Sammanfattning av beslut om klagomål 1623/2009/(BB)(TS)FOR (konfidentiellt) mot Europeiska kommissionen

Klagandena förvaltar upphovsrättsinnehavares rättigheter i Finland. De framförde ett klagomål till Europeiska kommissionen om att Finland inte uppfyllde sina förpliktelser enligt EU-rätten att skydda upphovsrättsinnehavares rättigheter, eftersom man låt kabeloperatörer återsända tv-kanaler utan att betala upphovsrättsinnehavarna.

Efter att ha gjort en undersökning kom ombudsmannen fram till att kommissionen underlätit att tydligt förklara orsakerna till att man inte gått vidare med det klagomål som mottagits. Ombudsmannen lade därför fram ett förslag till vänskaplig förlikning och bad kommissionen att tydligt förklara sin ståndpunkt och ge klagandena fyra veckor på sig att lämna synpunkter på ett eventuellt förslag till lösning.


The background to the complaint

1. The complainants complained to the European Commission in 2007 that Finland was not complying with its obligations under EU law to protect the rights of copyright holders. In 2009, they submitted a complaint to the Ombudsman about alleged maladministration by the Commission in its handling of their 2007 complaint.

2. In their complaint to the Commission, the complainants argued that the Finnish Copyright
Act infringed (i) Article 3 of the Information Society Directive [1]; (ii) Article 8 of the Rental Rights Directive [2], and (iii) Article 31 of the "Universal Service" Directive [3]. In sum, they argued that the Finnish Copyright Act allowed cable operators to retransmit "must-carry" television channels [4] containing copyrighted material to end users, without having to pay any fees to copyright holders.

3. The Commission asked the complainants to reply to 15 questions regarding (i) the implementation of the "must-carry" obligation in Finland, and (ii) the copyright and related rights aspects of the retransmission of must-carry channels in Finland. The complainants submitted their replies to the Commission on 5 February 2008.

4. By letter dated 10 March 2008, the Commission informed the complainants that it would not register the issue as a "complaint" against Finland. It stated the following:

"You complain that according to Sections 25i and 47 of the Finnish Copyright Law, authors, performers and phonogram producers are not entitled to any remuneration for the retransmission of must-carry channels within Finland. Hence, you conclude that Finnish copyright law is not in compliance with the provisions of Directive 2001/29/EC [the Information Society Directive] and Directive 1992/100/EC [the Rental Rights Directive]. It is however our understanding that the exclusion of remuneration for the retransmission of must-carry channels concerns retransmissions of domestic channels within the Finnish territory. In these circumstances, we do not currently intend to register your letter as a complaint against the Finnish Government".

5. By letter dated 2 April 2009, the complainants requested the Commission to give them access to the documents on which the Commission based the opinion expressed in the letter dated 10 March 2008. By letter dated 30 April 2009, the Commission informed the complainants that no such documents existed since the letter dated 10 March 2008 was based directly on the Commission services' understanding of the applicable EU legal framework.

6. On 17 June 2009, the complainant turned to the Ombudsman.

The subject matter of the inquiry

7. The Ombudsman opened an inquiry into the following allegations and claim.

Allegations

1) The Commission failed to provide sufficient grounds for its refusal to register the complainants' complaint.

2) The Commission failed to deal with the complainants' complaint correctly.
3) The Commission failed to guarantee equal treatment between Finland and other EU Member States.

**Claim**

The Commission should register the complaint and investigate its subject matter.

**The inquiry**

8. The complaint was forwarded to the Commission. The opinion provided by the Commission was then forwarded to the complainants with an invitation to make observations. The complainants' observations were submitted to the Ombudsman on 24 February 2010. On 3 March 2011, the Ombudsman made a proposal for a friendly solution. On 6 May 2011, the Commission responded to the proposal for a friendly solution. On 23 June 2011 the complainants submitted observations. On 19 July 2011, the Commission provided the Ombudsman with a copy of a letter to the complainants. On 30 August 2011, the complainants wrote to the Ombudsman and enclosed a copy of their letter to the Commission. On 29 November 2011, the complainants provided the Ombudsman with updated information, namely a letter that they received from the European Commission dated 10 October 2011.

**The Ombudsman's analysis and conclusions leading to a proposal for a friendly solution**

**Preliminary remarks**

9. The Ombudsman dealt with all three allegations and the claim together.

**Arguments presented to the Ombudsman**

10. The complainants argued that, when the Commission closed the case, the Institution did not expressly refer to any of the reasons for not registering a complaint which are listed in the second paragraph of point 3 of the Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law [5] ('the Commission Communication'). Point 3, second paragraph, of the Commission Communication reads as follows:

"Correspondence shall not be investigable as a complaint by the Commission, and shall therefore not be recorded in the central registry of complaints, if:

— it is anonymous, fails to show the address of the sender or shows an incomplete address;"
— it fails to refer, explicitly or implicitly, to a Member State to which the measures or practice contrary to Community law may be attributed;

— it denounces the acts or omissions of a private person or body, unless the measure or complaint reveals the involvement of public authorities or alleges their failure to act in response to those acts or omissions. In all cases, the Commission shall verify whether the correspondence discloses behaviour that is contrary to the competition rules;

— it fails to set out a grievance;

— it sets out a grievance with regard to which the Commission has adopted a clear, public and consistent position, which shall be communicated to the complainant;

— it sets out a grievance which clearly falls outside the scope of Community law."

