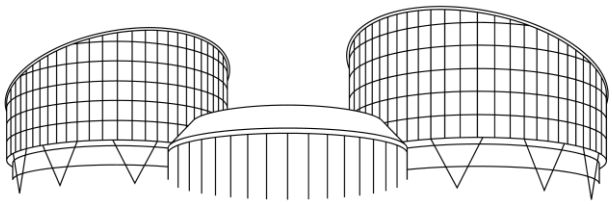

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 45199/09
MELTEX LTD
against Armenia

The European Court of Human Rights (Third Section), sitting on 21 May 2013 as a Chamber composed of:

Josep Casadevall, *President*,
Alvina Gyulumyan,
Corneliu Bîrsan,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria,
Johannes Silvis, *judges*,

and Marialena Tsirli, *Deputy Section Registrar*,

Having regard to the above application lodged on 19 August 2009,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Meltex Ltd, is a private Armenian broadcasting company ("the applicant company"), that was set up in 1995 and has its registered office in Yerevan. The applicant company was represented before the Court by Mr A. Ghazaryan and Mr A. Zeynalyan, lawyers practising in Yerevan.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Background to the case: application no. 32283/04 and the Court's judgment of 17 June 2008

3. Between June and December 2003 the National Television and Radio Commission ("the NTRC"), which was entrusted with regulating the licensing and monitoring the activities of private television and radio companies, put out calls to tender for band 25, bands 31, 39 and 51, bands 3 and 63, and band 56. The applicant company submitted bids for all of the above bands.

4. The NTRC awarded all of the licences to other bidders.

5. The applicant company instituted proceedings in the Commercial Court against the NTRC, contesting the results of the tenders. All the claims were dismissed in the final instance by the Court of Cassation on 27 February and 23 April 2004 respectively.

6. On 27 August 2004 the applicant company and its chairman, Mr Mesrop Movsesyan, lodged an application with the Court (application no. 32283/04) against the Republic of Armenia under Article 34 of the Convention. The applicants alleged that the refusal of the state authorities to award a broadcasting licence amounted to a violation of their freedom of expression under Article 10 of the Convention. In particular they submitted that the NTRC was obliged by law to inform them of the reasons for denying the applicant company a licence. The mere presence of the applicant company's representative during the presentation of competitive bids and a points-based vote which, moreover, indicated only a total score, did not constitute proper provision of a reasoned decision. The NTRC's letters announcing the outcome of the calls to tender could not be considered as notification of reasons either, since they simply announced the relevant decisions without stating the grounds for them. According to the applicants this rendered the licensing process arbitrary and not as prescribed by law.

7. The application was considered by the Court, which gave judgment on 17 June 2008 (*Meltex Ltd and Movsesyan v. Armenia*, no. 32283/04, 17 June 2008). The Court first considered that the application, in so far as it concerned the second applicant, was incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3, and therefore limited its examination of the complaints raised in the application to those which concerned the applicant company. In that respect, the Court held that there had been a breach of Article 10 of the Convention as the interferences with the applicant company's freedom to impart information and ideas did not meet the Convention requirement of lawfulness. The

Court noted in particular that a procedure which did not require a licensing body to justify its decisions did not provide adequate protection against arbitrary interference by a public authority with the fundamental right to freedom of expression (ibid., § 83).

8. As to the application of Article 41 of the Convention, the Court awarded the applicant company EUR 20,000 for non-pecuniary damages together with EUR 10,000 in legal costs and expenses for the proceedings before the Court (ibid., §§ 103-108).

2. Proceedings before the Court of Cassation for re-opening the cases

9. On 17 December 2008, on the basis of the Court's judgment, the applicant company applied to the Court of Cassation for the final two judgments given at domestic level to be reviewed on the basis of a new circumstance.

10. In its two decisions of 19 February 2009 the Court of Cassation dismissed the applications to reopen the proceedings. It held in particular that:

