

Dear Registrar,

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 46 countries, and through them more than 1 million European lawyers. The CCBE welcomes the opportunity to comment on the proposal to amend aspects of the Court's practice in relation to Rule 39 (interim measures) as set out in the enclosure to your letter of 13 November 2023. The proposals have been examined by the CCBE's specialist committee of practitioners focused on the work of the Court, PD Stras.

The operation of interim measures under R 39 has been developed over many years since the Court's first indication given in the *Soering* case in 1989, crucially including the recognition of the binding effect of R 39 indications. The scope and operation of R 39 is of great importance to legal practitioners, who are most often those who seek interim relief under the Rule. The clarification of the Court's practice in relation to R 39 is in itself welcome, particularly because interim measures are indicated in the most urgent and sensitive cases where irreversible harm is anticipated to the core rights under the Convention. It is understood that the Court's proposals will not involve amendment of the current text of R 39.

The Court's first two proposals change the current practice, by proposing that the judge who decides to indicate interim measures under R 39 should be named and that a judicial order setting out the interim measures should be sent to the parties. Both proposals are desirable. They will present the decision maker and the terms of the interim measures in a formal manner, which is appropriate for a binding indication to the parties. Presumably the judicial orders will be in what will become a common form. Both proposals will enhance the transparency and authority of decisions under R 39.

The Court's third proposal relates to the reasons for granting interim measures. The proposal is that the current practice should be retained, whereby reasons are not given, but the Court issues a press communique in certain cases, which describe the decision to issue interim measures.

With respect, from the perspective of court users, this proposal is regrettable and falls short of practice which would provide full transparency and legal clarity in relation to the decision to indicate interim measures. Three points should be made.

First, it is obvious that there are reasons for any decision to indicate interim measures. Those measures are binding obligations for the parties, given in sensitive and exceptional circumstances which inevitably impose a direction on the respondent Government which has not been given in the domestic proceedings relating to the case at issue. The authority of the indication, as well as its scope and conceivably its analogous applicability to other comparable cases, all point to the desirability for reasons to be given.

Secondly, it may be said that interim measures are by their nature temporary and subject to potential change or withdrawal if circumstances change. Although that is true, it is not a reason to fail to give reasons; rather the reverse. Giving reasons for the decision to impose interim measures would enable the domestic authorities to identify clearly

why interim measures have been indicated and what change of circumstances or conduct in the proceedings may lead to interim measures being adapted or lifted.

Thirdly, and importantly, the Convention obligations are predicated on subsidiarity and the assumption that, given that the Convention is part of the domestic law of all Council of Europe Member States, in principle human rights protection to the Convention standard should be provided by the domestic courts. Were reasons to be given for decisions to indicate interim measures this would signpost to domestic courts, as well as to practitioner before them, what the Convention requires in exceptional cases to prevent potentially irreversible harm to core rights protected by the Convention.

The current uneven practice of issuing a press communiqué in certain cases where interim measures have been indicated is no substitute for giving reasons. First, press communiqués are issued by the Registrar, not the Court; secondly, they are stated not to bind the Court. Thirdly, although a communiqué may be issued in cases which are judged suitable by the Registrar, the national authorities and courts as well as other court users have a legitimate interest in understanding the reasons for a divergence of view in Strasbourg from the position reached in sensitive cases in the domestic legal system.

It is respectfully suggested that the reform of the Court's practice relating to the grant of interim measures under R 39 should include that reasons are provided in the judicial order served on the parties and that that order should publicly available.

The Court's final proposal is that there should be no change in the current practice to adjourn requests for interim measures in cases where interim measures are sought prematurely. The current practice reflects the difficulty which arises quite often in urgent cases, that the applicant is attempting a final domestic remedy which, if granted will protect the position, but if refused will expose the applicant to the imminent risk of an irreversible breach of a core Convention right.

In such cases the potential protection of an application under R 39 can only be effective if the applicant can notify the Court in advance of the risk that an unfavourable decision would have irreversible consequences, giving the best estimate as to when that final domestic decision may be given. Technically, such cases are premature; in some the anticipated risk will not arise; in others there may be unexpected delays in the domestic proceedings; in others, matters may become urgent very quickly.

The Court's current practice, reflected in the Practice Direction, is well understood and works satisfactorily. The position has been simplified and improved by the opportunity to lodge requests for R 39 electronically. There is no obvious need for any change.

Finally, your letter makes clear that the current Practice Direction would be amended in the light of those of the proposals which the Court adopts. It is respectfully suggested that consideration might then be given to the fact that, although interim measures are usually directed to respondent Governments, the current Practice Direction is almost exclusively addressed to applicants and their representatives.

The CCBE thanks the Court for the opportunity to convey its views in relation to this important aspect of the Court's practice.

Your faithfully,