Brussels, March 2021

BSA Position Paper on the Digital Services Act

BSA | The Software Alliance (BSA)[1] welcomes the opportunity to provide input to the Commission's draft Digital Services Act (DSA). BSA is the leading advocate for the global software industry. Our Members are at the forefront of software-enabled innovation that is fueling global economic growth by helping enterprises in every sector of the economy operate more efficiently.

BSA supports the development of relevant policy instruments and smart regulation that strengthen the Digital Single Market in Europe. In this context, **we welcome the Commission's proposal for a DSA** as a good starting point to update the rules provided by the 2000 E-Commerce Directive, and as it strives to strike the right balance between ensuring online responsibility and accountability, while allowing digital businesses to continue to grow and innovate.

The 2000 E-Commerce Directive has played a fundamental role in the development of the DSM, providing a flexible regulatory framework and accounting of the different features and layers of the technology industry. The draft DSA introduces a number of important modifications, such as the so-called Good Samaritan Clause, while safeguarding several of the key elements of the 2000 E-Commerce Directive, such as the intermediary liability principles, the Country of Origin principle and tailored approach to requirements for different types of digital services. **The establishment of new categories of digital services such as online platforms and very large online platforms (VLOPs) subject to a set of enhanced rules, is a step in the right direction** to ensure safeguards and legal certainty, though additional clarifications on the concept of dissemination to the public would be necessary to ensure that the draft DSA achieves its objectives.

Overall, BSA calls upon the Commission and the other co-legislators, to **ensure that the Digital Services Act does not establish obligations that would conflict with requirements of other EU Legislation**, pending or proposed. The EU body of law offers strong safeguards and protection, as well as legal obligations and requirements for service providers. Any new requirements that were to be added by the draft DSA should take into account existing and proposed legislation to ensure harmonization and legal certainty.

More specifically, BSA would like to highlight the following elements:

1) **Dissemination to the public**

   BSA urges the co-legislators to **provide additional clarity around the concept of dissemination to the public**, which is instrumental in the distinction between hosting providers and online platforms. The objective of the proposal is to ensure that digital services have clear and effective rules, while providing proportionate responsibilities

[1] BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry before governments and in the international marketplace. Its members are among the world's most innovative companies, creating software solutions that spark the economy and improve modern life. With headquarters in Washington, DC, and operations in more than 30 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy.
BSA's members include: Adobe, Akamai, Atlassian, Autodesk, Bentley Systems, Box, Cloudflare, CNC/Mastercam, DocuSign, Dropbox, IBM, Informatica, Intel, Intuit, MathWorks, McAfee, Microsoft, Okta, Oracle, PTC, Salesforce, ServiceNow, Siemens Industry Software Inc., Slack, Splunk, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday.

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which are tailored to a specific digital service and risk profile. The current language used to describe the concept of dissemination to the public does not provide the necessary clarifications for all those services that host user-generated content whose defining characteristic is not the dissemination of content. In this context, **BSA would recommend that the Regulation makes it clear that the dissemination to the public of content, as a condition to qualify as an online platform, should be an essential characteristic of the service. Moreover, the dissemination should happen on the service that is to be qualified as a platform, not elsewhere.** This clarification would also be closely linked with the language included at the end of Recital 14 of the proposal, whereby "[i]nformation should be considered disseminated to the public within the meaning of this Regulation only where that occurs upon the direct request by the recipient of the service that provided the information." Recital 14 implies a direct involvement of the recipient of the service to disseminate the content, but it does not clarify that such dissemination should happen on the service itself, in order to qualify as an online platform.

2) Tailored approach to different digital services

BSA welcomes the Commission's decision to maintain, in the draft DSA proposal, the structure of the E-Commerce Directive, taking a **tailored-approach to the different obligations and requirements for different digital services**.

It is essential that the Commission ensures that this structure is maintained during the legislative process. A one-size-fits-all approach that would impose the same rules on all digital services would create disproportionate burdens for many businesses that do not have the ability to view, access or moderate content, or do not disseminate content to the public. Many B2B services providers, for example, do not offer content sharing services for end-consumers or the general public, and therefore may not have the ability to control, edit or curate user-generated content that may appear online. A one-size-fits-all approach would therefore limit the uptake of cloud technologies across businesses and damage the broader data economy.

