Dear Mr Max Bank,

We refer to your request for access to documents pursuant to 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’) that you introduced on 16 February 2021 via email and which was registered on 17 February 2021 under the above-mentioned reference number. We also refer to our holding reply, dated 10 March 2021, our reference Ares(2021)1735562, whereby we informed you that the time limit for handling your application was extended by 15 working days pursuant to Article 7(3) of Regulation 1049/2001.

1. SCOPE OF YOUR APPLICATION

By your application, you request access to the following:

‘Dear DG Communications Networks, Content and Technology,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting:

- All documents - including but not limited to minutes, (hand-written) notes, audio recordings, verbatim reports, operational conclusions, lines to take, e-mails, and presentations - related to the meetings members of DG Communications Networks, Content and Technology below the level of Commissioner and Cabinet have held with interest representatives on the Digital Services Act and the Digital Markets Act (including previous iterations of the proposals such as New Competition Tool and Markets Investigation Tool) since 01 August 2020 until today;
- All correspondence (i.e. any emails, correspondence, telephone call notes, and/or text messages including WhatsApp exchanges) between members of DG Communications Networks, Content and Technology below the level of Commissioner and Cabinet have held with interest representatives on the Digital Services Act and the Digital Markets Act (including previous iterations of the proposals such as New Competition Tool and Markets Investigation Tool) since 01 August 2020 until today.¹

Given the wide-scope of your request, we contacted you on 5 March 2021 with a view to finding a fair solution based on Article 6(3) of Regulation 1049/2001 (our reference, Ares(2021)1661920). In order to help you narrow down the scope of the request, we provided you with the categories of approximately 300 documents that had been identified at that stage. We indicated the steps that the handling of your application would entail and we concluded that according to our estimates a maximum of 15 documents could possibly be dealt with within 30 working days counting from the date of registration of your application.

In your reply you indicate that you do not accept our proposal to restrict the scope to the identification and assessment of 15 documents and you propose to restrict the scope of the request to correspondence and back to office reports.

Please note that the number of documents that correspond to your proposal is very large, thus the scope of your request still remains wide and must be reduced to a manageable amount of documents.

In line with the principles of sound financial management and good administration to which the Commission is bound to pursuant to Article 310(5) of the Treaty on the functioning of the European Union, we are obliged to balance your possible interest in access against the workload resulting from the processing of your application. This is in line with the case law of the EU Courts¹.

We have therefore, as announced in our email of 5 March 2021, restricted the scope of your application to what we could achieve, taking into account the Commission’s resources and the global workload of the concerned staff during the same period, within the given timeframe.

2. DOCUMENTS FALLING WITHIN THE SCOPE OF THE REQUEST

Within the timeframe provided in Article 7 of Regulation 1049/2001 we were able to identify and assess the following documents which fall within the scope of the request after having been restricted as set out above:

- Email from Developers Alliance of 5 November 2020 (Document 1) and its attachment (Document 2)
- Email from AER of 5 November 2020 (Document 3) and its attachment (Document 4)
- Email from ETNO of 7 September 2020 (Document 5) and its attachment (Document 6)
- Email from EuroCommerce of 30 November 2020 (Document 7) and its attachment (Document 8)

¹ Judgment of the Court of Justice of 2 October 2014 in case C-127/13, Strack v Commission, paragraphs 27-28
Following an examination of the identified documents under the provisions of Regulation 1049/2001, we have arrived at the conclusion that full access can be granted to five documents, partial access can be granted to four documents and access is refused to the remaining documents. Partial and full disclosure is prevented by exceptions to the right of access laid down in Article 4 of Regulation 1049/2001. Please note that parts of the documents also fall outside the scope of the request.

A. Full disclosure

Documents 2, 4, 6, 10 and 14 are fully disclosed.

B. Partial disclosure

Full disclosure of Documents 17 and 27 – 29 is prevented by the exception concerning the protection of privacy and integrity of the individual outlined in Article 4(1)(b) Regulation 1049/2001, since they contain the following personal data:

- Names, initials, functions and contact information of natural persons;
Handwritten signatures of natural persons.

