

## Decision of the European Ombudsman closing his inquiry into complaint 1640/2011/MMN against the European Commission

Decision

**Case 1640/2011/MMN - Opened on 22/08/2011 - Decision on 08/07/2013 - Institution concerned** European Commission ( No further inquiries justified ) |

The case concerns the organisation by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA Europe) of a photographic exhibition relating to same-sex couples hosted in a Commission building under the patronage of Vice-President Reding.

The Ombudsman included two allegations in his inquiry: (i) the Commission exceeded its powers and misused EU funds by placing the exhibition under its patronage, by hosting it, and by financing it; and (ii) the Commission insulted and discriminated against those EU citizens that do not share the views promoted by the said exhibition, given that the photographs included offensive language and the views it expressed were not shared by a considerable number of EU citizens.

In relation to the first allegation, the Ombudsman noted that the EU has no general competence in the relevant field. However, discrimination based on sexual orientation is prohibited under EU law.

As regards the specific facts, the Ombudsman's views may be summarised as follows. First, concerning the hosting of the exhibition, the content of the exhibition in question largely related to matters that fall within EU competence, although in some cases there may have been reasonable doubts. The Commission could, therefore, have displayed an appropriate disclaimer to that effect. The Ombudsman therefore made a further remark.

Second, although the Commission did not commit maladministration by co-financing the activities of ILGA Europe, including the exhibition in question, it could have provided more complete information to the complainant on this matter. The Ombudsman therefore made a second further remark.

Third, Vice-President Reding was entitled to place under her patronage an exhibition aimed at promoting non-discrimination on sexual orientation, a fundamental right recognised by the Charter. However, visitors may have been led to believe that the patronage implied the endorsement of the statements displayed. It was only during the Ombudsman's inquiry that the



Commission explained that granting patronage was a 'political gesture' designed to raise awareness of a subject and does not imply endorsing any specific messages. Thus, to avoid any unnecessary confusion in the eyes of the public, it would have been appropriate for the Commission to issue a disclaimer on the matter. The Ombudsman addressed this aspect in his first further remark.

The second allegation had two aspects. First, as regards the allegedly offensive language, the complainant's view, that is to say, that at least one statement accompanying one of the photographs exhibited was likely to offend some EU citizens, was understandable. In view of the fact that the Commission had clarified that granting patronage did not imply its endorsement, the Ombudsman also addressed this point in his first further remark.

Second, as regards the alleged discrimination, the Ombudsman considered that the present situation was not comparable to another case mentioned by the complainant.

In view of this, the Ombudsman concluded that there were no grounds for further inquiries but made the two further remarks already mentioned.

## The background to the complaint

1. The case concerns the organisation of a photographic exhibition relating to same-sex couples, which was held in a building of the European Commission (the 'Commission').
2. Between 10 and 20 May 2011, the Commission hosted in the Berlaymont building in Brussels a photographic exhibition organised by the European branch of the International Lesbian, Gay, Bisexual, Trans and Intersex Association ('ILGA Europe'). This exhibition related to same-sex couples under the title '*Different families - same love*'. The exhibition took place under the patronage of Vice-President Viviane Reding.
3. On 8 June 2011, the complainant wrote to Vice-President Reding. In her e-mail, the complainant requested more details concerning a statement that Vice-President Reding had made before the European Parliament, in which she indicated that Hungary had breached EU law by financing an anti-abortion campaign with EU funds that were not allocated for that purpose. Furthermore, the complainant noted that the Commission had hosted and co-financed the ILGA Europe exhibition. She also noted that the photographic exhibition had taken place under Vice-President Reding's 'sponsorship'.
4. In view of the foregoing, the complainant wondered why Hungary should not use EU funds to finance an anti-abortion campaign, while the Commission used EU funds to finance a campaign promoting the legal recognition of same-sex couples. Moreover, the complainant suggested that family matters are the exclusive competence of Member States. Therefore, she wondered what the legal basis for the Commission to intervene in this area was. The complainant noted that the exhibition promoted the right of same-sex couples to get married and to adopt children, as well



as the right of lesbian women to have their own children through artificial insemination. She added that there is no agreement between Member States on these issues.

5. On 16 June 2011, the Commission replied to the complainant. In its response it stated that it did not have any competence regarding abortion and that, for this reason, it could neither promote nor condemn abortion. Therefore, according to the Commission, the use of EU funds to promote an anti-abortion campaign would be contrary to EU law.

6. The Commission further indicated that no EU funds were used to finance the ILGA Europe exhibition, which was simply hosted in the Berlaymont building. It added that Vice-President Reding gave her patronage to the exhibition in her capacity as Commissioner for Fundamental Rights. According to the Commission, Vice-President Reding was in charge of the protection of the rights of the people represented by ILGA Europe. Moreover, the exhibition was not about artificial insemination but about the protection of the rights of the community in question. Finally, the Commission noted that the Charter of Fundamental Rights recognises the principle of non-discrimination on the grounds of sexual orientation.

7. On 18 June 2011, the complainant wrote again to the Commission. In her e-mail, she indicated that, contrary to what the Commission said in its letter of 16 June 2011, ILGA Europe's website stated that the Commission had '*generously supported the exhibition financially*'. Therefore, the complainant asked the Commission to specify which of these two statements was correct.

