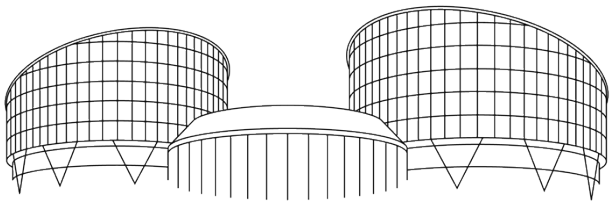

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

GRAND CHAMBER

CASE OF VEREIN GEGEN TIERFABRIKEN SCHWEIZ (VgT)
v. SWITZERLAND (No. 2)

(Application no. 32772/02)

JUDGMENT

STRASBOURG

30 June 2009

In the case of Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2),

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Christos Rozakis,
Françoise Tulkens,
Josep Casadevall,
Corneliu Bîrsan,
Anatoly Kovler,
Alvina Gyulumyan,
Ljiljana Mijović,
Egbert Myjer,
Dragoljub Popović,
Isabelle Berro-Lefèvre,
Päivi Hirvelä,
Giorgio Malinverni,
András Sajó,
Ledi Bianku,
Ann Power,
Mihai Poalelungi, *judges*,
and Erik Fribergh, *Registrar*,

Having deliberated in private on 9 July 2008 and on 27 May 2009,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 32772/02) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an association registered in Switzerland, Verein gegen Tierfabriken Schweiz (VgT) ("the applicant association"), on 25 July 2002.

2. The applicant association was represented by Mr R.W. Rempfler, a lawyer practising in St. Gall. The Swiss Government ("the Government") were represented by Mr F. Schürmann of the Federal Office of Justice.

3. The applicant association alleged, in particular, that the continued prohibition on broadcasting a television commercial, after the Court had found a breach of its freedom of expression, constituted a fresh violation of this right under Article 10 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court), and subsequently to the Fifth Section.

Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 18 January 2005 the President of the Chamber decided to give notice of the application to the Government. It was also decided that the merits of the application should be examined at the same time as its admissibility (Article 29 § 3 of the Convention and Rule 54A).

6. On 4 October 2007 the Chamber, composed of Snejana Botoucharova, Luzius Wildhaber, Karel Jungwiert, Volodymyr H. Butkevych, Margarita Tsatsa-Nikolovska, Javier Borrego Borrego and Renate Jaeger, judges, and Claudia Westerdiek, Section Registrar, delivered a judgment in which it unanimously declared inadmissible the complaint under Article 6, dismissed the Government's preliminary objection of failure to exhaust domestic remedies in respect of the complaint under Article 10, joined to the merits the Government's argument as to the application of Article 10 and, accordingly, declared admissible the complaint under that Article. The Chamber held by five votes to two that Article 10 of the Convention was applicable in the case and that there had been a violation of that Article. The dissenting opinion of Judge Jaeger joined by Judge Borrego Borrego was annexed to the judgment.

7. On 19 December 2007 the Government requested under Article 43 of the Convention and Rule 73 that the case be referred to the Grand Chamber. A panel of the Grand Chamber accepted that request on 31 March 2008.

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. The applicant and the Government each filed observations on the merits.

10. In addition, third-party comments were received from the Czech Government, who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

11. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 July 2008 (Rule 59 § 3). The President of the Grand Chamber granted leave to the president of the applicant association, Mr E. Kessler, to present the case on the association's behalf under Rule 36 § 3.

There appeared before the Court:

(a) *for the Government*
Mr F. SCHÜRMANN, Head of the Human Rights and Council of Europe Section, Federal Office of Justice, Federal Department of Justice, *Agent*,
Mr A. SCHEIDEGGER, Deputy Head of the Human Rights and Council of Europe Section,
Mr F. ZELLER, Legal Adviser to the Director, Federal Office of Communication, Federal Department of Environment, Transport, Energy and Communication,
Ms C. EHRICH, Legal Officer, Human Rights and Council of Europe Section, *Advisers*;

(b) *for the applicant association*
Mr E. KESSLER, President of the applicant association,
Ms C. ZEIER KOPP, Deputy Director of the applicant association, *Advisers*.

The Court heard addresses by Mr Kessler and Mr Schürmann and their replies to questions from its members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Application no. 24699/94 and the Court's judgment of 28 June 2001

12. The applicant association is dedicated to animal protection, campaigning in particular against animal experiments and battery farming.

13. In response to various advertisements produced by the meat industry, the applicant association made a television commercial lasting fifty-five seconds, consisting of two scenes.

The first scene showed a sow building a shelter for her piglets in the forest. With soft music playing in the background, the voiceover referred, among other things, to the pigs' sense of family. The second scene showed a noisy hall with pigs in small pens, gnawing nervously at the iron bars. The voiceover compared the conditions in which pigs were reared to concentration camps, and added that the animals were pumped full of medicines. The advertisement concluded with the exhortation: "Eat less meat, for the sake of your health, the animals and the environment!"

14. Permission to broadcast the commercial on the channels of the Swiss Radio and Television Company (*Schweizerische Radio- und Fernsehgesellschaft*) was refused on 24 January 1994 by the company responsible for television advertising (the Commercial Television Company (*AG für das Werbefernsehen*), now called Publisuisse SA) and, at final instance, by the Federal Court, which dismissed an administrative-law appeal by the applicant association on 20 August 1997.

In respect of the applicant association's complaint under Article 10 of the Convention, the Federal Court found that the prohibition of political advertising laid down in section 18(5) of the Federal Radio and Television Act pursued various aims; in particular, it was designed to prevent financially powerful groups from obtaining a competitive political advantage, to protect the formation of public opinion from undue commercial influence, to bring about a certain equality of opportunity among the different forces of society, and to contribute towards the independence of radio and television broadcasters in editorial matters.

15. On 13 July 1994 the applicant association lodged an application with the European Commission of Human Rights under former Article 25 of the Convention.

16. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

17. In a decision of 6 April 2000, the Court declared the application partly admissible.

18. In a judgment of 28 June 2001, the Court held that the refusal by the relevant Swiss authorities to broadcast the commercial in question infringed the right to freedom of expression guaranteed by Article 10 of the Convention (see *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, ECHR 2001-VI).

The Court found that the measure taken had been "prescribed by law" and had pursued a legitimate aim for the purposes of Article 10 § 2.

As to whether the measure had been "necessary in a democratic society" within the meaning of that provision, the Court noted, in particular, that it had not been established that the applicant association itself constituted a powerful financial group pursuing the aim of restricting the broadcaster's independence, unduly influencing public opinion or endangering equality of opportunity among the different forces of society. On the contrary, it had simply intended to participate in an ongoing general debate on the protection and rearing of animals. Accordingly, in the Court's opinion, the authorities had not demonstrated in a "relevant and sufficient" manner why the grounds generally advanced in support of the prohibition of political advertising could also serve to justify the interference in the particular circumstances of the case (ibid., § 75).

The Court also found that there had been no violation of Articles 13 and 14 of the Convention. As to the application of Article 41, it ordered Switzerland to pay the sum of 20,000 Swiss francs (CHF) (approximately 13,300 euros (EUR) today) for costs and expenses. However, it made no award to the applicant association for non-pecuniary damage.

B. Subsequent proceedings before the Swiss authorities

19. On 31 October 2001 the applicant association again applied to Publisuisse SA for permission to broadcast the same commercial with the addition of a comment referring to the Court's judgment and criticising the conduct of the Swiss Radio and Television Company and the Swiss authorities.

20. In a letter of 30 November 2001, Publisuisse SA refused the application.

21. On 1 December 2001, on the basis of the Court's judgment, the applicant association applied to the Federal Court for the final judgment given at domestic level to be reviewed, in accordance with section 139(a) of the former Federal Judicature Act (see paragraph 28 below). The application was worded and substantiated as follows:

Application for review

"In the case of *Verein gegen Tierfabriken Schweiz (VgT), 9546 Tuttwil, v. Swiss Radio and Television Company, Publisuisse SA and the Federal Department of Environment, Transport, Energy and Communication (DETEC)*:

I hereby request on behalf of VgT that the Federal Court's judgment of 20 August 1997 be reviewed and that the administrative-law appeal of 18 June 1996 be allowed.

Reasons: In its judgment of 28 June 2001, the European Court of Human Rights upheld an application challenging the Federal Court judgment of which I am seeking a review (see Annex 1). The judgment was served on 25 October 2001 (see Annex 2); this application for review has therefore been lodged in time.

Yours faithfully ..."

22. The Federal Department of Environment, Transport, Energy and Communication and the Swiss Radio and Television Company submitted in their respective observations of 10 January and 15 February 2002, which were duly transmitted to the applicant association, that the application to reopen the proceedings should be dismissed.

23. In a judgment of 29 April 2002, the Federal Court dismissed the application to reopen the proceedings. It held that the applicant association had not provided a sufficiently detailed explanation of the nature of "the amendment of the judgment and the redress being sought", a formal requirement imposed by section 140 of the former Federal Judicature Act

(see paragraph 29 below). It observed, in particular, that the applicant association had been unable to show that redress was possible only through the reopening of the proceedings. It further noted that the association had not sufficiently shown that it still had an interest in broadcasting the original commercial, which now appeared out of date almost eight years after it was initially intended to have been broadcast. Lastly, the Federal Court considered that the fresh refusal by Publisuisse SA, the competent authority in such matters, to sign a new agreement to broadcast the commercial should have formed the subject of separate proceedings. The relevant passages of the judgment read as follows:

"...

3.1 Section 140 of the Federal Judicature Act provides that an application for review must indicate, with supporting evidence, the ground relied on for the reopening of proceedings and whether it has been raised in due time. It is not enough simply to claim that the ground exists; it is also necessary to explain why, and to what extent, the operative provisions must be amended as a result (Elisabeth Escher, 'Revision und Erläuterung', note 8.28, in Geiser/Münch, *Prozessieren vor Bundesgericht*, 2nd ed., Basle 1998).

3.2 The application to reopen the proceedings in the instant case does not meet these formal requirements. The applicant association has sought the review of the Federal Court's judgment without explaining the extent to which this is necessary following the European Court's judgment of 28 June 2001. VgT evidently assumes that the Strasbourg Court's decision against Switzerland in itself makes the reopening of the proceedings necessary, but that is not the case. The mere fact that the Court, ruling on an individual application, has found a violation of the Convention does not mean that the Federal Court judgment in issue must automatically be reviewed in accordance with domestic law (see judgment 2A.363/2001 of 6 November 2001 in the *Boultif* case, point 3a/cc; Martin Philip Wyss, 'EMRK-Verletzung und bundesrechtliche Revision nach Art. 139a OG', in *recht 1999*, p. 100; Schürmann, op. cit., p. 100; Hottelier, op. cit., p. 749; BBl 1991 II 465, p. 529). Being a subsidiary remedy, reopening is justified only if it appears to remain necessary notwithstanding the compensation awarded by the European Court of Human Rights and constitutes the only means of obtaining redress (see Schürmann, op. cit., p. 102; Wyss, op. cit., p. 99). The application to reopen the proceedings must give at least a broad indication of how redress may be obtained only by this means (see judgment 2A.363/2001 of 6 November 2001 in the *Boultif* case, point 3b/cc).

3.3 ...