11. The complainants assumed that, since the Commission's statement referred to "domestic channels ", the Commission might have considered that the complaint " sets out a grievance which clearly falls outside the scope of Community law ". However, the complainants point out that the Commission did not make any clear reference to this reason in its letter dated 10 March 2008. In fact, the complainants argued that the Commission failed to provide any justification whatsoever for treating the subject-matter as a "domestic issue". The complainants also emphasised that such a conclusion could hardly be reached without carrying out an investigation.

12. The complainants maintained that their complaint clearly falls within the scope of EU law and that the Commission thus has an obligation to register it as a complaint. They argued that (i) the subject-matter of the complaint has cross-border dimensions within the EU, and (ii) the Commission should address the fact that more than half the material shown on commercial television channels is of foreign origin. For these reasons, the complainants considered that their complaint cannot be classified as a "domestic issue".

13. The complainants argued that the exceptions and limitations provided for in the Information Society Directive [6] should be applied in accordance with the Berne Convention and the WIPO Treaties. These stated that an author shall be entitled to equitable remuneration if any of his work is communicated to the public. The complainants stated that copyright holders are currently not receiving from Finland income to which they are entitled under the Information Society Directive and the Rental Rights Directives.

14. The complainants drew attention to the fact that the Commission took action to secure the rights of Romanian copyright societies in a similar situation, but failed to take any action in response to the present complaint.

15. The complainant also argued that the Commission infringed the European Code of Good Administrative Behaviour [7].
16. In the opinion submitted to the Ombudsman, the Commission stated that sufficient reasons were given for the Institution's refusal to register the complainants' complaint as an infringement complaint. The Commission pointed out that its letter dated 10 March 2008 was written after it had examined the complainants' responses to questions the Commission had put to them in order to clarify the geographical scope of the must-carry obligation imposed by Finland. The complainants' replies to those questions provided the Commission with the following information: (a) the must-carry obligation applies to domestic television and radio channels only; (b) only cable retransmissions are subject to the must-carry obligation; and (c) all Finnish cable networks retransmitting must-carry programmes operate within the domestic "initial service area" of the broadcasters whose programmes are retransmitted.

17. The Commission held that, in this context, it must have been clear to the complainants that the reason for not registering the complaint was, quite simply, that the broadcasts and retransmissions concerned were made within the borders of Finland. The Commission underlined that it was precisely the absence of cross-border cable retransmissions that led it to consider that the complainants' grievance is outside the scope of applicable EU rules on cable retransmission.

18. In reply to the complainants' argument that the Commission failed to consider the foreign origin of the subject matter being broadcast and retransmitted in Finland, the Commission underlined that neither its services' letter of inquiry dated 17 October 2007, nor the complainants' response of 4 February 2008 had relied on the origin of the subject matter being broadcast and retransmitted in order to determine the geographical scope of the matter. The Commission pointed out that, in their correspondence, its services correctly relied on where the broadcasts were made, and not where the subject matter being broadcast originated from.

19. As regards the complainants' argument that the Commission dealt differently with a similar situation in Romania, the Commission pointed out that the letter to Romania was motivated by concerns about retransmission in, Romania of broadcasts originating in other Member States. The Commission therefore disagrees with the complainants' allegation that it dealt differently with an identical situation.

20. The Commission stressed that it has discretionary powers when deciding whether to open an inquiry into an alleged infringement of EU law by a Member State.

21. In their observations on the Commission's opinion, the complainants argued that the Commission had still not provided a clear explanation for refusing, not only to register the complaint, but also to investigate it. The complainants argued that the Commission did not make clear what legal conclusion could be drawn from the fact that the cable retransmissions were made only in Finland. They pointed out that, in their complaint to the Commission, they clearly established that the problem they face results from the discrepancy between, on the one hand, the Information Society Directive, the Rental Rights Directive, and the "Universal Service" Directive and, on the other hand, Finnish legislation. The complainants pointed out that, even though the cable networks in question operate within
Finnish territory only and, likewise, the retransmission takes place within Finnish territory only, the discrepancy between the Directives and Finnish legislation should not be classified as a "domestic matter", or as a matter which falls outside the Commission's jurisdiction. The complainants also stated that the Commission had still not addressed their argument that an incorrect implementation of a Directive cannot be considered to constitute a "domestic matter". Instead, the Commission had merely stated that the cable networks which retransmit must-carry programmes are operated within Finnish territory, but no clear, legal conclusion was drawn from this fact.

22. In the complainants' view, the Commission thus failed to explain the legal relevance of the geographical location of the cable networks to the subject-matter at hand.