> "The complaint of the [applicant] Company to the European Court was about the failure of the NTRC to give reasons for not recognising the [applicant] Company as a winner in the competitions held by the NTRC, and the European Court merely considered and found that the lack of such reasoning was in conflict with the requirements of Article 10 of the Convention. Whereas, in [this] appeal the applicant [company] requested that the decisions recognising other companies as winners be declared void and a new competition be opened. The [applicant] Company based the above-mentioned requests on the principle of "*restitutio in integrum*".
>
> The above principle implies restoration of the situation existing before the breach, that is, restoration of everything the person had prior to the violation of his right. However, the complaints raised in the [applicant] Company's requests, namely about declaring null and void the decisions on recognising other companies as winners in the competition, recognising [the applicant company] as a winner and granting it a licence cannot be deemed a restoration of the situation existing before the violation, since the judgment of the European Court solely provided that the NTRC had failed to reason its decision on not recognising the [applicant] Company as a winner. The failure to reason the refusal does not automatically mean that the decision in respect of the winning company should be declared void and a new competition opened since the rights of the [applicant] Company (Article 10 of the Convention) were violated as a result of the failure to provide reasons for not recognising it as the winner and not as a result of recognising the other company as the winner in the competition ...
>
> ... it is not always possible to repair the consequences of violations established by the European Court by providing compensation, and the respondent state may be required to adopt individual or general measures in respect of the applicant. In particular, the European Court may require a new examination of the case, as it did in the case of *Barbera, Messeque and Jabardo v. Spain* of 6 December 1998.
>
> Meanwhile ... it is necessary to mention that the application of such measures becomes binding only when the European Court directly requires the application of such measures. The judgment of the European Court in this case, besides the

obligation to provide compensation, only mentioned that the unreasoned decisions of the Commission were unacceptable. The Court of Cassation therefore finds that the claims of the applicant, such as annulment of the decision on recognising the other company as the winner and granting a licence are not in line with the logic of the judgment of the European Court...”

3. Proceedings before the Constitutional Court

11. On 19 August 2009 the applicant company lodged an application with the Constitutional Court seeking to annul Article 204^{28} of the Code of Civil Procedure applied in its case by the Court of Cassation.

12. By its decision of 23 February 2010 no. DCC-866 the Constitutional Court terminated the proceedings. In doing so it held in particular that Article 204^{28} of the Code of Civil Procedure had already been recognised as unconstitutional in its decision no. DCC-755 and no law had been adopted to bring it into conformity with the Constitution.

4. New proceedings before the Court of Cassation for re-opening the cases

13. Relying on the decision of the Constitutional Court, the applicant company lodged two appeals with the Court of Cassation seeking the reopening of the cases on the ground of new circumstance, namely the decision of the Constitutional Court of 23 February 2010 (see above § 12).

14. On 13 August 2010 the Court of Cassation adopted two decisions dismissing the applicant’s appeals. In doing so, the Court of Cassation in particular stated:

“... relying on the decision no. DCC-866 of the Constitutional Court ... the Court of Cassation notes that its decision of 19 February 2009 is to be reviewed.

At the same time the Court of Cassation states that Article 204^{28} sets out the types of decisions to be taken by the court in the event of revision based on new circumstances, which means that the decision ... no. DCC-866 relates [solely] to the procedural norm applied by the Court of Cassation in its decision of 19 February 2009 and does not concern the reasons for dismissing the claims of the [applicant] Company from a legal point of view ...”

B. Resolution of the Committee of Ministers of the Council of Europe of 8 June 2011

15. The Court’s judgment of 17 June 2008 became final on 17 September 2008.

16. In a letter dated 20 May 2009 the applicant company informed the Directorate General of Human Rights and Rule of Law (“DGI”) of the Council of Europe about the refusal of the Court of Cassation to review the final judgments in its case.

17. In a letter dated 1 February 2010 the applicant company informed DGI about application no. 45199/09 lodged with the Court, raising an issue of a continuing violation of Article 10.

18. In a letter dated 10 February 2011 the applicant company informed DGI about the second refusal of the Court of Cassation to review its case. By the same letter DGI was informed that a new call to tender had taken place in December 2010. The applicant company alleged that it had submitted a competitive bid but in the results of the NTRC's point-based voting another company had been announced as the winner of the tender.

19. The Committee of Ministers of the Council of Europe concluded its examination of application no. 32283/04 on 8 June 2011 by adopting Resolution CM/ResDH(2011)39, the relevant parts of which read:

