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(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 21 December 1988

on aid granted by the Greek Government to the film industry for the production of Greek films

(Only the Greek text is authentic)

(89/441/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having given notice to the parties concerned to submit their comments pursuant to the above provision, and having regard to those comments,

Whereas :

I

Following repeated requests from the Commission, in particular by letters dated 13 October and 27 November 1986, the Greek Government tardily informed the Commission by letter dated 30 December 1986 of the existence of a law establishing aid for the Greek film industry (Law No 1597 of 12 May 1986, which entered into force on 21 May 1986).

The Law provides for aid in the following forms :

- first, automatic subsidies (Article 7 of the Law) equal to the public entertainment tax on films screened in cinemas, amounting to 12 % in Athens and Salonika and 8 % elsewhere. Payment of the subsidies ceases when they equal production costs,
- second, selective aid in the form of participation in film productions or State financing consisting in advances granted by the Greek Cinematography Centre for the production of Greek films (Article 18 of the Law). Participation in the production of films is of the order of 50 % of the cost of the film ; financing amounts to 25 %. Of 25 full-length films produced in Greece in 1987, 15 were granted State financing

which became non-returnable subsidies when revenue from the films did not cover production costs.

Prizes and endorsements for quality accompanied by cash prizes are also awarded for Greek films completed in the preceding year (Article 8). The Law defines the basic characteristics of the prizes, whilst the Ministry of Cultural Affairs adopts the implementing details.

Interest rates on bank loans or financing, irrespective of their form, for the production of Greek films may not exceed those applicable to business loans (Article 10 (1)).

In addition, the aid granted to cinema operators in the form of subsidies representing a percentage of the entertainment tax is subject to the compulsory programming of Greek films in those cinemas (Article 7 (4) of the Law).

The automatic subsidies, the prizes for quality, the terms of the production loans or financing and the compulsory programming rule are incompatible with the EEC Treaty as they are associated with a nationality condition which is discriminatory in respect of nationals of other Member States.

Similarly, the Commission considers that the selective film production aid provided for by Article 17 of the Law, granted in 1987 to 15 of the 25 films produced that year, appears to be awarded at least in practice to films meeting the definition of Greek films given in Article 5 of the Law. Such aid is therefore discriminatory and incompatible with the common market.

The necessary funds for the aid, managed by the Greek Centre for Cinematography, come from the tax levied on all films shown in Greek cinemas, amounting on average to Drs 600 to 650 million a year, or ECU 3 600 000 to 3 900 000.

A percentage of this tax (Article 7 of the Law), initially set at 50 %, but which can be increased gradually to 100 %, is earmarked for the development of the cinematographic art, the support of the Greek film industry and the study and implementation of national cultural policy in the field of cinema.

Some of the conditions governing the award of aid defined by the Law constitute restrictions based on nationality: thus Article 5, Chapter 1, stipulates that a film may be eligible for aid only if:

- (a) it is produced by Greek nationals or a legal person having their office in Greece and having as their legal representative a Greek national residing in Greece;
- (b) the original version of the film is in the Greek language and the screenplay and dialogue are written in Greek by a Greek national or person of Greek descent;
- (c) the director is Greek or of Greek descent;
- (d) three-quarters of each of the categories of technicians, actors and performing musicians are Greek;
- (e) most of the film was produced in Greece;
- (f) the negative and copies for screening in Greece and Cyprus were developed and printed in Greece;
- (g) all manual workers are Greek and covered for insurance purposes by the institute for Social Security or other public insurance body. This condition is mandatory for all national or foreign film production companies employing persons in Greece.

It is possible, exceptionally, in the cases provided for in Article 5 (2) and (3), by decision of the Minister for Cultural Affairs and with the approval of the Advisory Committee on Cinematography, for a film not fulfilling the criteria listed above to be regarded as Greek nevertheless. This exception, however, does not mean that the said criteria may be regarded as compatible. The rights guaranteed by the Treaty cannot be made subject to additional conditions not provided for by it even if they can be waived by decision of an administrative authority.

II

The aids referred to above, which constitute a considerable proportion of the financing which the producer would otherwise have to provide, facilitate the production of full-length films in particular; they are liable to affect intra-Community trade in a sector in

difficulty and to distort competition within the meaning of Article 92 (1) of the EEC Treaty.