Furthermore, many B2B services – in particular IaaS - could be classified as hosting service under the proposal, which would entail compliance with the updated notice and action requirements and removal and information orders (Articles 8 and 9 of the draft proposal). Enterprise cloud providers are often not in a position to identify which of their cloud customers' users is associated with content posted online. As a result, an enterprise cloud provider does not always have a direct relationship with the user uploading the alleged illegal content and may not have the ability to take action on the data that is made public. For these reasons, BSA recommends that the proposal includes language clarifying that requests should be sent to the cloud customers first, and only in second instance to the enterprise software provider, to ensure that action can be taken swiftly and by the most appropriate entity.

3) Know Your Business Customer principle

BSA strongly supports the European Commission's approach to the so called Know Your Business Customer (KYBC) principle. **By taking a tailored approach and identifying the specific conduct that it intends to address, the Commission ensures the**

protection of consumers by preventing dishonest businesses selling illegal products online, while avoiding applying inappropriate constraints on business-to-business services. Setting stronger consumer protection rules should first take into account whether the digital services actively provide a business-to-consumer good or service, while balancing the need to safeguard the smoothness and speed of online business operations.

We **would caution policymakers against expanding the proposed scope of these KYBC provisions and requiring that such obligations should be horizontally implemented by all digital services beyond online platforms**. The provision of core services to regulated sectors such as operators of essential services depends entirely on the ability to provide robust cloud solutions that are neither designed nor intended for consumers. Enterprise cloud-based solutions are often offered on a "Pay as You Go" principle, which has contributed to the success and security of the cloud, particularly among small businesses and developers. A large number of those businesses rely on the scalability of cloud solutions to provide their services to their customers, therefore **requiring extensive ex ante identification and verification checks on all businesses subscribing to cloud services, would create significant barriers to the delivery of cloud services in Europe**. Moreover, many B2B cloud services already implement strong safeguards to prevent fraudulent businesses from using cloud services (e.g. contractual obligations in service contracts, security-based services against fraud). Additional and disproportionate KYBC requirements may not only raise privacy and business confidentiality concerns, but could discourage companies, particularly SMEs and start-ups, from moving to the cloud, if held up from accessing services pending clearance.

4) Intermediary Liability

BSA also supports the Commission's decision to maintain the core principles of intermediary liability, as they were established by the E-Commerce Directive. The Directive has greatly contributed to the success of the digital ecosystem, from the internet to cloud services, and the current intermediary liability system – with clearly defined conditions – remains a fundamental aspect of the Digital Single Market. In this respect, we also welcome the decision to maintain the E-Commerce Directive's ban on general monitoring obligations.

5) Country of origin

In addition, the Commission's draft DSA proposal correctly provides for the so-called Country of Origin principle, which has proven to be a fundamental aspect of EU Legislation, originally in the 2000 E-Commerce Directive, and also in the General Data Protection Regulation (GDPR). **BSA recommends ensuring that the Country of Origin principle is retained throughout the legislative process**, as it mirrors the mechanism established by the E-Commerce Directive and GDPR, and would ensure better compliance for all digital service providers. The Country of Origin principle is a long established mechanism to ensure legal certainty for digital services operators, and is applied effectively in diverse sectors across the EU. Retaining the Country of Origin principle in the draft DSA proposal would ensure continuity of regulation between the 2000 E-Commerce Directive, reducing compliance costs and obligations for service

providers and customers, and at the same time incentivizing stronger harmonization between Member States as they implement the DSA.

6) **Good Samaritan Clause**

BSA welcomes the addition of a so-called **Good Samaritan Clause**, as it provides digital service providers with the necessary flexibility of carrying out internal content moderation activities when appropriate, without the risk of losing intermediary liability protections. The current language would incentivize service providers to protect users from harmful and illegal content. At the same time, this would also improve the role and responsibilities of digital service providers, while maintaining the necessary degree of flexibility.

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