General Court: Netflix v. European Commission

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On 16 May 2018, the General Court delivered its judgment in Netflix International BV v. European Commission, finding inadmissible Netflix's application for the annulment of the European Commission's 2016 decision on Germany's aid scheme for the funding of film production and distribution (see IRIS 2016-9/5). The Gesetz über Maßnahmen zur Förderung des deutschen Films (Filmförderungsgesetz - Law on the funding of film production) codifies an aid scheme for the funding of film production, distribution and exhibition, to be financed by a special levy imposed on undertakings in the cinema and video industry and the broadcasting sector. In March 2014, Germany informed the Commission of an amendment to the existing aid scheme, which extended liability for the levy to providers of video-on-demand services established outside Germany receiving revenue from customers in Germany through a German-language Internet presence. The amendment was to apply from the date of its approval by the Commission until 31 December 2016, and if the Commission approved the scheme, the levy would be recovered retroactively as from the date of the entry into force of the amendment - namely, 1 January 2014. On 1 September 2016, the European Commission issued its decision, and found that the measures were compatible with the Treaty on the Functioning of the European Union (TFEU), and did not infringe the Audiovisual Media Services Directive (2010/13/EU) ("the AVMS Directive") (see also IRIS 2016-6/11).

Following the Commission's decision, Netflix International, an online video-streaming service established in the Netherlands that launched its service in Germany in 2014 and became subject to the levy, applied to the General Court to have the Commission's decision annulled. Netflix International, together with its parent Netflix Inc., argued that the Commission's decision had been based on an incorrect interpretation of the AVMS Directive and infringed the TFEU. However, without addressing the substance of Netflix's application, the General Court declared the application inadmissible. The Court stated that under Article 263 of the TFEU, an application for the annulment of a Commission decision is admissible only if the applicants are directly affected by the contested decision, that decision takes the form of a regulatory act that does not contain implementing measures, or the applicants are directly and individually affected by the contested decision. Netflix had argued that it had been "specifically targeted", arguing that the explanatory memorandum to the FFG "explicitly refers to them in stating that 'the market leading company, which is far ahead of its competitors [and which] is also

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established elsewhere in Europe'" and that the Filmförderungsanstalt (German Film Board) had "contacted them immediately after the adoption of the contested decision in order to discuss payment of the levy and the provision of information".

The Court rejected Netflix's arguments, holding that it did not meet the cumulative conditions set out in the fourth paragraph of Article 263 TFEU, as it was affected by the contested decision only as a non-domestic video-on-demand distributor that provides services in the German language on German territory. The national legislation authorised by the contested decision therefore applies to Netflix only by reason of their objective legal and factual situation under a general rule. Lastly, the Court noted that Netflix is entitled to access to a court without being obliged to infringe the law and that in proceedings before national courts it may plead the invalidity of the contested decision and ask those courts to request a preliminary ruling from the Court of Justice.

Case T-818/16, Netflix International BV v. European Commission, Judgment of the General Court (Eighth Chamber), 16 May 2018

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