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Directorate-General for Communications Networks, Content and Technology

Director-General

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CNECT/B-2/ST/er

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REGISTERED LETTER WITH ACKNOWLEDGEMENT OF RECEIPT

Dear Mrs Cann,

Subject: Your application for access to documents – Ref GestDem N° 2017/2953

We refer to your submission dated 18/05/2017 in which you make a request for access to documents, registered on the same day under the above mentioned reference number.

An extended time limit was needed as your application concerned a large number of documents. Therefore, we have sent you a holding reply on 14/06/2017 (our reference Ares(2017) 2974797). The new time limit expired on 04/07/2017.

1. SCOPE OF THE REQUEST

You requested access to “*all meeting agendas, discussion papers, minutes/reports/outcomes and proposals to the Communications Committee on the topic of the "fair use" element of the "roam like at home" policy from September to December 2016*”.

In ANNEX I and II to this letter you can find the list of all Commission and third parties' documents that have been identified as corresponding to your request.

ANNEX I corresponds to the list of relevant Commission documents related to FUP discussions in the Communications Committee (COCOM) from September to December 2016 while Annex II corresponds to comments received from Member States and third parties on Draft Proposals on Fair use and Sustainability between September and December 2016.

2. ASSESSMENT OF THE DOCUMENTS COVERED BY REGULATION 1049/2001

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (hereinafter "Regulation 1049/2001"), I have arrived at the following conclusions:

a) Full access is provided to documents

(1,2,3,4,5,7,8,10,11,12,14,15,17,18,19,20,21,22,23) listed in ANNEX I and documents 22 and 60 listed in ANNEX II

We inform you that **the agendas, summary records and all the Implementing Regulation proposals listed in ANNEX I (i.e documents 1,2,3,4,7,8,10,11,12,14,17,18,19,20,21,22,23) are publically available on the RegCom registry.** The number of the Committee is C15400 COCOM and its exact name is Communications Committee (COCOM). These documents are only available in English. You may easily find the documents you are looking for using the hereby attached link:

<http://ec.europa.eu/transparency/regcomitology/index.cfm?CLX=en>

Furthermore **the presentation and the non-paper listed in ANNEX I (documents 5 and 15),** are attached to this letter as respectively ANNEX III and IV to the present letter.

As regards **the documents received from BEUC and BEREC (listed in ANNEX II n° 22 & 60),** these are publically available and could be found on their respective websites on the following links.

- BEUC letter of 22/11/2016: http://www.beuc.eu/publications/beuc-x-2016-123_upa_gbe_letter_to_permanent_representations_-_roaming_fair_use_policies.pdf
- BEREC input of 13/10/2016:
http://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/6527-berec-input-to-the-european-commission-implementing-act-on-fair-use-policy-and-sustainability-of-the-abolition-of-retail-roaming-surcharges

For the documents produced by the Commission listed in ANNEX I (i.e documents 1, 2, 3, 4, 7, 8, 10, 11, 12, 14, 17, 18, 19, 20, 21, 22, 23), you may reuse the documents requested free of charge for non-commercial and commercial purposes provided that the source is acknowledged, that you do not distort the original meaning or message of the document. Please note that the Commission does not assume liability stemming from the reuse.

For the non-paper and the presentation listed in ANNEX I (documents 5 and 15), please note that these documents are informal and do not reflect the position of the European Commission. They cannot be quoted as reflecting the Commission's position and cannot be reproduced or disseminated for commercial purposes without prior consent given by the Commission.

The documents received by the Commission from third parties, namely BEUC and BEREC (listed in ANNEX II n° 22 & 60) are disclosed for information only. Therefore, they cannot be re-used without the agreement of the originator, who holds a copyright on it. It does not reflect the position of the Commission and cannot be quoted as such.

b) Access denied

i. Minutes of COCOM meetings (documents 6, 9, 13, 16 and 24 listed in ANNEX I)

Pursuant to Article 4(3), of Regulation 1049/2001¹, the institutions shall refuse access to a document where '*disclosure of the document would seriously undermine the institution's decision-making process*'. Furthermore, '*access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process*'. Article 4(3) of Regulation 1049/2001 nevertheless provides that the exceptions laid down therein be waived in case there is an overriding public interest in disclosure.

