



Position Paper

Directive (EU) 2018/958 on the review of proportionality and its inapplicability to the profession of judicial officer

**Presented by the International Union of Judicial Officers
and the European Union of Judicial Officers**

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The purpose of this "Position Paper" of the International Union of Judicial Officers (UIHJ) is to demonstrate that based on European Union law, Directive (EU) 2018/958¹ of 28 June 2018, known as the "Proportionality Directive", is not applicable to the profession of judicial officer, due to the public nature of the duties carried out by them. This Directive requires Member States to verify that any new professional regulation is necessary, appropriate and proportionate, unless the profession concerned is involved in the exercise of official authority within the scope of Article 51 of the Treaty on the Functioning of the European Union (TFEU). However, judicial officers carry out specific missions that fall within this exception.

Directive (EU) 2018/958 is part of Directive 2005/36/EC of 7 September 2005, on the recognition of professional qualifications². It requires Member States to carry out a proportionality analysis before adopting new legislation affecting access to, or exercise of a so-called 'regulated' profession. Article 51 TFEU, which is part of EU primary law, excludes from the application of the rules on freedom of establishment and the freedom to provide services activities, connected with the exercise of official authority. It follows that if a profession satisfies the conditions of Article 51 TFEU, it automatically falls outside the scope of Directive 2018/958.

Since the seminal *Reyners*³ judgment delivered by the Court of Justice in 1974, three indicators have made it possible to qualify a profession with public authority: the ability to adopt a binding unilateral act, the possibility of resorting to coercion and the direct implementation of this act without prior judicial control. Judicial officers meet these criteria. They serve summonses which refer to the judge and commence a trial, they proceed to the seizure of property, to eviction, sometimes against the will of the debtor, and they have a legal right to forced access to the premises, the police only intervening in support.

¹ OJ L 173, 9 July 2018, p. 25.

² OJ L 255, 30 September 2005, p. 22.

³ ECJ, 21 June 1974, *Reyners v. Belgian State*, case. C2/74, ECR 1974, p. 631. Available on EURLex: <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A61974CJ0002>

The 1998 *Commission v Spain* and 1993⁴ *Thijssen*⁵ case-law confirms that the ability to impose a decision is sufficient to bring an activity within the scope of Article 51 of TFEU.

This classification is unanimously recognized by the laws and doctrines of the Member States. In Germany, the *Gerichtsvollzieher* are civil servants of the Länder⁶, the federal law, which transposed Directive 2018/958/EC, does not apply to them, since their powers fall within the scope of Article 51 TFEU from the outset. In the Netherlands, the law gives judicial officers a monopoly on service and enforcement. The Dutch government had excluded the profession from the scope of Directive 2005/36/EC as early as 2013⁷. However, further discussions have been initiated concerning the application of Directive 2018/958/EC. In this regard, several national professional organizations, such as the Netherlands Bar Association, the Royal Organization of Judicial officers, the Netherlands Corporation of Maritime Pilots, the Royal Netherlands Institute of Chartered Accountants and the Royal Netherlands Organization of Notaries, have expressed their strong opposition to such an application, which they consider to be an unjustified over-transposition. In Belgium, judicial officers are appointed by the King and their status is governed by the Judicial Code⁸, which confers on them duties falling within the scope of public authority such as the forced execution of court decisions as well as eviction procedures. Access to and pursuit of the profession is strictly governed by national legal provisions, independent of any harmonized European standard. Belgian legislation therefore does not expressly recognize judicial officers as a regulated profession falling within the scope of Directive 2018/958/EC. In that sense, their specific regime justifies an implicit exclusion from the proportionality review mechanism. In addition, judicial officers carry out public tasks such as the service of judicial documents and the enforcement of court decisions, thus confirming that they belong to a professional category excluded under Article 51 TFEU. In France, where commissioners of justice are public and ministerial officers with a monopoly on the enforcement of documents and the service of documents, the circular of 24 April 2023 transposing Directive 2018/958/EC does not mention these professionals. This confirms that the profession is considered to be an exercising official authority.