23. The complainants recalled that the Commission has already carried out an investigation into the enforcement of the must-carry obligation in Finland. At the time of that investigation, the Commission did not take the view that the must-carry obligations were a "domestic matter", even though exactly the same cable networks were involved. The complainants argue, therefore, that the Commission acted inconsistently by refusing to register their complaint on the grounds that the matter is a "domestic matter".

24. The complainants also argued that the effects of copyright infringement are not confined to Finnish territory because most of the material shown on the must-carry television channels is of foreign origin. Thus, Finland does not pay foreign copyright holders the income to which they are entitled under EU directives. The complainants pointed out that, even though cable networks operate within national borders in most Member States, copyright holders normally receive remuneration for must-carry retransmissions.

25. Finally, the complainants stated that the failure to remunerate copyright holders for must-carry retransmissions which occur in Finland restricts the free movement of goods because foreign copyright holders will be unwilling to let their copyright-protected material enter the Finnish market.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

The Commission's discretionary powers

26. The Commission drew attention to its discretionary powers to decide whether or not to open an inquiry into an alleged infringement of EU law by a Member State.

27. The Ombudsman underlined that he is not calling into question the Commission's discretionary powers regarding the application of Article 258 TFEU. However, he underlined that principles of good administration require that the Commission should not exercise such discretion arbitrarily. This means that, when faced with a choice of measures, it would be good administration if the Commission were to explain to EU citizens why one course of
action, as opposed to another, was chosen.

28. The Ombudsman considers that an adequate explanation is, for example, one which clarifies:

(1) why the issue complained about does not fall within the scope of EU law; or

(2) why the issue complained about falls within the scope of EU law but does not constitute an infringement of EU law; or

(3) why it is not clear that there is an infringement of EU law [8], in which case the Commission should then provide an adequate explanation for deciding to exercise its discretion [9] not to investigate further; or

4) why the Commission takes the view that there is an infringement of EU law, in which case the Institution should then provide an adequate explanation for deciding to exercise its discretion not to pursue the issue further [10].

29. The Ombudsman underlines that, by providing an adequate explanation for its discretionary decisions, the Commission can improve relations with citizens, increase its legitimacy, and strengthen its effectiveness as Guardian of the Treaties.

The specific complaint to the Commission

30. As regards the way in which the Commission dealt with the complainants' specific complaint against Finland, the Ombudsman first of all noted that the Commission stated that the complainants' grievance was not within the scope of the applicable EU rules on cable retransmission. This statement is certainly correct. The aim of Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [11] ('the Satellite and Cable Directive') is to contribute to the cross-border broadcasting of television programmes. Article 8(1) (Cable retransmission right) of the Satellite and Cable Directive states that "Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators." (Emphasis added) Thus, clearly, if electronic communications networks (for example, cable companies) retransmit broadcasts emanating only from the Member State in which the cable companies operate, the Satellite and Cable Directive clearly does not apply. The Ombudsman considers that the Commission adequately explained its position as regards the compliance of Finnish rules with the Satellite and Cable Directive.

31. He noted, however, that the complainants were not arguing that the Finnish rules in question do not comply with the Satellite and Cable Directive. Rather, the complainants' argument was, in summary, that the retransmission of copyright materials by cable
operators in Finland, who are subject to must-carry obligations, constitutes a “communication to the public” of copyrighted works within the meaning of (i) Article 3 of the Information Society Directive and (ii) Article 8 of the Rental Rights Directive. As a result, the complainants argued that Finland should not exempt cable operators from paying right holders “equitable remuneration” for the retransmission of their works.

32. While the Ombudsman did not exclude that the aspects of Finnish law described by the complainants do not infringe the Information Society Directive, the Rental Rights Directive, or the “Universal Service” Directive, he considers that the Commission has not provided the complainants with a clear explanation of the Commission’s views regarding Finland’s compliance with the Information Society Directive or the Rental Rights Directive. The Ombudsman underlined that, because the Commission has failed to set out its position clearly, the complainants were unsure whether the Commission considered that Finland was acting in compliance with the Information Society Directive or the Rental Rights Directive.

33. As regards the complainants’ argument that a similar situation that arose in Romania was treated differently by the Commission, the Ombudsman considered that the reasons given by the Commission were sufficient to reassure the complainants that the cases were not identical, and could not, therefore, be compared.

Procedural framework

34. The Ombudsman noted that, in its Communication to the European Parliament and the European Ombudsman, the Commission established a procedural framework for dealing with complaints regarding infringements of EU law. The Commission Communication defines a “complaint” as any written approach made to the Commission which indicates measures or practices which are contrary to EU law.

35. Paragraph 3 of the Commission Communication states that any correspondence which is likely to be investigated as a complaint” shall be recorded in the central registry of complaints kept by the Secretariat-General of the Commission. Correspondence shall not be investigable as a complaint by the Commission, and shall therefore not be recorded in the central registry of complaints, if:- it is anonymous, fails to show the address of the sender or shows an incomplete address; -it fails to refer, explicitly or implicitly, to a Member State to which the measures or practice contrary to Community law may be attributed; -it denounces the acts or omissions of a private person or body, unless the measure or complaint reveals the involvement of public authorities or alleges their failure to act in response to those acts or omissions. In all cases, the Commission shall verify whether the correspondence discloses behaviour that is contrary to the rules; it fails to set out a grievance; it sets out a grievance with regard to which the Commission has adopted a clear, public and consistent position, which shall be communicated to the complainant; it sets out a grievance which clearly falls outside the scope of Union law [12] [13].