The Commission has always considered that aid to the film industry should, in view of its combined economic and cultural function, qualify for exemption under Article 92 (3) (c) of the EEC Treaty provided, however, that it satisfies all the requirements of the Treaty, notably those concerning the free movement of persons and freedom to provide services (Articles 7, 48, 52 and 59).

The Greek aid measures, however, discriminate against nationals of other Member States and do not comply with Articles 7, 48, 52 and 59 of the EEC Treaty. They do not therefore qualify for exemption under Article 92 of the Treaty.

As soon as the Commission learnt of the non-notified Law No 1597/1986, it informed the Greek Government, notably by letter dated 13 February 1987, of the incompatibility of a number of the provisions of that law, and requested it to make the necessary modifications.

Since none of the replies from the Greek Government indicated that the Law would be amended in the near future to bring it into line with the Treaty, the Commission decided on 21 December 1987 to initiate the procedure provided for in the first subparagraph of Article 93 (2) of the EEC Treaty in respect of the said Law.

III

In its reply to the opening of the procedure, the Greek Government, in a letter dated 12 April 1988, emphasized the special nature of the film industry as an expression of national cultural values which must be safeguarded by establishing certain criteria based on nationality. It nonetheless acknowledged that not all the criteria contained in Article 5 were essential for that purpose. It was prepared to amend certain points, and even abolish points (d) and (g), whilst maintaining that a film must continue to have some 'stamp' of its cultural identity. The Government did not, however, state when the changes would be made nor their specific content. It did not rule out the possibility that one or more restrictions based on nationality might be retained on grounds of cultural identity. These observations bear no relevance to the question of the automatic granting of aid to film producers and cinema operators and the loans and financing granted by banks. Furthermore, the

Commission considers that in the case in point the reasons given do not justify restrictions on the free movement of persons and freedom to provide services, which are fundamental rights established by the EEC Treaty.

Although the Greek position evolved somewhat, the Commission cannot therefore conclude that all restrictions based on nationality contained in the definition of Greek films eligible for aid will be abolished. Article 5 of Law No 1597 can be considered compatible with the Treaty only if nationals of other Member States are treated in the same way as Greek nationals.

In spite of the time granted by the Commission since 13 February 1987, in spite of the bilateral explanatory meetings between the Commission departments and the Greek representatives before and after the opening of the Article 93 (2) procedure, the aid law in question has not been amended to date. In a letter dated 5 December 1988, the Greek Minister for Culture informed the Commission that a committee of experts had been given the task of drafting a new amending law which would be submitted to Parliament before the end of February 1989. No such draft has as yet been received by the Commission.

IV

During the procedure, the Greek authorities claimed, notably by letter dated 9 November 1987, that the aid was intended to assist the art of cinematography. They considered that, since no Community provisions prohibited Member States from assisting the national arts, no Community rules had been infringed.

The EEC Treaty, and in particular the rules on competition and the free movement of persons, services and capital, apply without exception to all gainful activities whether of an economic, cultural, social or other nature. Film production as a gainful activity satisfies the conditions for the application of the EEC Treaty. Furthermore, in accordance with the General Programmes of 18 December 1961, the Council adopted during the transitional period Directives 63/607/EEC⁽¹⁾, 65/264/EEC⁽²⁾, 68/639/EEC⁽³⁾ and 70/451/EEC⁽⁴⁾ in the field of film production. In particular, Article 3 (2) (b) of the last-mentioned Directive provides for the abolition of

the requirement that a person wishing to receive financial aid towards productions should be of a given nationality.

The Commission does not challenge the Greek Government's assertion that, in view of the situation in the Member States such as Greece which produce a smaller quantity of films, State aids are essential to maintain and develop the film industry.

The Commission could therefore consider examining the aid measures in question in the light of Article 92 (3) (c) of the Treaty and the derogations it provides for. The Law in question, however, does not simply establish aid for the Greek film industry, it restricts, needlessly for the purposes of the aid, the possibilities for nationals of other Member States to work as producers or take part in the production of assisted films.