> "... Having regard to the judgment transmitted by the Court to the Committee once it had become final;
>
> Recalling that the violation of the Convention found by the Court in this case concerns the applicant company's right to freedom of expression on account of the refusal by the National Television and Radio Commission (NTRC), on seven occasions in 2002 and 2003, to deliver to the applicant a broadcasting licence without giving reasons for its decisions (violation of Article 10) (see details in Appendix); ...
>
> Having examined the information provided by the government in accordance with the Committee's Rules for the application of Article 46, paragraph 2, of the Convention;
>
> Having satisfied itself that, within the time-limit set, the respondent state paid the applicant the just satisfaction provided in the judgment (see details in Appendix),
>
> Recalling that a finding of violations by the Court requires, over and above the payment of just satisfaction awarded by the Court in its judgments, the adoption by the respondent state, where appropriate:
>
> - of individual measures to put an end to the violations and erase their consequences so as to achieve as far as possible *restitutio in integrum*; and
>
> - of general measures preventing similar violations;
>
> Having taken note that the applicant company had participated in a tender in December 2010, that it received a reasoned decision from the NTRC and that it has the possibility to contest the results of the licensing tender in the courts of the Republic of Armenia;
>
> Having taken note of the authorities' commitment that the NTRC will fully and properly substantiate and reason its decisions, "both in respect of winners of competitions as well as other participants"; ...

DECLARES, having examined the measures taken by the respondent state (see Appendix), that it has exercised its functions under Article 46, paragraph 2, of the Convention in this case and

DECIDES to close the examination of this case.

Appendix to Resolution CM/ResDH(2011)39: Information about the measures to comply with the judgment in the case of

Meltex and Mesrop Movsesyan against Armenia

Introductory case summary

The case concerns a violation of the applicant company's freedom of expression on account of the refusal by the National Television and Radio Commission (NTRC), on seven occasions in 2002 and 2003, to deliver to the applicant a broadcasting licence (violation of Article 10).

The European Court concluded that there had been interference with the applicant company's freedom to impart information and ideas and that this interference had not met the requirement of lawfulness under the European Convention. The Court noted in particular that a procedure which did not require a licensing body to justify its decisions did not provide adequate protection against arbitrary interference by a public authority with the fundamental right to freedom of expression.

I. Payment of just satisfaction and individual measures

a) Details of just satisfaction

Non-pecuniary damage - 20000 EUR

Costs and expenses - 10000 EUR

Total - 30000 EUR

Paid on 27/11/2008

b) Individual measures

A call for new licensing tenders for digital broadcasting on 25 national and local frequencies was announced on 20 July 2010. The applicant company took part in a tender for one frequency (competition No. 11). The results of the licensing tender "On winners in the 11th competition" are set out in Decree No. 96-A of the National Television and Radio Commission, dated 16 December 2010. The applicant company did not win the tender. Nothing prevents it from contesting the results of the licensing tender in the courts of the Republic of Armenia.

II. General measures

The Law on Amendments and Additions to the Television and Radio Broadcasting Act was adopted on 10 June 2010.

The provision of the TV and Radio Broadcasting Act concerning reasoning of decisions of the NTRC, Article 49(3), reads as follows "The National Commission shall decide the winner of the competition on the basis of the results of the point-based vote. The decision of the National Commission shall be properly substantiated and reasoned".

In order to alleviate any misunderstanding of the obligation on the NTRC to reason all types of decisions, the Government Agent made the following official statement : "Article 49(3) of the TV and Radio Broadcasting Act should be interpreted in accordance with Article 10 of the Convention, and in the light of the Meltex judgment, in a way that a single decision of the Commission provides a full and proper substantiation and reasoning of the results of the points-based vote, including both in respect of the winner of the competition, as well as of all of its other participants"...

It is therefore expected that any future decision of the NTRC will be taken in conformity with the European Convention of Human Rights and the case-law of the European Court of Human Rights.

III. Conclusions of the respondent state

The government considers that the measures adopted have fully remedied the consequences for the applicant of the violation of the Convention found by the European Court in this case, that these measures will prevent similar violations and that Armenia has thus complied with its obligations under Article 46, paragraph 1, of the Convention."

C. Relevant domestic law and practice

20. The relevant provisions of the Code of Civil Procedure, as in force at the material time, read as follows:

"**Article 204[20] The grounds of revision of judicial acts based on new circumstances**

1. Judicial acts can be reviewed on the ground of the following:

...

2) a final decision or judgment of an international court ... which substantiates a violation of human rights provided by an international agreement of the Republic of Armenia;

...

2. Final judicial acts of first instance courts, the Court of Appeal and the Court of Cassation can be subject to appeal on the basis of new circumstances.

Article 204[28] The power of the court in the event of revision

In the event of revision of the judicial act on the basis of new circumstances the court is empowered:

1) not to grant the appeal and leave the previous judicial act in force;

2) to change the judicial act fully or partially;

3) to terminate the proceedings fully or partially."

