ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
OPĆI SUD EUROPSKE UNIJE
TRIBUNALE DELL'UNIONE EUROPEA
EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
EUROPOS SĄJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI ĠENERALI TAL-UNJONI EWROPEA
GERECHT VAN DE EUROPESE UNIE
SĄD UNII EUROPEJSKIEJ
TRIBUNAL GERAL DA UNIÃO EUROPEIA
TRIBUNALUL UNIUNII EUROPENE
VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
SPLOŠNO SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

16 May 2018 *

(Action for annulment — State aid — Aid planned by Germany to fund film production and distribution — Decision declaring aid compatible with the internal market — Act not of individual concern — Regulatory act entailing implementing measures — Inadmissibility)

In Case T-818/16,

Netflix International BV, established in Amsterdam (Netherlands),

Netflix, Inc., established in Los Gatos, California (United States),

represented by C. Alberdingk Thijm, S. van Schaik, S. van Velze and E.H. Janssen, lawyers,

applicants,

v

European Commission, represented by J. Samnadda, G. Braun and B. Stromsky, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for annulment of Commission Decision (EU) 2016/2042 of 1 September 2016 on the aid scheme SA.38418 — 2014/C (ex 2014/N) which Germany is planning to implement for the funding of film production and distribution (OJ 2016 L 314, p. 63),

THE GENERAL COURT (Eighth Chamber),

composed of A.M. Collins (Rapporteur), President, R. Barents and J. Passer, Judges,

* Language of the case: English.

Registrar: G. Predonzani, Administrator,

having regard to the written part of the procedure and further to the hearing on 9 November 2017,

gives the following

Judgment

1 The Gesetz über Maßnahmen zur Förderung des deutschen Films (Filmförderungsgesetz) (Law on the funding of film production) of 25 June 1979 (BGBl. 1979 I, p. 803) ('the FFG') codifies an aid scheme for the funding of film production, distribution and exhibition, financed by a special levy imposed on undertakings in the cinema and video industry and the broadcasting sector.

2 On 3 December 2013, by Decision C(2013) 8679 final on the aid scheme SA.36753 (2013/N), the European Commission declared that that aid scheme for providers established in Germany ('the existing aid scheme') was compatible with Article 107(3)(d) TFEU, up to 31 December 2016.

3 On 4 March 2014, the Federal Republic of Germany informed the Commission of an amendment to the existing aid scheme ('the amendment') in accordance with Article 108(3) TFEU.

4 The effect of the amendment was twofold. First, it extended liability for the levy to video on demand service providers established outside Germany receiving revenue from customers in Germany through an internet presence in the German language. Second, eligibility for aid was also extended to include those non-domestic video on demand service providers. The obligation to pay the levy did not apply, however, if the turnover of the undertakings concerned was subject, at the place of establishment, to a comparable financial contribution for the promotion of cinematographic works by institutions for the promotion of films. As was the case with the existing aid scheme, the proceeds raised through payment of the levy were paid into a fund. That fund, which is administered by the Filmförderungsanstalt (Film Board, Germany, 'the FFA'), promotes various cultural objectives in the audiovisual sector, which include providing financial support for the video on demand sector.

5 The amendment was to apply from the date of its approval by the Commission until 31 December 2016. The Nichtanwendungserlass des Beauftragten der Bundesregierung für Kultur und Medien (BKM) (Decree suspending the order of the Federal Commissioner for Culture and the Media (BKM)) of 11 November 2013 stated, however, that if the Commission approved the scheme, the levy would be recovered retroactively as from the date of entry into force of the amendment, that is to say, 1 January 2014.

6 On 17 October 2014, the Commission opened an investigation.

7 On 1 September 2016, by Commission Decision (EU) 2016/2042 of 1 September 2016 on the aid scheme SA.38418 — 2014/C (ex 2014/N) which Germany is planning to implement for the funding of film production and distribution (OJ 2016 L 314, p. 63), addressed to the Federal Republic of Germany, the Commission found that the amendment was compatible with the internal market pursuant to Article 107(3)(d) TFEU ('the contested decision'). Accordingly, it authorised the implementation of the amendment.

