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Particular Aspects Regarding the Separation of Working Time from Rest Time for Offshore Workers Under Romanian Legislation in light of the Requirements laid down in Directive 2003/88/EC

Răzvan Anghel ¹

Abstract

Purpose. The analysis aims to clarify two practical and theoretical issues regarding the definition of working time from rest time that occurs in practice, particularly in the case of workers on marine oil drilling platforms, namely the issue of on-board rest periods and the issue of the time needed for workers' transportation to the marine drilling platform and back to shore

Design/ methodology/ approach. The analysis considers some examples in Romanian national courts case law, examined in light of Directive 2003/88 provision and CJEU case law.

Findings. Offshore workers have a unique situation that determines the organisation of working time, which must be considered when dealing with a case involving these workers. If the issue of on-board rest periods appears to be quite clear in the national case law, then the issue of time required for workers to be transported to and from the marine drilling platform seems to still be problematic for national courts, especially since there is an ongoing scientific

¹ PhD. student, Faculty of Law of the University of Bucharest, Judge, President of the First Civil Section, Court of Appeal Constanța; This work is a result of the research conducted by the author during the doctoral program followed within the Doctoral School of Law of the Faculty of Law of the University of Bucharest. Email address: anghel.razvan@drept.unibuc.ro.

debate about whether and when travel time should be considered working time, according to CJEU case law.

Research limitations/implications. As of right now, there are too few cases regarding offshore workers, particularly cases that focus on the organisation of working time. The cases that do exist mainly deal with salary rights rather than the employer's obligation to respect the maximum working time or the minimum rest time; thus, those issues are only dealt with incidentally.

Originality/value. This analysis contributes some clarifying details on the boundaries of working time and rest time for offshore workers. Furthermore, it emphasises the important distinction between the legal regime of working time for the purpose of health and security and the legal regime of working additional overtime for the purpose of salary rights determination.

Paper type. Issues paper.

Keywords: Romania, offshore workers, working time, rest time, travel time

1. Introduction

The situation of offshore workers presents a discrepancy in the normal organisation of working time. Often these employees cannot return to their own residences at the end of their average work hours, as going to the workplace involves a means of transportation that is not available to all employees, some of whom have no options for reaching the workplace and are required to attend special training sessions for transport safety (naval or air).

As a result, there have been issues concerning the differentiation of working time from rest time during periods in which the employee does not carry out the activity stipulated in the individual employment contract, when they are merely at the workplace or on their way to work.

2. The notion of offshore activity and offshore worker

Directive 2003/88/EC on certain aspects of the organisation of working time² defines offshore activity because it is included among those activities for which EU Member States may introducederogations.

Under Article 2 (8) of the Directive, offshore activity is defined as follows: “work performed mainly on or from offshore installations (including drilling rigs), directly or indirectly in connection with the exploration, extraction or exploitation of mineral resources, including hydrocarbons, and diving in connection with such activities, whether performed from an offshore installation or a vessel.”

For a complete understanding of this definition, there are the relevant provisions of Directive 2013/30/EU³, which defines the offshore concept at Article 2 (2) as “situated in the territorial sea, the Exclusive Economic Zone or the continental shelf of a Member State within the meaning of the United Nations Convention on the Law of the Sea.” This definition is reproduced and continued in Article 2 (24) of Law 165/2016 on the safety of offshore oil operations⁴ with some explanatory elements⁵. At the same

² *OJ L 299, 18.11.2003*

³ on safety of offshore oil and gas operations, *OJ L 178, 28.6.2013, p. 66–106*

⁴ Published in M.Of. nr. 572/28.07.2016;

⁵ According to this definition offshore means “located in the inland maritime waters, the territorial sea in the contiguous zone and in the exclusive economic zone or on the Black Sea continental shelf under the jurisdiction of Romania, within the meaning of the

time, Directive 2013/30/EU also contains more definitions establishing the notion of offshore installation (in article 2 p.(19),(20),(21) (a), (b), (c)⁶. Directive 2003/88 does not define the concept of an offshore worker. However, such definition is found in Regulation (EU) 2016/399⁷ which, at Article 2 (20), defines the offshore worker as “a person working on an offshore installation located in the territorial waters or in an area of exclusive maritime economic exploitation of the Member States, as defined under the international law of the sea, and who returns regularly by sea or air to the territory of the Member States.”