8. The complainant further noted that, contrary to what the Commission indicated in the same letter, one of the photographs in the exhibition did relate to artificial insemination. Moreover, she asked whether Vice-President Reding shared the view expressed in the photograph in question that the exclusion of lesbian women from artificial insemination '*is solely motivated by lesbophobia and is discrimination on the grounds of sexual orientation*'. The complainant asked why, if Vice-President Reding did not share these views, she placed the exhibition under her patronage.

9. The complainant also argued that, since the Commission has no competence regarding abortion, it also has no competence to promote novel concepts of family and marriage.

10. On 6 July 2011, the complainant lodged a complaint with the Ombudsman, which was registered as complaint 1440/2011/MMN.

11. On 19 July 2011, the Ombudsman's services asked the complainant to provide certain additional documents, which she did on 20 July 2011.

12. In complaint 1440/2011/MMN, the complainant put forward the following allegations:

(1) The Commission exceeded its powers and misused EU funds by giving its patronage to, hosting and financing a photographic exhibition relating to same-sex couples prepared by the ILGA Europe.



(2) The Commission insulted and discriminated against those EU citizens that do not share the views promoted by the said exhibition.

**13.** Moreover, the complainant put forward the following claims:

(1) The Commission should distance itself from ILGA Europe's exhibition.

(2) The Commission should request the repayment of its financial support for the said exhibition.

(3) The Commission should adopt clear rules to prevent cases like the present one from happening in the future.

**14.** On 29 July 2011, the Commission wrote to the complainant in order to inform her that no EU funds were used for ILGA Europe's exhibition. The Commission indicated that ILGA Europe would in the coming days remove from its website the incorrect statement to the contrary. It added that the EU does not have competence on artificial insemination and that it is for Member States to decide on the conditions for this practice.

**15.** On 2 August 2011, the Ombudsman informed the complainant that, with the exception of the first allegation, the complaint was inadmissible for lack of prior appropriate administrative approaches. The Ombudsman noted, however, that it appeared from the complaint that the complainant aimed at more than a finding of maladministration limited to the first allegation. In view of this, the Ombudsman concluded that it was not appropriate to open an inquiry into the first allegation alone.

**16.** On 4 August 2011, the complainant asked the Ombudsman to open forthwith an inquiry into the first allegation she had raised. This complaint was registered as complaint 1640/2011/MMN. Moreover, in an e-mail of the same date to the Commission, the complainant brought to the attention of the Commission the second allegation she had raised in her previous complaint. The complainant subsequently submitted a similar allegation to the Ombudsman.

## **The subject matter of the inquiry**

**17.** In her letters to the Ombudsman, the complainant submitted the following allegations, which were included in the Ombudsman's inquiry:

### **Allegations:**

(1) The Commission exceeded its powers and misused EU funds by giving its patronage to, hosting and financing a photographic exhibition relating to same-sex couples prepared by ILGA Europe.



(2) The Commission insulted and discriminated against those EU citizens that do not share the views promoted by the said exhibition by giving its patronage to, hosting and financing the said photographic exhibition, given that: (i) the relevant photographs were accompanied by text containing offensive language; and (ii) the views expressed through this photographic exhibition were not shared by or were unacceptable to a considerable number of EU citizens.

## **The inquiry**

**18.** On 22 August 2011, the Ombudsman opened an inquiry into the first allegation only and asked the Commission to provide an opinion.

**19.** On 18 October 2011, the complainant informed the Ombudsman that the Commission had not yet addressed her second allegation. Thus, the complainant requested the Ombudsman to include this allegation in his inquiry.

**20.** On 5 December 2011, the Ombudsman received the Commission's opinion, which was forwarded to the complainant for her observations.

**21.** On 9 December 2011, the complainant submitted her observations.

**22.** On 29 February 2012, the Ombudsman invited the Commission to provide further information concerning the first allegation. He also asked the Commission for an opinion on the complainant's second allegation.

**23.** On 14 June 2012, the Commission provided its further opinion, which was forwarded to the complainant for her observations.

**24.** On 21 and 22 June 2012, the complainant submitted additional observations.

## **The Ombudsman's analysis and conclusions**

### **Preliminary remark**

**25.** As a preliminary matter, the Ombudsman wishes to emphasise that the present inquiry focuses on the specific photographic exhibition, organised by ILGA Europe and hosted at the Berlaymont building between 10 and 20 May 2011. Thus, the Ombudsman's assessment is based on the specific factual circumstances and legal issues surrounding the exhibition in question.

### **A. Allegation that the Commission exceeded its powers and misused EU funds**



## Arguments presented to the Ombudsman

**26.** The complainant alleged that the Commission exceeded its powers and misused EU funds by placing under its patronage, by hosting and by financing the photographic exhibition relating to same-sex couples prepared by ILGA Europe. The arguments put forward to support the complainant's first allegation can be summarised as follows.

**27.** First, the EU does not have competence in matters relating to marriage, family, adoption and assisted reproduction. Member States have the exclusive competence to legislate on these matters and there is no consensus among Member States in relation to these issues.

**28.** Second, the ILGA Europe photographic exhibition defended one specific position which advocated the legal recognition of same-sex couples on the same footing as couples of different sex.

**29.** Third, the Commission financed and hosted this photographic exhibition. Furthermore, Vice-President Reding placed this exhibition under her patronage.

**30.** Fourth, Vice-President Reding criticised Hungary's use of EU funds to finance an anti-abortion campaign. If Hungary should not use EU funds to finance an anti-abortion campaign, then the Commission should also not use EU funds to finance a campaign which promoted the legal recognition of same-sex couples.