8 Netflix International BV is a wholly owned subsidiary of Netflix, Inc., an American company incorporated in the State of Delaware (United States) (together 'the applicants' or 'Netflix'). It was established in the Netherlands on 1 January 2015. Netflix offers its services in all the countries of the European Economic Area (EEA). For a monthly subscription fee, its users have access to television programmes and films which they can watch on screens connected to the internet.

9 Netflix launched its services in Germany in 2014 and, since it offers its services to a German audience on the German market, it comes within the scope of the amendment. By virtue of that amendment, it must pay a levy based on the turnover generated by its customers in Germany for any content (films, TV shows, documentaries, etc.) with a length of more than 58 minutes, broadcast via the internet in the German language.

Procedure and forms of order sought

10 By application lodged at the Court Registry on 22 November 2016, the applicants brought the present action.

11 By a separate document lodged at the Court Registry on 20 February 2017, the Commission raised an objection of inadmissibility under Article 130(1) of the Rules of Procedure.

12 On hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral part of the procedure in accordance with Article 130(6) of the Rules of Procedure.

13 The parties presented oral argument and replied to the questions concerning admissibility put by the Court at the hearing on 9 November 2017.

14 The applicants claim that the Court should:

– declare that the action is admissible and well founded;

– annul the contested decision;

– order the Commission to pay the costs.

15 The Commission contends that the Court should:

– dismiss the action as inadmissible;

– order the applicants to pay the costs.

16 By documents lodged at the Court Registry on 9, 13 and 23 March 2017 respectively, the Federal Republic of Germany, the French Republic and the FFA applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. By document lodged at the Court Registry on 13 March 2017, the Kingdom of the Netherlands applied for leave to intervene in support of the form of order sought by the applicants.

Law

17 Under Article 130 of the Rules of Procedure, on the application of the defendant, the Court may decide on inadmissibility or lack of competence without going to the substance of the case.

18 At the outset, it should be recalled that, in accordance with the fourth paragraph of Article 263 TFEU, any natural or legal person may, under the conditions laid down in the first and second paragraphs of that article, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

19 In the present case, it is common ground that the contested decision is addressed solely to the Federal Republic of Germany. In those circumstances, the present action for annulment is admissible, pursuant to the fourth paragraph of Article 263 TFEU, only if the applicants are directly concerned by the contested decision and if that decision is a regulatory act which does not entail implementing measures or if they are directly and individually concerned by the contested decision, which the Commission disputes.

Existence of a regulatory act which does not entail implementing measures and directly affects the applicants

20 On the basis of three main arguments, the applicants claim that the contested decision does not entail implementing measures.

21 In the first place, the applicants, invoking, principally, the judgment of 15 September 2016, *Ferracci* v *Commission* (T-219/13, EU:T:2016:485), maintain that measures taken by national authorities in order to execute an act are not implementing measures if they are not the consequence of the regulatory act but result solely from national law, and if the regulatory act is of a purely declaratory nature. Thus, the contested decision directly authorises the amendment and requires no further implementation, in particular with regard to the applicants.

The contested decision automatically and retroactively brought the amendment into force, which rendered them directly liable to pay the levy and subject to an obligation to provide information to the FFA. Furthermore, the way in which the levy is calculated and imposed, and the way in which the aid decisions are awarded, are, in the applicants' view, matters which are already determined by the amendment and thus by the contested decision.

22 In the second place, the applicants submit that the Court of Justice has declared that it is evident from the origin of the final limb of the fourth paragraph of Article 263 TFEU that the objective of that provision is to prevent an individual from being obliged to infringe the law in order to have access to a court. It follows that the criterion of not entailing implementing measures must be interpreted in the light of that objective. As the contested decision does not entail any implementing measures to be taken by the Federal Republic of Germany, the applicants maintain that they cannot challenge such measures before the German courts or plead the invalidity of the contested decision in national proceedings.

