ARMENIA

DOC FOR DISSEMINATION-1

20 May 2009

Department for the execution
Of the Judgments of ECHR
Directorate General of the Human Rights and Legal Affairs
Council of Europe
F-67075 Strasbourg CEDEX

Re: State of Execution by Armenia of *Meltex Ltd. and Mesrop Movsesyan v. Armenia* judgment of the European Court (no.32283/04)
(A1+TV case)
Dear Sir/Madame,

Please consider this letter as a communication to the Committee of Ministers under Rule 9(1) of the Rules for the Supervision of the Execution of ECHR Judgments for the forthcoming 1059th DH meeting of the Ministers Deputies of June 2-4, 2009.

This communication is about failure by Armenia of implementing individual measures for restoring to the extent as possible the violated rights of the Meltex ltd. after judgment of the European Court against Armenia on 17/06/2008. The following is analysis by my lawyers who instituted unsuccessful revision proceedings in Armenia based on the judgment of the European Court.

Background facts

The Meltex Ltd. (hereinafter Meltex) lost in 8 broadcasting license competitions in 2002 and 2003. In 2003 the Meltex lodged an application with the European Court of Human Rights complaining that the Television and Radio National Commission of Armenia (hereafter Commission) violated the Article 10 of the European Convention in failure of giving reasons when refusing 7 license applications of the Company. The Government argued before the European Court that the NTRC had not taken any decision refusing a license to the applicant company, but had simply announced the winners of the calls for 7 tenders. On June 17, 2008 the European Court decided that by not recognizing the applicant company as the winner in the calls for tenders it competed in, the NTRC effectively refused the applicant company's bids for a broadcasting license and therefore such refusals constituted interferences with the applicant

company's freedom to impart information and ideas[1]. It further decided that licensing procedure whereby the licensing authority gives no reason for its decisions does not provide adequate protection against arbitrary interference by a public authority and therefore seven denials of a broadcasting license did not meet the Convention requirements of lawfulness under Article 10 of the Convention[2].

On December 17, 2008 the Meltex instituted revision proceedings in the Court of Cassation of Armenia seeking *restituto in integrum* on the basis of the Recommendation (2000)2 of the Council of Europe about re-examination or re-opening of certain cases at domestic level following judgments of the European Court, as well as on the basis of the Article 241^{1} and 241^{6} of the Civil Procedure Code of Armenia. The last two provisions stipulate that the decisions of the European Court shall be considered as "new circumstances" for instituting revision proceedings before domestic courts. The Meltex brought two revision claims to the Court of Cassation requesting to revise its two former decisions made in 23/04/2004 and in 27/02/2004.

Revision proceedings

Claim 1

The Meltex requested from Court of Cassation to revise its decision of 23/04/2004 and declare that the rights of the company under Article 10 were violated by the Commission in 2003. It further requested from court to declare as void the seven decisions of the Commission taken by in 2003 concerning licensing competitions for 25^{th}, 31^{st}, 39^{th}, 51^{st}, 63^{rd} and 56^{th} decimeter bands and the 3^{rd} metric band and obligate the Commission to call on a new licensing competition. Meltex requested the above as a restituto in integrum against the violated rights under ECHR decision. However, on February 19, 2009 the Court of Cassation turned down the appeal by justifying that the European Court ruled solely about the failure of the Commission in reasoning its decisions. The Court of Cassation also ruled that the failure of reasoning by the Commission of its decisions did not automatically presume that the decision concerning the winner companies had to be declared void and that the Commission had to hold new competitions. The Cassation Court justified the above by saying that the rights of the company were violated as a result of the Commission's failure of reasoning its decisions rather than as a result of winning by other companies in competitions (see the literally translation of the citation from court's decision below). Further, the Cassation Court ruled that application of general and individual measures

[1] See par. 74 of the judgment.
[2] See para.83-84 of the judgment.

"*shall be binding [on the State] solely if the European Court directly provides in the judgment about necessity of taking such measures*[3].

The Court of Cassation did not address the Meltex's request about declaring that the rights of the company were violated and about obligating the Commission of holding a new licensing competition. Instead of that, the court ruled that the application for revision should be denied on the basis that the European Court did not find that the Armenian courts had violated the Article 6 of the Convention[4].