3. Special regulation of the working time of offshore workers

According to Article 17 (3) (a), Directive 2003/88 allows for Member States to derogate from Articles 3-5, 8 and 16⁸ in the case of activities where the worker's place of work and his domicile are remote from one another, such as offshore activities, and Article 20 (2) allows Member States to extend the reference period in Article 16 (b)⁹ to 12 months for workers principally engaged in offshore activities.

The derogations referenced in Article 17 (3) may be established by laws and regulations, collective agreements or other agreements concluded

United Nations Convention on the Law of the Sea concluded at Montego Bay Jamaica) on December 10, 1982, ratified by Law no. 110/1996”.

⁶ Article 2 of Directive 2013/30 contains the following definitions:

(19) ‘installation’ means a stationary, fixed or mobile facility, or a combination of facilities permanently inter-connected by bridges or other structures, used for offshore oil and gas operations or in connection with such operations. Installations include mobile offshore drilling units only when they are stationed in offshore waters for drilling, production or other activities associated with offshore oil and gas operations;

(20) ‘production installation’ means an installation used for production;

(21) ‘connected infrastructure’ means, within the safety zone or within a nearby zone of a greater distance from the installation at the discretion of the Member State:

(a) any well and associated structures, supplementary units and devices connected to the installation;

(b) any apparatus or works on or fixed to the main structure of the installation;

(c) any attached pipeline apparatus or works;

⁷ of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ, L 77/1 of 23.03.2016;

⁸ regarding daily rest, break time, weekly rest, night work and reference periods;

⁹ Regarding maximum weekly working time;

between the social partners – however, they must be expressly determined by the Member States as this article itself is not sufficient enough to exclude offshore activity from the application of the directive provisions. In several situations, the CJEU has determined that the provisions of Article 17 on derogations imply the manifestation of the State's will to exclude some activities from the application of the provisions of the Directive, and they are not sufficient in and of themselves to be opposed to workers¹⁰, by the employer or by the national courts.

It should be emphasised that Directive 2003/88 does not allow for derogations from the provisions of Article 2, which defines working time. As a result, collective agreements or even state regulations cannot establish other definitions of working time for the offshore workers, either expressly or implicitly, by declaring that the working time of such workers exclude or include certain periods. Subsequently, the definition of a period as working time or rest time must be made in accordance with Article 111 of the Romanian Labour Code as interpreted in compliance with the definition at Article 2 of Directive 2003/88 and CJEU case law.

For offshore activity in Romania, the organisation of working time regulation is encompassed by the provisions of Order no. 822/2007 of the Ministry of Economy and Finance¹¹, which establishes that by means of collective bargaining, the following shall be set for the offshore workers: working time, working hours and working conditions, according to the legal provisions. It is significant that the order, in accordance with Directive 2003/88, does not permit establishing a notion of working time itself by means collective bargaining.

It is also noteworthy that this normative act defines offshore work in Article 1 by assuming the definition of offshore activity is contained in Article 2 (8) of Directive 2003/88.

¹⁰ CJUE judgement (Second Chamber) of 21 October 2010 in the case C - 227/09 in the procedure regarding *Antonino Accardo e.a. vs. Comune di Torino*, par.46 and 51; In this view, CJUE stated that “*where European Union law gives to Member States the option to derogate from certain provisions of a directive, those States are required to exercise their discretion in a manner that is consistent with general principles of European Union law, which include the principle of legal certainty. To that end, provisions which permit optional derogations from the rules laid down by a directive must be implemented with the requisite precision and clarity necessary to satisfy the requirements flowing from that principle*”- Judgement of the Court (Second Chamber) of 21 October 2010 in the case C - 227/09, cited, par.55;

¹¹ on the organisation of working time for offshore staff , published in M.Of. no. 537/08.08.2007;

Therefore, in these respects, collective labour agreements concluded by each offshore employer and the unions governs the organisation of working time for offshore workers.

4. Specific issues related to the delimitation of working time from rest time during the activity on-board marine oil drilling platforms

In judicial practice, two specific issues have been identified regarding the delimitation of working time from rest time for offshore workers in litigation related to the work carried out on oil drilling platforms:

- The first problem was qualifying the periods during which the worker is not planned to work and does not work but is merely on board the drilling rig as working or rest time;
- The second problem was qualifying the periods during which the worker is transported to the marine platform or to the shore and the training period required for that purpose as working or rest time.