**31.** In its letter of 16 June 2011, the Commission stated the following:

*" On the first topic, I would like to underline the fact that the EU has no competence regarding abortion. This means that the EU cannot promote or condemn abortion; that is why the Commission considers that the use of EU money for an anti-abortion campaign is not in line with EU competence.*

*On the second topic, the exhibition you refer to was organised by ILGA Europe, the European organisation which defends the rights of gays, lesbians and transsexuals in the EU. No EU funding was used for this event. The exhibition was simply hosted in the Berlaymont building. Vice-President Reding also gave her patronage to this event as she is in charge of the defence of the rights of people represented by ILGA Europe. The exhibition was not about artificial insemination but about the respect of the rights of this community. The Charter of Fundamental Rights of the European Union states in Article 21 the principle of non-discrimination, notably on the grounds of sexual orientation. "*

**32.** On 29 July 2011, the Commission confirmed that no EU funding had been used for the exhibition. The Commission added that ILGA Europe would remove the incorrect information from its website.



**33.** The Commission further acknowledged that the EU has no competence on artificial insemination and that it is therefore for Member States to establish the conditions for such practices.

**34.** On 4 August 2011, the complainant disputed the Commission's statement that it did not finance the relevant exhibition, stating that it appeared that the Commission financed approximately two thirds of ILGA Europe's activities.

**35.** In its first opinion, the Commission informed the complainant that ILGA Europe received funding from the EU under the PROGRESS programme, in accordance with the rules governing this programme and the Financial Regulation.

**36.** However, the Commission noted that this was an 'operating grant' provided to ILGA Europe for its entire programme of activities, of which the exhibition was only one. The Commission added that ILGA Europe did not receive specific funding for the photographic exhibition.

**37.** The Commission stressed that the support it granted ILGA Europe did not imply that it adopted a position on the real or alleged message contained in the photographs covered by the exhibition or in their captions.

**38.** The Commission added that ILGA Europe's actions fell within the scope of the objectives of the PROGRESS programme, namely, the promotion of equality and the fight against discrimination on the grounds of sexual orientation in this case. The Commission noted that this objective was also laid down in Article 19 of the Treaty on the Functioning of the European Union ('TFUE') [1] , in the Charter of Fundamental Rights and in secondary legislation such as Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2] .

**39.** The Commission indicated that it has taken a number of measures to combat homophobia and discrimination on the basis of sexual orientation and that the funding of ILGA Europe should be understood in this context. Furthermore, the Commission argued that it is possible to provide EU financing in areas where the EU has no legislative competence and mentioned, as an example, the Fundamental Rights programme.

**40.** Finally, the Commission added that the case of the anti-abortion campaign in Hungary was different because in that case the action was not foreseen under the grant agreement, irrespective of whether or not the EU had legislative competence on the matter.

**41.** In her initial observations, the complainant argued that the explanations provided by the Commission concerning the financing of ILGA Europe's activities were unsatisfactory.

**42.** In particular, the complainant considered that the Commission misrepresented the facts and distorted the content of its previous correspondence. In her view, the Commission had, in its letters of 16 June and 29 July 2011, indicated that no EU funding was used for the ILGA Europe exhibition. However, in its first opinion to the Ombudsman, the Commission argued that it had in



fact stated that ILGA Europe had not directly and specifically received EU funding for the exhibition.

**43.** The complainant added that it appeared from the Commission's first opinion that, in reality, the Commission indirectly financed the exhibition by financing ILGA Europe's activities in general. According to information made public by ILGA Europe, the Commission's funding represented almost 70% of ILGA Europe's budget in 2011. The complainant further noted that the Commission's funding was provided after its approval of ILGA Europe's annual work programme.

**44.** The complainant disputed the Commission's contention that the objective pursued by the exhibition could be correctly considered to be combating discrimination based on sexual orientation. In the complainant's view, the objectives of the exhibition went beyond the concept of discrimination. In her view the exhibition sought to promote the legal recognition of same-sex couples, a matter upon which most Member States do not agree.

**45.** The complainant insisted that the EU does not have competence on this controversial issue, which falls within the exclusive competence of Member States. She referred to the principle of conferred competences of EU law, according to which the EU institutions only have the competences which have been conferred on them by the Member States.

**46.** In its reply to the Ombudsman's request for further information, the Commission repeated that ILGA Europe received an 'operating grant' for its entire annual work programme in the context of the PROGRESS programme and indicated that such practice was in compliance with the Financial Regulation [3]. This grant covered ILGA Europe's general operating costs and did not constitute direct financing of any specific activities. Moreover, the Commission emphasised that this support was given in the context of its mandate to fight discrimination on the grounds of sexual orientation.

**47.** In her additional observations, the complainant indicated that the Commission made misleading statements insofar as it initially informed her that it had not at all funded the exhibition in question, but later indicated that it had not provided 'direct' funding for the exhibition. In the complainant's view, making such misleading statements was unacceptable.

**48.** The complainant acknowledged that the Commission is empowered to take actions to fight discrimination on the grounds of sexual orientation. Examples of such discrimination could be national legislation restricting access to certain professions (e.g., lawyers, bankers) or to administrative documents (e.g., a driving licence) on grounds of sexual orientation.