Publisuisse SA evidently once again refused to conclude an advertising agreement with VgT, which appealed against the refusal to the Federal Office of Communication; the proceedings are still pending. By taking this action, VgT itself proves that it is not continuing to suffer any practical adverse effects that can only be redressed by reopening the proceedings. It does not claim that it still has an interest in having the original commercial broadcast; it is, moreover, unlikely that this is the case, since VgT's primary objective is no longer (solely) to encourage a decline in meat consumption and to denounce the conditions in which animals are reared (which are also likely to have changed in the almost eight years since the commercial was

intended to have been broadcast), but to publicise the Court's finding of a violation of its freedom of expression. It is thus no longer the same commercial that is under discussion today. The consequences of the Convention violation committed at the time were redressed as a result of the judgment against Switzerland and the award of just satisfaction under Article 41 of the Convention; the new agreement which VgT now wishes to conclude must form the subject of separate proceedings.

...

4.2 In its judgment of 20 August 1997, the Federal Court held that VgT's commercial was subject to the public-law prohibition on political advertising set forth in section 18(5) of the Federal Radio and Television Act and could provide the Swiss Radio and Television Company, or rather Publisuisse SA, with a valid reason for not concluding the advertising agreement. The European Court of Human Rights did not share this view and held that there was no justification in a democratic society for refusing to broadcast a commercial on the ground that it constituted political advertising, which was banned on television. The Court did not express an opinion on whether and to what extent Switzerland, by not ensuring that the commercial could be broadcast, had breached any positive obligations resulting from the extension of the Convention safeguards to relations between private entities (see paragraph 46 of the Court's judgment). The subject of the Federal Court's judgment was the finding by the authorities that VgT's commercial could be considered 'political' within the meaning of the Radio and Television Act and that the refusal to broadcast it could be justified on this public-law ground alone. The judgment did not deal with the question whether the Swiss Radio and Television Company had boycotted VgT, whether the company dominated the advertising market and whether, on that account, it would have been under an obligation to conclude an advertising agreement. These (civil law) aspects of an obligation to contract must be addressed in the appropriate form of civil proceedings (concerning cartel law, competition law or the general law relating to personality rights) and not under the law governing trading licences. This argument, which Switzerland put forward, was not contested by the European Court.

4.3 In this connection, by enacting the relevant (civil) legislation and establishing judicial remedies to implement it, Switzerland has complied with its positive obligation under Article 10 of the Convention to ensure the appropriate realisation among private entities of the rights guaranteed by the Convention. The rules of competition and cartel law or the possibility of asserting a civil-law obligation to contract are intended to encourage a means of implementing fundamental rights that is fair and strikes a balance between the various interests at stake in the sphere of economic relations between private entities. VgT is free to use this legal remedy in seeking to have its commercial broadcast, provided that, contrary to what has been said above, it still has a real interest in the broadcast; in that eventuality, due regard will have to be had in the proceedings to its constitutional rights and the principles enshrined in Article 10 of the Convention (see Article 35 of the Federal Constitution). The judgment of the European Court of Human Rights does not conflict with this view; however, all that can be inferred from the judgment is that the classification of the commercial as 'political advertising' did not justify refusing to broadcast it, or that the broadcasting of the commercial by the Swiss Radio and Television Company, on the basis of Article 10 of the Convention, should not have had any consequences for the broadcaster under the law relating to trading licences. The Swiss Radio and Television Company rightly points out that the judgment cannot be construed as requiring it to broadcast the commercial in issue in breach of the existing legal rules (such as the provisions of the Federal Unfair Competition Act), since the European

Court did not address the corresponding questions, limited itself to examining the issue of 'political' advertising and did not state any position on the Swiss Radio and Television Company's 'negative' freedom of expression. Since the Court's judgment simply finds that the prohibition of political advertising on television must not stand in the way of broadcasting the commercial, VgT must seek to have it broadcast through recourse to the civil courts and not through the reopening procedure, should the Swiss Radio and Television Company, or rather Publisuisse SA, still refuse to broadcast it (see Ulrike Preissler, *Die Zulässigkeit ideeller Werbung im Fernsehen*, dissertation, Bonn 1994, pp. 113 et seq.; Martin Dumeruth, 'Rundfunkrecht', in Koller/Müller/Rhinow/ Zimmerli (eds.), *Schweizerisches Bundesverwaltungsrecht*, Basle 1996, note 126; Rolf H. Weiss, 'Rechtliche Grundlagen für Werbung und Sponsoring', in *SMI* 1993, pp. 213 et seq., in particular p. 226, footnote 58).

4.4 The Swiss Radio and Television Company cannot be directly ordered to broadcast the commercial in issue, since the Federal Court has no power in public law to give such an order. The applicant association had requested the Federal Office of Communication to issue a declaratory order to the effect that, under Article 10 of the Convention, VgT was entitled to have its commercial broadcast ('right to broadcast advertising'). The Federal Court acknowledged from a procedural point of view that a right to have such an order issued existed (section 25 of the Federal Administrative Procedure Act in conjunction with Article 13 of the Convention) but ruled in the instant case – wrongly in the European Court's view – on the basis of section 18(5) of the Federal Radio and Television Act that there was no right of access to television for political advertising. If the Federal Court had decided in the same way as the European Court, it would have had to limit itself to finding that the Swiss Radio and Television Company had not been entitled to refuse to broadcast the commercial on the ground that it was political in nature, or rather that reliance on this ground for the refusal was contrary to Article 10 of the Convention. On the other hand, given the lack of legal basis, the Federal Court could not have ordered the Swiss Radio and Television Company to broadcast the commercial in the context of proceedings governed by broadcasting legislation (see Dumermuth, op. cit., note 491). VgT is now seeking such an order solely by way of the reopening procedure, but it cannot obtain it in relation to the decision to be reviewed. The Federal Court cannot make an order, following a judgment of the Strasbourg Court, that it was not empowered to make in the original proceedings (see judgment 2A.232/2000 of 2 March 2001 in the *Amann* case, point 3b/bb, published in *EuGRZ* 2001, p. 322).

..."

24. On 3 March 2003 the Federal Office of Communication dismissed an appeal by the applicant association against Publisuisse SA's decision of 30 November 2001 refusing permission to broadcast the commercial featuring the additional comment.

C. Resolution of the Committee of Ministers of the Council of Europe of 22 July 2003

25. The Committee of Ministers of the Council of Europe, which had not been informed either by the applicant association or by the Government that the Federal Court had dismissed the application for review, concluded its

examination of application no. 24699/94 on 22 July 2003 by adopting Resolution ResDH(2003)125, the relevant parts of which read:

"...

Having regard to the Rules adopted by the Committee of Ministers concerning the application of Article 46 § 2 of the Convention;

...

Whereas during the examination of the case by the Committee of Ministers, the Government of the respondent State gave the Committee information about the measures taken preventing new violations of the same kind as that found in the present judgment; this information appears in the appendix to this resolution;

...

Declares, after having taken note of the information supplied by the Government of Switzerland, that it has exercised its functions under Article 46 § 2 of the Convention in this case.

Appendix to Resolution ResDH(2003)125

Information provided by the Government of Switzerland during the examination of the VgT Verein gegen Tierfabriken *case by the Committee of Ministers*

As regards individual measures, the judgment was transmitted to the applicant, who was entitled to request the revision of the Federal Court's judgment of 20 August 1997.

Concerning general measures, the judgment has been sent out to the Federal Office of Communication, the Federal Department for Environment, Transport, Energy, and Communication and to the Federal Court.

In addition, the Court's judgment has been published in the journal *Jurisprudence des autorités administratives de la Confédération* no. 65/IV(2001), and can be consulted on the following website: ... The judgment has also been mentioned in the Federal Council Annual Report on the Swiss activities at the Council of Europe in 2001, which has been published in the *Feuille fédérale* no. 8/2002.

The Government of Switzerland considers that, given the information mentioned above, there will no longer exist a risk of a repetition of the violation found in the present case and, consequently, Switzerland has satisfied its obligations under Article 46 § 1 of the Convention."

26. In a letter of 12 December 2003, the applicant association informed the Council of Europe's Directorate General of Human Rights of the Federal Court's refusal to review the judgment of 20 August 1997 following the Court's finding of a violation of Article 10.

27. On 12 January 2005 the Council of Europe's Directorate General of Human Rights informed the applicant association that it did not consider it

advisable to conduct a fresh examination of the matter alongside the Court's consideration of the application lodged in July 2002 in the present case.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Relevant domestic law and practice

28. Sections 136 et seq. of the former Federal Judicature Act, which was in force until 31 December 2006, concerned, *inter alia*, the review of judgments of the Federal Court. Section 139(a) provided:

Breach of the European Convention on Human Rights

"1. A decision of the Federal Court or of a lower court may be reviewed if the European Court of Human Rights or the Committee of Ministers of the Council of Europe has granted an individual application on account of a breach of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms and its Protocols, and redress is possible only through such a review.

2. If the Federal Court determines that a review is called for, but a lower court has jurisdiction, it shall refer the case to the lower court to reopen proceedings in the matter.

3. The cantonal court shall then decide on the application for a review even if cantonal law does not envisage such a ground for the reopening of proceedings."

29. Section 140 of the Act provided:

Application for review

"The application for review must indicate, with supporting evidence, the ground relied on for the reopening of proceedings and whether it has been raised in due time; it must also state the nature of the amendment of the judgment and the redress being sought."

30. Thus, on the basis of section 140, the Federal Court on 2 March 1999 partly revised one of its judgments after the Court had found a violation in *Hertel v. Switzerland* (25 August 1998, *Reports of Judgments and Decisions* 1998-VI). It held, in particular:

"... The judgment of the European Court of Human Rights may afford the applicant satisfaction and, through the award of CHF 40,000, financial compensation for the cost of the proceedings. But it does not remove the restrictions imposed on the applicant by the Commercial Court and confirmed by the Federal Court in its judgment of 25 February 1994. These restrictions may be upheld only within the bounds of necessity as defined by the European Court. Since those restrictions may be

lifted or limited only by means of an appeal to the Federal Court, the requirement of section 139(a) of the Federal Judicature Act is met ..."

31. Section 122 of the Federal Court Act of 17 June 2005, in force since 1 January 2007, reproduces the content of section 139(a) of the former Federal Judicature Act. It provides:

Breach of the European Convention on Human Rights

"An application for review of a judgment of the Federal Court on account of a violation of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms may be submitted if the following conditions are satisfied:

(a) the European Court of Human Rights, in a final judgment, has found a violation of the Convention or its Protocols;

(b) compensation cannot remedy the effects of the violation;

(c) the review is necessary to remedy the effects of the violation."

32. In a judgment of 18 July 2008 the Federal Court granted an application to reopen the proceedings following the Court's finding of a violation of Article 8 of the Convention in *Emonet and Others v. Switzerland* (no. 39051/03, 13 December 2007), and set aside its judgment of 28 May 2003. The relevant parts of the Federal Court's judgment read as follows:

"As to the law:

1. By virtue of section 122(a) of the Federal Court Act, an application for review of a judgment of the Federal Court on account of a violation of the Convention may be submitted if the European Court, in a final judgment, has found a violation of the Convention or its Protocols. In such an event, the application for review must be lodged with the Federal Court no later than 90 days after the European Court's judgment has become final within the meaning of Article 44 of the Convention (section 124(1)(c) of the Federal Court Act). Having been parties to the proceedings that resulted in the impugned judgment, the applicants have *locus standi*. The judgment became final on 13 March 2008; the application has therefore been lodged in time. The application also states the ground relied on for reopening the proceedings and the nature of the amendment of the judgment being sought; it should therefore be considered on the merits.

