versions of the regulation.*

19 However, Article 6(5) states that a driver must record as 'other work' any time spent as described in Article 4(e) (namely the activities other than driving included within the definition of working time in Article 3(a) of Directive 2002/15/EC and any work carried out for the same or another employer, within or outside the transport sector), as well as any time spent driving a vehicle used for commercial operations not falling within the scope of that regulation and any periods of 'availability', as defined in Article 15(3)(c) of Regulation (EEC) No 3821/85, since the last daily or weekly rest period.

20 It is unclear whether such 'other work' counts towards the calculation of the two-weekly driving time limit.

21 The interpretation applied by the courts that have already examined the case identifies the driving period (periodo di guida) with the daily work shift. That interpretation is based on the reference in the definition of 'daily driving time' ('periodo di guida giornaliero') (Article 4(k) of the regulation) to the period between two daily rest periods and on the separate definition in Article 4 of the regulation of 'driving time' ('tempo di guida') – namely, the recorded driving activity – and 'driving period' ('periodo di guida'), so that the latter would appear to designate a wider time interval.

22 The second question referred to the Court of Justice is as follows:

'Must Article 6(3) of Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 be interpreted as meaning that "the total accumulated driving time during any two consecutive weeks" consists of the sum of the "driving times" for the two weeks – according to the definition in Article 4(j) above – or does it also include other activities and, in particular, the entire working shift worked by the driver during the two weeks, or all the 'other work' referred to in Article 6(5)?'

ON THOSE GROUNDS

The Court, having regard to Article 267 of the Treaty on the Functioning of the European Union, requests that the Court of Justice of the European Union give a preliminary ruling on the questions of interpretation of European Union law set out in paragraphs 11 and 22 above.

[…] [*closure and standard wording*]

Rome, […] 9 February 2021.

THE PRESIDENT