This analysis is supported by several European instruments. Directive 2006/123/EC on services in the internal market⁹ expressly excludes "the services of state-appointed [...] judicial officers".¹⁰ Furthermore, under Council of Europe law, the European Court of Human Rights

⁴ ECJ, 29 October 1998, *Commission v. Spain*, case. C-114/97 [1998] ECR I6717. Available on EURLex: <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A61997CJ0114>

⁵ ECJ, 13 July 1993, *Thijssen*, case. Case C42/92 [1993] ECR I4047. Available on EURLex: <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A61992CJ0042>

⁶ See Art. 33 sec. 4 Grundgesetz (German Constitution), §§ 154, 155 Gerichtsverfassungsgesetz, GVG, § 753 Zivilprozeßordnung, ZPO

⁷ See The Netherlands, Parliamentary Papers II 2014/2015,34272, no. 3, p. 50: "*In view of the nature of the office of a judicial officer, the Directive does not apply. By its very nature, this concerns the exercise of a profession with public authority, since the judicial officer has been granted powers under the law which involve the power of enforcement (e.g. seizure of assets). In the case of exercise of public authority, it is desirable to work only with the national qualifications for these professions. The directive also does not apply to these professions*"

⁸ See article 509 of the Judicial code

⁹ OJ L 376, 27 December 2006, p. 36.

¹⁰ See Article 2(2)(l).

described judicial officers as "public bodies of the State" in *the Platakou*¹¹ and *Tsironis*¹² judgments (2001). In a similar vein, under European Union law, Advocate General Villalón¹³ emphasized in his 2010 Opinion in the case *Commission v. Belgium* that the enforcement of a notarial act falls exclusively within the competence of the judicial officer, who is by nature a public authority.

Subjecting judicial officers to the proportionality test would expose Member States to three risks. The first is legal uncertainty: each enforcement measure could be challenged for lack of a prior test of the proportionality of the regulations governing the profession of judicial officer. The second is the infringement of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights¹⁴: to delay the execution of a decision would be to deprive the litigant of the concrete benefit of their judgment. The third is the infringement of the primary law of the European Union: by subjecting judicial officers to the proportionality test referred to in Directive 2018/958/EC, the European Union exceeds its powers, by disregarding the exception provided for in Article 51 of the Treaty on the Functioning of the European Union (TFEU), which excludes from the scope of the freedoms of establishment and to provide services activities connected with the exercise of official authority. This exception expressly limits the scope of secondary legislation, such as directives.

The UIHJ therefore calls on the European institutions and the Member States of the European Union to formally recognize that Directive 2018/958/EC does not apply to judicial officers, to refrain from including them in their transposition legislation, and to pursue a structured dialogue with the UIHJ. This exchange should prevent over-transposition, ensure domestic and cross-border legal certainty, and safeguard the effective enforcement of court decisions in Europe.

In conclusion, because they implement decision-making and coercive powers specific to the State, judicial officers participate fully in the exercise of public authority. In accordance with Article 51 TFEU and the settled case-law of the Court of Justice, Directive 2018/958/EC is not applicable to them. Any national measure to the contrary would infringe EU primary law and weaken the effective judicial protection of citizens.

¹¹ *Platakou v. Greece*, Application no. 38460/97, judgment of 11 January 2001 (Chamber, final on 5 September 2001), § 37: the Court describes judicial officers as "public bodies of the State".

¹² *Tsironis v. Greece*, application no. 44584/98, judgment of 6 December 2001 (final on 6 March 2002): confirmation of the status of judicial officer as a public body. The ECtHR further stated in the case of 3ACZ S.R.O. v. the Czech Republic, 10 February 2011, no. 221835/06 : §62. The Court accepts that the provisions concerning the payment of enforcement fees, as applied by the domestic courts in the present case, pursue the legitimate aim of ensuring the proper administration of justice, of which judicial officers form an integral part. In its judgment of 22 June 2004 in *Pini and Bertami and Manera and Atripaldi v. Romania* (nos. 78028/01 and 78030/01), the Court noted at § 183 that enforcement agents "act in the interest of the proper administration of justice, which makes them an essential component of the rule of law".

¹³ Opinion of Advocate General Villalón, 14 September 2010, *Commission v. Belgium* (Case No. C47/08), §§ 1630.

¹⁴ It will be recalled that the right to the execution of judgments within a reasonable time has been enshrined by the European Court on Human Rights, on the basis of Article 6 of the European Convention on Human Rights, since the *Hornsby v. Greece* judgment of 19 March 1997, application no. 18357/91.



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