COMPLAINT

21. The applicant company complained under Article 10 of the Convention that the Government had failed to enforce the Court's judgment of 17 June 2008 in the case of *Meltex Ltd and Movsesyan v. Armenia*, (no. 32283/04). In particular, relying on the Court's judgment in the case of *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, ECHR 2009, the applicant company claimed that the refusal of the Court of Cassation to reopen its case constituted a fresh violation of its freedom of expression under Article 10 of the Convention.

THE LAW

22. The applicant company complains that the Court of Cassation failed to reopen its case in compliance with the Court's judgment of 17 June 2008 in relation to its first application. It considers that there has been, as a result of this failure, a new violation of Article 10 of the Convention which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

1. The applicant's submissions

23. The applicant company alleged, *inter alia*, that the principles established by the Court in the case of *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* were applicable in its case. In both cases the only issue at stake was whether the refusal of the competent domestic court to reopen the case after the Court had found a violation of Article 10 amounted to a new violation of the same Article.

24. The applicant further alleged that the Court of Cassation's refusal of its reopening requests amounted to a continuing violation of its rights under Article 10.

2. The Court's assessment

25. The Court finds that it is necessary to examine whether it has jurisdiction *ratione materiae* to examine the applicant's complaint.

(a) General principles

26. The Court reiterates that the finding of a violation in its judgments is in principle declaratory (see *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX) and that, under Article 46 of the Convention, the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers (see, *mutatis mutandis*, *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B). It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see *Pisano v. Italy* (striking out) [GC], no. 36732/97, § 43, 24 October 2002 and *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII). Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scozzari and Giunta*, cited above, § 249). For its part, the Court cannot assume any role in this dialogue (*Lyons and Others*, cited above).

27. Although the Court can in certain situations indicate the specific remedy or other measure to be taken by the respondent state (see, for instance, *Assanidze v. Georgia* [GC], no. 71503/01, point 14 of the operative part, ECHR 2004-II) it still falls to the Committee of Ministers to

evaluate the implementation of such measures under Article 46 § 2 of the Convention (see *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, § 107, 23 November 2010; *Suljagić v. Bosnia and Herzegovina*, no. 27912/02, § 61, 3 November 2009).

28. Consequently, the Court has consistently emphasised that it does not have jurisdiction to verify whether a Contracting Party has complied with the obligations imposed on it by one of the Court's judgments. It has therefore refused to examine complaints concerning the failure by States to execute its judgments, declaring such complaints inadmissible *ratione materiae* (see *Moldovan and Others v. Moldova* (dec.), no. 8229/04, 15 February 2011; *Franz Fischer v. Austria* (dec.), no. 27569/02, ECHR 2003-VI).

29. However, the Committee of Ministers' role in this sphere does not mean that measures taken by a respondent State to remedy a violation found by the Court cannot raise a new issue undecided by the judgment (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* cited above, § 62) and, as such, form the subject of a new application that may be dealt with by the Court.

30. On that basis, the Court has found that it has the competence to entertain complaints in a number of follow-up cases, for example where the domestic authorities have carried out a fresh domestic examination of the case by way of implementation of one of the Court's judgments whether by reopening the proceedings (see *Emre v. Switzerland* (no. 2) no. 5056/10, 11 October 2011 and *Hertel*, cited above) or by the initiation of an entire new set of domestic proceedings (see *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria* (no. 2), nos. 41561/07 and 20972/08, 18 October 2011 and *Liu v. Russia* (no. 2), no. 29157/09, 26 July 2011).

31. Moreover, in the specific context of a continuing violation of a Convention right following adoption of a judgment in which the Court has found a violation of that right during a certain period of time, it is not unusual for the Court to examine a second application concerning a violation of that right in the subsequent period (see, amongst others *Ivanţoc and Others v. Moldova and Russia*, no. 23687/05, §§ 93-96, 15 November 2011 regarding continuing detention; *Wasserman v. Russia* (no. 2), no. 21071/05, §§ 36-37, 10 April 2008 as to the non-enforcement of a domestic judgment). In such cases the "new issue" results from the continuation of the violation that formed the basis of the Court's initial decision. The examination by the Court, however, is confined to the new periods concerned and any new complaints invoked in this respect (see, for example, *Ivanţoc and Others*, cited above).

32. It is clear from the Court's case-law that the determination of the existence of a "new issue" very much depends on the specific circumstances of a given case and that distinctions between cases are not always clear-cut.