**49.** However, she added that the Commission does not have a mandate to take sides in debates concerning same-sex marriage, adoption by same-sex couples and similar issues. The complainant emphasised that these issues fall outside the scope of EU competence. In the complainant's view, when Member States provided the EU with a mandate to fight discrimination they did not consider that the decision not to allow same-sex marriage or same-sex adoption could be regarded as discriminatory.





**50.** Moreover, the complainant questioned whether the Commission could use EU funds to finance the activities of ILGA Europe, since the latter's activities fall outside the scope of EU competence. In this respect, the complainant noted that the Commission provides funding of up to 80% of ILGA Europe's operating costs.

### **The Ombudsman's assessment**

**51.** As a preliminary matter, the Ombudsman notes that Article 5(2) of the Treaty on the European Union ('TEU') establishes the principle of conferred competences as follows:

*' Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. '*

**52.** Pursuant to this fundamental principle of EU law, the EU institutions can only act within the limits of the powers assigned to them expressly or implicitly in the Treaty. In this respect, the Court has held the following:

*' 23. It follows from Article 3 b of the Treaty [now Article 5(2) TFEU], which states that the Community is to act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein, that it has only those powers which have been conferred upon it.*

*24. That principle of conferred powers must be respected in both the internal action and the international action of the Community.*

*25. The Community acts ordinarily on the basis of specific powers which, as the Court has held, are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them. ' [4]*

**53.** The Ombudsman further notes that, on 19 September 2011, Vice-President Reding replied on behalf of the Commission to a written question from a Member of Parliament as follows: *' The European Union has no competence as regards the recognition of marriages and registered partnerships and, as a result, there is no requirement under EC law for Member States to change their substantive family law or modify the national definition of marriage. '*

**54.** In view of the foregoing, the parties in the present complaint appear to be in agreement that, at the present stage of development of EU law, the EU has no general competence in the area concerned. Moreover, the Ombudsman takes note of the existence of significant differences in the legislations of Member States in this area, which remains a highly debated and even controversial topic at national level.

**55.** However, as the Commission has correctly indicated, discrimination on the grounds of sexual orientation is prohibited within the scope of application of EU law (Article 21 of the



Charter of Fundamental Rights). Moreover, discrimination on the grounds of sexual orientation is prohibited in the areas covered by Directive 2000/78/EC, such as conditions relating to access to employment, access to training, employment and working conditions.

**56.** The Ombudsman further notes that the EU Courts have had to deal with a number of questions concerning the principle of non-discrimination on the grounds of sexual orientation. Illustrative examples of court cases on these questions include the allegedly discriminatory recruitment policy of a football club on grounds of sexual orientation, [5] the award of pension rights by a Member State to the survivor in a same-sex partnership, [6] the dismissal of an employee because he had undergone gender reassignment surgery, [7] the award of work-related benefits to a worker's partner in an unregistered same-sex couple, [8] the award of household allowances to an EU official who was in a registered same-sex partnership [9] and the award of pension rights to the surviving transsexual partner in an unmarried couple. [10]

**57.** In all the above-mentioned cases, the EU courts concluded that the matter fell within the competence of the EU. In this context, the Court of Justice has held:

*' Admittedly, civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination '.* [11]

**58.** Moreover, Advocate-General Ruiz-Jarabo Colomer has stated:

*' It is not a question of developing European matrimonial law but of ensuring that the principle that there should be no discrimination based on sex is fully effective. '* [12]

**59.** Furthermore, it is interesting to note that, in the majority of the cases examined, the EU Courts considered that the measures under scrutiny (adopted by the Member States in some cases and by the EU institutions in others) were contrary to the principle of non-discrimination established under EU law. [13]

**60.** In view of the foregoing, it is clear that the EU has the power, and also the obligation, to fight discrimination on the grounds of sexual orientation within the scope of its competence. Thus, as a matter of principle, the Commission is empowered to pursue such a goal by direct as well as indirect means, such as through financing, hosting or placing under its patronage an exhibition seeking to promote non-discrimination on the grounds of sexual orientation. In particular, such action may fall within the EU competence when the alleged discrimination affects any of the freedoms guaranteed by the TFEU, such as the right to free movement within the EU.

**61.** As regards the specific facts, the present complaint raises three issues, namely, the hosting, the financing and the granting of patronage, which should be examined within the context set out above regarding the scope of EU competence in this field. These issues are



addressed below.

### (i) The hosting of the exhibition

**62.** As regards the hosting of the exhibition by the Commission, the Ombudsman considers that the content of the exhibition in question, and in particular the captions of the photographs, largely related to matters that fall or could be argued to fall within the scope of EU competence. This applies in particular to photographs and captions concerning alleged restrictions on the free movement of EU citizens resulting from the non-recognition of same-sex marriages and registered partnerships, pension benefits and immigration by third-country nationals.

**63.** However, the Ombudsman acknowledges that the link between some photographs and their captions and the competence of the EU appears to be more tenuous. In some cases, there may even be reasonable doubts as to whether they fall within the scope of EU competence. The Ombudsman does not need to take a position whether indeed each and every one of the issues covered by the statements in the captions fell within the scope of the EU competence. However, it is clear that some of the captions raise controversial issues about the exact scope of EU competence in this field, or that of a given Member State's legislation. The Ombudsman considers that in such cases it is incumbent upon the Commission to adopt a prudent and cautious approach in order to prevent any unnecessary confusion in the mind of the public. To put it succinctly, the Commission should avoid creating the impression that it agrees with and supports the statements made by the organiser of the exhibition, particularly in a situation when it is obvious that certain statements concern issues for which EU competence is doubtful and that the views expressed on these issues are not shared by all EU citizens. Thus, the Commission could have considered displaying an appropriate disclaimer, in order to clarify that the statements in the captions reflected the views of ILGA Europe which were not necessarily identical with its own views.