The submission that the Confederation should be ordered to pay the applicants the sums awarded by the European Court in respect of non-pecuniary damage and costs and expenses cannot, however, be dealt with in the present review proceedings. Accordingly, it is inadmissible.

2. The basis in section 122 of the Federal Court Act for reopening the proceedings is subject to several conditions. Thus, an individual application must have been upheld by the European Court in a final judgment finding a violation of a right guaranteed by the Convention (subsection (a)); compensation cannot remedy the effects of the

violation (subsection (b)); and the review must be necessary to remedy the effects of the violation (subsection (c)). The conditions laid down in this provision are similar to those which applied under the Federal Judicature Act (section 139(a)), with the result that, in principle, the case-law under the previous legislation retains its full force.

2.1 In the instant case the European Court found that the severing of the mother-child relationship following the child's adoption by her mother's partner constituted, in the particular circumstances of the case, unjustified interference with the applicants' right to respect for family life and, on that account, a violation of Article 8 of the Convention. The European Court's judgment has, moreover, been final since 13 March 2008 (section 122(a) of the Federal Court Act). Furthermore, it is clear that no award of compensation can afford redress for the loss of the mother-child relationship as a result of the adoption (section 122(b) of the Federal Court Act). The first two conditions in section 122 of the Federal Court Act are therefore satisfied.

2.2. It remains to be ascertained whether a review of the Federal Court's judgment is necessary to remedy the effects of the violation of Article 8 of the Convention (section 122(c) of the Federal Court Act). The mere fact that there has been a breach of the Convention does not mean that the decision referred to the European Court has to be reviewed. This follows from the very nature of the reopening procedure, which is an extraordinary remedy. Accordingly, if there is another ordinary remedy that could afford redress, that remedy should be used first. The answer to this question depends on the nature of the Convention violation that has been found. Where only material interests remain at stake, the proceedings cannot in principle be reopened. However, where the unlawful situation persists despite the European Court's finding of a violation of the Convention, a review is possible. The proceedings are then reopened within the limits of the relevant ground (see, with reference to the Federal Judicature Act, judgment 2A.232/2000 of 2 March 2001, point 2b/bb, published in: *Pra 2001* no. 92, p. 538, and the judgments cited; and, with reference to the Federal Court Act, Elisabeth Escher, in *Basler Kommentar BGG*, Basle 2008, note 6 on section 122; judgment 1F_1/2007 of 30 July 2007, point 3.2).

The European Court held on this point that the annulment of the adoption for lack of consent would not be able to remedy the effects of adoption at the origin of the dispute. An action to that end could not, according to the European Court's case-law, be regarded as an effective remedy on the basis of which a plea of inadmissibility could be raised against the applicants for failure to exhaust domestic remedies. The European Court also held that the adopter and the adopted person's mother could not be required to marry in order to restore the adopted person's relationship with her mother. In the Court's view, it is not for the national authorities to take the place of those concerned in reaching a decision as to the form of communal life they wish to adopt. The concept of family under Article 8 of the Convention is, moreover, not confined to marriage-based relationships. Accordingly, unless the mother-daughter relationship is restored and an amendment to that effect is made to the civil-status register, it must be acknowledged that the unlawful situation will persist.

Accordingly, the application for review should be allowed and the judgment of 28 May 2003 should be set aside.

..."

B. Relevant international law and practice

1. Execution of the Court's judgments

33. On 19 January 2000, at the 694th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe adopted Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights:

> "The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,
>
> Considering that the aim of the Council of Europe is to bring about a closer union between its members;
>
> Having regard to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the Convention');
>
> Noting that under Article 46 of the Convention ... the Contracting Parties have accepted the obligation to abide by the final judgment of the European Court of Human Rights ('the Court') in any case to which they are parties and that the Committee of Ministers shall supervise its execution;
>
> Bearing in mind that in certain circumstances the above-mentioned obligation may entail the adoption of measures, other than just satisfaction awarded by the Court in accordance with Article 41 of the Convention and/or general measures, which ensure that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (*restitutio in integrum*);
>
> Noting that it is for the competent authorities of the respondent State to decide what measures are most appropriate to achieve *restitutio in integrum*, taking into account the means available under the national legal system;
>
> Bearing in mind, however, that the practice of the Committee of Ministers in supervising the execution of the Court's judgments shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*;
>
> I. Invites, in the light of these considerations the Contracting Parties to ensure that there exist at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum*;
>
> II. Encourages the Contracting Parties, in particular, to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where:
>
> (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied

by the just satisfaction and cannot be rectified except by re-examination or reopening, and

(ii) the judgment of the Court leads to the conclusion that

(a) the impugned domestic decision is on the merits contrary to the Convention, or

(b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

Explanatory memorandum

...

8. Paragraph 1 sets out the basic principle behind the recommendation that all victims of violations of the Convention should be entitled, as far as possible, to an effective *restitutio in integrum*. The Contracting Parties should, accordingly, review their legal systems with a view to ensuring that the necessary possibilities exist.

..."

34. Paragraph 35 of the Report by the Parliamentary Assembly of the Council of Europe on execution of judgments of the European Court of Human Rights (doc. 8808, 12 July 2000) reads as follows:

"Since the Court does not tell States how to apply its decisions, they must consider how to do so themselves. The obligation to comply with judgments is an obligation to produce a specific result – to prevent further violations and repair the damage caused to the applicant by the violation. ..."

35. On 10 May 2006, at the 964th meeting of the Ministers' Deputies, the Committee of Ministers adopted Rules for the supervision of the execution of judgments and of the terms of friendly settlements:

"*Rule 1*

1. The exercise of the powers of the Committee of Ministers under Article 46 §§ 2 to 5 and Article 39 § 4 of the European Convention on Human Rights is governed by the present Rules.

...

Rule 6: Information to the Committee of Ministers on the execution of the judgment

1. When, in a judgment transmitted to the Committee of Ministers in accordance with Article 46 § 2 of the Convention, the Court has decided that there has been a violation of the Convention or its Protocols and/or has awarded just satisfaction to the injured party under Article 41 of the Convention, the Committee shall invite the High Contracting Party concerned to inform it of the measures which the High Contracting Party has taken or intends to take in consequence of the judgment, having regard to its obligation to abide by it under Article 46 § 1 of the Convention.

2. When supervising the execution of a judgment by the High Contracting Party concerned, pursuant to Article 46 § 2 of the Convention, the Committee of Ministers shall examine:

(a) whether any just satisfaction awarded by the Court has been paid, including as the case may be, default interest; and

(b) if required, and taking into account the discretion of the High Contracting Party concerned to choose the means necessary to comply with the judgment, whether:

(i) individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention;

(ii) general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations.

Rule 7: Control intervals

1. Until the High Contracting Party concerned has provided information on the payment of the just satisfaction awarded by the Court or concerning possible individual measures, the case shall be placed on the agenda of each human rights meeting of the Committee of Ministers, unless the Committee decides otherwise.

2. If the High Contracting Party concerned informs the Committee of Ministers that it is not yet in a position to inform the Committee that the general measures necessary to ensure compliance with the judgment have been taken, the case shall be placed again on the agenda of a meeting of the Committee of Ministers taking place no more than six months later, unless the Committee decides otherwise; the same rule shall apply when this period expires and for each subsequent period.

Rule 8: Access to information

1. The provisions of this Rule are without prejudice to the confidential nature of the Committee of Ministers' deliberations in accordance with Article 21 of the Statute of the Council of Europe.

2. The following information shall be accessible to the public unless the Committee decides otherwise in order to protect legitimate public or private interests:

(a) information and documents relating thereto provided by a High Contracting Party to the Committee of Ministers pursuant to Article 46 § 2 of the Convention;

(b) information and documents relating thereto provided to the Committee of Ministers, in accordance with the present Rules, by the injured party, by non-governmental organisations or by national institutions for the promotion and protection of human rights.

...

Rule 9: Communications to the Committee of Ministers

1. The Committee of Ministers shall consider any communication from the injured party with regard to payment of the just satisfaction or the taking of individual measures.

2. The Committee of Ministers shall be entitled to consider any communication from non-governmental organisations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of judgments under Article 46 § 2 of the Convention.

3. The Secretariat shall bring, in an appropriate way, any communication received in reference to paragraph 1 of this Rule, to the attention of the Committee of Ministers. It shall do so in respect of any communication received in reference to paragraph 2 of this Rule, together with any observations of the delegation(s) concerned provided that the latter are transmitted to the Secretariat within five working days of having been notified of such communication.

...

Rule no. 16: Interim resolutions

In the course of its supervision of the execution of a judgment or of the terms of a friendly settlement, the Committee of Ministers may adopt interim resolutions, notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution.

Rule no. 17: Final resolution

After having established that the High Contracting Party concerned has taken all the necessary measures to abide by the judgment or that the terms of the friendly settlement have been executed, the Committee of Ministers shall adopt a resolution concluding that its functions under Article 46 § 2 or Article 39 § 4 of the Convention have been exercised."

2. Obligations on States under general international law

36. Article 35 of the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts (adopted by the General Assembly of the United Nations at its 53rd session (2001), and reproduced in *Official Records of the General Assembl*y, 56th Session, Supplement No. 10 (A/56/10)) is worded as follows:

Article 35: Restitution

"A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

37. Article 26 of, and the third paragraph of the Preamble to, the Vienna Convention of 23 May 1969 on the Law of Treaties, which entered into force in respect of Switzerland on 6 June 1990, sets forth the principle of *pacta sunt servanda*:

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

38. The applicant association alleged that the continued prohibition on broadcasting the television commercial in issue, after the Court had found a violation of its freedom of expression, constituted a fresh violation of its freedom of expression under 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."

A. Preliminary objections

1. Failure to exhaust domestic remedies

(a) The parties' submissions

39. In the Government's submission, the reopening procedure was not an appropriate remedy in the present case for securing the broadcasting of the commercial, since the Federal Court could not in any event have ordered it to be broadcast in the context of such a procedure.

40. They further noted that the applicant association had appealed to the Federal Office of Communication against the refusal by Publisuisse SA to broadcast the commercial featuring the additional comment and, the same day, had lodged the application to reopen the proceedings, which, by definition, could relate only to the broadcasting of the original version. Indeed, it was the fact that this procedure had been instituted in the meantime that explained the Federal Court's assessment: what was the point of a reopening procedure which, at best, could lead to a result that, in any event, no longer corresponded to what the applicant association was now seeking?

41. Lastly, the Government also pointed out that the legal relationship between the applicant association and Publisuisse SA was governed by private law. The refusal to broadcast the commercial therefore raised an issue not only from the standpoint of legislation on television and radio advertising (the concept of "political advertising"), but also from that of private law, in particular the law on cartels, competition or protection of personality rights. In addition to this distinction in terms of substantive law there had been a distinction in terms of procedure at the material time: in the context of an administrative-law appeal – the only remedy used by the applicant association – the Federal Court had solely had jurisdiction to consider the merits of the refusal based on section 18(5) of the Radio and Television Act. A civil action, which, by contrast, had never been initiated, would have afforded an opportunity to determine whether Publisuisse SA had been obliged to broadcast the commercial despite the conflicting private interests (economic freedom, freedom of expression and the interests of the meat industry).

42. The applicant association contested the Government's argument that it had failed to exhaust domestic remedies. It pointed out that the Federal Court, in its judgment of 29 April 2002, had stated that appeals against decisions by the Federal Office of Communication could be lodged with the Federal Department of Environment, Transport, Energy and Communication where the proceedings concerned cartels. In the applicant association's submission, it followed by converse implication that no such appeal could have been lodged against the Office's decision of 3 March 2003, since the proceedings had concerned a trading licence.