As to the implementation of the general measures, the Court of Cassation referred to 1043 Meeting of the Ministers Deputies of 12 December 2008 according to which the Deputies took note of the measures by Armenian authorities of reforming the radio and television broadcasting law to bring it in line with the standards of the Council of Europe. The Cassation Court referred to this decision in order to justify its findings above that the European Court did not request application of individual measures, otherwise the Committee of Ministers would have requested also an implementation of individual measures along with the general measures in its 1043 Meeting of the Ministers Deputies (see page 7, paragraph 5).

Finally, the Court of Cassation referred to *res judicata"* in grounding its refusal about reviewing its former decision by opposing the *"res judicata"* to *restitutio in integrum* and giving the former a prevalence. The Court of Cassation referred to *Brumerascu v. Romania* (no. 28342/95) and *Ryabykh v. Russia, no. 52854/99, 24/07/03)* as basis for justifying that the *res judicata* appears in almost an absolute way.

Claim 2

With the second claim Meltex requested from the Court of Cassation to revise its decision of 27/02/2004 (civil case no. 3-397(TD) in which the court had decided in 2004 that the Decision 75-A of the Commission concerning the license application for 63rd frequency band was lawful[5]. During the revision proceedings of 13/02/2009, the Chairman of the Court of Cassation requested from the representatives of Meltex to show where in the text of the judgment the European Court held that the Court of Cassation had violated the European Convention in 2004. The representatives of Meltex ltd. answered that even though the Court did not explicitly ruled

[3] Court of Cassation decision of 19/12/09, no. 3-10TD2009, page 7, paragraph 4.
[4] Page 8, par 4 of the decision.
[5] Decision 27/02/2004 of the Court of Cassation– page 4, last sentence of par. 1.

that the Convention was violated by the Court of Cassation, the Court clearly ruled that the Article 10 was violated by the Commission. Consequently, when the court did a judicial review of the decision in 2004, it erred by finding that the Decision No.75A was lawful. Otherwise, the court's decision of 2004 would not conflict the European Court's decision of 2008.

The Court of Cassation promulgated its decision on 19/02/2009 in which it made the following findings;

a. *"The complaint of the Company to the European Court was about failure of the Commission of giving reasons for not acknowledging the Company as a winner in the competitions held by the Commission, and the European Court merely considered and found that the lack of such reasoning was in conflict with the requirements of the Article 10 of the Convention. Whereas, in the subject case [the appellant] brought an appeal about acknowledging that the decision about the winner was void, as well as about acknowledging [the Company] as a winner and giving the Company a license. The Company put the principle of "restituto in integrum" in the basis of the above mentioned requests".*

   …The request brought by the Company, in particular about declaring null and void the decision of acknowledging other company as a winner during the competition, and acknowledging the Company as a winner and giving the Company a license, cannot be deemed as a restoration of the situation before the violation, since the decision of the European Court solely provided that the Commission failed to reason its decision about not acknowledging the Company as a winner. Whereas, the failure of reasoning the refusal shall not automatically presume that the decision about the winner is void and that the Company is a winner of the competition, since the rights of the Company (article 10 of the Convention) were violated not as a result of acknowledging other company as a winner, but as a result of non-reasoning the failure of the Company as a winner (page 5, par 1-2 of the Court of Cassation decision of 19//02/2009).

The above findings of the Court of Cassation comes into conflict with the finding of the European Court in paragraph 74 of the judgment in which it ruled that there was no essential difference whether a broadcasting license was refused on the basis of an individual application or whether such license was not obtained as a result of a failure to win a call for tenders. The Court ruled that by not recognizing the applicant company as the winner in the calls for tenders

it competed in, the NTRC effectively refused the applicant company's bids for a broadcasting license. Thus, the European Court ruled that the non-recognition of Meltex as the winner constituted in itself an interference which was then recognized as unlawful. In addition to this, the scope of the request by Meltex in 2008 for the revision proceedings was the same as the request brought to the Court of Cassation in 2004. Consequently, the above findings of the European Court alone put the findings of the Court of Cassation in 2009 in doubt.

Further, the Court of Cassation interpreted the Article 46 of the Convention by giving its own interpretation of the mechanisms of execution of the judgments of the European Court. In particular, the Cassation Court provided:

> *"The application of [general] and [individual] measures "shall be binding solely in those cases where the European Court directly provides about necessity of application of such measures in its decision. In the judgment of the European Court concerning the subject case, in addition to the obligation of payment of the compensation, the [Court] mentioned only about unacceptability of unreasoned decisions by the Commission*[6].