4.1. General aspects of working time organisation on-board marine oil drilling platforms

Examples of working time organisation on-board marine oil drilling platforms are provided in court rulings from cases concerning wage claims. Thus, in a collective labour agreement concluded by a company operating offshore oilfield operations, a 12-hour shift work program was established for a period of 14 days, including Saturdays and Sundays, followed by a 14-day free pay period and a 15% turn-over payment¹²; for the employees to whom this organisation of working time is applied, Saturdays and Sundays are normal working days, so their salary is determined on the base of its normal rate, the continuous shift allowance granted to them representing the consideration for the work done on Saturdays and Sundays as mentioned¹³. For these employees, the additional work is only the work done “over the turntable,” this being

¹² Facts presented in the reasoning of civil sentence no. 3704/08.04.2016 of Bucharest Tribunal – 8th Section for labour litigations and social security cases, available at <http://www.rolii.ro/hotarari/587e9e07e490096c2700442d>;

¹³ As it results from the reasoning of the civil decision no.510/CM of 16.11.2016 of Constanța Court of Appeal, 1st Civil Section, ECLI:RO:CACTA:2016:024.000510;

determined as the difference between the number of productive hours to be achieved according to the turntables of that month - with possible adjustments - and the number of hours worked by the employee during that month¹⁴. This form of offshore employees' working time organisation is common to petroleum exploitation, and similar collective labour agreements are also concluded in other countries¹⁵.

In this way, the employees perform 4 additional working hours a day for 10 working days, i.e. 40 hours plus an additional 48 hours in 4 days of weekly rest. They receive 8 free hours in 10 working days within the following 14 calendar days and so they have 80 free hours in compensation, respectively. This results in 8 hours of unpaid additional work for which the employees receive a 15% increase in the monthly salary, calculated at 168 hours, although a minimum 75% increase should be granted for only 8 hours according to Article 123 (2) of Labour Code – and that represents a higher amount so that no additional salary entitlements are to be paid¹⁶.

4.2. The issue of inactive periods when the worker is on board the marine drilling platform

The problem arose because of offshore workers' claims that the entire 24-hour period of a day should be considered working time, and therefore, the period exceeding 8 hours per day should be paid as overtime, since they remain at the workplace - that is, the marine platform - even though they are not working, nor are they scheduled to work or perform an on call service; but for reasons that concern the work safety or needs, they may be required at any time to intervene.

¹⁴ Constanța Court of Appeal, 1st Civil Section, civil decision no. 130/CM of 05.04.2017, ECLI:RO:CACTA:2017:024.000130 available at. www.rolii.ro;

¹⁵ For example item 3.0 of Offshore Agreement related to offshore oil operations applicable from 01 May 2014 to 30 April 2016 concluded between social partners in Norway, available at <https://nelfo.no/Documents/Norsk%20Teknologi/Arbeidsliv/Offshore%20Agreement%202014-2016.pdf>, accessed at 15.10.2017;

¹⁶ Constanța Court of Appeal, 1st Civil Section, civil decision no.461/CM of 13.06.2012, Constanța Court of Appeal, 1st Civil Section, civil decision no. 130/CM of 05.04.2017, ECLI:RO:CACTA:2017:024.000130; Constanța Court of Appeal, 1st Civil Section, civil decision no.510/CM of 16.11.2016 ECLI:RO:CACTA:2016:024.000510 available at. www.rolii.ro

Particularly, this problem has arisen in the case of medical staff providing specialised assistance on board the marine drilling platforms, in which case, additionally, the CJEU's case law on the status of physicians performing on-call duty in the medical unit is invoked.

In the judicial practice, such claims were rejected on account of the fact that the employees worked in the shift program established under the collective labour agreement. In addition, they did not provide additional work¹⁷ being the case of an unequal work program defined by art.113 par.2 of Labour Code and carried out under the conditions established in art.114 par.2 of Labour Code with regards to the weekly working time taken together with art.114 par.4 of Labour Code, meaning that the reference period for which the working time exceeds 48 hours, including overtime, is set at 12 months¹⁸. From this perspective, it is necessary to analyse the qualification of periods during which the employee is at work without performing any activity.