**64.** The Ombudsman considers, however, that only a few of the statements in the captions at the exhibition fall within the category referred to in the preceding paragraph. In his view, the main thrust of the exhibition did not fall outside the competence of the EU. Therefore, the Commission did not exceed its competence by hosting an exhibition such as the one here at stake. Thus, the first and the second arguments do not lead the Ombudsman to make a finding of maladministration. Notwithstanding the foregoing and taking into account the doubts regarding EU competence in matters arising from certain of the photographs and their corresponding captions, the Ombudsman will make a further remark.

### (ii) The granting of financial support

**65.** As regards the issue of the exhibition's financing, it emerged in the course of the Ombudsman's inquiry that the Commission did not *directly* finance the exhibition. However, the Commission confirmed that ILGA Europe received funding from the EU under the PROGRESS programme for its entire range of activities in order to promote equality and to fight



discrimination on the grounds of sexual orientation. The Commission clarified that ILGA Europe did not receive specific funding for the exhibition at stake. However, the Commission can be regarded to have *indirectly* funded the exhibition insofar as it provided financing for ILGA Europe's programme of activities in general.

**66.** The Ombudsman considers that the promotion of equality and the fight against discrimination on the grounds of sexual orientation is clearly a legitimate objective of the EU. Therefore, the Commission did not commit an instance of maladministration in the present case by co-financing the general activities of ILGA Europe to promote equality and to fight discrimination on the grounds of sexual orientation, which included, *inter alia*, the exhibition in question. To the extent that, for the reasons indicated in the previous section, the main thrust of the exhibition in question did not fall outside the scope of EU competence, the Commission did not commit an instance of maladministration by indirectly financing it.

**67.** In the Ombudsman's view, the Commission cannot be required to carry out individual checks for each specific action for which an association such as ILGA Europe has received Community funding and support, so as to ascertain that the relevant action falls within the EU's sphere of competence. The legitimacy of the financial support given by the EU could only be questioned if it emerges that a given action clearly exceeds the purpose for which the financial support has been granted. However, the Ombudsman considers that the relevant exhibition does not fall into this category.

**68.** Therefore, the complainant's third argument cannot succeed.

**69.** Furthermore, as regards the Commission's criticisms of Hungary's use of EU funds to finance an anti-abortion campaign, the Ombudsman notes that the Commission has explained that that case was different because the relevant action (i.e., the anti-abortion campaign) was not foreseen under the grant agreement. Therefore, in the Ombudsman's view, the two situations are not comparable and there is no contradiction in the Commission's position, contrary to what the complainant suggested. Thus, the complainant's fourth argument cannot succeed.

**70.** However, the Ombudsman notes that in her e-mail of 18 June 2011, the complainant drew the Commission's attention to a statement by ILGA Europe appearing on its website, according to which the Commission had supported the exhibition financially. On 29 July 2011, the Commission confirmed to the complainant that no EU funds were used for the ILGA Europe exhibition. As indicated above, the Commission subsequently clarified that it did not provide specific funding for the exhibition in question but awarded an 'operating grant' to ILGA Europe for its entire programme of activities.

**71.** In the Ombudsman's view, although its initial response was not inaccurate, the Commission could have provided more complete information from the outset regarding the relevant facts and the legal basis for the financing of ILGA Europe's activities (including the exhibition), in order to avoid the risk of misleading citizens concerning its use of EU funds. Such a proactive and transparent approach would be likely to increase the trust of EU citizens in the EU institutions in



general, and in the Commission in particular. Therefore, the Ombudsman will make a further remark in relation to this issue.

### **(iii) The granting of patronage**

**72.** The Ombudsman notes that, according to the documents provided by the Commission, the granting of patronage is subject to a number of criteria. Namely, patronage should be viewed as 'moral support' for European events (at least two Member States must be involved) dealing with subjects connected as closely as possible with Community priorities and should be linked not to the nationality, but to the portfolios of Commission Members. In relation to this, the Commission has argued that Vice-President Reding, acting in her capacity as Commissioner for Fundamental Rights, was entitled to place under her patronage an exhibition aimed at promoting non-discrimination on the grounds of sexual orientation, which is among the fundamental rights recognised by the Charter.

**73.** The Ombudsman further notes that, according to the Commission (see point 85 below), the granting of patronage is merely a 'political gesture' designed to raise awareness of a subject in general and does not imply endorsing any specific messages. Despite the Commission's description of patronage as merely 'moral support' or as a 'political gesture' designed to raise awareness of a topic in general, the Ombudsman considers that many EU citizens may have a different perception of the implications of patronage. Therefore, the Commission should be very prudent when granting patronage, in particular if the content of the event may be controversial or may appear to go beyond the scope of EU competence, even if only partially.

**74.** In the present case, it cannot be excluded that visitors may have been led to believe at the time that the patronage implied the Commission's endorsement of all the statements displayed during the exhibition. However, in view of the additional clarifications provided in the course of the Ombudsman's inquiry, this impression has now been dispelled. Therefore, the Commission's position can be considered as convincing. Despite the foregoing, taking into account the clear risks of controversy and the doubts arising from at least one of the photographs exhibited and the corresponding caption (see points 78 and 98 below), a more cautious approach on the part of the Commission would have been advisable. In particular, the Commission could have made it clear to the public from the outset that its patronage should not be misconstrued as official support for all the photographs and statements displayed during the exhibition. Thus, the Ombudsman will make a further remark in this respect in order to avoid this risk in the future.