(b) The Chamber judgment

43. With regard to the question of exhaustion of domestic remedies, the Chamber set out the following arguments:

> "34. The Court observes that the applicant association's application to reopen the proceedings was worded in a very cursory fashion barely satisfying the requirements of section 140 of the former Federal Judicature Act. Nevertheless, since the Federal Court, after stating the grounds for declaring the request inadmissible, concluded that the applicant association had not sufficiently shown that it still had an interest in

broadcasting the original version of the commercial, the Court considers, in the light of its case-law, that this complaint cannot be dismissed for failure to exhaust domestic remedies, seeing that the Federal Court ruled on the merits of the case, albeit briefly (see, *mutatis mutandis*, *Huber v. Switzerland*, no. 12794/87, Commission decision of 9 July 1988, Decisions and Reports (DR) 57, p. 259; *Chammas v. Switzerland*, no. 35438/97, Commission decision of 30 May 1997; *Jamal-Aldin v. Switzerland*, no. 19959/92, Commission decision of 23 May 1996; *Thaler v. Austria* (dec.), no. 58141/00, 15 September 2003; *Voggenreiter v. Germany* (dec.), no. 47169/99, 28 November 2002; and *Atik v. Germany* (dec.), no. 67500/01, 13 May 2004), in finding it probable that the association no longer had any interest in having the original version of the commercial shown on television.

35. It follows that the complaint under Article 10 cannot be dismissed for failure to exhaust domestic remedies."

(c) The Court's assessment

44. It should be noted at the outset that the only issue at stake here is whether there has been a violation of Article 10 in that the Federal Court did not allow the applicant association's application to reopen the proceedings after the Court had found a violation of that Article. Accordingly, the Government's arguments in relation to the commercial featuring the additional comment are immaterial.

45. In the light of the parties' observations as set out above, the Grand Chamber confirms the reasoning and the conclusion of the Chamber judgment. It follows that the complaint under Article 10 cannot be dismissed for failure to exhaust domestic remedies.

2. Lack of jurisdiction ratione materiae

(a) The Chamber judgment

46. The Chamber considered that the complaint under Article 10 concerning the Federal Court's refusal to review its judgment of 20 August 1997 was to be regarded as raising a new issue that had not been determined in the Court's judgment of 28 June 2001. The refusal was therefore capable of constituting a fresh violation of Article 10 of the Convention, for the following reasons:

"51. It must therefore be determined whether the Federal Court's judgment of 29 April 2002 constitutes a fresh interference with the applicant association's freedom of expression that may be examined on the merits by the Court.

52. The Court considers it useful to point out that the present case is not a 'typical' one involving the reopening of criminal proceedings following a finding of a violation of Article 6 of the Convention (see, for example, the cases of *Sejdovic*, *Lyons and Others* and *Krčmář and Others*, all cited above), but relates to the refusal to reconsider the prohibition on broadcasting a television commercial, and hence to Article 10 of the Convention. In that respect it is comparable to the case of *Hertel* (dec.), cited above. It should be noted, however, that in the *Hertel* case the Federal

Court granted the applicant's application to reopen the proceedings, lifting to a significant extent the restrictions on his freedom of expression. The Committee of Ministers, moreover, concluded the procedure before it by means of a final resolution that took due account of the amendments to the Federal Court judgment held by the Court to have infringed Article 10.

In view of these significant differences, the Court must consider whether its approach in the *Hertel* decision (cited above), which entailed examining whether the allegations of a fresh violation of Article 10 were well-founded rather than declaring them inadmissible as being incompatible *ratione materiae* with the Convention or its Protocols, is also feasible in the present case.

53. With regard to the measures taken by the Swiss Government in order to discharge their obligations under Article 46 § 2 of the Convention, it is not disputed that they paid the sums which the Court had awarded the applicant association for costs and expenses under Article 41 in its judgment. It is also clear from Resolution ResDH(2003)125 of 22 July 2003 that the Court's judgment was disseminated among the appropriate authorities and published in the journal *Jurisprudence des autorités administratives de la Confédération* and on the Internet (see paragraph 16 above).

54. It should also be noted that the Committee of Ministers concluded its examination of application no. 24699/94 by noting the possibility of an application for review before the Federal Court, in other words without awaiting the outcome of that procedure, which was available under Swiss law (see the appendix to the resolution in paragraph 16 above).

55. The Court further reiterates that the Convention is intended to guarantee rights that are not theoretical or illusory but practical and effective (see, *mutatis mutandis*, *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, p. 16, § 33, and *Bianchi v. Switzerland*, no. 7548/04, § 84, 22 June 2006).

It is true that the Convention does not require the States Parties to institute procedures for the fresh examination of a case following a finding of a violation by the Court (see *Saïdi*, cited above, p. 57, § 47, and *Pelladoah*, cited above, p. 36, § 44). The Court would nevertheless emphasise that the availability of such a procedure in Swiss law may be regarded as an important aspect of the execution of its judgments and demonstrates a Contracting State's commitment to the Convention and the case-law to which it has given rise (see, *mutatis mutandis*, *Barberà, Messegué and Jabardo v. Spain* (Article 50), judgment of 13 June 1994, Series A no. 285-C, p. 56, § 15, and *Lyons and Others*, cited above).

However, its availability in domestic law is not sufficient in itself. The domestic court concerned, namely the Federal Court, must in addition apply the Convention and the Court's case-law directly (see also, *mutatis mutandis*, regarding the right of access to a court and the effectiveness required of an ordinary appeal or an appeal on points of law, *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, pp. 13-15, §§ 25 et seq.). This appears especially important in the present case since the Committee of Ministers closed the procedure for supervising execution of the Court's judgment by simply referring to the availability of the remedy of an application for review, without awaiting its outcome. It is clear that a reference to a remedy which proves incapable of affording effective and practical redress where a Convention violation has been found will deprive applicants of their right to have the effects of the violation redressed as far as possible.

56. Lastly, it follows from a grammatical interpretation of section 139(a) of the former Federal Judicature Act (see 'Relevant domestic law and practice', paragraph 19 above) that an application to the Federal Court for reopening of the proceedings is a subsidiary means of redress, seeing that this provision states that such an application will be admissible where '... redress is possible only through such a review'.

It has to be noted in the present case that in its judgment of 28 June 2001 the Court did not make any award to the applicant association in respect of non-pecuniary damage. In the absence of any claim by the association under that head, it did not even express the opinion that the finding of a violation of Article 10 could be regarded as constituting adequate and sufficient redress for the non-pecuniary damage it had sustained. Accordingly, reopening of the proceedings before the Federal Court with a view to obtaining *restitutio in integrum* – the ideal form of reparation in international law – would have enabled the effects of the violation found by the Court to be redressed as far as possible (see, to similar effect, *Pisano*, cited above, § 43; *Scozzari and Giunta*, cited above, § 249; and *Sejdovic*, cited above, § 119; see also, for a practical example of the application of the relevant Swiss law, *Hertel* (dec.), cited above, in which the applicant had the general prohibition on disseminating his views lifted following his application to the Federal Court for a review (see 'Relevant domestic law and practice', paragraph 21 above).

57. The Court is also mindful of the fact that the application to reopen the proceedings in the present case was worded in a very cursory fashion barely satisfying the requirements of section 140 (see 'Relevant domestic law and practice', paragraph 20 above). Nevertheless, the Federal Court's findings as to the applicant association's interest in broadcasting the commercial, while brief, were capable of giving rise to a fresh interference with the applicant association's freedom of expression.

58. The Court therefore considers that the complaint under Article 10 concerning the Federal Court's refusal to review its judgment of 20 August 1997 must be regarded as raising a new issue that was not determined in the Court's judgment of 28 June 2001, and is accordingly compatible *ratione materiae* with the provisions of the Convention and its Protocols. ..."

(b) The parties' submissions

(i) The Government

47. The Government stated that, in contrast to most of the judgments and decisions cited by the Chamber, the Committee of Ministers had already adopted a final resolution concluding that it had "exercised its functions under Article 46 § 2 of the Convention in this case". They indicated the individual and general measures they had taken, which bore witness to the effort made at all levels – legislative, administrative and judicial – to comply with the Court's judgment, for example: payment of the sum awarded to the applicant association by way of just satisfaction; the possibility of applying to the Federal Court to reopen the proceedings; the measures mentioned in the appendix to the Committee of Ministers' final

resolution; the decision by the Director of the Federal Office of Communication to adopt a significantly narrower interpretation of the concept of "political advertising" in section 18(5) of the Federal Radio and Television Act, and the application of this new interpretation in many cases; and the entry into force of a fully revised version of the Federal Radio and Television Act of 24 March 2006, which incorporated the restrictive interpretation and provided for an appropriate, cost-free procedure for complaining, *inter alia*, that "a refusal to grant access to programme content was unlawful".

48. With regard more specifically to the application to reopen the proceedings, it was clear from the actual wording of its resolution that the Committee of Ministers had not deemed it essential to ascertain the outcome of that application before adopting its final resolution. In the Government's submission, it followed that the Committee of Ministers had considered, on the one hand, that the individual and general measures already adopted were sufficient in themselves to close the case irrespective of the outcome of the reopening procedure and, on the other, that such a procedure was indeed a possibility offered by domestic law, but not an obligation imposed by the Convention.

49. In the Government's submission, the Chamber judgment had the effect of transferring responsibility from the Committee of Ministers to the Court. It therefore impinged on the basic principle of the separation of powers between the Court and the Committee of Ministers, as provided for in Article 46 § 2 of the Convention.

50. The Government further noted that, during the drafting of Protocol No. 14, the Court had expressed misgivings regarding any proposed reform of the Convention's control system which would involve transferring responsibility for the supervision of judgments from the Committee of Ministers to the Court. If Protocol No. 14 had already been in force, the Court would have been unable to assume jurisdiction in the instant case because Article 46 § 4 of the Convention, as amended by the Protocol, entitled the Committee of Ministers to institute infringement proceedings before the Court only in cases where a State persistently refused to abide by a final judgment, that is, before the final resolution of the Committee of Ministers had been adopted.

51. In the Government's submission, the Chamber's reasoning did not take account of the case-law to the effect that the Convention did not give the Court jurisdiction to direct a State to reopen proceedings. Reopening was not a requirement deriving from the Convention. In other words, if it was accepted that the Convention did not oblige States Parties to institute procedures for the fresh examination of a case, it should also be accepted that States that had opted for such procedures were free to determine the formal and substantive conditions governing them and, where they applied, to examine whether those conditions had been met. As with any

interpretation of domestic law, the Court's role was limited to ensuring that the examination by the national authorities and courts was not tainted by arbitrariness or manifest unreasonableness. The reasoning of the majority of the Chamber might give rise to unequal treatment between States whose domestic law provided for reopening procedures and those with no such procedures. The Government fully subscribed on that account to the dissenting opinion of the judges in the minority that "[a]n unfavourable outcome for the applicant cannot be regarded as any less compatible with the Convention than the absence of such a procedure". On that point, the Government emphasised that section 139(a) of the former Federal Judicature Act had granted the applicant association the right to apply for review of a judgment but on no account the right to obtain such a review, let alone the outcome they desired.