Firstly, in the SIMAP case¹⁹, the Court of Justice has established that the entire period during which the medical staff performs on-call duty must be regarded as working time, including intermittent periods of inactivity - provided that the worker is at work - but should not be considered as working time and, consequently, should be included in the rest period, the time for home on-call duty. Thus, the Court held that “even if the activity actually performed varies according to the circumstances, the fact that such doctors are obliged to be present and available at the workplace with a view to providing their professional services means that they are carrying out their duties in that instance.”²⁰

In other cases, the Court then held that periods of on-call duty at the workplace constitute working time, the reason being that, in such a

¹⁷ Prahova District Court, 1st Civil Section, civil sentence no.1249/24.04.2016 (the appeal was rejected by Ploiești Court of Appeal - 1st Civil Section with the civil decision no.2679/07.12.2016, ECLI:RO:CAPLO:2016:018:002679); Bucharest Court of Appeal 8th Civil Section for labour conflicts and social security cases, civil decision no.1229 of 27.02.2017 and civil decision no.1427/07.03.2014, available at www.rolii.ro;

¹⁸ Constanța Court of Appeal, 1st Civil Section, civil decision no.211/CM of 19.06.2017, RO:CACTA:2017:024.000211; Constanța Court of Appeal, 1st Civil Section, civil decision no. 7/CM of 17.02.2016 available at www.rolii.ro;

¹⁹ CJEU – Judgement of 3 October 2000, in the case C-303/98, the procedure Sindicato de Médicos de Asistencia Pública (Simap) vs. Conselleria de Sanidad y Consumo de la Generalidad Valenciana, available at www.curia.eu;

²⁰ Par. 48 of the judgement;

situation, the worker is at the employer's disposal and exercises his function or duties²¹. The issue of including in the working time notion some periods when the worker does not actually work and when, to a certain extent, may even rest, has only actually become a real issue in the Jaeger²² case where this theory was developed to its current extent.

It must be noted that, in order to reach this conclusion, the CJEU considered, firstly, that medical doctors should remain alert and active throughout the on-call duty period at the workplace; and during that period, they may be asked to provide medical services for as long as necessary, without any limitation, according to the legislation. As CJEU stated, the decisive factor in considering what constitutes working time, within the meaning of Directive 93/104, is that doctors are required to be available at the place established by the employer and to be able to provide their services immediately. In fact, those obligations which make physicians unable to choose the place at which they are on stand-by are recognised as being part of their duties. In the Court's view, the conclusion cannot be affected by the fact that the employer provides a room where medical staff members can remain if their professional services are not required. Finally, the Court also took into account that, in such circumstances, the periods in which the doctors' services are not required may be short and subject to frequent interruptions; as it stands, these doctors are required to intervene whenever necessary, not only in cases of emergency, but also to oversee their patients' condition or undertake administrative work²³.

It is vital to the development of the CJEU case-law that, in the aforementioned judgment, the Court states that “an employee available at the place determined by the employer cannot be regarded as being at rest during the periods of his on-call duty when he is not actually carrying on any professional activity.”²⁴

²¹ CJUE – Sixth Chamber, *Ordinance of 3 July 2001, in the case C-241/99, the procedure Confederación Intersindical Galega (CIG) c. Servicio Galego de Saúde (Sergas)*, ECLI:EU:C:2001:371, par.33 and 34 available at www.curia.eu;

²² CJEU – Judgement of 9 September 2003, in the case C-151/02, *Landeshauptstadt Kiel c. Norbert Jaeger*, ECLI:EU:C:2003:437, par.44-71 of the reasoning and the operative part;

²³ Par.57, 63, 70 of the judgement, available at www.curia.eu;

²⁴ Par.65 of the judgement;

This line of case law will be confirmed and continued in the Dellas case²⁵, subsequently in the Vorel case²⁶, and incidentally in the Fuß case (2)²⁷, where it held that the period during which a firefighter is required to be present at work constitutes working time. Moreover, starting with this case, the Court has stated as a principle that any period of on-call duty or permanent care where the worker is required to be present at the workplace must be considered working time, whether the employee is working for the duration.

In regard to periods of inactivity within the workplace, a distinction must be made between two categories: on the one hand, there are inactive periods that are inherent to the activity and the way in which it is organised, be it short interruptions²⁸ or longer periods of time, as is the case with being on-call, included in the working time²⁹; on the other hand, there are rest periods, pauses in activity that are planned and intended to restore the capacity to work. These periods of rest may be short, such as a daily break, or longer, such as those for workers involved in activities that do not allow them to return home at the end of the normal working hours.

