



24.6.2010

## NOTICE TO MEMBERS

Subject: Petition 1894/2009 by Cristina Andreu (Spanish), on behalf of the "Asociación de mujeres cineastas y de medios audiovisuales, CIMA", on the positive discrimination that the Spanish Ministry of Culture's new rules seek to introduce in the field of State aid to the film industry

### 1. Summary of petition

The petitioner claims that the Ministry of Culture has changed the rates in the new order (Spanish Ministry of Culture Order 2834/2009 of 19 October 2009) granting State aid to the film industry. These rates are established on the basis of a certain positive discrimination and attach a greater value to projects presented by women. According to the petitioner, these criteria are contrary to ECJ case law in Cases C-450/93 and C409/95, as they automatically promote women who were previously in an objectively equal position to men.

### 2. Admissibility

Declared admissible on 29 March 2010. Information requested from Commission under Rule 202(6).

### 3. Commission reply, received on 24 June 2010.

#### The petition

The petitioner alleges that an order of the Spanish Ministry of Culture violates European Union law on gender equality.

This is Order 2834/2009 of 19 October 2009 providing rules for granting State aid to the film industry.

In particular, the petitioner criticises Article 28 of the Order, which provides:

«Article 28. Assessment of projects.

1. Projects will be assessed by the Committee on aid for the production of screenplays and the development of film projects, as governed by Article 104, which [Committee], in accordance with the procedures and mechanisms established by the aforesaid article, will assess the following aspects according to the maximum relevant weightings:

- a) Originality and quality of the proposed feature film project: up to 45 points. For this purpose, a score of 20 points will be awarded if the project is based on a screenplay which was produced with funding obtained under Article 19.
- b) The budget, its suitability for the project, and the funding plan: up to 25 points.
- c) The credit-rating of the producer together with the financial and business record of the production company and its associated companies: up to 25 points.
- d) If the director of the film is a woman who has not directed a feature film before: 5 points.

2. The assessment described in Section a) in the previous paragraph will be conducted separately, maintaining the anonymity of the applicant. In the case of a choice between two projects obtaining the same number of points under this assessment, before the other sections are assessed, preference will be given to the project whose director or screenplay author is a woman. This preference, if applicable, will be applied successively to projects beginning with those with the greatest number of points. It will automatically cease to be applied should a situation of equality be reached in the total number of projects granted.»

The petitioner recalls that there is an undeniable significant inequality between men and women in the cinema industry in Spain. It quotes a recent study that concluded that only 7% of films made in Spain were directed by a woman, only 15% have a screenplay written by a woman and only 21% were produced by a woman.

However, the petitioner criticises the affirmative actions provided for in the abovementioned Ministerial Order for two reasons.

On one hand, the petitioner argues that they fail to guarantee a positive impact as regards gender inequality, notably because they lack clear objectives and methods for monitoring and evaluation.

On the other hand, the petitioner argues that they might give rise to ‘individualised competition between men and women’ and be open to challenge on grounds of breaching the principle of equality of opportunities. The petitioner claims that they violate European Union law, in particular the prohibition of discrimination based on gender as interpreted by the European Court of Justice in its judgments of 17 October 1995, Case C-450/93, Kalanke case, and of 11 November 1997, Case C-409/95, Marschall.

The petitioner requests instead for specific support measures for women. She makes the following alternative suggestion:

«The request made by CIMA (...) is that for each and every form of aid, a specific points system should be established for projects which are directed or produced by a woman or have a woman as author of the screenplay. Specifically, the system should award: ‘5 points in any of the following cases: if the film is to be directed by a woman, if it has a screenplay of female authorship, or if it is to be produced by women who can claim at least 60% of the rights of ownership of the film and/or if the executive producer is a woman; 8 points if two of these situations arise and 10 points if all three are met.’»

The Commission had received a similar complaint from CIMA at the time it was considering its State aid assessment of the above-mentioned measure. In its State aid decision N587/09<sup>1</sup> the Commission considered the criticism made by CIMA and noted that "ninguna norma comunitaria impone a los Estados miembros la obligación de garantizar que la mitad de las

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<sup>1</sup> [http://ec.europa.eu/competition/state\\_aid/register/ii/by\\_case\\_nr\\_n2009\\_0570.html#587](http://ec.europa.eu/competition/state_aid/register/ii/by_case_nr_n2009_0570.html#587)

ayudas a la actividad cinematográfica se atribuya a películas escritas o dirigidas por mujeres."

European Union law

Article 157(3) TFEU provides that :

«1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

(...)

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.»

Council Directive 2006/54/EC prohibits discrimination on the grounds of sex in matters of employment and occupation.

In particular, Article 14 of this Directive provides that:

«1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations. (...)

Meanwhile, Directive 2006/54/EC requires Member States to put in place judicial and or administrative procedures in order to enable persons who consider themselves being discriminated against to seek redress.

To understand the argument of the petitioner, it is also necessary to recall the rulings of the Court in the cases she mentions.

In its judgment in the case "Kalanke" the European Court of Justice ruled that :

«(...) the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes national rules such as those in the present case which, where candidates of different sexes shortlisted for promotion are equally qualified, automatically give priority to women in sectors where they are under-represented, under-representation being deemed to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organization chart.»