36. It was clear, the Ombudsman noted, that the issue complained about does not fall within any of the categories described in paragraph 3 of the Commission Communication. As
regards the last three points, the Ombudsman noted that (i) the complainants certainly "set out a grievance"; (ii) there is nothing in the file to indicate that the Commission has taken a "clear, public and consistent position" on the issues raised by the complainants, and that the Institution communicated that position to the complainants, and (iii) the complainants' grievance clearly falls within the scope of Union law.

37. In light of the above, the Ombudsman concluded that the Commission should have registered the complainants' correspondence as a complaint, and issued an acknowledgement to the complainants, giving their complaint a case number. The Commission failed to do so.

38. The Ombudsman underlined that the procedural step of registering the complainants' correspondence as a complaint would not have prevented the Commission from closing the complaint appropriately, either on the grounds that, after carrying out an investigation [14], it reached the conclusion that there was no infringement of EU law, or because it decided to exercise its discretion to close the case.

39. The Ombudsman noted that, because the Commission failed to register the issue as a complaint, the complainants were (wrongly) led to believe that the Commission had decided that their complaint fell within the scope of paragraph 3 of the Commission Communication. The Ombudsman also underlines that, if the Commission had taken the procedural step of registering the complainants' correspondence as a complaint, the complainants would not have misunderstood the position taken by the Commission.

40. The Ombudsman also underlines that registering the complainants' correspondence as a complaint would have ensured that the Commission would have had to comply with paragraph 10 of its Communication. That paragraph states that, where a Commission department intends to propose that no further action be taken on a complaint, it will give the complainant prior notice thereof in a letter setting out the grounds on which it is proposing that the case be closed, and inviting the complainant to submit any comments within a period of four weeks. The Ombudsman noted that it is further stated that where the complainant's observations persuade the department concerned to reconsider its position, investigation of the complaint will continue. The Ombudsman underlined that this procedure constitutes an important procedural guarantee for complainants.

41. In light of the above, the Ombudsman concluded that the Commission failed to register the complaint as a complaint in accordance with the Commission Communication. The Commission also failed to explain clearly the reasons for not proceeding further with the case. These failures constituted a potential instance of maladministration in respect of which the Ombudsman made a proposal for a friendly solution. He stated that the Commission should register the complaint. If, after registering the complaint, the Commission decided not to proceed further with its investigation, it should explain to the complainants the reasons for not doing so. In particular, it would be appropriate for the Commission to explain clearly its position on the complainants' argument that Finnish law infringes the Information Society Directive and the Rental Rights Directive. The Commission could then, in accordance with paragraph 10 of the Commission Communication, give the complainants four weeks within
which to submit their comments on any proposal to close the case.

The arguments presented to the Ombudsman after his friendly solution proposal

42. In its response to the proposal for a friendly solution, the Commission noted that the infringement complaint concerned the implementation of must-carry obligations for broadcasting entities in Finland. One measure concerned the fact that no remuneration was given to authors, performers and phonogram producers when broadcasts were retransmitted, within Finland, by so-called "must-carry" channels. It added that the copyright directives deal with the authors' exclusive right of "communication to the public" (Article 3(1) of Directive 2001/29) and the performers' and phonogram producers' "single equitable remuneration" that is due when a phonogram, published for commercial purposes, is used for broadcasting or communication to the public (see Article 8(2) of Directive 1992/100/EC). It noted that on 17 October 2007, the Commission addressed a list of questions to the complainants. The questions aimed to shed some light on the geographical scope of the must-carry obligation, the original broadcast and its retransmission within Finland, the latter being allegedly exempted from remuneration. After examining the complainants' responses, the Commission's services informed the complainants, on 10 March 2008, that the case was confined to domestic retransmissions of broadcasts that originated within the Finnish territory and that, for this reason, the Commission did not intend to register the case. The complainants did not challenge this factual assumption. Instead, the complainants' legal counsel reverted to the Commission's services on 2 April 2009 (only) to request access to the documentation that led to the letter of the Commission's services of 10 March 2008. On 30 April 2009, the Commission's services responded that their opinion of 10 March 2008 was based solely on the services' correspondence with the complainants' legal counsel and their own appraisal of the facts of the case.

43. As regards the Ombudsman's proposal for a friendly solution, the Commission reiterated that it gave the complainants sufficient grounds for its refusal to register the complaint and the complainants did not contest the Commission's factual assumptions underlying its decision not to register this complaint. It was, the Commission argued, clearly explained to the complainant that the Commission did not register the complaint because none of the elements at stake concerned broadcasts or retransmissions thereof that were cross-border in scope. However, the Commission accepted the Ombudsman's proposal to explain more fully its position on the complainants' argument, in particular why it did not register the complaint and why the facts submitted by the complainants only occurred in relation to transmissions within the Finnish territory. It added that an opportunity would be given to the complainants to submit supplementary comments on the Commission's line of reasoning. If the complainants supplied further evidence of cross-border transmissions, the Commission would reconsider its refusal to register the complaint.