As far as the COCOM meeting's minutes are concerned, these documents reflect the internal deliberations of COCOM and their disclosure could seriously undermine the institution's decision-making process even after the decision has been taken. The meeting minutes contain Member States' individual positions at different stages and the release of the documents requested would seriously undermine the decision-making process protected by Article 4(3), first subparagraph of Regulation 1049/2001.

Regulation (EU) No 182/2011², laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (hereinafter "Regulation 182/2011"), does not provide for public or privileged access to the individual positions of Member States, nor to detailed minutes of committee meetings.

Furthermore, Article 13(2), (3) and (4) of the Rules of Procedure of the COCOM Committee, adopted on 28 June 2012, establishes a specific confidentiality requirement, namely that '*the committee's discussions shall be kept confidential. Documents submitted to members of the committee, experts and representatives of third parties shall be confidential*³, unless access is granted to those documents pursuant to paragraph 1 or they are otherwise made public by the Commission. The members of the committee, as well as experts and representatives of third parties, shall be required to respect the confidentiality obligations set out in this Article'.

Pursuant to Article 9 of Regulation 182/2011, Articles 9(2) and 12(2) of the COCOM's Rules of Procedure provide that *summary records shall not mention the individual position of the members* and that *the committee's discussions shall be confidential*. It follows that access to the documents would undermine the decision-making process protected by Article 4(3) of Regulation 1049/2001 and that access has to be refused on that basis even after the decision has been taken.

Consequently, the requested documents are covered by the above mentioned exception pursuant to Article 4(3) of Regulation 1049/2001.

Pursuant to Article 4(3) of Regulation 1049/2001, the exceptions to the right of access defined therein must be waived if there is an overriding public interest in disclosing the document requested. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. in this case it must outweigh the protection of the decision-making process under Article 4(3) of Regulation 1049/2001.

In your request, you do not bring forward any arguments demonstrating the existence of an overriding public interest in disclosure. Similarly, we have not identified any public interest that would override the interests protected by Article 4(3) of Regulation 1049/2001 (and by the specific confidentiality rules applicable to *comitology* procedures). On the contrary, we consider

¹ COCOM12-16 Final.

² Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011, Official Journal L 55 of 28.2.2011, page 13.

³ In accordance with Article 339 TFEU, '[t]he members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components'.

that the protection of the decision-making process prevails over any possible other private or public interest in this case.

In particular, Article 10(2) of the Rules of Procedure, especially for the purpose of Article 10 of Regulation 182/2011, provides for the drafting of a summary record briefly describing each agenda point of each meeting and the result of the vote on the proposed measures submitted to the committee. It shall not mention the individual position of the members in the committee's discussions. All these summary records are listed in ANNEX I and are available in the public registry RegCom.

Having analysed your request, we have not found any elements which could justify the existence of an overriding public interest in the sense of the Regulation, which would outweigh the exceptions stipulated in Article 4(3) mentioned above.

Therefore, we have concluded that access to the aforementioned documents cannot be granted.

We have also examined the possibility of granting partial access to the document concerned in the sense of Article 4(6) of Regulation 1049/2001. However, we have arrived at the conclusion that this would not be possible, as the documents requested are entirely covered by the exception of Article 4(3) of Regulation 1049/2001, as explained above.

After having examined **all COCOM meetings' minutes** listed in ANNEX I, namely the documents in points 6, 9, 13, 16 and 24, we therefore regret to inform you that access cannot be granted.

ii. Third parties documents

- **Comments received from Member States and EEA Members on Draft Proposals on Fair use and Sustainability listed in ANNEX II**

For identical reasons of risk of seriously undermining the decision making process, public access to **the comments received from Member States and EEA Members** on Draft Proposals on Fair use and Sustainability listed in ANNEX II cannot be granted, despite the fact that the legislation has already been adopted.