23 The applicants claim that, before a German court, they are only entitled to claim their rights in two types of situations. First, they invoke a situation in which they might be brought before a court following non-payment of specific tax notices or following failure to cooperate in the context of a tax procedure, in particular, concerning the obligation to provide information laid down in Article 70 of the FFG in its amended version. In such cases, as they submitted at the hearing, they would have been obliged to infringe the law in order to have access to a court. Second, they refer to a situation in which they might decide to challenge specific tax notices addressed to them. According to the applicants, such tax notices do not constitute implementing measures.

24 The applicants maintain that, in any event, they cannot bring a direct action against the contested decision before a national court on the same basis as in the present case, that is to say, an infringement of EU law, since a national court may only ultimately decide, in the light of the circumstances of the case, whether a question must be referred to the Court of Justice for a preliminary ruling. Furthermore, they submit that there are differences in terms of judicial protection as well as of time and costs between a direct action and a reference for a preliminary ruling. Such constraints, they argue, prevent them from enjoying effective judicial protection, contrary to the objective of the final limb of the fourth paragraph of Article 263 TFEU.

25 In the third place, the applicants claim that any tax notice issued by the German authorities would constitute the mere execution and enforcement of the already adopted amendment to the existing scheme.

26 The Commission contests those arguments.

27 It should be noted that the Court of Justice has held that the concept of a regulatory act which does not entail implementing measures within the meaning

of the final limb of the fourth paragraph of Article 263 TFEU must be interpreted in the light of that provision's objective, which consists in preventing an individual from being obliged to infringe the law in order to have access to a court. Where a regulatory act directly affects the legal situation of a natural or legal person without requiring implementing measures, that person could be denied effective judicial protection if he did not have a direct legal remedy before the Courts of the European Union for the purpose of challenging the legality of that regulatory act. In the absence of implementing measures, natural or legal persons, although directly concerned by the act in question, would be able to obtain a judicial review of that act only after having infringed its provisions, by pleading that those provisions are unlawful in proceedings initiated against them before the national courts (judgment of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 27).

28 The Court of Justice also held that where a regulatory act entailed implementing measures, judicial review of compliance with the EU legal order was ensured irrespective of whether those measures were adopted by the European Union or the Member States. Natural or legal persons who are unable, because of the conditions governing admissibility laid down in the fourth paragraph of Article 263 TFEU, to challenge a regulatory act of the European Union directly before the Courts of the European Union are protected against the application to them of such an act by the ability to challenge the implementing measures which the act entails (judgment of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 28).

29 In addition, the question whether a regulatory act entails implementing measures should be assessed by reference to the position of the person pleading the right to bring proceedings under the final limb of the fourth paragraph of Article 263 TFEU (judgment of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 30).

30 Furthermore, in order to determine whether the measure being challenged entails implementing measures, reference should be made exclusively to the subject matter of the action (judgment of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 31).

31 In the present case, the applicants seek, by their action, annulment of the contested decision on the ground, first, that it is based on an incorrect interpretation of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ 2010 L 95, p. 1) and, second, that it infringes Articles 56, 49 and 110 TFEU and Article 107(3)(d) TFEU.

32 Article 1 of the contested decision declares the amendment to be compatible with the internal market and authorises its implementation. The amendment was to

apply from the date of its approval by the Commission until 31 December 2016. However, the suspension decree of 11 November 2013 stated that, if the Commission approved the scheme, the levy would be recovered retroactively from the date of entry into force of the amendment, that is, from 1 January 2014. Accordingly, the contested decision, in itself, does not set out the specific and actual consequences of the declaration of compatibility for every taxpayer subject to the tax (see, to that effect, judgment of 26 September 2014, *Dansk Automat Brancheforening* v *Commission*, T-601/11, EU:T:2014:839, paragraph 58, and order of 26 April 2016, *EGBA and RGA* v *Commission*, T-238/14, not published, EU:T:2016:259, paragraph 39).