**75.** In view of the foregoing, the Ombudsman considers that there are no grounds for further inquiries into the first allegation.

## **B. Allegation that the Commission insulted and discriminated against those EU citizens that do not share the views promoted by the exhibition**



## Arguments presented to the Ombudsman

**76.** In her complaint, the complainant alleged that, by placing the said exhibition under its patronage, by hosting it and by financing it, the Commission insulted and discriminated against those EU citizens that do not share the views promoted by the said exhibition. Such a conclusion is, according to the complainant, borne out by the fact that (i) the relevant photographs were accompanied by text containing offensive language and (ii) the views expressed through this exhibition were not shared by or were unacceptable to a considerable number of EU citizens.

**77.** In support of her argument concerning the offensive language, the complainant referred in particular to two photographs. One of the photographs, under the heading ' *Family values* ', gave the impression that a heterosexual couple with two children had made the following statement (which appeared as a quotation with inverted commas):

*' We are what is considered a 'traditional' married couple with children. We find ridiculous and offensive claims by some clergy, and the so-called 'defenders' of traditional family values, that the legal recognition of same-sex families and their children is a threat to our family. We oppose the discrimination and unfair treatment that same-sex couples and their children still face in Europe. Love does not have a gender or sexual orientation and should be embraced and recognised in all its expressions. '*

**78.** The other photograph referred to by the complainant showed a lesbian couple under the heading ' *Lesbian motherhood* ', with the following caption:

*' Opposite sex couples have access to safe and medically assisted artificial insemination. Lesbian couples are often denied such an option despite the availability of modern technology for them to have their own biological children. Given technological advances, such exclusion is solely motivated by lesbophobia and is discrimination on the grounds of sexual orientation. '*

**79.** Furthermore, the complainant argued that giving patronage to the exhibition was a way of endorsing its content. Thus, the complainant submitted that, by offering her patronage, Vice-President Reding adopted as her own the views and opinions that were presented, or at least gave that impression to visitors that she was doing so. Therefore, the complainant indicated that there was a contradiction between Vice-President Reding's patronage and the Commission's contention that it did not take a position on the real or alleged message contained in the photographs or their captions.

**80.** Moreover, the complainant argued that the financing provided by the Commission to ILGA Europe also made it responsible for the content of the exhibition. In this respect, the complainant added that the Commission's funding appeared to be dependent on its prior approval of ILGA Europe's annual work programme.



**81.** As regards the alleged discrimination, the complainant argued that, in order to avoid such discrimination, the Commission should provide equally generous support to those seeking to promote the 'traditional' concept of family. In this respect, the complainant referred to Vice-President Reding's criticism of Hungary for financing an anti-abortion campaign with EU funds.

**82.** In its opinion, the Commission indicated that it co-finances a number of activities proposed by ILGA and set out in its annual work programme. However, this does not mean that the Commission is adopting a position on the real or alleged message contained in the photographs and in their captions.

**83.** Furthermore, the Commission noted that the case of Hungary and the exhibition were fundamentally different. In the Hungarian case, the action (i.e., the anti-abortion campaign) was not foreseen by the grant agreement, irrespective of whether or not the EU had legislative powers in this area.

**84.** In its further opinion, the Commission argued that the allegedly contentious message expressed in the exhibition was an intrinsic aspect of freedom of expression, which is among the foundations of democratic societies and is also enshrined in the Charter of Fundamental Rights (Article 11). The Commission contended that freedom of expression also protects ideas that may not be shared and may even shock or disturb. The Commission noted that stimulating public debate is the very purpose of an exhibition.

**85.** Vice-President Reding placed the exhibition under her patronage in her capacity as Commissioner responsible for fundamental rights, equality and non-discrimination, and in the context of the International Day against Homophobia. Offering patronage does not imply endorsing any specific messages. Patronage constitutes a political gesture to raise awareness of a subject in general.

**86.** In her additional observations, the complainant argued that the Commission had infringed its own rules for the granting of patronage. Specifically, the complainant indicated that, although patronage should not offend Member States, the exhibition could offend those Member States whose legislation did not recognise the rights sought by ILGA Europe. Moreover, in the complainant's opinion, the content of the exhibition could not be regarded as a Community priority since the EU had no competence in this area.

**87.** The complainant admitted that ILGA Europe's freedom of expression should cover also its controversial opinions. However, in the complainant's view, ILGA Europe's freedom of expression does not allow the Commission to take sides in a political debate in which it should have remained neutral.

## **The Ombudsman's assessment**

**88.** It is not disputed that the Commission hosted and placed the exhibition in question under its





patronage. Moreover, as indicated above, insofar as it financed ILGA Europe's activities, the Commission may be regarded as having indirectly financed the exhibition. Thus, the Ombudsman will consider whether this may imply that the Commission insulted and discriminated against certain EU citizens because of the allegedly strong language used and because some EU citizens do not share the views expressed by the organisers of the exhibition. The Ombudsman will address these two issues in turn.