Pursuant to Article 4(3), of Regulation 1049/2001⁴, the institutions shall refuse access to a document where *'disclosure of the document would seriously undermine the institution's decision-making process'*. Furthermore, *'access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process'*. Article 4(3) of Regulation 1049/2001 nevertheless provides that the exceptions laid down therein be waived in case there is an overriding public interest in disclosure.

The comments received from Member States and EEA Members reflect the internal deliberations of COCOM and their disclosure could seriously undermine the institution's decision-making process even after the decision has been taken. These contributions contain Member States' individual positions at different stages and the release of the documents requested would seriously undermine the decision-making process protected by Article 4(3), first subparagraph of Regulation 1049/2001 as also explained under point I above.

⁴ COCOM12-16 Final.

Thus, the requested documents are covered by the above mentioned exception pursuant to Article 4(3) of Regulation 1049/2001.

Pursuant to Article 4(3) of Regulation 1049/2001, the exceptions to the right of access defined therein must be waived if there is an overriding public interest in disclosing the document requested. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. in this case it must outweigh the protection of the decision-making process under Article 4(3) of Regulation 1049/2001.

In your request, you do not put forward any arguments demonstrating the existence of an overriding public interest in disclosure. Similarly, we have not identified any public interest that would override the interests protected by Article 4(3) of Regulation 1049/2001 (and by the specific confidentiality rules applicable to *comitology* procedures – see above under i.). On the contrary, we consider that the protection of the decision-making process prevails over any possible other private or public interest in this case.

Having analysed your request, we have not found any elements which could justify the existence of an overriding public interest in the sense of the Regulation, which would outweigh the exceptions stipulated in Article 4(3) of Regulation 1049/2001 mentioned above.

Therefore, we have concluded that access to the aforementioned documents cannot be granted.

We have also examined the possibility of granting partial access to the document concerned in the sense of Article 4(6) of Regulation 1049/2001. However, we have come to the conclusion that this would not be possible, as the documents requested are entirely covered by the exception of Article 4(3) of Regulation 1049/2001, as explained above.

After having examined all comments received from Member States or EEA Members on Draft Proposals on Fair use and Sustainability listed in ANNEX II, we therefore regret to inform you that access cannot be granted.

- **Comments received from other stakeholders, (operators and associations, except BEUC and BEREC contributions n°22 & 60, also listed in ANNEX II)**

As regards **comments received from other stakeholders**, (operators and associations, except BEUC and BEREC contributions n°22 & 60, also listed in ANNEX II) the reason for denying access to these documents is the protection of commercial interests under Article 4(2), first indent, of Regulation 1049/2001, which stipulates that *"The institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, unless there is an overriding public interest in disclosure."*

Use of the exception under Article 4(2), first indent, of Regulation 1049/2001 on the grounds of protecting commercial interests is justified with respect to the aforementioned documents. Its disclosure would allow, in particular, the instructed public to gather important information of business relevance, which would be harmful for the stakeholders that have delivered the opinion. The documents requested contain sensitive information for the sector and their disclosure would give an overall picture of the competitive situation or of commercial priorities. These can also be an indicator for expected investments and general situation of the companies and of the industry as a whole.

Having analysed your request, we have not found any elements which could justify the existence of an overriding public interest in the sense of the Regulation, which would outweigh the exceptions stipulated in Article 4(2), first indent, mentioned above.

We have also examined the possibility of granting partial access to the document concerned in the sense of Article 4(6) of Regulation 1049/2001. However, we have come to the conclusion that this would not be possible, as the documents requested are entirely covered by the exception of Article 4(2) of Regulation 1049/2001, as explained above. Therefore, we have concluded that access to the aforementioned documents cannot be granted.