The action taken by the Commission is aimed at ensuring that nationals of other Member States can benefit fully from the free movement of persons and freedom to provide services. It is not aimed at requiring that the artistic and technical members of a unit be composed of nationals from all or certain Member States. It is for the producer and possibly the director to decide on the composition of the unit. The choice must not, however, be limited by discriminatory provisions which grant aid on condition that certain functions are reserved for nationals.

The Commission would also point out that, under Community law, all selective or automatic assistance for film production can be made subject to the condition that the film be made in studios or laboratories situated in the State granting the aid.

To limit the free movement of persons and freedom to provide services only to films not receiving State aid would be to exclude the majority of national film productions from the scope of the EEC Treaty.

It is likely that the film industry would improve its position in relation to competition from third countries if, instead of artificially limiting by law the use of other Member States' artistic, intellectual, technical and financial resources, it increased that use.

The Commission considers that the obligation to make the original version of a film in the Greek language (Article 5 (1) (b)) constitutes a legitimate concern to preserve a national language. However, it should be made possible, notably by means of dubbing techniques, for all nationals not knowing Greek to take part in the making of a film. Should this possibility not be recognized, the obligation to make a film in Greek would constitute further or hidden discrimination contrary to the EEC Treaty.

⁽¹⁾ OJ No 159, 2. 11. 1963, p. 2661/63.

⁽²⁾ OJ No 85, 19. 5. 1965, p. 1437/65.

⁽³⁾ OJ No L 260, 22. 10. 1968, p. 22.

⁽⁴⁾ OJ No L 218, 3. 10. 1970, p. 37.

By amending Article 5 of the Law in question in line with the criteria described above, the assistance provided for in Article 7 (3), the prizes and endorsements for quality (Article 8) and the bank loans and financing for the production of Greek films (Article 10) would be compatible with the common market. In order for aid to cinema operators to be compatible with the common market, it is necessary that films made by other Member States be treated in the same way as Greek films, should the Greek authorities decide to retain the system of compulsory programming. The requirement that films be treated in the same way is provided for in Council Directive 63/607/EEC, and in particular in Article 5 thereof.

The selective aid scheme provided for by Article 17 can be based, under Community law, on cultural and artistic evaluation criteria. Entitlement to such aid, however, cannot be based on the conditions at present contained in Article 5 which require the producer or a certain number of participants in the film to be of Greek nationality. If the Greek legislator considers that a form of aid must be subject to certain cultural and quantitative conditions, the quantitative conditions must apply equally to Greek nationals and to nationals of other Member States.

Not only should such discrimination on grounds of nationality not be incorporated more or less explicitly in legislative instruments and implementing arrangements, they should not constitute a criterion applied in practice to the award of aid.

V

In view of the above considerations the Commission considers that:

- (a) Law No 1597 of 12 May 1986 is incompatible with the common market within the meaning of Article 92 (1) of the EEC Treaty because the award of aid is subject to conditions of nationality that are incompatible with Articles 7, 48, 52 and 59 of the EEC Treaty;
- (b) in view of the gravity of the restrictions in question, the provisions of the said Law must be amended within the shortest possible time, i.e. by 15 May 1989; after that date, no aid may be granted if the restrictions in question have not been removed;
- (c) in view of the mandatory nature of the obligations arising out of Articles 7, 48, 52 and 59 of the Treaty,

any aid granted after 15 May 1989 under the discriminatory conditions established by the said law is illegal and must therefore be recovered,

HAS ADOPTED THIS DECISION:

Article 1

1. The scheme of aid for the film industry introduced by Law No 1597 of 12 May 1986 is incompatible with the common market within the meaning of Article 92 (1) of the EEC Treaty because the award of aid is subject to conditions of nationality that are incompatible with Articles 7, 48, 52 and 59 of the EEC Treaty.

2. The Greek Government is hereby required to amend the aid scheme referred to in paragraph 1 in order to remove the restrictions on grounds of nationality by 15 May 1989.

After that date, no aid may be granted if the said restrictions have not been abolished.

3. If the Greek Government fails to comply with the obligations set out in paragraph 2, any aid granted after 15 May 1989 shall be deemed illegal and shall be recovered.

Article 2

The Greek Government shall inform the Commission of the measures it has taken to comply with this Decision by 15 May 1989.

Article 3

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 21 December 1988.

For the Commission

Peter SUTHERLAND

Member of the Commission