For the latter type of inactivity, the purpose of rest, either by legal rules or by contractual clauses and internal regulations, is expressly determined. For example, given its relatively short duration, a worker may even remain at the workplace during the daily break, but not be at the employer's disposal, since the break is expressly included in the rest time and, ergo, excluded from working time, the two concepts excluding each other³⁰. In such

²⁵ CJEU – judgement of 1 December 2005, in the case C-14/04, Abdelkader Dellas, Confédération générale du travail, Fédération nationale des syndicats des services de santé et des services sociaux CFDT, Fédération nationale de l'action sociale Force ouvrière c. Premier ministre, Ministre des Affaires sociales, du Travail et de la Solidarité, ECLI:EU:C:2005:728, available at www.curia.eu;

²⁶ CJEC, Fifth Chamber, Ordinance of 11.01.2007, in the case C 437/05, Jan Vorel c. Nemocnice Český Krumlov, ECLI:EU:C:2007:23, available at www.curia.eu;

²⁷ CJUE, Second Chamber, Judgement of 25.11.2010, in the case C- 429/09, Günter Fuß c. Stadt Halle ECLI:EU:C:2010:717, available at www.curia.eu;

²⁸ CJEU – Forth Chamber – Judgement of 26.07.2017 in the case C-175/16, Hannele Hälvä, Sari Naukkarinen, Pirjo Paajanen, Satu Piik c. SOS-Lapsikylä ry, ECLI:EU:C:2017:617, par.42, available at www.curia.eu;

²⁹ CJEU – Judgement of 9 September 2003, in the case C-151/02, *Landeshauptstadt Kiel c. Norbert Jaeger*, ECLI:EU:C:2003:437, cited ;

³⁰ CJEU Judgement of 3 October 2000, in the case C-303/98, SIMAP, cited, par.47;

cases, if claims are made that the time spent in the workplace is working time, the worker must prove he/she has carried out the work or, at the very least, was at the disposal of the employer and ready to resume work, contrary to the purpose of the break.

During the periods of planned interruptions, the worker may still be at work but she/he is not at the employer's disposal or in the exercise of her/his duties, even if she/he may be required to resume work; this is because the interruptions are not incompatible with any potential and exceptional interventions required by the employer in the appropriate timeframe, such as for security reasons (where the intervention itself will be taken into account when determining the duration of actual work)³¹. For this reason, such a theoretical possibility was judged to be insufficient by the CJEU in determining the inclusion of this period in the definition of working time³².

For a period of time to be considered working time, all features must be met³³, and so the CJEU has already established that it is not sufficient for the worker to be at the employer's disposal (for example, by performing on-call duty) but at his own home, residence or another place of his choice³⁴. Thus, it can be concluded that it is not enough for the worker to be at the workplace for the period during which she/he is in that place to be considered working time. The condition, as deemed by the court, is that for a certain period of time to be included in the category of working time, the worker must be at the employer's disposal while being at the workplace and not working³⁵.

There are similarities found in the sectorial directives, specifically in the regulation of working time in the field of transport activities where – due

³¹ Cour de cassation, Chambre social, audience publique du 28.05.2014, n° de pourvoi 13-10544, audience publique du 28.05.2014, n° de pourvoi 13-13996 available at www.legifrance.fr;

³² Regarding home on call duty, judgement in the case SIMAP, cited, par.50;

³³ European Commission, Communication [...] on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC, COM (1998)662 final – Explanatory memorandum, available at <http://ec.europa.eu/social/BlobServlet?docId=2933&langId=en>, p.12 pct.6; on the same opinion see Iso Del Giudice, F., Izzo, F, Solombrino, M. – Manuale di diritto del lavoro, ed.XXXIV, Editura Simone, Napoli, 2016 , p.244 and Roşioru, Felicia – Dreptul individual al muncii, Ed. Universul Juridic, Bucureşti, 2017 p.412;

³⁴ CJEU, judgement in the case SIMAP, cited, par. 50 ;

³⁵ CJEU, judgement in the case SIMAP, cited, par.48;

to the nature of the activities that prevent the worker from going home on a daily basis – certain periods of time, which have the purpose of restoring work capacity, are included in rest time and are consequently excluded from working time, even though the worker is still present at a place imposed by the employer or at the place of work.³⁶

