Brussels, November 2018

BSA | The Software Alliance ("BSA"),[1] the leading advocate for the global software industry, welcomes the continued efforts of the European Commission to tackle illegal content online and recognises that online platforms have important responsibilities to improve the effectiveness of the fight against terrorist content online, a laudable objective, shared by BSA.

The recent legislative proposal, however, raises numerous concerns for the software industry; in particular, we are concerned about the "one-size-fits-all" approach contained in the provision governing the scope of this draft legislation, which covers a wide range of different services. Such an approach does not recognize the reality that different types of services may require individual responses.

Indeed, the draft Regulation applies to "hosting service providers" ("HSPs") without drawing a distinction between the existence of different types of service providers in today's marketplace. The broad definition currently includes cloud services, E-mail services, social media, app-stores, instant messenger services, web-hosting services, professional networks, news websites with comment functions and software development services. Furthermore, the reference to HSPs making content available to "third parties" (rather than, for example, to "the public"), and the fact that the conduct can be passive, suggests that a wide range of providers will be caught by the draft Regulation, including all cloud infrastructure providers. Consequently, providers offering enterprise cloud services or privately shared cloud services will fall within the scope of the draft Regulation, even though they are generally not used to disseminate content to the public. Many of these services raise significantly different risk profiles with regard to the dissemination of terrorist content and it is our understanding that they were not intended to be covered by the future legislative framework.

BSA therefore encourages the co-legislators to limit the scope of the draft Regulation to exclude providers of business-to-business hosting services for four central reasons:

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[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 60 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, ANSYS, Apple, Autodesk, Bentley Systems, Box, CA Technologies, Cadence, CNC/Mastercam, DataStax, DocuSign, IBM, Informatica, Intel, Intuit, MathWorks, McAfee, Microsoft, Okta, Oracle, PTC, Salesforce, SAS Institute, Siemens PLM Software, Slack, Splunk, Symantec, Trend Micro, Trimble Solutions Corporation, and Workday.*

1. **Technical Limitations:** Business-to-business cloud providers are not in a position to identify which of the enterprise customer's users is associated with objectionable content posted online. Therefore, the cloud service provider would have no other option than to shut down the entire customer's website.
2. **Data Access:** Enterprise cloud providers do not have unfettered access to the data stored in their cloud infrastructure by enterprise customers in a way which would allow them to monitor or filter illegal content and control the data that may be made public;
3. **Risk Assessment:** As the content stored by business-to-business HSPs is often not accessible to the public, there is limited risk of wide-spread dissemination of terrorist content online, making it unnecessary for such service providers to set up the infrastructure and monitoring obligations required by this draft Regulation.
4. **Privacy Considerations:** The right to privacy and data protection must be carefully balanced against the danger of dissemination of terrorist content online. It is important for the majority of users to protect the right to privacy when sharing material on a cloud service, particularly for those services which are designed to have limited or no access for the public. The scope of the proposed draft Regulation should thus exclude those providers whose services are not accessible to the general public.

While BSA supports the objectives of this draft Regulation, the future legal framework should be tailored and limited in scope to avoid capturing all types of HSPs irrespective of how they function or how they are used. Such an approach would allow for competent authorities to focus on those services where the dissemination of terrorist content represents a true threat to society, while simultaneously avoiding placing burdensome costs on business-to-business software entities.

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