In its judgment in the case "Marschall" the Court ruled that :

«A national rule which, in a case where there are fewer women than men at the level of the

relevant post in a sector of the public service and both female and male candidates for the post are equally qualified in terms of their suitability, competence and professional performance, requires that priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour is not precluded by (...)the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, provided that:

- in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate, and
- such criteria are not such as to discriminate against the female candidates.»

In the both cases mentioned by the petitioner the European Court of Justice refers to Article 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976. These provisions are not in force anymore. The prohibition of discrimination based on sex in employment, inscribed in its Article 2(1) of Directive 76/207/EEC, is now provided by Article 14 of Directive 2006/54/EC. Meanwhile, the possibility to adopt measures to promote equal opportunity for men and women, which was provided by Article 2(4) of Directive 76/207/EEC, is now inscribed in Article 157(3) of the TFEU (ex-article 141 TEC).

#### Analysis of the case

In the view of the Commission, the petitioner's allegations are not correct, or, at least, do not justify opening infringement procedures against Spain.

As a preliminary remark, it may be noted that the petition concerns a matter covered by European Union gender equality law, since it relates to a situation regarding access to a self-employed activity – which is mentioned in the above quoted Article 14 of Directive 2006/54/EC.

The petitioner argues that Order 2834/2009 of the Spanish Ministry of Culture violates EU law for two reasons.

On the one hand, she argues that it fails to guarantee a positive impact as regards gender inequality.

On the other hand, she alleges that it violates the prohibition of discrimination based on gender. She makes also alternative suggestions to solve this alleged problem.

Concerning the first argument of the petitioner, it should be noted that European Union law does not require the adoption by Member States of measures of positive action in favour of women. As the abovementioned Article 157(4) TFEU clearly provides for, Member States are allowed to adopt such measures, but they are not obliged to do so. Consequently, if a Member State does not adopt positive action measures in favour of women, or if the measures it adopts are not ambitious or efficient enough, that Member State does not violate European Union law.

Regarding the second argument of the petitioner, a number of points should be noted.

First of all, the preference attributed to women in Article 28(2) of Order 2834/2009 does not put in question the quality of the projects funded, since the choice will always be made between two projects equally good - obtaining the same number of points in the quality assessment.

Moreover, according to the same provision, this eventual preference, if applicable, will automatically cease to be applied should a situation of equality be reached in the total number

of projects granted. Therefore, among people with equally good projects, the number of total women whose projects are funded will never be superior to that of men - as a result of the contested preference.

The petitioner further points out that there is a significant inequality between men and women in the cinema industry in Spain.

Finally, it must be noted that the alternative system suggested by the petitioner would not improve the situation. This would not happen, even if one would agree with the petitioner and would take a formalistic interpretation of the principle of equal treatment. Worst, from this latter perspective, it seems that the situation could indeed deteriorate if the alternative suggestions of the petitioner were adopted.

In fact, the present system criticised by the petitioner ensures the quality of projects funded, since it only gives preference to women in case there is equal quality of the projects presented for funding.

However, if the Commission understood correctly the petitioner's proposal, it appears that the alternative system she suggested could give preference to women, even in a case where their projects were considered to be of inferior quality to those of men. This assessment can be briefly explained in the following manner.

As the petitioner suggests, in the alternative system "a specific points system should be established for projects which are directed or produced by a woman or have a woman as author of the screenplay." Film projects where women are directors, screen players or producers would receive an additional 5 points if one of these situations arise, 8 points if two of these situations arise and 10 points if all three are met.

This system could produce the following situation.

When evaluated on equality, a project presented by men only is granted 45 points.

Meanwhile, the quality of a project presented by women only is granted 40 points. However, according to the proposed system, the men's project would not be funded by the aid system and the women's project would be funded. This would happen because the women's project would receive extra 10 points simply because women were involved in it - in spite of being less good than the other project.

Last but not least, it should be noted that Directive 2006/54/EC requires Member States to put in place judicial and/or administrative procedures in order to enable persons who consider themselves being discriminated against to seek redress.

Spain has transposed this Directive by the "Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres".

Member States are responsible for ensuring the correct and effective implementation of Community legislation into their national legal order. As guardian of the Treaties, the Commission closely monitors the implementation of Community law at national level and takes the necessary measures as provided for by the EC Treaty, should Member States be found in breach of Community law.

Nevertheless, once this transposition is correct, like in Spain, it remains to the individual who believes he or she has been of discrimination to initiate legal proceedings provided for in the national law and to contest possible offences before the national courts. The control of the application of the directives to the individual case is the task of the national jurisdictions.

In the Commission's view, it does not appear from the available information that the contested national measure is clearly contrary to the requirements of the applicable European Union law.

Moreover, in this particular case, which concerns an issue of great complexity, only the national courts are in a position to examine all the relevant facts of the case.

Therefore, the Commission will not initiate infringement procedures against Spain on the basis of the facts alleged by the citizen.

### Conclusions

The Commission has examined in depth the allegations of the petitioner. It does not appear from the available information that the contested national measure is clearly contrary to the requirements of the applicable European Union law.

Therefore, the Commission will not initiate infringement procedures against Spain on the basis of the facts alleged by the citizen.

In any event, the necessary legal instruments are in place in Spain for the citizens to defend their right to equality based on gender within the meaning of the applicable rules of European Union law – which include the relevant case law of the European Court of Justice in this respect.