44. In their observations, the complainants stated that the Commission has not accepted the Ombudsman's proposal for a friendly solution. The complainants argued that the Commission proposes a solution that is not satisfactory and does not remedy the faults
resulting from maladministration in the initial procedure before the Commission.

45. First of all, they noted that the core of the Ombudsman's proposal for a friendly solution was that the Commission should register the complaint. However, the Commission still refuses to do so. Thus, the Commission disregards an essential element of the friendly solution proposal that could have served as a means to correct the faults of the initial Commission procedure.

46. The complainants also maintained that the Commission did not give sufficient grounds for its refusal to register the complaint. In this regard, the complainants referred to the comments already submitted to the Ombudsman.

47. The complainants disagreed with the Commission's factual assumptions underlying the decision all along, even though the maladministration on the Commission's part has made it difficult to contest those assumptions in a detailed manner. They underlined that the Commission originally gave a vague factual reasoning to the complainants, referring to the "legal framework" without any specification. Moreover, according to the Commission, there was no "case file" that could have been accessed by the complainants for them to be able to find out more about what led the Commission to arrive at the conclusion it did. While the Commission believes that it has clearly explained to the complainants that none of the elements at stake concerned broadcasts or retransmissions thereof that were cross-border in scope, and maintains that the facts submitted by the complainants only occurred in relation to transmissions within the Finnish territory, as the complainants have explained to the Ombudsman in their previous statements, the matter at hand cannot be classified as a domestic issue. In sum, given that copyright holders located outside Finland, including those in all the other EU Member States, keep losing income that would be rightfully theirs according to EU law, the matter cannot escape the application of EU law only on the grounds that the cables in which the copyright protected material is retransmitted run in the Finnish territory.

48. The complainants then made reference to the Ombudsman's proposal for a friendly solution which referred to the complainants' argument that the retransmission of copyright materials by cable operators in Finland, who are subject to must-carry obligations, constitutes a "communication to the public" of copyrighted works within the meaning of (i) Article 3 of the Information Society Directive and (ii) Article 8 of the Rental Rights Directive. As a result, Finland should not exempt cable operators from paying right holders "equitable remuneration" for the retransmission of their works. The complainants submitted that the Commission has not provided them with a clear explanation of the Commission's views regarding Finland's compliance with EU law.

49. Yet, the complainants now point out, the Commission is still reluctant to explain its position as to the compliance of the Finnish rules with the (i) Article 3 of the Information Society Directive and (ii) Article 8 of the Rental Rights Directive, which is the actual matter at issue.

50. The complainants thus renewed their position that the Finnish rules are contrary to EU
law, because they exempt cable operators from paying right holders equitable remuneration for the retransmission of their works. The complainants contend that the Commission should register the case and investigate it appropriately.

51. The complainants again argued, therefore, that the Commission acted inconsistently by refusing to register their complaint on the grounds that the matter is a "domestic matter". The complainants asserted that the Commission has had several opportunities to explain its position fully both during the initial procedure and the procedure before the Ombudsman.

52. To conclude, the complainants maintained their opinion that the Commission has neglected the principles of good administration. In addition, the Commission rejected the Ombudsman’s proposal aiming at correcting the faults resulting from maladministration on the part of the Commission. It failed to register the complaint as a "complaint" in accordance with the Commission Communication. In view of this conclusion, an appropriate way to resolve the matter would have been for the Commission to register the complaint in accordance with the Ombudsman's proposal for a friendly solution. Thus, the complainants could not agree that the solution proposed by the Commission could be satisfactory. The complainants respectfully asked the Ombudsman to take further measures to find an appropriate solution to the case and remedy the situation.

Further correspondence

53. After having received the complainants’ observations (June 2011), the Commission copied to the Ombudsman a letter it had written to the complainants (July 2011). In that letter, the Commission stated that, in accordance with the Ombudsman’s proposal for a friendly solution, it had now registered the complaint submitted to it on 29 June 2007 under reference number CHAP(2011)01663. It had then reassessed that complaint.

54. As regards the cross-border element, the Commission had originally come to the conclusion that there was no cross-border element on the basis of the answers to the request for supplementary information provided by the complainants on 4 February 2008. The answers to the request for supplementary information stated the following:

- the must-carry obligation is only incumbent on domestic television and radio channels (response to question 1);

- only cable retransmissions are subject to the must-carry obligation (response to question 2);

- all Finnish cable networks retransmitting must-carry programmes operate within the domestic “initial service area” of the broadcasters whose programmes are retransmitted (response to question 4).

55. It was thus the Commission’s understanding, on the basis of the answers to the request for supplementary information provided by the complainants on 4 February 2008, that the
exclusion of remuneration for the retransmission of must-carry channels concerned retransmissions of only domestic channels within the Finnish territory. The Commission stated that, to date, the fact that all broadcasts and all retransmissions of such broadcasts occurred within the confines of the Finnish territory had not been contested by the complainants in any correspondence addressed to DG MARKT.