3. CONFIRMATORY APPLICATION

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/282
B-1049 Bruxelles
or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,



Roberto VIOLA

List of ANNEXES:

ANNEX I

List of relevant Commission COCOM documents related to FUP discussions in COCOM from 09-12/2016

ANNEX II

Comments received from Member States and third parties on Draft Proposals on Fair use and Sustainability between September and December 2016

ANNEX III

Presentation on Draft implementing act on fair use policy and the sustainability mechanism on 30/09/2016

ANNEX IV

Draft implementing act on fair use policy and sustainability mechanism: non-paper on outstanding issues raised by COCOM dated 9 November 2016

ANNEX I

List of relevant Commission COCOM documents related to FUP discussions in COCOM from 09-12/2016

1.	COCOM16-07REV-1	Agenda 64 th COCOM meeting 30 September 2016
2.	COCOM16-10	Draft IA Regulation FUP sustainability
3.	COCOM16-07REV-2	Agenda 64 th COCOM meeting 30 September 2016
4.	S047636/01	Summary record 64th COCOM 30 September 2016
5.		FUP presentation
6.	COCOM16-11	Minutes 64 th COCOM meeting 30 September 2016
7.	COCOM16-12-REV1	Agenda 65 th COCOM meeting 19 October 2016
8.	S047939/01	Summary record 65th COCOM 19 October 2016
9.	COCOM16-15	Minutes 65 th COCOM meeting 19 October 2016
10.	S048503/01	Summary record 66th COCOM 11 November 2016
11.	COCOM16-16	Agenda 66 th extraordinary COCOM meeting 11 November 2016
12.	COCOM16-17	Agenda 67 th COCOM meeting 23 November 2016
13.	COCOM16-18	Minutes 66 th extraordinary COCOM meeting 11 November 2016
14.	S049420/01	Summary record 67th COCOM 23 November 2016
15.		Non-paper FUP sustainability
16.	COCOM16-21	Minutes 67 th COCOM meeting 23 November 2016
17.	COCOM16-17REV-1	Agenda 67 th COCOM meeting 23 November 2016
18.	COCOM16-10REV-1	Modified Draft IA Regulation FUP sustainability
19.	COCOM16-10REV-2	Revised Draft Regulation FUP_Sustainability
20.	COCOM16-22	Agenda 68th extraordinary meeting 7 December 2016
21.	COCOM16-10REV-3	Revised Draft Regulation FUP_Sustainability
22.	COCOM16-10REV-4	Revised Draft Regulation FUP_Sustainability
23.	S048999/01	Summary record 68th COCOM 12 December 2016
24.	COCOM16-23	Minutes 68 th extraordinary COCOM meeting 12 December 2016

ANNEX II

Comments received from Member States and third parties on Draft Proposals on Fair use and Sustainability between September and December 2016

	Member State	Date	Ares
1.	Finland	28/09/2016 7/10/2016	Ares(2016)5610146 Ares(2016)5816193
2.	Austria	6/10/2016	Ares(2016)5807383
3.	Norway	7/10/2016	Ares(2016)5809295
4.	Germany	7/10/2016	Ares(2016)5814303
5.	Malta	7/10/2016	Ares(2016)5814451
6.	Lithuania	7/10/2016	Ares(2016)5814625
7.	Hungary	7/10/2016	Ares(2016)5817015
8.	Latvia	7/10/2016	Ares(2016)5818825