33 The specific and actual consequences of the contested decision in respect of the applicants must be given material form by national acts such as the FFG law in its amended version and the various acts implementing that law, such as the tax notices defining the exact amount payable by each operator and the decisions granting aid using the new criteria introduced by the amendment. Those acts are, as such, and having regard to the applicants, themselves measures implementing the contested decision within the meaning of the final limb of the fourth paragraph of Article 263 TFEU (see, to that effect, judgments of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraph 53, and of 26 September 2014, *Dansk Automat Brancheforening* v *Commission*, T-601/11, EU:T:2014:839, paragraph 59).

34 Furthermore, it should be noted that, since those acts may be challenged before the national courts, the applicants are entitled to access to a court without being obliged to infringe the law. In proceedings before national courts, they may plead the invalidity of the contested decision and ask those courts to request a preliminary ruling from the Court of Justice pursuant to Article 267 TFEU (see, to that effect, order of 26 April 2016, *EGBA and RGA* v *Commission*, T-238/14, not published, EU:T:2016:259, paragraph 41 and the case-law cited).

35 That conclusion is not called into question by the allegedly mechanical nature of the measures taken at national level, that question being irrelevant in ascertaining whether a regulatory act entails implementing measures within the meaning of the final limb of the fourth paragraph of Article 263 TFEU (judgment of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, paragraphs 41 and 42).

36 The applicants' argument that measures based on national law cannot constitute implementing measures within the meaning of the final limb of the fourth paragraph of Article 263 TFEU is similarly unconvincing. The Court of Justice has previously held that if such measures render a regulatory act applicable with regard to the categories of persons concerned, they may themselves constitute implementing measures (judgment of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraph 53).

37 Similarly, the argument concerning the alleged necessity for the applicants to infringe the law, in particular by failing to comply with the obligation to provide information under Article 70 of the FFG, is not convincing. Even if such an obligation were imposed on them immediately after the entry into force of the amendment without involving any decision by the FFA with regard to them, failure to fulfil that obligation would not constitute an infringement of the FFG, since, as is apparent from the observations concerning Article 70 of the FFG made at the hearing, if the applicants were to refuse to provide the information requested, the FFA would make its own assessment to determine the amount payable by them as a levy. They could then challenge that assessment before a national court after receiving their tax notice.

38 As regards the applicants' arguments that the constraints associated with the national procedure would prevent them from obtaining effective judicial protection, it must be recalled that the conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU must be interpreted in the light of the fundamental right to effective judicial protection, but such an interpretation cannot have the effect of setting aside those conditions, which are expressly laid down in that Treaty (see judgment of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, paragraph 44 and the case-law cited).

39 However, judicial review of compliance with the EU legal order is ensured, as can be seen from Article 19(1) TEU, not only by the Court of Justice but also by the courts and tribunals of the Member States. The Treaty on the Functioning of the European Union has, by Articles 263 and 277, on the one hand, and Article 267, on the other, established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the EU judicature (see judgment of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, paragraph 45 and the case-law cited).

40 In that regard, it must be borne in mind that where a national court or tribunal considers that one or more arguments for invalidity of an EU act, put forward by the parties or, as the case may be, raised by it of its own motion, are well founded, it is incumbent upon it to stay proceedings and to make a reference to the Court of Justice for a preliminary ruling on the act's validity, the Court of Justice alone having jurisdiction to declare an EU act invalid (judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 96; see also, to that effect, judgment of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452, paragraph 20).

41 As regards persons who do not fulfil the requirements of the fourth paragraph of Article 263 TFEU for bringing an action before the Courts of the European Union, it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection. That obligation of the Member States was reaffirmed by the second subparagraph of Article 19(1) TEU, which states that Member States 'shall provide remedies

sufficient to ensure effective legal protection in the fields covered by Union law'. That obligation also follows from Article 47 of the Charter of Fundamental Rights of the European Union as regards measures taken by the Member States to implement EU law within the meaning of Article 51(1) of the Charter of Fundamental Rights (see judgment of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, paragraph 49 and the case-law cited).