56. The Commission then added that the foreign origin of works and subject matter that is broadcast and retransmitted in Finland was not referred to in any previous correspondence between the Commission and the complainant. The Commission services therefore relied only on the geographical source of broadcasts, and not on where the subject matter of broadcasts originated from. The Commission services now acknowledge, however, that the foreign origin of works and other subject matter included in the cable retransmission may have an influence on the analysis of the existence of the cross-border element.

57. As regards the "communication to the public" right, the Commission notes that the complainants state that according to amended Sections 25i and 47 of the Finnish Copyright Act (revised by law 821/2005), a cable operator may retransmit must-carry channels in Finland without paying any remuneration to authors, performers and phonogram producers. The Commission pointed out that the complainants argue that this infringes (i) Article 3 of Directive 2001/29/EC (Information Society Directive), according to which Member States must provide authors with the exclusive right to authorise or prohibit any communication to the public, (ii) Article 8(2) of Directive 2006/115/EC (Rental Rights Directive), which grants a single equitable remuneration right to performers and phonogram producers in respect of any communication to the public of their performances fixed on commercial phonograms and (iii) provisions of international law.

58. The Commission services acknowledge that retransmission of broadcast programmes - generally understood as the simultaneous transmission of a broadcast by a different entity such as a cable operator - is a separate copyright act, also requiring authorisation from and/or remuneration to right holders. Consequently, the retransmission of must-carry channels also has to be considered as a new act of communication to the public, undertaken by a telecommunications operator providing a network service in a cable television network.

59. As regards channels subject to must-carry obligations, these are enumerated in Section 134 of the Finnish Communications Market Act. The Commission added that this section was amended in 2010. The version of Section 134 which was reproduced in the complainants' letter of 29 June 2007 stated the following:

"1) public service television and radio programmes that are freely receivable in the municipality in which the network is located, as referred to in section 7(1) of the Act on the Finnish Broadcasting Company Ltd (1380/1993), within the limits of the capacity specified for the Finnish broadcasting company Ltd under the Radio Act (1015/2001);

2) freely receivable ancillary and supplementary services related to these programmes;

3) television and radio programmes that are provided in the municipality in which the network is
located by virtue of a national programming licence under section 7(1) of the Act on Television and Radio Operations;

4) material supplied for a particular item in a programme referred to in a sub-section 3, advertisements included in the programmes and other similar services forming part of the programmes.

The current section 134 reads as follows (unofficial translation):

"Section 134 (732/2010) Obligation to transmit programmes and services

(1) A telecommunications operator providing a network service in a cable television network has an obligation to transmit the following in the network without charge:

1) public service television and radio programmes that are receivable in the municipality in which the network is located, as referred to in section 7(1) of the Act on the Finnish Broadcasting Company Ltd (1380/1993), in terms of television and radio broadcasting in terrestrial mass communications networks referred to in section 2(7) of this Act;

2) ancillary and supplementary services related to these programmes;

3) freely receivable television and radio programmes that are in the public interest and broadcast by virtue of a national programming licence, and that shall be accompanied by an audio description and subtitling service in accordance with section 19 a of the Act on Television and Radio Operations (744/1998);

4) freely receivable material supplied for a particular item in a programme referred to in paragraph 3, advertisements included in the programmes, and ancillary and supplementary services related to the programmes."

60. The Commission concluded, based on information it had received from the Finnish Ministry of Transport and Communications, that the recent amendments of the Communications Market Act narrow down the scope of must-carry obligations. The aim of the amended Section 134 of the Communications Market Act was precisely to reduce the number of commercial channels which are subject to must-carry obligations, in particular by limiting these obligations to public service programmes and freely available programmes that are in the public interest.

61. The Commission stated that it is of the opinion that, since they abolish the remuneration due to right holders for the retransmission of must-carry channels, the provisions of Section 25i and Section 47 of the Finnish Copyright Act may not be compatible with the relevant EU law (notably Directive 201/29/EC and Directive 2006/115/EC). The Commission, however, took note of the fact that the scope of the must-carry obligations, as defined in Section 134 of the Communications Market Act, was substantially reduced in 2010 and the number of channels which are subject to these obligations has therefore been limited (public service television and radio programmes that are receivable in the municipality in which the network is located.
and freely receivable television and radio programmes that are in the public interest). The reduced scope means that only public television channels and 3 local commercial TV channels are subject to the must-carry obligations. Such a limitation of the scope also reduces the number of foreign origin programmes which are subject to the must-carry obligations.

62. The Commission then stated its view that the impact of the Finnish provisions included in Section 25i and Section 47 of the Finnish Copyright Act on the functioning of the Internal Market is not substantial enough to justify direct Commission intervention on the matter. For this reason it did not intend to pursue the case further. Consideration of a solution at the national level seemed to be the most appropriate course of action in this case. It added that, if the complainants had new information which may influence the Commission's decision, it would be most grateful to receive it by no later than four weeks from the date of the letter. It further stated that in the event that the complainants would not provide supplementary information within this deadline, or the information provided would not modify the assessment, the case would be closed.