So, for instance, in *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (cited above), the Court found that it was competent to examine a complaint that the domestic court in question had dismissed an application to reopen proceedings following the Court's judgment. The Court relied mainly on the fact that the grounds for dismissing the application were new and therefore constituted relevant new information capable of giving rise to a fresh violation of the Convention (ibid., § 65). It further took into account the fact that the Committee of Ministers had ended its supervision of the execution of the Court's judgment without taking into account the reopening refusal as it had not been informed of that decision. The Court considered that, from that standpoint also, the refusal in issue constituted a new fact (§ 67). Similarly, in its recent judgment in the case of *Emre v. Switzerland* (no. 2) (cited above) the Court found that a new domestic judgment given following the reopening of the case, and in which the domestic court had proceeded to carry out a new balancing of interests, constituted a new fact. It also observed in this respect that the execution procedure before the Committee of Ministers had not yet commenced. Comparable complaints were, however, dismissed in the cases of *Schelling v. Austria* (no. 2) (dec.), no. 46128/07, 16 September 2010 and *Steck-Risch and Others v. Liechtenstein*, (dec.) no. 629061/08, 11 May 2010, as the Court considered that on the facts, the decisions of the domestic courts refusing the applications for reopening were not based on or connected with relevant new grounds capable of giving rise to a fresh violation of the Convention. Further, in *Steck-Risch and Others v. Liechtenstein* the Court observed that the Committee of Ministers had ended its supervision of the execution of the Court's previous judgment prior to the domestic court's refusal to reopen the proceedings and without relying on the fact that a reopening request could be made. There was no relevant new information in this respect either.

33. Accordingly, the powers assigned to the Committee of Ministers by Article 46 to supervise the execution of the Court's judgments and evaluate the implementation of the measures taken by the States under this Article will not be encroached on where the Court has to deal with relevant new information in the context of a fresh application (see *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland* cited above, § 67).

(b) Application of the above principles

34. Applying the above principles to the case before it, the Court must therefore ascertain whether the present application contains relevant new information possibly entailing a fresh violation of Article 10, for the examination of which the Court is competent *ratione materiae*, or whether it concerns only the execution of the initial application without raising any relevant new facts.

35. The Court recalls in this connection that the Grand Chamber, in its judgment in the case of *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) (cited above) considered the decision of the Swiss Federal Court to dismiss the applicant's request to reopen the proceedings following the Court's finding of a breach of Article 10 to constitute relevant new information capable of giving rise to a fresh violation of Article 10. In coming to that conclusion, the Court noted that when dismissing the application to reopen the proceedings and to allow the applicant to broadcast the commercial in question, the Federal Court mainly relied on new grounds (ibid., § 65).

36. In addition, the Court observed that the Committee of Ministers had ended its supervision of the execution of the Court's previous judgment by adopting a Resolution in which it had relied on the fact that the applicant was entitled to request the revision of the impugned judgment of the Swiss Federal Court. The fact that the Government had not informed the Committee of Ministers that the Federal Court had previously already refused to reopen the proceedings constituted another new fact and the Court therefore considered itself competent *ratione materiae* to examine the new application (ibid., §§ 25, 67-68).

37. In determining whether, in the present case, the refusal of the Court of Cassation to reopen the applicant company's case constitutes relevant new information, the Court notes that the Court of Cassation dismissed the applicant company's reopening request, stating that the annulment of the decision of the NTRC did not emanate from the Court's judgment of 17 June 2008.

38. The Court notes that in its judgment of 17 June 2008 it found the violation of the applicant company's right to freedom of expression only on account of the refusal by the NTRC to deliver to the applicant company a broadcasting licence without giving reasons for its decisions (see above § 8) – a fact which the Court of Cassation acknowledged in the reopening proceedings. It is clear that the Court of Cassation did not bring any new arguments in refusing the applicant company's request.

39. In these circumstances, the Court considers that the present case must be distinguished from that of *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) (cited above) in that the Court of Cassation's decision not to reopen the compensation proceedings was not based on relevant new grounds capable of giving rise to a fresh violation of Article 10.

40. Moreover, the Committee of Ministers ended its supervision of the execution of the Court's previous judgment in application no. 32283/04 after the refusal by the Court of Cassation to reopen the proceedings. Although the Committee of Ministers had been informed that the Court of Cassation had dismissed the application to reopen the proceedings, in its resolution the Committee of Ministers declared itself satisfied with the

individual and general measures taken by the Republic of Armenia to execute the Court's judgment.

41. That being so, the Court finds that it has no jurisdiction to examine the applicant's complaint and therefore the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Marialena Tsirli	Josep Casadevall
Deputy Registrar	President