42 Consequently, the arguments raised by the applicants concerning the constraints associated with the German national procedure cannot be accepted.

43 Finally, it should be noted that the applicants' reference to the judgment of 15 September 2016, *Ferracci* v *Commission* (T-219/13, EU:T:2016:485), is irrelevant. The case which gave rise to that judgment concerned a Commission decision which stated, on the one hand, that an aid regime was unlawful, while deciding that it was appropriate not to recover any of the aid, and, on the other hand, that two other provisions of national law did not constitute State aid within the meaning of Article 107(1) TFEU (judgment of 15 September 2016, *Ferracci* v *Commission*, T-219/13, EU:T:2016:485, paragraph 20). The General Court therefore held that that decision did not entail implementing measures with regard to the applicant, since the Italian Republic had neither to order recovery of the aid nor to give effect to aid declared compatible in so far as the national provisions in question were outside the scope of Article 107(1) TFEU and the decision in question did not impose any obligation on the Member State. Conversely, the contested decision declares the aid scheme in question to be compatible with the internal market.

44 Consequently, irrespective of whether the contested decision constitutes a regulatory act, and without it being necessary to rule on whether it is of direct concern to the applicants, it must be held that the action does not fulfil the conditions governing admissibility laid down by the final limb of the fourth paragraph of Article 263 TFEU.

Direct and individual concern to the applicants

45 The applicants rely on five arguments in claiming that the contested decision affects them individually.

46 First of all, the applicants maintain that, although the levy is imposed on all non-domestic video on demand providers, they are specifically harmed, inter alia, because they have certain attributes that single them out from other video on demand providers, in that they are specifically targeted by the contested decision. They rely, in this regard, on the explanatory memorandum to the FFG, which, in their view, explicitly refers to them in stating that 'the market leading company which is far ahead of its competitors is also established elsewhere in Europe'.

47 In the second place, the applicants claim that they are part of a closed circle of operators. The fact that the amendment applied only from 1 January 2014 to 31 December 2016, and thus concerned only non-domestic video on demand providers providing their services during that period, confirms the closed nature of that circle of operators.

48 In the third place, the applicants claim that they are affected by the contested decision, because, on account of that decision, they immediately became liable to pay the levy and to provide information to the FFA. They substantiate their claim by maintaining that the FFA contacted them immediately after the adoption of the contested decision to discuss payment of the levy and the provision of information.

49 In the fourth place, the applicants submit that they were granted procedural safeguards because they submitted comments as a concerned party to the Commission on 9 January 2015, which, accordingly, distinguished them from other non-domestic video on demand providers which did not qualify as concerned parties or which, for other reasons, did not submit their comments. They maintain that the Commission, by including their arguments in its assessment, clearly acknowledged that they were a concerned party, distinguishable from other video on demand providers.

50 In the fifth and last place, the applicants claim that they suffered harm as a result of the effects of the amendment and that they therefore have a specific interest in the annulment of the contested decision. In that respect, they rely on the fact that, in encouraging them to promote German films, the amendment in actual fact led them to adapt their policy and offering in Germany in order to be partly compensated for the levy and to have access to funding. Consequently, the German scheme to which the contested decision relates substantially and specifically affects their market strategy.

51 The Commission disputes those arguments.

52 It should be noted, as regards the condition of individual concern, in accordance with the second scenario covered by the fourth paragraph of Article 263 TFEU, according to settled case-law, natural or legal persons other than those to whom a measure is addressed may claim to be individually concerned, for the purposes of that article, only if that act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed (judgment of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 107; see, also, judgment of 27 February 2014, *Stichting Woonlinie and Others* v *Commission*, C-133/12 P, EU:C:2014:105, paragraph 44 and the case-law cited).