63. In their response to the Commission's letter, the complainants stated first that they appreciated the fact that the Commission had now registered its complaint.

64. In response to the substantive arguments put forward by the Commission in its letter to the complainants, they first expressed their appreciation for the Commission's statement that Finnish legislation may not be compliant with EU law. However, they did not agree with the Commission's view that this infringement is not sufficiently substantial to warrant direct intervention by the Commission. In this context, the complainants stated that there is additional information which the Commission should be apprised of regarding the economic context and consequences of the must-carry system in Finland. They also stated that they would explain why the recent modification to Finnish legislation has no significant impact on the situation.

65. First, the complainants stated that all EU Member States should be treated equally as regards compliance with EU law, regardless of their size or economic weight. Not intervening in the Finnish case could, they argued, set a precedent which would signal to Member States that it is not mandatory to comply with EU law and that the TV copyright market in small Member States is too small to warrant intervention by the Commission.

66. The complainants also invoked Article 17 of the Charter of Fundamental Rights, which aims to protect the right to property. Article 17(2) states that intellectual property must be protected. They argued that the Commission is obliged to respect the Charter.

67. The complainants pointed out that since 1 January 2006, copyright holders have lost their rights to remuneration in Finland in relation to the retransmission of protected material through must-carry channels. The complainants argued that the impact of this loss is substantial. In 2009, 40% of the content of programmes retransmitted on must-carry channels was of Finnish origin and 60% was not Finnish (33% European, 24% North American and 3% others). They pointed out that the recent modification to the Finnish law had no
appreciable impact on these figures. This shows that non-Finnish content plays a crucial role in all must-carry channels in Finland. Therefore, the abolition of the right to remuneration does have significant cross-border effects within the EU internal market. In sum, the Finnish cable operators are significantly subsidised by both domestic and foreign copyright holders. Indeed, the retransmission of must-carry channels forms the economic basis of the cable operators' business. And yet, on the basis of Finnish law, these cable operators do not have to pay any remuneration to the copyright holders.

68. In support of their view that the Finnish law in question impacts substantially on the EU market, the complainants pointed out that pay-TV markets in Finland have lagged behind other EU countries. Free TV in Finland still covers over 90% of TV viewing. The 7 must-carry channels have 90% of the viewing of free to air channels in Finland and 78% of all viewing (be it free or pay TV).

69. The complainants added that half of Finnish households receive free channels through terrestrial transmission and half by cable. These shares are relatively stable over time.

70. Copyright holders receive fees from the free TV channels that use their material, but get nothing from the cable operators. However, the cable operators receive EUR 85 million in basic fees from users (the basic fees cover the must-carry channels and a separate charge is made for additional services). The complainants pointed out that the penetration of cable operators would not be as large in Finland if the must-carry channels were not also offered as a basic service. In sum, the complainants are of the view that the cable operators are free-riding at the copyright holders' expense - they do not pay for the copyrighted work they retransmit on must-carry channels. Nevertheless, they generate revenues from the retransmission of such work. The complainants argued that the economic harm to copyright holders is substantial, both for Finnish works and for foreign works.

71. The complainants pointed out that the recently amended legislation narrows down the number of must-carry channels from 11 to 7. However, the aggregate must-carry TV viewing share was only reduced by 10%. Thus, the change has only had a marginal impact. In addition, the recent changes extend must-carry obligations to cover new emerging and growing technologies, such as retransmission in IPTV (Internet Protocol TV). As a result, the scope of non-compliance with EU law has increased, and is likely to grow in the future.

72. The complainants pointed out that must-carry obligations are not a "burden" on cable operators. On the contrary, cable operators generate significant turnover by charging users basic fees for the must-carry content. Copyright holders have no share in this revenue (even though this copyright content adds value to the service offered by the cable operators).

73. The complainants underlined that while the situation described above has a significant impact on the rights of Finnish copyright holders, it has the same impact on non-Finnish copyright holders.

74. In response to the letter of the complainants, the Commission stated that, in light of the further correspondence of the complainants, the case had now been transferred to the EU
Pilot project under reference number 2526/11/MARK. The EU Pilot database has been set up to exchange information with the authorities in the participating Member States in order to respond to enquiries and resolve the complaints which the Commission receives about infringements of EU law by the Member States. In this context, the Commission will now contact Finland to request information or seek solutions to the problems. It added that only in this way can all the facts and the legal position be confirmed, and appropriate conclusions be reached.

75. The complainants indicated that they were happy with the response of the Commission.

The Ombudsman's assessment after his friendly solution proposal

76. The Ombudsman applauds the Commission's most recent steps to resolve the present complaint. He notes that by following the Communication to the European Parliament and the European Ombudsman, which establishes a procedural framework for dealing with complaints regarding infringements of EU law, the Commission has now been able to deal appropriately with the complaint. By registering the complaint, and by allowing the complainants to provide further information in relation to the initial position taken by the Commission, the Commission has been able to obtain further and updated information. This information has led the Commission to alter its initial views on the complaint. As a result, the Commission has now asked for further clarifications from the Finnish authorities through the EU Pilot project. The Ombudsman also underlines that the complainants now have a clearer understanding of the position of the Commission, thus enabling them to provide comments and further information to the Commission.