9.	GSMA/ETNO	7/10/2016	Ares(2016)5817397
10.	Poland	7/10/2016	Ares(2016)5818811
11.	Bulgaria	7/10/2016	Ares(2016)5818338
12.	Croatia	7/10/2016	Ares(2016)5818252
13.	Netherlands	7/10/2016	Ares(2016)5831276
14.	Denmark	7/10/2016	Ares(2016)5836821
15.	Portugal	7/10/2016	Ares(2016)5837035
16.	Cyprus	10/10/2016	Ares(2016)5863624
17.	Spain	10/10/2016	Ares(2016)5865689
18.	Sweden	10/10/2016	Ares(2016)5863957 Ares(2016)3769182
19.	Greece	12/10/2016	Ares(2016)5878834
20.	UK	12/10/2016	Ares(2016)5883328
21.	Italy	12/10/2016	Ares(2016)5890624
22.	BEREC	13/10/2016	Ares(2016)5909699
23.	France	19/10/2016	Ares(2016)6028721
24.	Austria	25/10/2016	Ares(2016)6103073
25.	Sweden	30/09/2016 20/10/2016 26/10/2016	Ares(2016)5722652 Ares(2016)6036193 Ares(2016)6133826
26.	SIA BITE Latvija	25/10/2016	Ares(2016)6126780
27.	The Netherlands	25/10/2016	Ares(2016)6112529
28.	Portugal	25/10/2016	Ares(2016)6123710
29.	Croatia	25/10/2016	Ares(2016)6123862
30.	Germany	26/10/2016	Ares(2016)6133236
31.	Norway	26/10/2016	Ares(2016)6133567
32.	Spain	26/10/2016	Ares(2016)6145580
33.	Finland	26/10/2016	Ares(2016)6133464
34.	Poland	26/10/2016	Ares(2016)6134021
35.	Latvia	26/10/2016	Ares(2016)6134101
36.	Belgium	26/10/2016 10/11/2016	Ares(2016)6134169 Ares(2016)6351327
37.	Greece	26/10/2016	Ares(2016)6143648
38.	Hungary	26/10/2016	Ares(2016)6144935
39.	Malta	26/10/2016	Ares(2016)6156526
40.	Italy	27/10/2016	Ares(2016)6168469
41.	Ireland	28/10/2016	Ares(2016)6243321
42.	France	28/10/2016	Ares(2016)6242205
43.	BEUC	31/10/2016	Ares(2016)6239372
44.	Lithuania	2/11/2016	Ares(2016)6236091
45.	Portugal	14/11/2016	Ares(2016)6424374
46.	Spain	15/11/2016	Ares(2016)6424552
47.	Belgium	15/11/2016	Ares(2016)6428603
48.	Slovakia	15/11/2016	Ares(2016)6428856
49.	Italy	15/11/2016	Ares(2016)6430125
50.	Norway	15/11/2016	Ares(2016)6431125
51.	Greece	16/11/2016	Ares(2016)6444262
52.	Lithuania	16/11/2016	Ares(2016)6439793
53.	The Netherlands	16/11/2016	Ares(2016)6439868

54.	UK	16/11/2016	Ares(2016)6439957
55.	Poland	16/11/2016	Ares(2016)6440864
56.	Ireland	17/11/2016	Ares(2016)6487920
57.	France	18/11/2016	Ares(2016)6498106
58.	Telenor	21/11/2016 22/01/2016	Ares(2016)6516160 Ares(2016)6556335
59.	GSMA	21/11/2016	Ares(2016)6530443
60.	BEUC	22/11/2016	Ares(2016)6598304
61.	Portugal	25/11/2016	Ares(2016)6625425
62.	Austria	25/11/2016	Ares(2016)6625958
63.	Hungary	25/11/2016	Ares(2016)6627164
64.	Bulgaria	25/11/2016	Ares(2016)6626195
65.	The Netherlands	25/11/2016	Ares(2016)6626328
66.	Denmark	25/11/2016	Ares(2016)6626461
67.	Croatia	25/11/2016	Ares(2016)6656405
68.	Lithuania	25/11/2016	Ares(2016)6633562
69.	Sweden	25/11/2016	Ares(2016)6633796
70.	Norway	25/11/2016	Ares(2016)6633939
71.	Italy	25/11/2016	Ares(2016)6648906
72.	Slovakia	25/11/2016	Ares(2016)6649123
73.	UK	25/11/2016 28/11/2016	Ares(2016)6650098 Ares(2016)6674486
74.	Belgium	25/11/2016	Ares(2016)6650273
75.	Germany	28/11/2016	Ares(2016)6673309
76.	Finland	28/11/2016	Ares(2016)6673649
77.	Slovenia	28/11/2016	Ares(2016)6673968
78.	Poland	28/11/2016	Ares(2016)6674322
79.	Telenor	28/11/2016	Ares(2016)6661194
80.	France	28/11/2016	Ares(2016)6674620
81.	Spain	28/11/2016	Ares(2016)6674728
82.	Greece	28/11/2016	Ares(2016)6675415
83.	Ireland	28/11/2016	Ares(2016)6674920
84.	Malta	8/12/2016	Ares(2016)6863754
85.	Telenor	9/12/2016	Ares(2016)6889018
86.	Finland	9/12/2016	Ares(2016)6889184
87.	Sweden	9/12/2016	Ares(2016)6889400