53 As regards the question whether the contested decision, which is addressed solely to the Federal Republic of Germany, is of individual concern to the applicants,

first, it must be held that that decision constitutes a measure of general application in so far as it applies to objectively determined situations and entails legal effects for categories of persons envisaged in a general and abstract manner.

54 However, it cannot be ruled out that, in certain circumstances, the provisions of a measure of general application may be of individual concern to some of the economic operators involved (see judgment of 16 December 2011, *Enviro Tech Europe and Enviro Tech International* v *Commission*, T-291/04, EU:T:2011:760, paragraph 101 and the case-law cited).

55 An applicant may, inter alia, show that he enjoys a special status within the meaning of the judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17), when his position on the relevant market is substantially affected by the aid to which the decision at issue relates (judgment of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 35).

56 It should be noted that it is for an applicant to demonstrate that the Commission decision may adversely affect its legitimate interests by seriously jeopardising its position on the market in question (judgment of 22 November 2007, *Spain* v *Lenzing*, C-525/04 P, EU:C:2007:698, paragraph 41).

57 While the applicants claim that the contested decision is capable of affecting and harming them, they have not demonstrated that their position is substantially affected by the entry into force of the amendment. They merely submit that they have had to adapt their policy and that they are specifically targeted, in so far as the statement of reasons for the amendment refers expressly to them as a market leading company. They also maintain that the FFA contacted them immediately after the adoption of the contested decision to discuss payment of the levy.

58 Since none of those arguments is capable of establishing that the applicants' market position was substantially affected by the contested decision, it must be held that that decision does not substantially affect their market position; it is therefore not possible to establish that they have a special status within the meaning of the judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17).

59 The applicants' argument concerning a limited class of operators, to which they belong does not alter that finding. It is true that the Court of Justice held that where the contested decision affected a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons could be individually concerned by that measure inasmuch as they formed part of a limited class of economic operators (judgment of 27 February 2014, *Stichting Woonlinie and Others* v *Commission*, C-133/12 P, EU:C:2014:105, paragraph 46).

60 Nevertheless, the possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as that

measure is applied by virtue of an objective legal or factual situation defined by it (see judgments of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 47 and the case-law cited, and of 16 December 2011, *Enviro Tech Europe and Enviro Tech International* v *Commission*, T-291/04, EU:T:2011:760, paragraph 104 and the case-law cited).

61 The applicants are affected by the contested decision only as a non-domestic video on demand distributor which provides services in the German language on German territory. The national legislation authorised by the contested decision therefore applies to the applicants only by reason of their objective legal and factual situation under a general rule (see, to that effect, order of 26 April 2016, *EGBA and RGA* v *Commission*, T-238/14, not published, EU:T:2016:259, paragraph 67 and the case-law cited).

62 That finding is not called into question by the fact that the amendment authorised by the contested decision, which dates from 1 September 2016, applied only up to 31 December 2016. That circumstance is not such as to establish the existence of a limited class of economic operators conferring a particular status on the applicants. When the levy was devised, adopted and implemented at national level, following the adoption of the contested decision, it was intended to apply to all market participants satisfying the objective criteria (see, to that effect, order of 27 August 2008, *Adomex* v *Commission*, T-315/05, not published, EU:T:2008:300, paragraph 27, and judgment of 16 December 2011, *Enviro Tech Europe and Enviro Tech International* v *Commission*, T-291/04, EU:T:2011:760, paragraph 109). Furthermore, since the video on demand distribution market is dynamic and the entry of new participants consequently possible, the operators affected by the contested decision constituted an open group.

63 It follows from the case-law of the Court of Justice and the General Court that the fact of belonging to a limited class of economic operators may derive from the fact that the applicant had specific rights before the adoption of the decision (see, to that effect, judgments of 26 June 1990, *Sofrimport* v *Commission*, C-152/88, EU:C:1990:259, paragraph 12; of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraphs 61 to 63; and of 27 February 2014, S*tichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraphs 61 and 62).