C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

The case has been settled by the Commission.

The complainant and the Commission will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 6 January 2012

Member States are obliged to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works by wire.


[4] "Must carry" obligations are regulated under Article 31 of the "Universal Service" Directive which states that Member States may impose reasonable "must carry" obligations, concerning the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts. Such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent. The obligations shall be subject to periodic review.


[6] Recital 44 of the Information Society Directive states that "[w]hen applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter."

[7] Article 18 of the European Code of Good Administrative Behaviour provides that "1. [e]very decision of the Institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision. 2. The official shall avoid making decisions which are based on brief or vague grounds or which do not contain individual reasoning". Article 4 of the European Code of Good Administrative Behaviour provides that "[t]he official shall act according to law and apply the rules and procedures laid down in Community legislation. The official shall in particular take care that decisions which affect the rights or interests of
individuals have a basis in law and that their content complies with the law."

[8] The Ombudsman noted that the Commission is not required, when exercising its powers under Article 258 TFEU, to take definitive positions as regards the interpretation of EU law. However, it should, in such circumstances, expressly inform the complainant that it has not taken a definitive position as regards the interpretation of EU law. In line with the case-law of the EU Courts, the Ombudsman has consistently taken the view that adequate explanations can, inter alia, include the following: (i) the infringement can be better dealt with by national courts or national administrative appeal bodies; (ii) infringement proceedings are on-going before the Commission or before the European Court of Justice in similar cases, in which case it would not be an efficient use of resources to open further identical cases; (iii) the infringement concerns failures to comply in the past; (iv) the Member State in question has given reassurances to the Commission that it is about to remedy the lack of compliance; (v) the issue concerns an isolated instance of lack of compliance, or (vi) there is not a sufficient EU interest in the issue complained about. See complaints 1437/2002/IJH, 3570/2005/WP, and 3391/2006/FOR, which are available at the following internet address: http://www.ombudsman.europa.eu/en/cases/home.faces. See also the report prepared by the European Ombudsman for the 1998 FIDE Congress, 'The Citizen, the Administration and Community Law' which is available at the following internet address: http://www.ombudsman.europa.eu/en/resources/otherdocument.faces

[9] With particular reference to the issue raised by the Commission in paragraph 26 above, the Ombudsman notes that it cannot be maintained that the Commission is "exercising its discretionary powers" when it takes the position that an issue falls outside the scope of EU law (paragraph 28, point 1 above), or where it takes the position that the issue falls within the scope of EU law, but does not constitute an infringement of EU law. Rather, the Commission can be said to be exercising its discretionary powers where it decides not to pursue infringement proceedings against a Member State even though it has not definitively decided that an infringement has not taken place, or where it decides not to pursue infringement proceedings against a Member State even though it has taken the view that an infringement has taken place. See also paragraph 1.2 of the Ombudsman decision of 29 October 1996 available at http://www.ombudsman.europa.eu/cases/decision.faces/en/573/html.bookmark

[10] In line with the case-law of the EU Courts, the Ombudsman has consistently taken the view that adequate explanations can, inter alia, include the following: (i) the infringement can be better dealt with by national courts or national administrative appeal bodies; (ii) infringement proceedings are on-going before the Commission or before the European Court of Justice in similar cases, in which case it would not be an efficient use of resources to open further identical cases; (iii) the infringement concerns failures to comply in the past; (iv) the Member State in question has given reassurances to the Commission that it is about to remedy the lack of compliance; (v) the issue concerns an isolated instance of lack of compliance, or (vi) there is not a sufficient EU interest in the issue complained about. See complaints 1437/2002/IJH, 3570/2005/WP, and 3391/2006/FOR, which are available at the following internet address: http://www.ombudsman.europa.eu/en/cases/home.faces. See also the report prepared by the European Ombudsman for the 1998 FIDE Congress, 'The Citizen, the Administration and Community Law' which is available at the following internet
[12] In complaint 431/2008/ELB, the Ombudsman made the following further remark with regard to a procedural point: "If the Commission decides not to register as a 'complaint' correspondence from a citizen in respect of an infringement of Community law by a Member State, it should always inform the citizen of the reasons for doing so." The Ombudsman's decision on complaint 431/2008/ELB can be found on the Ombudsman's website (http://www.ombudsman.europa.eu).

[13] As regards the final point, the Ombudsman underlines that the possible conclusion that the Finnish rules do not infringe the Information Society Directive or the Rental Rights Directive (or the "Universal Service" Directive) does not imply that the issues raised by the complainants fall outside the "scope" of EU law.

[14] The Ombudsman notes that the Commission did actually investigate the complaint at hand. It sent a detailed questionnaire to the complainants seeking to clarify a number of issues relating to the complaint. The Commission then analysed the complainants' response before writing back to them.