52. The Government further maintained that if the Federal Court had concluded in its initial judgment – as the European Court subsequently had – that the refusal to broadcast the commercial on account of its political nature had breached Article 10 of the Convention, it would in any event have been limited to that finding and could not have ordered the commercial to be broadcast, given the lack of any legal basis authorising it to impose such an obligation on Publisuisse SA. A measure that had been impossible at the time of the initial judgment could not be possible in the proceedings aimed at securing a review of that judgment. In the Government's submission, no such obligation could be inferred from the Convention either, as the two judges in the minority had also observed.

53. Lastly, the Government pointed out that the applicant association had urged Publisuisse SA to allow the commercial to be broadcast with the additional comment. The Federal Court had been aware of this when considering the application to reopen the proceedings and had concluded, without any element of arbitrariness, that it was unlikely that the applicant association still had an interest in having the original version broadcast. This assessment was borne out by the fact that the applicant association had already lodged an appeal with the Federal Office of Communication against Publisuisse SA's second refusal, a fact of which the Federal Court was likewise aware. The Government considered it self-evident, for the same reason, that the reopening procedure was not an appropriate context for determining whether or not this second refusal by Publisuisse SA was consistent with the applicant association's freedom of expression.

54. In the light of those factors, the Government were persuaded that the Federal Court could not be criticised for not having "applied the Convention and the Court's case-law directly". It followed that by refusing, in the context of the reopening procedure, to order that either the initial or the modified version of the commercial in issue be broadcast, the Federal Court had not caused a fresh violation, the only condition which could have justified the Court's assuming jurisdiction *ratione materiae*.

(ii) The applicant association

55. In the applicant association's submission, the Government's argument that the Court lacked jurisdiction *ratione materiae* disregarded the particular circumstances of the instant case. It further noted that the Committee of Ministers of the Council of Europe, having been duly informed by it that the Federal Court had given a ruling on its application to reopen the proceedings, had preferred not to resume its procedure for supervising the execution of the judgment, having regard in particular to the fresh application lodged by the applicant association.

(iii) The third party

56. The Czech Government submitted that the Court had no jurisdiction in the Committee of Ministers' supervision of the execution of its judgments, although that did not deprive it of the possibility – subject to certain conditions – of examining alleged new violations of the Convention occurring in the same case after a judgment had been given. They contended that in the following three situations no violation of the Convention could be found:

(a) where the reopening of the proceedings was not possible because domestic law did not provide for such a possibility;

(b) where an application to reopen proceedings was rejected as inadmissible for failure to meet the statutory requirements (for example, the time-limit for an application, procedural requirements, subsidiarity); and

(c) where the competent national courts, having allowed an application to reopen proceedings, gave a decision on the same grounds as those criticised by the Court, provided that such an approach was justified under the Convention (for example, by an intervening change in the circumstances of the case).

57. In other words, the Czech Government submitted, since the Convention did not guarantee the right to have domestic proceedings reopened following a judgment by the Court, the Court had no power to find against a respondent State for rejecting an application to that effect. Nevertheless, it did have the power to find against a respondent State where, after the domestic proceedings had been reopened, the national courts adopted an identical decision without any justification. What mattered in the Czech Government's view was that, in general, a mere failure to remedy the original violation of the Convention as such could never constitute a fresh violation, the only exception being continuing violations, a category to which the instant case did not belong.

58. The Czech Government further observed that States which decided to introduce a system for the reopening of proceedings following a finding of a Convention violation should remain free to determine the system's admissibility criteria. It was quite impossible to apply, even, *mutatis mutandis*, the Court's case-law concerning both the right of access to a court

and the effectiveness required of an ordinary appeal or an appeal on points of law as aspects of Article 6 § 1 of the Convention, as the Chamber had argued in its judgment. Stressing that the safeguards in that provision were not applicable to the procedure for examining an application to reopen proceedings, the Czech Government argued that they would apply even less to a procedure concerning an application to reopen proceedings following a judgment of the Court.

59. In the Czech Government's submission, it was of little consequence what stage had been reached in the Committee of Ministers' supervision of the execution of the Court's judgment, and in particular whether or not it had already adopted a final resolution bringing its supervision to an end.

60. Furthermore, whether the Court had any jurisdiction at the judgment execution stage did not depend on the Committee of Ministers' opinion as to whether or not the measures taken by the respondent State to execute the judgment could be regarded as sufficient. In particular, the Court did not have jurisdiction to assess the resolutions adopted by the Committee of Ministers or to remedy alleged shortcomings in them.

(c) The Court's assessment

(i) Principles

61. The Court reiterates that findings of a violation in its judgments are essentially declaratory (see *Marckx v. Belgium*, 13 June 1979, § 58, Series A no. 31; *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX; and *Krčmář and Others v. the Czech Republic* (dec.), no. 69190/01, 30 March 2004) and that, by 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).

62. The Committee of Ministers' role in this sphere does not mean, however, 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 *Mehemi v. France (no. 2)*, no. 53470/99, § 43, ECHR 2003-IV, with references to *Pailot v. France*, 22 April 1998, § 57, *Reports* 1998-II; *Leterme v. France*, 29 April 1998, *Reports* 1998-III; and *Rando v. Italy*, no. 38498/97, § 17, 15 February 2000) and, as such, form the subject of a new application that may be dealt with by the Court. In other words, the Court may entertain a complaint that a retrial at domestic level by way of implementation of one of its judgments gave rise to a new breach of the Convention (see *Lyons and Others*, cited above, and *Hertel v. Switzerland* (dec.), no. 53440/99, ECHR 2002-I).

63. Reference should be made in this context to the criteria established in the case-law concerning Article 35 § 2 (b), by which an application is to

be declared inadmissible if it "is substantially the same as a matter that has already been examined by the Court ... and contains no relevant new information". The Court must therefore ascertain whether the two applications brought before it by the applicant association relate essentially to the same person, the same facts and the same complaints (see, *mutatis mutandis*, *Pauger v. Austria*, no. 24872/94, Commission decision of 9 January 1995, Decisions and Reports 80-A, p. 170, and *Folgerø and Others v. Norway* (dec.), no. 15472/02, 14 February 2006).

(ii) Application in the present case

64. In the present case it should be noted that following the Court's judgment of 28 June 2001, the applicant association applied to the Federal Court for a review of that court's judgment of 20 August 1997. The application was dismissed on 29 April 2002. The Federal Court held, in particular, that the applicant association had not sufficiently shown that it still had an interest in broadcasting the original version of the commercial, which now appeared out of date almost eight years later. In the meantime, the applicant association had again applied to Publisuisse SA for permission to broadcast the commercial with the additional comment. On 30 November 2001 Publisuisse SA refused this fresh request. An appeal against that decision was dismissed by the Federal Office of Communication on 3 March 2003.

65. The Court observes in particular that in dismissing the application to reopen the proceedings, the Federal Court mainly relied on new grounds, namely that because of the time that had elapsed, the applicant association had lost all interest in having the commercial broadcast. By comparison, one of the main arguments put forward by the domestic authorities in refusing permission to broadcast the commercial in the first set of proceedings brought by the applicant association related to the prohibition of political advertising. Accordingly, in the opinion of the Federal Court itself, the general context had evolved to such an extent that it was legitimate to wonder whether the applicant association still had an interest in broadcasting the commercial. That is sufficient to warrant the conclusion that the refusals received after the Court's judgment of 28 June 2001 constitute relevant new information capable of giving rise to a fresh violation of Article 10.

66. In the Government's submission, the present case should be declared inadmissible *ratione materiae*, since, by virtue of Article 46 of the Convention, execution of the Court's judgments falls solely within the jurisdiction of the Committee of Ministers. In that connection, the Court would first reiterate that, by Article 32 § 1 of the Convention, its jurisdiction extends "to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in

Articles 33, 34 and 47". Article 32 § 2 provides that "[i]n the event of dispute as to whether the Court has jurisdiction, the Court shall decide".

67. However, it cannot be said that the powers assigned to the Committee of Ministers by Article 46 are being encroached on where the Court has to deal with relevant new information in the context of a fresh application. Furthermore, in the instant case the Committee of Ministers, by adopting Resolution ResDH(2003)125, ended its supervision of the execution of the Court's judgment of 28 June 2001, although it had not taken into account the Federal Court's judgment of 29 April 2002 refusing the applicant association's application to reopen the proceedings, since the Government had not informed it of that judgment. From that standpoint also, the refusal in issue constitutes a new fact. If the Court were unable to examine it, it would escape all scrutiny under the Convention.

68. The Government's preliminary objection of lack of jurisdiction *ratione materiae* must therefore likewise be dismissed.

B. Merits

1. The parties' submissions

(a) The applicant association

69. The applicant association did not share the view of the minority of the Chamber judges that it had submitted a fresh request for permission to broadcast the commercial precisely because the original version was out of date. It pointed out that the commercial itself had not been altered but simply featured an additional comment explaining that the commercial had been censored and that the Court had found the censorship to be in breach of Article 10. In any event, the applicant association submitted that it was not for the Swiss authorities to determine whether an opinion expressed in a television commercial was outdated or not.

70. The applicant association also maintained that the argument by the judges in the minority that the review of the Federal Court's judgment had been unnecessary was irrelevant. It pointed out that, on the contrary, the Federal Court judgment invalidated by the Court still appeared as a leading judgment in the Federal Court's official reports. It further submitted that the Federal Court's reasoning in the judgment it had delivered after the Court's judgment provided evidence of continuing censorship.

71. The applicant association argued that the Chamber judgment was well-founded since it took sufficient account of the particular circumstances of the case.

(b) The Government

72. The Government submitted that the interference with freedom of expression had been justified under Article 10 § 2 of the Convention.

73. They noted that the Grand Chamber might be required to determine whether Switzerland had had a positive obligation under Article 10 of the Convention to compel Publisuisse SA to broadcast the commercial in question. In the Government's submission, such an obligation could be accepted only if the following three conditions were met: (1) the commercial did not infringe the prohibition of "political advertising" as interpreted following the Court's initial judgment; (2) the commercial did not breach other rules on broadcasting (for example, on unfair or misleading advertising); (3) Publisuisse SA had no latitude to reject the commercial, even if it could rely on such fundamental rights as contractual and/or economic freedom. Assuming that the first two conditions were met, it would still be necessary to weigh up the interests at stake. In that connection, the Government maintained that, even if the conditions for a positive obligation were satisfied, there were stronger arguments for concluding that Switzerland had not breached any such obligation in the instant case.

74. The Government further pointed out that one of the central aspects of the Court's reasoning in the first *VgT Verein gegen Tierfabriken* judgment of 28 June 2001 was that "the national television programmes of the Swiss Radio and Television Company ... were the only ones broadcast throughout Switzerland". However, in the Government's submission, while that observation reflected the situation in 1994 it no longer corresponded to the reality prevailing in 2001 and 2002. Figures published for 2001 showed that 37% of gross revenue from television advertising had been generated by the Swiss Radio and Television Company's two German-language channels, 27% by advertising slots aimed specifically at viewers in the German-speaking part of Switzerland and 15% by private national and regional channels. In the Government's view, it could not be argued that any subsequent technical developments had reduced this degree of competition. The applicant association had therefore had genuine alternative options for broadcasting the commercial in issue.

75. In any event, the Government subscribed to the opinion of the judges in the minority that the applicant association's interest in broadcasting the commercial had not been worthy of protection. In that connection, they submitted that the assessment of the merits of the complaint should take into account the fact that alongside its application to reopen the proceedings, the applicant association had applied to the Federal Office of Communication for permission to broadcast the commercial featuring the additional comment.