## (i) The allegedly offensive language

**89.** As regards the allegedly offensive language, the Commission has stressed that it did not endorse the real or alleged message contained in the photographs or their captions. It merely wished to contribute to raising awareness towards the prohibition of discrimination on the grounds of sexual orientation (which is a fundamental right), in the context of the International Day against Homophobia. In this respect, the Commission referred in particular to ILGA Europe's freedom of expression and pointed out that such freedom is among the fundamental rights protected by the Charter (Article 11).

**90.** In relation to freedom of expression, the Court of Justice has held the following:

*' Freedom of expression, as an essential foundation of a pluralist, democratic society reflecting the values on which the Union, in accordance with Article 2 TEU, is based, constitutes a fundamental right guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union which, pursuant to Article 6(1) TEU, has the same legal value as the Treaties. This freedom is also affirmed in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950. '* [14]

**91.** Moreover, it appears from the case-law that the freedom of expression is to *' be understood in a wide sense to include remarks and statements that, by their content, correspond to assertions amounting to a subjective appraisal. '* [15]

**92.** The Court of Justice has further held that:

*' 154. In accordance with settled case-law, whilst the principle of freedom of expression is expressly recognised by Article 10 of the ECHR and constitutes one of the fundamental pillars of a democratic society, it nevertheless follows from Article 10(2) that freedom of expression may also be subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under that provision and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, to this effect, Case C-368/95 Familiapress [1997] ECR I<sup>3689</sup>, paragraph 26; Case C-60/00 Carpenter [2002] ECR I<sup>6279</sup>, paragraph 42; Case C-112/00 Schmidberger [2003] ECR I<sup>5659</sup>, paragraph 79; and Karner, paragraph 50).*

*155. Also, as has been correctly pointed out by the Parliament, the Council and the parties*





*intervening in support of them, the discretion enjoyed by the competent authorities in determining the balance to be struck between freedom of expression and the objectives in the public interest which are referred to in Article 10(2) of the ECHR varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When a certain amount of discretion is available, review is limited to an examination of the reasonableness and proportionality of the interference [...]. ' [16]*

**93.** It follows from the foregoing that freedom of expression is among the fundamental values of a democratic society. Although freedom of expression is not unlimited and may be subject to certain limitations in order to protect other legitimate aims, the competent authorities have a margin of discretion to strike a balance between freedom of expression and other objectives of public interest.

**94.** In the present case, the complainant has acknowledged that ILGA Europe enjoys freedom of expression for its opinions. The Ombudsman considers that the fact that the Commission provided financial support, hosted and placed the relevant exhibition under its patronage does not imply in and of itself that it endorsed the message of the exhibition or that the statements made therein can be attributed to the Commission.

**95.** The Commission may host events and finance activities in order to foster debate about the issues surrounding those events or activities. This does not necessarily imply that the Commission endorses the specific message or content. On the contrary, the Commission may simply and legitimately wish to stimulate a debate.

**96.** Furthermore, the Commission argued that the granting of patronage is merely a political gesture designed to raise awareness of a subject in general. According to this view, Vice-President Reding could legitimately give patronage to the exhibition in question in the framework of her mandate as Commissioner responsible for fundamental rights.

**97.** Although, as indicated above, the Commission's position is not unconvincing many EU citizens may have a different perception of the implications of patronage. Indeed, there is a risk that the granting of patronage may give the impression to the public that the Commission endorses the content or message of an event.

**98.** It should be noted that the complainant has referred to two specific photographs and their accompanying captions in this context. As regards the first of these photographs, the Ombudsman notes that the statement referred to in point 77 above, was clearly marked as a quotation (within inverted commas) made by a couple. It was thus clear that the views expressed in that statement were those of the said couple. In the Ombudsman's view, it was therefore unlikely that the public would have received the impression that the Commission was endorsing this statement. In contrast, the statement mentioned in point 78, was not marked as the expression of a personal opinion. This statement is worded as follows: '[...] *Given technological advances, such exclusion [i.e., the exclusion of lesbian couples from artificial insemination] is solely motivated by lesbophobia and is discrimination on the grounds of sexual orientation*'. The Ombudsman notes that the statement creates the impression that it is stating



a fact. However, it is clear that the statement in reality merely reflects the views of the organisers of the exhibition. It is also clear that these views are not shared by a considerable number of citizens. In these circumstances, the Ombudsman understands the complainant's view that a statement suggesting that anyone who does not agree with allowing lesbian couples to benefit from artificial insemination is 'solely motivated by lesbophobia' was likely to offend at least some EU citizens.

**99.** As mentioned above, it cannot be excluded that at least some visitors may have had the impression at the time that the patronage implied the Commission's endorsement of the entire contents of the exhibition, including the above-mentioned statement. Although the Commission has clarified in the course of the Ombudsman's inquiry that this was not the case, it would clearly have been advisable to make this clear at an earlier stage, for instance, by displaying an appropriate disclaimer.

**100.** Thus, the Ombudsman considers that it would be advisable if the Commission could in the future avoid the risk of giving the misleading impression to the public that it has endorsed the specific content or message of an exhibition by including an appropriate disclaimer to that effect in all future similar events which the Commission hosts, finances or which it places under its patronage. Therefore, the Ombudsman will make a further remark in relation to this.