Article 9(1)(b) of the Data Protection Regulation does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced. In your request, you do not express any particular interest to have access to these personal data nor do you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

Consequently, I conclude that, pursuant to Article 4(1)(b) Regulation 1049/2001, access cannot be granted to the personal data contained in the requested documents, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

C. Non-disclosure

We regret to inform you that access cannot be granted to Documents 1, 3, 5, 7 – 9, 11 - 13, 15, 16 and 18 – 26 as disclosure is prevented by exceptions to the right of access laid down in Article 4 of Regulation 1049/2001.

(i) Protection of commercial interests

Article 4(2) first indent of Regulation 1049/2001 provides 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.

This provision must be interpreted in light of Article 339 of the Treaty of the Functioning of the European Union (TFEU), which requires staff members of the EU institutions to refrain from disclosing information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

Documents 1, 3, 5, 7 – 8, 10 - 13, 16, 26 and parts of Documents 9 and 15 originate from third parties and refer to the activities and business strategies of third parties. After assessment, we have arrived at the conclusion that disclosure of these Documents would adversely affect the commercial interests of the concerned third parties. Parts of Documents 18 – 25 contain sensitive business information relating to business strategies and other commercial interests of the companies concerned. There is a real and non-hypothetical risk that disclosure of the documents could undermine and seriously affect the commercial interests of these companies.

(ii) Protection of the decision-making process

The first subparagraph of Article 4(3) of Regulation 1049/2001 provides that ‘[a]ccess to a document, drawn up by an institution for internal use or received by the an institution,
which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.’

Documents 1, 3, 5, 7 – 9, 11 - 13, 15, 16 and 18 – 26 contain preliminary views and reflections of the Commission services and of other actors regarding the Digital Services Act package. The above-mentioned Documents were drawn up by the Commission for internal use or were received by the Commission and their content is subject to ongoing discussions and deliberations in the inter-institutional negotiations on the Digital Services Act package. The Commission services must be free to explore all possible options in the run-up to ongoing legislative procedures, which are still at an early stage. The risk of disclosing sensitive information regarding the Commission services’ preliminary views during the ongoing inter-institutional negotiations on the legislative proposals at question would deter them from freely expressing their opinions and having frank, internal discussions. Speculations and misinterpretations of the public on the views and reflections put forward in an early stage of the decision-making process would affect the exploration of different policy options and unduly restrict the Commission’s internal space to think, exposing the Commission to external pressure during the inter-institutional negotiations. The risk of disclosure of these preliminary views and reflections during the ongoing inter-institutional negotiations would therefore seriously undermine the ongoing decision-making process. This risk is also reasonably foreseeable and not purely hypothetical.

We have considered whether partial access could be granted to these documents. However, partial access is not possible considering that the documents are covered in their entirety by the abovementioned exceptions of Article 4 of Regulation 1049/2001. Please note that parts of Documents 1, 3, 7, 9, 11 and 13 also fall outside the scope of the request.

4. **OVER RIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Articles 4(2) and 4(3) of Regulation 1049/2001 apply, unless there is an overriding public interest in the disclosure of documents. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by disclosure. We have examined whether there could be an overriding public interest in the disclosure of documents which are being withheld but we have not been able to identify such an interest.

5. **REUSE OF DOCUMENTS**

Documents 2, 4, 6, 10, 14, 17 and 27 - 29 originate from third parties. Please note that they are disclosed to you based on Regulation (EC) No 1049/2001. However, this disclosure is without prejudice to the rules on intellectual property, which may limit your right to reproduce or exploit the released documents without the agreement of the originators, who may hold an intellectual property right on it. The European Commission does not assume any responsibility from their reuse.
6. CONFIRMATORY APPLICATION

In accordance with Article 7(2) of Regulation (EC) No 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 Secretariat-General of the Commission at the following address:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

Electronically signed

Roberto Viola

Enclosures: (9)