(c) The third party

76. The Czech Government submitted that even if it could be accepted, at a stretch, that the applicant association had the right to have the effects of a violation of the Convention redressed as far as possible, that right would not have its basis in the Convention but rather in the general principles of international law relating to State liability. However, since no such right was guaranteed by the Convention itself as a human right or fundamental freedom, the Court was in no way required to ensure its observance under Article 19 of the Convention.

2. The Court's assessment

(a) The Chamber judgment

77. The Court notes firstly that the Chamber considered that the refusal of the applicant association's application to reopen the proceedings following the Court's judgment of 28 June 2001 constituted fresh interference with the exercise of its rights under Article 10 § 1. Leaving open the questions of the legal basis for the interference and the legitimate aims it pursued, the Chamber found a violation of Article 10 for the following reasons:

> "62. In its judgment of 28 June 2001 the Court found that the measure in issue was not 'necessary in a democratic society', among other reasons because the authorities had not demonstrated in a 'relevant and sufficient' manner why the grounds generally advanced in support of the prohibition of political advertising also served to justify the interference in the particular circumstances of the applicant association's case (see *VgT Verein gegen Tierfabriken*, cited above, § 75).
>
> In the instant case the Federal Court refused the applicant association's application to reopen the proceedings on the ground that the association had not provided a sufficient explanation of the nature of 'the amendment of the judgment and the redress being sought', as it was formally required to do by section 140 of the former Federal Judicature Act (see paragraph 20 above).
>
> However, the Court considers that that approach is overly formalistic, seeing that it followed from the circumstances of the case as a whole that the association's application necessarily concerned the broadcasting of the commercial in question, which had been prohibited by the Federal Court itself on 20 August 1997.
>
> Furthermore, the Federal Court nevertheless added that the applicant association had not sufficiently shown that it still had an interest in broadcasting the original version of the commercial. In doing so, it effectively took the place of the applicant association in deciding whether there was still any purpose in broadcasting the commercial. However, it failed to give its own explanation of how the public debate on battery farming had changed or become less topical since 1994, when the commercial was initially meant to have been broadcast.

63. Accordingly, the Court, while conscious of the Swiss authorities' margin of appreciation in the matter (see *VgT Verein gegen Tierfabriken*, cited above, § 67), is not satisfied that the Federal Court applied domestic law in conformity with the principles embodied in Article 10 of the Convention. That being so, the reasons given by the Swiss Federal Court, having regard to the case as a whole and to the interest of a democratic society in ensuring and maintaining freedom of expression in matters of indisputable public interest, were not 'relevant and sufficient' to justify the interference in issue."

(b) Positive obligation on the respondent State to take the necessary measures to allow the television commercial to be broadcast

(i) Preliminary remarks

78. Unlike the Chamber, the Grand Chamber considers it appropriate to examine the present case from the standpoint of the positive obligation on the respondent State to take the necessary measures to allow the television commercial to be broadcast.

79. Article 1 of the Convention provides that the Contracting States "shall secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention". As the Court stated in *Marckx* (cited above, § 31; see also *Young*, *James and Webster v. the United Kingdom*, 13 August 1981, § 49, Series A no. 44), in addition to the primarily negative undertaking of a State to abstain from interference in Convention guarantees, "there may be positive obligations inherent" in such guarantees.

80. In this connection, the Court reiterates the importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, "effective" exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures (see, *mutatis mutandis*, Özgür Gündem *v. Turkey*, no. 23144/93, §§ 42-46, ECHR 2000-III, and *Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000).

81. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. However, this obligation must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, for example, *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports* 1998-VIII, and *Appleby and Others v. the United Kingdom*, no. 44306/98, § 40, ECHR 2003-VI).

82. Moreover, the boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the

case is analysed in terms of a positive duty on the State or in terms of interference by a public authority which needs to be justified, the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests at stake (see, *mutatis mutandis*, *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, § 58, ECHR 2006-I, and *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, §§ 98 et seq., ECHR 2003-VIII).

(ii) Principles governing the execution of the Court's judgments

83. The Court reiterates that the Convention must be read as a whole. In the context of the present case, the examination of whether there has been a fresh violation of Article 10 must take into account the importance in the Convention system of effective execution of the Court's judgments in accordance with Article 46 of the Convention, which provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

84. In this connection it should be pointed out that one of the most significant features of the Convention system is that it includes a mechanism for reviewing compliance with the provisions of the Convention. Thus, the Convention does not only require the States Parties to observe the rights and obligations deriving from it, but also establishes a judicial body, the Court, which is empowered to find violations of the Convention in final judgments by which the States Parties have undertaken to abide (Article 19, in conjunction with Article 46 § 1). In addition, it sets up a mechanism for supervising the execution of judgments, under the Committee of Ministers' responsibility (Article 46 § 2 of the Convention). Such a mechanism demonstrates the importance of effective implementation of judgments.

85. As regards the requirements of Article 46, it should first be noted that a respondent State found to have breached the Convention or its Protocols is under an obligation to abide by the Court's decisions in any case to which it is a party. In other words, a total or partial failure to execute a judgment of the Court can engage the State Party's international responsibility. The State Party in question will be under an obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to take individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the Court and to redress the effects, the aim being to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (see, among many other authorities, *Scozzari and*

Giunta v. Italy [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and *Assanidze v. Georgia* [GC], no. 71503/01, § 198, ECHR 2004-II).

86. These obligations reflect the principles of international law whereby a State responsible for a wrongful act is under an obligation to make restitution, consisting in restoring the situation which existed before the wrongful act was committed, provided that restitution is not "materially impossible" and "does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation" (Article 35 of the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts – see paragraph 36 above). In other words, while restitution is the rule, there may be circumstances in which the State responsible is exempted – fully or in part – from this obligation, provided that it can show that such circumstances obtain.

87. In any event, respondent States are required to provide the Committee of Ministers with detailed, up-to-date information on developments in the process of executing judgments that are binding on them (Rule 6 of the Committee of Ministers' Rules for the supervision of the execution of judgments and of the terms of friendly settlements – see paragraph 35 above). In this connection, the Court emphasises the obligation on States to perform treaties in good faith, as noted, in particular, in the third paragraph of the Preamble to, and in Article 26 of, the Vienna Convention on the Law of Treaties 1969 (see paragraph 37 above).

88. Admittedly, subject to monitoring by the Committee of Ministers, the respondent State in principle remains free to choose the means by which it will discharge its obligations under Article 46 § 1 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, and *Lyons and Others*, cited above). However, in certain special circumstances the Court has found it useful to indicate to a respondent State the type of measures that might be taken to put an end to the situation – often a systemic one – which has given rise to the finding of a violation (see, for example, *Öcalan v. Turkey*, no. 46221/99, § 210 *in fine*, ECHR 2005-IV, and *Popov v. Russia*, no. 26853/04, § 263, 13 July 2006). Sometimes, the nature of the violation does not even leave any choice as to the measures to be taken (see *Assanidze*, cited above, § 202).

89. With regard in particular to the reopening of proceedings, the Court clearly does not have jurisdiction to order such measures (see, among other authorities, *Saïdi v. France*, 20 September 1993, § 47, Series A no. 261-C, and *Pelladoah v. the Netherlands*, 22 September 1994, § 44, Series A no. 297-B). However, where an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, the Court may indicate that a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation (see, among other authorities, *Gençel v. Turkey*, no. 53431/99,

§ 27, 23 October 2003; *Öcalan*, cited above, § 210; and *Claes and Others v. Belgium*, nos. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 and 49716/99, § 53, 2 June 2005). This is in keeping with the guidelines of the Committee of Ministers, which in Recommendation No. R (2000) 2 called on the States Parties to the Convention to introduce mechanisms for re-examining the case and reopening the proceedings at domestic level, finding that such measures represented "the most efficient, if not the only, means of achieving *restitutio in integrum*" (see paragraph 33 above).

90. In the instant case the Chamber considered that the reopening of proceedings at domestic level could constitute an important aspect of the execution of the Court's judgments. The Grand Chamber shares that view. However, the reopening procedure must also afford the authorities of the respondent State the opportunity to abide by the conclusions and the spirit of the Court judgment being executed, while complying with the procedural safeguards in the Convention. This applies all the more where, as in the instant case, the Committee of Ministers merely notes the existence of a reopening procedure without awaiting its outcome. In other words, the reopening of proceedings that have infringed the Convention is not an end in itself; it is simply a means – albeit a key means – that may be used for a particular purpose, namely the full and proper execution of the Court's judgments. Seeing that this is the sole criterion for assessing compliance with Article 46 § 1 and applies equally to all Contracting States, no discrimination can result between those which have introduced a reopening procedure in their legal system and others.

(iii) Application of the above principles in the instant case

91. The Court must ascertain whether, in view of the importance of the execution of its judgments in the Convention system and the applicable principles, the respondent State had a positive obligation to take the necessary measures to allow the television commercial in issue to be broadcast following the Court's finding of a violation of Article 10. In determining whether such an obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual.

92. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or, as in this case, on debate of questions of public interest (see *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103; *Castells v. Spain*, 23 April 1992, § 43, Series A no. 236; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239; *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996-V; and *Monnat v. Switzerland*, no. 73604/01, § 58, ECHR 2006-X). This applies all the more in the instant case, having regard to the Court's judgment of 28 June 2001. Moreover, the television commercial

concerned battery pig farming. Accordingly, as it related to consumer health and to animal and environmental protection, it was undeniably in the public interest.

93. The Court further notes that the television commercial was never broadcast, even after the Court's judgment had found that the refusal to broadcast it infringed freedom of expression. However, prior restraints on publication entail such dangers that they call for the most careful scrutiny (see The Sunday Times *v. the United Kingdom (no. 2)*, 26 November 1991, § 51, Series A no. 217, and *Dammann v. Switzerland*, no. 77551/01, § 52, 25 April 2006).

94. Furthermore, the Court has already found, in its judgment of 28 June 2001, that the interference in issue was not necessary in a democratic society, among other reasons because the authorities had not demonstrated in a relevant and sufficient manner why the grounds generally advanced in support of the prohibition of "political advertising" could serve to justify the interference in the particular circumstances of the case (see *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, § 75, ECHR 2001-VI). The Federal Court subsequently dismissed the applicant association's application to reopen the proceedings on the ground that the association had not provided a sufficient indication of its position as to the nature of "the amendment of the judgment and the redress being sought", as it was formally required to do by section 140 of the former Federal Judicature Act (see paragraph 29 above). On this point, the Grand Chamber shares the view expressed in paragraph 62 of the Chamber judgment that this approach is overly formalistic in a context in which it is clear from the circumstances as a whole that the association's application necessarily concerned the broadcasting of the commercial in question, which had been prohibited by the Federal Court itself on 20 August 1997.

95. The Federal Court further held that the applicant association had not sufficiently shown that it still had an interest in broadcasting the commercial. As the Chamber observed in paragraph 62 of its judgment, the Federal Court thereby took the place of the applicant association, which alone was competent at that stage to judge whether there was still any purpose in broadcasting the commercial. The Grand Chamber shares that view. It further observes that the public interest in dissemination of a publication does not necessarily decrease with the passing of time (see, to similar effect, *Editions Plon v. France*, no. 58148/00, § 53, ECHR 2004-IV). Moreover, the Federal Court did not offer its own explanation of how the public debate on battery farming had changed or become less topical since 1994, when the commercial was initially meant to have been broadcast. Nor did it show that after the Court's judgment of 28 June 2001 the circumstances had changed to such an extent as to cast doubt on the validity of the grounds on which the Court had found a violation of Article 10. Lastly, the Court must also reject the argument that the applicant

association had alternative options for broadcasting the commercial in issue, for example via private and regional channels, since that would require third parties, or the association itself, to assume a responsibility that falls to the national authorities alone: that of taking appropriate action on a judgment of the Court.