## (ii) The alleged discrimination

**101.** As regards the issue of the alleged discrimination, the Ombudsman notes that according to well-established case-law:

*'It is nevertheless contrary to the general principle of equal treatment, which is one of the fundamental principles of Community law, for comparable situations to be treated differently unless the difference in treatment is objectively justified [...].'* [17]

**102.** In support of her arguments concerning the alleged discrimination, the complainant referred to the case of Hungary, in which the Commission criticised this Member State for having used EU funds to finance an anti-abortion campaign. In the Ombudsman's view, this situation is not comparable to the present one because, as the Commission explained, in the case of Hungary the grant agreement between the Commission and Hungary did not foresee the carrying out of such a campaign.

**103.** In the Ombudsman's opinion, concerns regarding discrimination could have arisen if, for instance, an association or group of citizens had requested permission to use the Commission's premises to carry out an exhibition promoting the values of 'traditional families' and the Commission had refused such permission without a valid justification. However, the complainant has not referred to such events.

**104.** In view of the foregoing, the Ombudsman concludes that there are no grounds for further inquiries into the second allegation. However, the Ombudsman will make a further remark in



relation to the possibility of introducing a disclaimer in similar situations in the future.

## C. Conclusions

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

**There are no grounds for further inquiries.**

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

## Further remarks

**The Commission could include an appropriate disclaimer when it decides to host, finance or place events or activities under its patronage, in order to avoid the risk of giving the misleading impression to the public that it has endorsed the specific content or message of the event or activity in question. This would be particularly appropriate if the content of the event or exhibition may arguably exceed at least partially the scope of its competence, or if the content or message may be controversial.**

**Whenever the Commission receives a request for information concerning the use of EU funds, the Commission could consider providing proactively as complete information as possible from the outset regarding the relevant facts and the legal basis for such financing, in order to avoid the risk of misleading EU citizens.**

P. Nikiforos Diamandouros

Done in Strasbourg on 8 July 2013

[1] Article 19(1) of the TFEU establishes the following: "*Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*"

[2] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal



treatment in employment and occupation (OJ 2000 L 303 p. 16).

[3] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248 p. 1). This regulation has been repealed and replaced by Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union (OJ 2012 L 298 p. 1).

[4] Opinion 2/94 on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I-1759, paragraphs 23-25.

[5] Case C-81/12 *Asociatia ACCEPT v Consiliul National pentru Combaterea Discriminari*, judgment of 25 April 2013, not yet published in the ECR.

[6] Case C-267/06 *Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757.

[7] Case C-13/94 *P. v S.* [1996] ECR I-2143.

[8] Case C-249/96 *Grant v South-West Trains* [1998] ECR I-621.

[9] Case T-364/97 *D. v Council* [1999] SC I-A-1 and SC II-1; on appeal, joined Cases C-122/99 P and C-125/99P *D. v Council* [2001] ECR I-4319.

[10] Case C-117/01 *K. B. v the NHS Pensions Agency and the Secretary of State for Health* [2004] ECR I-541.

[11] See *Maruko*, cited above, at paragraph 59.

[12] See the Opinion of AG Ruiz-Jarabo Colomer in *K. B.*, cited above, paragraph 76.

[13] In *P. v S.* (cited above), the Court ruled that EU law prohibited the dismissal of a transsexual employee because he had undergone gender reassignment surgery. In *Maruko* (cited above), the Court held that national legislation which prevented the award of occupational pension rights to the survivor in a registered same-sex partnership would be contrary to EU law if the surviving partner is in a situation comparable to that of a spouse according to the national court. In *K. B.* (cited above), the Court concluded that national legislation which prevents a transsexual to marry a person of the sex to which he or she belonged may be contrary to EU law insofar as this makes it impossible for the survivor to benefit from his or her partner's pension rights. In *Asociatia ACCEPT* (cited above), the Court considered that the recruitment policy of a football club which discriminated against a football player on grounds of his/her sexual orientation would be contrary to EU law.

In contrast, in two cases, namely, in *Grant* (cited above) and in *D. v Council* (cited above), the Court dismissed the allegations of breach of the principle of non-discrimination.



In *Grant*, the Court concluded that there was no discrimination based on sex because the refusal to award work-related benefits to the worker's same-sex partner applied both to male and female workers with a partner of the same sex. Although Advocate General Elmer did not share the Court's conclusion, the Court considered it immaterial that the employer (a private company) had awarded the benefits at stake to the unmarried female partner of the male worker who occupied previously the plaintiff's post.

As regards *D. v Council*, the EU courts considered, both at first instance and on appeal, that the Staff Regulations should be given an autonomous interpretation and not by reference to the law of the relevant Member State (in this respect, it should be noted that the EU official in question had entered into a registered same-sex partnership in his country of origin, namely, Sweden, which was assimilated to a certain extent at least to marriage). On the basis of the Staff Regulations in force at the time, the Court of Justice concluded that the intention of the EU legislature was to grant entitlement to the household allowance only to married couples (paragraph 37). In the Court's view, only the EU legislature could adopt measures to alter that situation by amending the Staff Regulations, which has been done subsequently.

[14] Case C-163/10, *Aldo Patriciello*, judgement of 6 September 2011, not yet published on the ECR, paragraph 31.

[15] *Idem*, paragraph 32.

[16] Case C-380/03, *Germany v Parliament and Council* [2006] ECR I-11573, paragraphs 154-155. See also case C-421/07, *Frank Damgaard* [2009] ECR I-2629, paragraphs 26-27.

[17] See, for instance, joined cases 271/83, 15/84, 36/84, 113/84, 158/84, 203/84 and 13/85, *Alan Ainsworth and others v Commission and Council* [1987] ECR 167, paragraph 33.