EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE

Director General

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Mr Jacob Kohnstamm
Chairman,
Article 29 Data Protection Working Party
European Commission
Directorate-General Justice
Data Protection Unit
B-1049 Bruxelles/Brussel
Belgium

Dear Mr Kohnstamm,

I refer to your email of 5 March 2013 concerning the publication, by the Commission, of several letters by the Article 29 Working Party on the page set aside for Working Party matters on the website of the Commission (DG Justice).

Given that the letters would be uploaded on a webpage hosted by the Commission and in consideration of the fact that the Working Party has no legal personality, the Commission would be liable for issues of legal responsibility arising from the publication of these documents. You will therefore easily understand that, were these letters published, I have to ensure that their publication complies with applicable legal rules.

As regards the publication of letters containing references to Commission's officials, the Commission is first of all, as employer, under a general duty of care towards its officials and agents pursuant to the Staff Regulation as interpreted by the Court of Justice. According to the case law of the Court, the Commission's duty of care must be discharged with particular rigor and the institution's margin of discretion is significantly limited in this field. This implies *inter alia* that the institution has an obligation to act, notably by taking appropriate protection measures vis-à-vis staff members whose safety, welfare, dignity or reputation may be compromised. In the cases at hand, I am advised by the services responsible for human resources matters that the appropriate protection measure would be to replace the reference to specific Commission's official (Mr/Ms X or Y) by a general reference to "the Commission". Also, according to the principle of proportionality, it would not appear necessary for the purposes of making the Working Party's views public to refer (either directly or indirectly) to the precise identity of the officials concerned.

In other words, such a solution would allow the Art. 29 Working Party to fully and independently express its views on the statements in question, while avoiding undue

"personal exposure" of officials who acted in the performance of their duties and functions.

As these letters refer to identified or identifiable Commission officials – and this would be the case even if, as suggested above, their names would be deleted – their publication would constitute a processing of personal data which has to be carried out in compliance with Regulation 45/2001.

In particular, this means that a specific legal basis is needed. As no alternative legitimising grounds appear available in the cases at issue (such as, e.g., compliance with a legal obligation, public interest on the basis of the Treaties or a legal instrument on the basis thereof), only the data subject's unambiguous consent could make the publication legitimate (art. 5(d)).

In this regard, it should be noted that even if the consent of the data subjects referred to in the letters were obtained, it would be consent given by an employee to an employer. The validity of consent in such circumstances has been questioned, by the Working Party itself, among others. Hence, according to the Working Party's Opinion on the definition of consent (WP 187), data processing operations in the employment environment, where there is an element of subordination, may require careful assessment of whether individuals are free to consent. Consent in such circumstances should therefore be accompanied with strong guarantees. The data subjects should be informed and effectively entitled to exercise their right to access, rectification, objection, blocking and erasure. This should notably include the possibility for the data subjects to verify and comment on the accuracy of the statements in question before they would be published.

Furthermore, consent does not negate the controller's (i.e. the Commission in this case) obligations with regard to the principles of data quality under art. 4 of Regulation 45/2001, namely that personal data must be processed fairly and lawfully; collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes; be adequate, relevant and not excessive in relation to the purposes for which they were collected; must be accurate and, where necessary, kept up to date, and kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected.

In particular, this would require in the cases at hand that the concerned data subjects should be informed of and consent to the duration of the publication. Indeed, as recommended by the Commission's data protection officer, it is advisable that the personal data contained in these letters be not be published for an unlimited period of time and be deleted from the website after a certain period of time, i.e. when their processing is no longer necessary for the purposes for which they were collected (e.g., as regards the publication of the letter to Mrs Reding, when the negotiations of the reform package will be concluded).

As regards the publication of letters from and to private parties, we would propose that the following notice be inserted on the specific page of the Commission's website dedicated to the Working Party:

"Please note that it is the policy of the Article 29 Working Party to publish on its website the correspondence it receives, as well as its response to such correspondence. Should you not wish that your correspondence, or the response of the Working Party, be published, in full or in part, either for reasons of business confidentiality, protection of

personal data or other legitimate reason, please indicate in advance such reason/s, as well as the parts of the correspondence to which this applies".

Finally, as far as the specific Microsoft correspondence is concerned, we intend to write to Microsoft asking if it maintains its objection to publication and if so, the reasons for such objection as well as the sections of the correspondence to which such objection applies.

I am confident that these explanations and proposals can contribute to find a mutually satisfactory solution to this matter.

Your sincerely,

Françoise LE BAIL