96. Furthermore, the argument that the broadcasting of the commercial might be seen as unpleasant, in particular by consumers or meat traders and producers, cannot justify its continued prohibition. The Court reiterates in this connection that freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; *Lehideux and Isorni v. France*, 23 September 1998, § 55, *Reports* 1998-VII; *Murphy v. Ireland*, no. 44179/98, § 72, ECHR 2003-IX; and *Monnat*, cited above, § 55).

97. The Court notes, lastly, that the Contracting States are under a duty to organise their judicial systems in such a way that their courts can meet the requirements of the Convention (see *mutatis mutandis*, *Bottazzi v. Italy* [GC], no. 34884/97, § 22, ECHR 1999-V, and the case-law cited therein). This principle also applies to the execution of the Court's judgments. Accordingly, it is equally immaterial in this context to argue, as the Government did, that the Federal Court could not in any event have ordered that the commercial be broadcast following the Court's judgment. The same is true of the argument that the applicant association should have instituted civil proceedings.

(iv) Conclusion

98. Having regard to the foregoing, the Court considers that the Swiss authorities failed to comply with their positive obligation under Article 10 of the Convention in the instant case. There has therefore been a violation of that Article.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

100. The applicant association did not claim an award for pecuniary or non-pecuniary damage.

B. Costs and expenses

101. The applicant association claimed 4,000 euros (EUR) in respect of the costs and expenses incurred before the Grand Chamber.

102. The Government requested the Court, in view of the somewhat brief nature of the memorial submitted by the applicant association's representative, to reduce that sum by an appropriate amount.

103. Having regard to the material before it and the criteria established in its case-law, the Court considers that the applicant association's claims are reasonable. It therefore awards it the sum of EUR 4,000, plus any tax that may be chargeable to it, in respect of the costs and expenses incurred before the Grand Chamber.

C. Default interest

104. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses* by fifteen votes to two the Government's preliminary objection concerning the failure to exhaust domestic remedies;

2. *Dismisses* by eleven votes to six the Government's preliminary objection concerning the Court's lack of jurisdiction *ratione materiae*;

3. *Holds* by eleven votes to six that there has been a violation of Article 10;

4. *Holds* by eleven votes to six
   (a) that the respondent State is to pay the applicant association, within three months, EUR 4,000 (four thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant association, to be converted into Swiss francs at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate

equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 30 June 2009.

Erik Fribergh	Jean-Paul Costa
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:

(a) dissenting opinion of Judge Malinverni joined by Judges Bîrsan, Myjer and Berro-Lefèvre;

(b) dissenting opinion of Judge Sajó;

(c) dissenting opinion of Judge Power.

J.-P.C.
E.F.

DISSENTING OPINION OF JUDGE MALINVERNI JOINED BY JUDGES BÎRSAN, MYJER AND BERRO-LEFÈVRE

(Translation)

1. To my great regret, I am unable to agree with the conclusions reached by the majority. My opinion differs from that expressed by my colleagues on two issues that I consider to be central to the present case: the Court's jurisdiction as regards the execution of its judgments, and the obligations on States in the same sphere.

I

2. Article 46 § 2 of the Convention provides that the final judgment of the Court is transmitted to the Committee of Ministers, which supervises its execution. Accordingly, the Convention does not confer any jurisdiction on the Court as regards the execution of its own judgments. Supervision of execution falls outside the Court's jurisdiction, being entrusted to a political body, the Committee of Ministers.

3. Admittedly, in a second judgment the Court may examine new facts not dealt with in its previous judgment, even if they occurred in the context of the execution of that judgment. The question arising is therefore whether the present case involved a new fact justifying the Court's jurisdiction *ratione materiae*.

4. Let us recapitulate the facts: after the Court's first judgment, the applicant association applied to the Federal Court under section 139(a) of the former Federal Judicature Act for a review of that court's initial judgment. On 29 April 2002 the Federal Court dismissed the application. The Committee of Ministers, for its part, adopted Resolution ResDH(2003)125 on 22 July 2003, ending its supervision of the execution of the judgment.

5. It is true that the Committee of Ministers had not been informed that the Federal Court had dismissed the application to reopen the proceedings. Nevertheless, in its resolution the Committee of Ministers declared itself satisfied with the individual and general measures taken by Switzerland to execute the Court's judgment.

6. The measures included publication of the judgment, payment of the award of just satisfaction (Article 41) and the fact that the applicant association had been able to apply for a review under section 139(a) of the Federal Judicature Act. In other words, the Committee of Ministers did not consider it necessary to make the adoption of its resolution dependent on the Federal Court's response, whether positive or negative, to the application to reopen the proceedings. In my opinion, the Committee of Ministers'

adoption of the resolution conclusively ended the examination of the case at international level.

7. Even assuming that the Committee of Ministers erred in adopting its resolution prematurely – that is, before knowing the outcome of the application for review – I consider that it is not for the Court but, if need be, for the Committee of Ministers to rectify that error.

8. In any event, the question before the Court was whether the domestic authorities' second refusal to broadcast the television commercial in issue constituted new information. The Court has often addressed the concept of new information in the context of the reopening of domestic proceedings following one of its judgments.

9. The *Mehemi v. France (no. 2)* case (no. 53470/99, § 43, ECHR 2003-IV) is an example where the Court acknowledged the existence of new information and ruled that it had jurisdiction to examine whether the measures taken by the respondent State following its initial judgment were compatible with the Convention. The new facts were the conversion of the order for the applicant's permanent exclusion into a ten-year exclusion order, and the issuing of a special visa allowing him to return to France. Those measures had been taken after the Court's first judgment, and the Court ruled that it had jurisdiction to examine them. The subject matter of the second application was indeed different from that of the first application. Similarly, in *Hertel v. Switzerland* ((dec.), no. 53440/99, ECHR 2002-I) the Court held that a partial, as opposed to a total, prohibition constituted new information.

10. Apart from these few examples, most of the Court's judgments have shown that the mere refusal to reopen proceedings at national level following a judgment by the Court does not constitute new information, even where the applicant continues to suffer the adverse effects of a domestic judgment given in breach of the Convention.

11. The *Lyons and Others v. the United Kingdom* case ((dec.), no. 15227/03, ECHR 2003-IX), in which the Court had found a violation of Article 6 in its initial judgment, is a perfect illustration of this. In the Court's view, the proceedings which the applicants were seeking to challenge had their origin in earlier proceedings. In its decision the Court therefore considered that the applicants' argument that the United Kingdom had committed a new breach of Article 6 rested on their view that by refusing to quash their convictions or to order a retrial, the domestic courts had failed to give effect to the Court's initial judgment. It noted, however, that the respondent State was free to choose the means by which it was to discharge its legal obligation under Article 46. The Court therefore lacked jurisdiction to find a State to be in breach of the Convention simply on account of its failure to take a particular course of action in executing one of the Court's judgments.

12. The following principles thus appear to emerge from the Court's case-law: if, following the reopening of proceedings, the respondent State has altered the applicant's situation, this amounts to new information and the Court will normally have jurisdiction (the *Mehemi* approach); on the other hand, the national authorities' refusal to reopen proceedings following the Court's finding of a violation does not in principle constitute new information (the *Lyons and Others* approach).

13. Unlike the majority, I take the view that the Federal Court's refusal to review its initial judgment should not be regarded as new information that was not examined in the Court's initial judgment. On the contrary, I consider that the refusal to reopen proceedings at national level does not constitute new information and is not a basis for finding that the Court has jurisdiction *ratione materiae*.

14. The fact that the *Lyons and Others* case concerned Article 6 and the present case concerns Article 10 is not sufficient to account for the difference between the finding in the former case and the conclusion reached by the majority in the present case. The second refusal by the Swiss authorities to broadcast the commercial in question does not constitute new information either. The commercial was exactly the same as the one that had initially been refused, apart from the fact that it was preceded by a reference to the Court's finding against Switzerland.

15. I therefore conclude that the Court does not have jurisdiction *ratione materiae* to deal with the application in the present case.

16. I would like to point out in this connection that Article 16 § 4 of Protocol No. 14 to the Convention, which admittedly is not yet in force, assigns the Committee of Ministers, and no one else, the task of monitoring the execution of the Court's judgments. If a State refuses to abide by a judgment, infringement proceedings may be brought before the Court by the Committee of Ministers alone, and not by individuals.

II

17. This initial conclusion is further strengthened by an examination of the obligations on States following judgments by the Court against them.

18. It should be noted here that although the Court's judgments are binding (Article 46), States are free to choose the means whereby they will comply with them. Other than in exceptional cases (see, for example, *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II), the Court's judgments thus impose on States an obligation to achieve a particular outcome, in principle leaving them free to decide how to achieve it. In particular, the Convention does not require States to reopen domestic proceedings following a finding of a violation by the Court. This possibility is a matter for their discretion, although in judgments concerning Article 6

the Court has often encouraged States to opt for this solution, especially in criminal cases.

19. Swiss domestic law has introduced a procedure for the review of Federal Court judgments following findings of a violation by the Court. However, this possibility of applying to reopen proceedings is not absolute but is subject to conditions. Firstly, section 139(a) of the Federal Judicature Act (section 122 of the Law now in force) provided that an application for review of a Federal Court judgment was admissible only if redress could not be afforded by any other means (the subsidiarity principle). Furthermore, and above all, section 140 provided that the application for review had to indicate, with supporting evidence, the ground relied on for the reopening of proceedings and whether it had been raised in due time. It also had to state the nature of the amendment of the judgment and the redress being sought.

20. Swiss law therefore grants victims of a violation of the Convention the right to apply for a review but on no account the right to obtain such a review, let alone the outcome they desire.

21. The Federal Court dismissed the application to reopen the proceedings in the present case for the following reasons: firstly, the applicant association had not shown that redress was possible only through this means. In the Federal Court's view, other remedies were available, in particular actions based on civil law and competition law, for challenging the fresh refusal to broadcast the commercial in issue (see paragraph 41 of the judgment). Publisuisse SA's second refusal to broadcast the commercial should therefore have been the subject of separate proceedings rather than an application for review. The reopening procedure was not an appropriate remedy in the present case for securing the broadcasting of the commercial, even in its original version, since the Federal Court could not in any event have ordered it to be broadcast in the context of such a procedure (see paragraph 39 of the judgment). Only a civil action, of which the applicant association had not availed itself, would have afforded an opportunity to determine whether Publisuisse SA was obliged to broadcast the commercial.

22. Furthermore, the applicant association did not explain how it wished the judgment to be amended. Lastly, it had not shown that it still had an interest in broadcasting the commercial. In the Federal Court judges' opinion, bearing in mind the time that had elapsed since the refusal of the initial request to Publisuisse SA to broadcast the commercial, such an interest was no longer topical. On this point, I do not share the majority's opinion that the Federal Court thereby took the place of the applicant association, which alone was competent at that stage to judge whether there was still any purpose in broadcasting the commercial (see paragraph 95 of the judgment). The Court has always accepted that States are free to set admissibility criteria for applications to the courts, for example an interest entitling the applicant to take proceedings, and that the courts enjoy a wide margin of appreciation in determining whether the criteria are satisfied.

23. I do not consider that the Federal Court was overly formalistic in refusing to review its judgment. The application for review was quite simply not compatible with the requirements set out in section 140 of the Federal Judicature Act.