The problem, however, was whether such periods could be included in working time when the worker's residence is the workplace. In the *Grigore*³⁷ case, the Court held that, according to the interpretation of Article 2 (1) of Directive 2003/88, classifying a period as “working time” “does not depend on the provision of a tied accommodation within the range of forest within that forester’s purview in so far as that provision does not imply that he is required to be physically present at the place determined by the employer and available there to his employer so that he may take appropriate action if necessary.” Based on this judgment, it can be concluded that the existence of a dwelling space within the space that constitutes a place of work is not enough to prove that the time spent by the worker in the dwelling is neither working time nor rest time. Furthermore, the Court stated that, for the purpose of delimiting working time from rest time, the criteria already set out in its case law must be applied in this case. Relevant to this point, Advocate General Eleanor Sharpston delivered on 26 July 2017 her Opinion in Case C-518/15, which is as follows: “[t]he fact that, in any given case, a worker may be required to spend stand-by time within a radius that is relatively close to his place of work does not in my view detract from the need to have proper regard to the quality of the time he may spend; [s]ave where a worker may be able to intervene remotely, it is of the nature of that type of duty that he may be under an obligation to remain close to his place of work; [i]t is the quality of the time that is spent rather than the precise

³⁶ For example in accordance with Directive 2002/15/EC, is a rest period for mobile workers who drive a team vehicle, the period spent standing by the driver or in the crate while the vehicle is in motion; according to Directive 2014/112/EU, in the case of inland waterway transport, the notion of “rest” also includes the rest time on board the vehicle when it moves or is at rest;

³⁷ Order of the Court (Sixth Chamber) of 4 March 2011, in the case C-258/10, *Nicușor Grigore v Regia Națională a Pădurilor Romsilva - Direcția Silvică București*, par.2 of the operative part, available at www.curia.eu

degree of required proximity to the place of work that is of overriding importance in this context.”³⁸

This evaluation must bear in mind that the situation of the embarked staff is unique and that surely, in the case of a longer mission, the embarked staff remains on-board the ship, as it may be unreasonable or too costly for the staff to leave the ship/drilling platform to go home at the end of each day and then return to the ship/platform for another period of activity.

As a result, the daily rest period of 12 hours – during which the employee is at the place of work, i.e. the marine platform, yet is not available to the employer and is not required to take action if needed under a pre-established program – does not meet the criteria for a period of duty/service at the workplace and cannot be included in the working time; thus, it constitutes rest time.

At the same time, although offshore activity is treated distinctly, drilling marine platforms are considered ships, according to art. 23 of Government Emergency Ordinance no. 42/1997 on civil navigation. Therefore, the question can be raised on whether or not in this case the definition of working time provided by Directive 1999/63/ EC could be taken into account, which would mean that it should be considered as working time only the period “during which the employee is required to do work on account of the ship.”

4.3. The issue of the time needed for workers’ transportation to the marine drilling platform and back to shore

The problem arose when some employees argued that the time used for transportation from shore – from a sea port or an airport – to the marine platform and then back should be deemed overtime and remunerated as additional work.

The local court denied this claim, stating that “Article 1 (3) of Annex no. 7 to the Collective Labour Agreement stipulates that “the transport time for [...] offshore employees is not considered working time and is therefore not included in the normal working time. In view of the specific nature of transport from the place of embarkation to the marine platform,

³⁸ Opinion of Advocate General Sharpston, delivered on on 26.07.2017 in the case C-518/15, ECLI:EU:C:2017:619, par.57, available at www.curia.eu;

employees will benefit for each shift from a gross allowance equivalent to the corresponding salary rights for 12 working hours on marine platforms.”³⁹

In the appeal, the court found that the time spent by the worker (employed as doctor) traveling from home to work could not be considered working time because he was not offering medical care during that period, nor was he at the employer’s disposal as Directive 2003/88/EC stipulates; and the employee did not prove that during the transportation from his home to his workplace was he bound by law to respect the employer’s directions or required to perform his regular duties⁴⁰.

Notably, the mentioned litigation regarding the employee’s claims for supplementary salary was related to overwork, and not about the employer’s obligation to respect the maximum working time or the minimum rest time. In this case, the definitions of working time and overwork at art.111 and 120 of Romanian Labour Code are applicable, both implying actual and effective work. When it comes to determining the salary rights for overwork, it appears to be irrelevant whether some periods are included as working time if the employee has not worked during that period of time.

If the litigation had been about the employer’s obligation to respect the maximum working time and the minimum rest time, it should have been applied to the definition of working time in art.2 of the Directive 2003/88 and art.111 of Labour Code as it is interpreted by European Union regulations and CJUE case law; this directive has a limited objective, namely the protection of the health and safety of the workers, and not the remuneration for working time.