Finally, as in the above case, the Court of Cassation referred to the principle of *"res judicata"* by opposing it to the principle of *"restitution in integrum"* as basis for refusing to revise its former decision. The court unduly generalized the *res judicata* principle by demonstrating it in an almost absolute form. Whereas, in the Explanatory Memorandum of the Recommendation (2000)2, the Committee of the Ministers provided. *"Securing the rights of the individual and the effective implementation of the Court's judgments prevail over the principles underlying the doctrine of res judicata"*[7]. Moreover, the main text of the Recommendation refers to such judgments of the Court that lead to the conclusion that the violation found was based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

Thus, according to the interpretation of the Court of Cassation of the Article 46 of the European Convention, the individual or general measure shall be implemented by the respondent State unless the European Court explicitly provides in the text of the judgment what specific individual or general measures shall be applied in a given case. Besides, the execution of judgments, including deciding on the scope of general and individual measures, is out of the

[6] See page 6, par 2 of the decision.
[7] See paragraph 10 of the Explanatory Memorandum to the Recommendation.

jurisdiction of the European Court and is vested with the Committee of the Ministers that supervises the execution of the decisions of the European Court.

As to the implementation of general measures, the Court of Cassation again referred to 1043 Meeting of the Ministers Deputies of 12 December 2008 by making the same conclusions as above[8], in particular, that the ECHR judgment concerning the Meltex presumed only application of general measures.

The Parliament majority is of the same opinion as the Cassation Court. For example, the member of the Parliamentary majority and the Special Rapporteur on legislative reforms of the Broadcasting Law is of the opinion that *"the decision of the European Court did not raise the Meltex's issues, it raised the issue about [legislative] framework and its regulation. A set of legislative proposals have already been made connected with the regulations, the timeframe of holding the competitions, giving reasons about the winner, the business plan, diversity, etc…".*[9]

Concerning the undertakings of the Armenian Government about general measures

It appears that the application of general measures presume an incorporation in the Radio and Television Law of Armenia (Broadcasting Law) of a legal norm obligating the Commission to reason its decisions. The point is that such a norm was incorporated in the Broadcasting law by the bill of amendment of December 3, 2003[10]. According to Article 13 of the Bill of Amendments, the following paragraph was added after Article 50 of the law: *"The National Commission must properly justify its decisions about granting license, refusing license and declaring the license void".* Thus, the legal norm obligating the Commission to reason its decisions was in place at the time when the application for 56th decimeter band was refused by the Commission on December 29, 2003 (see paragraph 42-45 of the Meltex ECHR judgment). Therefore, if the general measures presume incorporating a legal norm obligating the Commission to reason its decisions, such norm was incorporated in 2003 and therefore there is no necessity for further reforming of the law in dispute in order to bring it in line with the judgment of the European Court and eliminate any possibility of repetition of the same violation in the future. .

[8] See page 7, paragraph 5 of the decision.

[9] "What can Ashotyan see from A1+TV's tower". Interview with Armen Ashotyan. See at www.a1plus.am , news line of 25/02/2009.

[10] Bill of Amendment No. 69-N about Making Additions and Changes in the Broadcasting Law of 03 December 2003.

Absolute ban on holding licensing competitions

Finally, we would like to inform that on September 10, 2008 the National Parliament imposed an absolute ban on holding broadcasting license competitions until July 20, 2010. No reason was given in the bill of amendments (Law No.137) as to the reason for banning the licensing competitions. Informally, the members of the Parliamentary majority have repeatedly stated that the ban was imposed for digitization of TV broadcasting sphere as a legitimate aim.

Thus, in summarizing the above it appears that the Court of Cassation,

a. refused to acknowledge that the rights of the company were violated in 2003,
b. refused to obligate the Commission to call on a new competition,
c. found that the judgment of the European Court presumed only an application of general measures.

In addition, the Government imposed absolute ban on licensing competitions until the end of 2010 which means that it would be impossible for Meltex to participate in a licensing competition as one of the possible individual measures. In considering that the absolute ban was imposed for ensuring digitization of television broadcasting sphere, it is highly possible that the 2010 deadline will be extended by the Government.

Thank you very much for your assistance.

Sincerely,

Movses Movsesyan
Chairman of Meltex ltd.

Ara Ghazaryan
Representative

Artak Zeynalyan
Representative