24. If a State provides for a reopening procedure in its domestic legal system, it has to be allowed to subject it to admissibility criteria, as with any form of appeal. In such matters, there can be no question of an automatic process. The Court's finding of a violation does not confer on the applicant the automatic right to have the domestic judgment reviewed and to obtain a new decision in his or her favour.

25. The opinion expressed by the majority is likely to have a perverse effect: it will penalise States which, seeking to improve the execution of the Court's judgments, have introduced a reopening procedure in their domestic legal systems. States that have not introduced such a procedure will not have to fear a second finding of a violation, whereas those that have will run that risk. As Judges Jaeger and Borrego Borrego quite rightly observed in their dissenting opinion annexed to the Chamber judgment, "[a]n unfavourable outcome for the applicant cannot be regarded as any less compatible with the Convention than the absence of such a [reopening] procedure".

26. The reasoning adopted by the majority may create a risk of inequality between two categories of States: those that have made provision for a reopening procedure and the others. It might help to discourage States that have not already done so from setting up domestic mechanisms for the review of national supreme courts' judgments following findings of a violation by the Court.

27. In conclusion, I consider that in refusing to take any action on the applicant association's request, the Swiss authorities were not responsible for a second violation of Article 10. While I acknowledge the importance, in the Convention system, of proper execution of the Court's judgments, I am unable to join the majority in asserting that the respondent State had a positive obligation to take the necessary measures to allow the television commercial to be broadcast following the Court's finding of a violation of Article 10.

28. How would the majority have reacted if, contrary to what happened, the Federal Court had declared the application to reopen the proceedings admissible, had examined it on the merits but had confirmed its initial judgment instead of setting it aside? To argue that there would have been a violation of the Convention in such circumstances would amount to holding that the Court's judgments have an indirect quashing effect, which cannot in any way be inferred from Article 46 § 1.

DISSENTING OPINION OF JUDGE SAJÓ

I voted against finding the application admissible.

The original 2001 judgment of the Court (hereinafter "the original judgment") did not order any specific action to be taken. On the contrary, the Court found it necessary to emphasise in the case "that its judgment is essentially declaratory" (see paragraph 78 of the original judgment). It follows that it is up to the Contracting States to determine how to organise the broadcasting of television commercials in order to perform their obligations under the Convention.

The operative part of the original judgment declares that Article 10 of the Convention has been violated. But there was no specific obligation imposed on the State. The applicant association did not ask for any specific remedy in its application (see paragraph 3 of the original judgment).

On 31 October 2001 the applicant association applied to Publisuisse SA for permission to broadcast the original commercial, to which a comment was added which referred to the Court's judgment and contained remarks about the conduct of the Swiss Radio and Television Company and the Swiss authorities.

On 30 November 2001 Publisuisse SA refused to grant permission to broadcast the commercial. The applicant association lodged an appeal with the Federal Office of Communication, which observed in 2003 that it was not empowered to force Publisuisse SA to broadcast the commercial. The applicant association did not avail itself of the administrative-law and civil-law remedies available in respect of the decision of the Federal Office of Communication and simply submitted an application to the Court.

The day after the refusal by Publisuisse SA, parallel to making use of the remedy that is available in the event of refusal to broadcast a commercial, the applicant association turned to the Federal Court with an application for the Federal Court's judgment of 20 August 1997 to be reviewed (this was the decision upholding the original refusal by Publisuisse SA). The application was refused as the applicant association failed to show that such a review was necessary. Showing of necessity is a condition for reopening proceedings in Swiss law. In fact, if the applicant association wished to have the original commercial broadcast, the existence of the judgment of the Federal Court, which was found by the Court (in its original judgment) to amount to a violation of Article 10 of the Convention, did not constitute an obstacle to this. Publisuisse SA refused to broadcast the commercial in view of other considerations. The appeal against Publisuisse SA's 2001 refusal decision was pending at the time the Federal Court denied the request to reopen the proceedings.

The judgment (see paragraph 19 of the present judgment) describes the contested commercial as being the same commercial "with the addition of a

comment referring to the Court's judgment and criticising the conduct of the Swiss Radio and Television Company and the Swiss authorities".

The addition of these remarks would have changed the original message to a considerable extent. The amended commercial would have contained a completely new idea (criticism of the authorities) and was seeking a stamp of official condemnation. The new demands go beyond the original commercial, which dealt with the conditions of pig farming. As the Federal Court concluded, the applicant association wanted to publicise the fact that the Court had found that its freedom of expression rights had been violated, which in the view of the Federal Court turned the commercial into a different one (see point 3.3 of the Federal Court decision, quoted in paragraph 23 of the judgment). The Federal Court evaluated the facts, finding that it was no longer the same commercial that was under discussion. Generally, national courts are better placed to evaluate facts, and there is no reason to depart from the finding of the national court in the present case.

Even if Publisuisse SA, acting for Switzerland, were bound not to violate Article 10 of the Convention as indicated in the original judgment, it does not follow that it was bound to grant permission to have the *amended* commercial broadcast in the context of the changed broadcasting market and debate of 2001. If the applicant association complains that its Article 10 rights were violated, this is a complaint that partly concerns a fresh interference. Even in the case of the original, unaltered commercial there would have been cause for consideration by Publisuisse SA, given the impact of the changes in the broadcasting market. Seven years had passed since the original request had been made. In seven years the political context and the context of the debate may have changed; the broadcasting market may have become more or less diverse, with more or fewer opportunities to communicate ideas, as a result of which the commercial interests of broadcasters would have changed accordingly. In the context of mandated broadcasting of commercials, special considerations apply which require independent judgment and judicial scrutiny. The duty to broadcast commercials imposed on private entities imposes restrictions on the private property and informational interests of broadcasters. "Must carry" rules impinge on the core of freedom of expression. Editorial freedom may suffer through the imposition of a "must carry" duty in a changed environment. Given that the imposed broadcasting of commercials, even (and in particular) with political content, is a far-reaching interference with the freedom of expression of the broadcaster/editor for the alleged sake of other people's commercial and expressive interests, the utmost care is needed. Here, contrary to a court order to execute a pecuniary obligation, automaticity cannot be the rule. The positive obligations of the State with regard to the enforcement of Article 10 have to be construed with the utmost care when it comes to the imposition of an obligation to broadcast

commercials of any nature, notwithstanding the laudable intent to diminish the difference between "powerful" and "weak" speakers. It will be for the State, the most powerful speaker, and, for that matter, a non-neutral one, to determine who is the favoured "weak" speaker, or which position demands preferential access. The obligation to broadcast is, *per se*, not only an interference with the right to speak but in fact it is a form of constrained speech, even if the indication that this is a commercial allows, in principle, some distinction to be drawn between the broadcaster's position and the viewpoint of the commercial that was broadcast.

To my mind the refusal to reopen the proceedings does not amount to a violation of the State's obligations under the Convention as regards the execution of the Court's judgment, as the original declaratory judgment did not specify a particular remedy. The State has the choice of finding the appropriate remedy, subject to the supervision system established under the Convention. As discussed in the dissenting opinion of Judge Malinverni joined by Judges Bîrsan, Myjer and Berro-Lefèvre, States are free to choose, at least in respect of certain types of judgments, how to carry out their obligations regarding execution.

DISSENTING OPINION OF JUDGE POWER

I voted with the minority in this matter for two reasons. Firstly, I am of the view that the complaint in relation to the ongoing refusal to broadcast the commercial in question is inadmissible *ratione materiae* having regard to the provisions of Article 35 § 2 (b). Secondly, in so far as there has been a fresh interference in the applicant association's right to freedom of expression by the refusal to broadcast its additional comment and criticisms, there has been a failure to exhaust domestic remedies as required by Article 35 § 1 of the Convention.

To the extent that this application concerns the ongoing refusal to broadcast a particular television commercial I cannot but conclude that this complaint is "substantially the same" (in terms of parties, facts and complaints) as the matter which has already been examined by this Court in its judgment of 28 June 2001 and in which a violation of Article 10 of the Convention has already been found[1]. I do not share the majority's view that the Federal Court's rather brief comment on the applicant association's current interest in broadcasting the commercial which was made in the context of its dismissal of an application to reopen proceedings for failure to comply with the requirements of domestic law was, in itself, sufficient to constitute a fresh interference with the applicant association's freedom of expression. To my mind, the Federal Court's comment did not raise an essentially "new" issue and does not constitute a sufficiently solid basis for this Court's examination of the original complaint for a second time.

In so far as the refusal to reopen proceedings *may* raise an issue under Article 46, it is clear that the Convention confers no jurisdiction upon this Court in relation to the execution of its own judgments.

To the extent that there is any "new" element to this application (and I am wholly satisfied that there is), I am bound to conclude that the applicant association has not exhausted domestic remedies in relation thereto. In October 2001, it applied to Publisuisse SA for permission to broadcast the same television commercial which had been the subject of this Court's judgment of 28 June 2001. However, in addition thereto, the applicant association also sought permission to impart to the public additional and important information in respect of which there can be little doubt but that the public had an interest in receiving. This additional information consisted of a comment informing the public of this Court's judgment together with the applicant association's criticisms of the conduct of the Swiss Radio and Television Company and the Swiss authorities (see paragraph 19 of the judgment). That application was refused on 30 November 2001. The next day, the applicant association applied to the Federal Court for a reopening

1. *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, ECHR 2001-VI.

of its earlier judgment of 20 August 1997 which had dealt, solely, with the original refusal to broadcast the commercial.

By any standards, it can be argued that the refusal to broadcast the applicant association's comment and criticisms constituted an additional or "new" interference with its right to freedom of expression and comprised sufficient grounds for raising a new claim of a violation of Article 10 of the Convention. The applicant association was entitled to know what, if any, legitimate aim was being pursued in restricting its right to impart this information to the public and what, if any, "pressing social need" existed which could possibly justify such a serious interference with its right to freedom of expression. However, the Convention lays down clear rules on admissibility, one of which provides that this Court may only deal with a matter after all domestic remedies have been exhausted (Article 35 § 1). The principle of subsidiarity recognises that the Strasbourg Court is a supervisory body of last resort and that the primary responsibility for remedying violations of the Convention lies with the Contracting Parties. Thus, in so far as there was a second and serious interference with the applicant association's freedom of expression it ought to have instituted fresh proceedings in relation thereto and it was obliged, legally, to exhaust all domestic remedies within such proceedings before raising its complaint before this Court.

It would appear that the applicant association did, in fact, institute separate proceedings by lodging an appeal with the Federal Office of Communication. However, instead of awaiting the outcome thereof, it sought to have its complaint concerning this second interference in its freedom of expression examined by having it subsumed, retrospectively, into a review of the Federal Court's earlier judgment. I accept the respondent State's argument that it is self-evident that the reopening procedure in relation to the original refusal to broadcast the commercial was not an appropriate context for determining whether this further refusal by Publisuisse SA to broadcast new and additional information was consistent with the applicant association's right to freedom of expression. In its decision of 29 April 2002, the Federal Court noted that the appeal before the Federal Office of Communication was "still pending". The applicant association, nevertheless, proceeded to lodge its complaint before this Court on 25 July 2002 some eight months *prior* to the delivery of the decision of the Federal Office of Communication and certainly before the domestic courts had any opportunity to rule on the "new" interference. It thus failed to exhaust domestic remedies, as required. Accordingly, having regard to the provisions of Article 35 § 1, this complaint has to be declared inadmissible.