It should be kept in mind that Directive 2003/88 allows for deviations from Articles 3-5, 8 and 16 in the case of offshore activities according to Article 17 (3) (a), yet does not allow for derogations from the provisions of Article 2, which defines the working time.

³⁹ Buzău District Court, 1st Civil Section, civil sentence no. 337/13.04.2017, ECLI:RO:TBBZU:2017:001.000337 (the appeal was rejected by Ploiești Court of Appeal with the civil decision no.2389/07.11.2017, ECLI:RO:CAPLO:2017:018.002389, available at www.rolii.ro);

⁴⁰ Ploiești Court of Appeal with the civil decision no.2389/07.11.2017, ECLI:RO:CAPLO:2017:018.002389, available at www.rolii.ro

Under the collective labour agreement, the parties in a relationship of employment cannot establish that certain periods of time are included or excluded from working time – contrary to what may result from the provisions of Article 2 of Directive 2003/88 – as they would provide a different definition of working time, and so, they would implicitly deviate from the provisions from which they are not supposed to deviate.

Therefore, the qualification of a period as working time or rest time cannot be considered under the collective labour agreement; however, an assessment of the factual situation must be completed according to the provisions of art. 111 of Labour Code, interpreted in compliance with art. 2 of Directive 2003/88, as this was, in its turn, interpreted by the CJEU.

In addition, it must be kept in mind that the referenced claims were regarding the time spent by the employee during transportation from a specific place (determined by the employer and by the nature of the transportation means) to the workplace, and not from home to the work place or the departure place.

Pertaining to this, it should be recalled that in CJEU's verdict in the case of Tyco⁴¹, the Court has held that “[p]oint (1) of Article 2 of Directive 2003/88/EC [...] must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, in which workers do not have a fixed or habitual place of work, the time spent by those workers travelling each day between their homes and the premises of the first and last customers designated by their employer constitutes ‘working time’, within the meaning of that provision.”

Although the Court has examined a specific set of circumstances to reach that conclusion, it has left out some key principles. For instance, the Court dictates that the workers' commute to the clients is necessary for them to perform their assigned tasks⁴², and so, ”workers in a situation such as that at issue [...] must be regarded as carrying out their activity or duties during the time spent travelling between home and customers”⁴³. With regard to the condition that the worker should be at the disposal of the employer during this period, it was ruled that, in order to meet that

⁴¹ CJUE, Third Chamber, Judgement of 10.09.2015, in the case C- 266/14, Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) c. Tyco Integrated Security SL, Tyco Integrated Fire & Security Corporation Servicios SA, ECLI:EU:C:2015:578, available at www.curia.eu ;

⁴² Par.32 of the judgement;

⁴³ Par.34 of the judgement;

condition, the worker must be in a situation wherein he is legally obliged to submit to the employer's instructions and to work for him⁴⁴; the determining factor is that the worker is required to be physically present at the place chosen by the employer and remain at the employer's disposal so they are available at a moment's notice⁴⁵. Moreover, it was acknowledged in the main proceedings that the employer establishes the list of clients and the order in which they are to be observed by the workers, as well as the timetable for customer meetings⁴⁶. During these journeys, the workers are subject to the instructions of the employer, meaning they cannot freely dispose of their time and cannot devote themselves to their own interests, indicating that they are, in fact, at the disposal of employers⁴⁷.

The decisive criterion for distinguishing working time from rest time in these situations – as expressed by the CJEU in the Tyco case – can be used in other cases. As discussed earlier, this criterion decrees that the worker has no or very little options on how to reach a specific location, determined by employer, in other words the workers are subject to a high degree of constraint, and that their employer must have a high degree of control over this activity, of course, excluding the time needed to be present at the fixed workplace.

It is interesting that this CJEU verdict was considered in a case on the same subject matter as the previous one. The Court of Appeal noted that it is unnecessary to verify whether the period needed to reach the marine platform and for the obligatory training on the rules on flight safety should be included in the working time, referring exclusively to the operative part of the CJEU judgement and finding that the applicant is not in the situation of the plaintiffs in that case; this was concluded because in that case, the workers “have a fixed, habitual job and cannot be assimilated to a technician who installs and maintains operating security devices in homes and industrial and commercial premises located in the territorial area in which they are assigned, in order to appeal to the CJEU's reasoning.” However, the Court of Appeal did not proceed to examine the prospect of working time including periods designated for flight

⁴⁴ Par.36 of the judgement;

⁴⁵ Par.35 of the judgement;

⁴⁶ Par.38 of the judgement;

⁴⁷ Par.39 of the judgement;

preparation, flight safety training, or alcohol tests, since the object of the dispute was not the employer's compliance with regulations concerning the period of daily rest, but salary rights. Nonetheless, the court found that for the periods designated for these mandatory activities, the compensation received by the applicant covered more than the difference in hours needed to complete the shift, excluding those periods from calculation of the time that is spent during paid work⁴⁸.