64 The applicants have not established that they enjoyed any acquired rights within the meaning of the case-law, before the adoption of the contested decision or the national legislation, which could have been affected by that decision or legislation.

65 Nor can the applicants' fourth argument, based on the procedural rights they enjoyed, be upheld. By that argument, they claim that the fact that they have the status of concerned parties within the meaning of Article 108(2) TFEU and that they exercised the procedural guarantees deriving from that provision demonstrates that they are individually concerned by the contested decision.

66 In that regard, it should be noted that, in the context of the procedure for reviewing State aid provided for in Article 108 TFEU, it is only during the formal examination phase, referred to in paragraph 2 of that article, which is designed to enable the Commission to be fully informed of all the facts of the case, that the TFEU imposes an obligation on the Commission to give the parties concerned notice to submit their comments (judgment of 13 December 2005, *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, C-78/03 P, EU:C:2005:761, paragraph 34).

67 In the present case, in the context of the procedure provided for in Article 108(2) TFEU, undertaken by the Commission, the Commission invited the parties concerned to submit their comments, which the applicants did, submitting their point of view on 9 January 2015.

68 However, that participation at the preliminary examination stage as concerned parties is not sufficient to establish that the contested decision concerns the applicants individually. In any event, active participation in the formal procedure leading to the adoption of a Commission decision on the compatibility of an aid scheme must be accompanied by a substantial effect on their market position in order to satisfy the criterion set out in the fourth subparagraph of Article 263, in accordance with its second hypothesis (see, to that effect, judgment of 22 November 2007, *Sniace* v *Commission*, C-260/05 P, EU:C:2007:700, paragraph 60). As has already been set out in paragraph 57 above, the applicants have adduced no evidence to support their claim that their market position has been substantially affected.

69 It must also be held that no parallel may be drawn in the present case with the case giving rise to the judgment of 7 October 2009, *Vischim* v *Commission* (T-420/05, EU:T:2009:391), on which the applicants rely in support of their claim that they are individually concerned in so far as they submitted their comments to the Commission before the adoption of the contested decision. That case concerned a procedure involving the applicant's production of an actual technical evaluation of an active substance, which was essential to the adoption of the measure in question, and was not a State aid case involving the voluntary intervention of concerned parties by means of comments on the compatibility of a State aid scheme in the context of the Commission's procedure for reviewing State aid.

70 Consequently, since the applicants are not individually concerned, it must be held that they do not fulfil the cumulative conditions set out in the context of the second scenario envisaged by the fourth paragraph of Article 263 TFEU.

71 In the light of all of the foregoing considerations, the action must be dismissed as inadmissible.

The applications to intervene

72 Pursuant to Article 144(3) of the Rules of Procedure, where the defendant lodges a plea of inadmissibility or of lack of competence, as provided in Article 130(1) of those rules, a decision on the application to intervene is not to be given until after the plea has been rejected or the decision on the plea reserved.

73 In the present case, since the action has been dismissed as inadmissible in its entirety, there is no need to rule on the applications to intervene lodged by the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands and the FFA.

Costs

74 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful in their action, they must be ordered to bear their own costs and to pay those of the Commission, in accordance with the form of order sought by the Commission, with the exception of those relating to the applications to intervene.

75 In accordance with Article 144(10) of the Rules of Procedure, the applicants, the Commission, the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands and the FFA are each to bear their own costs relating to the applications to intervene.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action as inadmissible;

2. Declares that there is no need to rule on the applications to intervene lodged by the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands and the Filmförderungsanstalt;

3. Orders Netflix International BV and Netflix, Inc. to bear their own costs and to pay those incurred by the European Commission, with the exception of those relating to the applications to intervene;

4. Orders Netflix International, Netflix, the Commission, the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands and the Filmförderungsanstalt each to bear their own costs relating to the applications to intervene.

Collins Barents Passer

Delivered in open court in Luxembourg on 16 May 2018.

E. Coulon

Registrar President