Transporting the worker to the marine platform from an airport or a sea port is done with the employer's means of transportation since, obviously, the employee could not travel by his own means of transportation to that destination. The process of taking over the activity at the platform and the travel back to shore is marked by the same characteristics, with the worker not having the option of remaining on-board, provided that the marine platform has a reduced technical accommodation and maintenance capacity for only the two teams who work the 12-hour shift.

It is true, however, that this inactive period cannot be considered additional work, as this involves doing actual work, according to art.122 of Labour Code; furthermore, it can be remunerated according to the provisions of the collective labour agreement, since it was, after all, stated in that case⁴⁹.

On several occasions, the CJEU has indicated not only that the issue of remuneration does not fall within the scope of the Working Time Directives⁵⁰, but also it has established that inactive periods of time – including additional working time – can be remunerated at a level lower than active periods that constitute working time, since no provision in the directives imposes a certain level of pay for periods considered working

⁴⁸ Bucharest Court of Appeal 7th Civil Section for labour conflicts and social security cases, civil decision no.1229 of 27 February 2017, available at www.rolii.ro;

⁴⁹ For details see Anghel, Răzvan - Procedura soluționării conflictelor individuale de muncă – ghid pentru practicieni, Ed.C.H. BECK București, 2017 p.333; Anghel, Răzvan – Timpul de lucru și timpul de odihnă – Jurisprudența Curții de Justiție a Uniunii Europene, Universul Juridic 2017 p.123-124;

⁵⁰ E.g. CJUE Ordinance (Sixth Chamber) of 04.03.2011, in the case C-258/10, item 4 of the operative part and the case law cited in that judgement, available at www.curia.eu; see also the CJUE Judgement in the case *Dellas e.a. cied*, par.38 and CJUE Ordinance in the case *Vorel*, cited, par.32 and CJUE Judgement, Third Chamber of 10 September 2015, in the case C - 266/14 par.48-49, available at www.curia.eu;

time⁵¹. As a result, much less could be sustained that the inactive periods that constitute working time could be remunerated at a level higher than normal working time, as it is set for additional work. This is the consistent stance of the French Court of Cassation, which has found – even though it acknowledged that, according to the case-law of the CJEU, it should be recognised as working time during any period in which the worker remains at the employer's disposal at the workplace – in several cases that inactive working time should have no influence on wage entitlements because these periods of time cannot be considered effective working time⁵².

5. Conclusions

Just as other activities that prevent the employee from returning home at the end of their normal work hours, offshore activity involves periods of on-board rest that cannot be deemed working time, much less working overtime – especially in the case of employees on marine drilling platforms. At any rate, one must take into account the object of the litigation – namely, whether it is about the employer's obligation to respect the maximum working time and minimum rest time or merely about salary rights – as the rules applied to delimitate working time from rest time differs depending on the case. The definition of working time, as described by Directive 2003/88, can include inactive periods only for the purpose of work safety and health regulation and not for the determination of salary rights, as in the latter's case, the only relevant factor is the actual work done.

⁵¹ CJUE Ordinance (Fifth Chamber) of 11.01.2007, in the case C-437/05 and CJUE Judgement (Third Chamber) of 10.09.2015, in the case C- 266-14 par.47, available at www.curia.eu

⁵² Cour de cassation, Chambre social, audience publique du 31.10.2012, n° de pourvoi 11-12277, audience publique du 23.01.2013, n° de pourvoi 10-20413, audience publique du 07.12.2010, n° de pourvoi 09-42711/ 09-67632, audience publique du 13.06.2007, n° de pourvoi 06-42106, audience publique du 28.05.2014, n° de pourvoi 13-10544, audience publique du 30.11.2010, n° de pourvoi 09-66672, audience publique du 28.05.2014, n° de pourvoi 13-13996, available at www.legifrance.fr.

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