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BSA POSITION PAPER ON THE DIGITAL NETWORKS ACT

Strengthening Europe's connectivity rules

The Business Software Alliance (BSA) is the leading advocate for the global software industry before governments and in the international marketplace. Our members[1] are at the forefront of software-enabled innovation that is fueling global economic growth, including cloud computing and AI products and services. BSA's membership includes many of the world's leading enterprise software providers to organizations of all sizes. Throughout the years, our members have heavily invested in creating cutting-edge solutions that support digital transformation across all industries and sectors in Europe.

BSA and its members greatly value the European Union's efforts to stimulate the roll-out of connectivity, as outlined in the Digital Decade 2030 targets. We acknowledge the significant work carried out by many European regions to achieve these goals. As part of these efforts, and keeping in mind the European Commission's White Paper "How to Master Europe's Digital Infrastructure Needs?" (hereinafter: the White Paper), the recently released Digital Networks Act presents both challenges and opportunities, which should be addressed through a pragmatic, business- and consumer-friendly approach.

BSA strongly supports the overall objective of strengthening Europe's infrastructure by promoting connectivity and digitalization. Acknowledging the importance of accelerating connectivity and digitalization as a main driver of growth, BSA members have an important role to play in the European digital ecosystem, empowering companies, governments, and citizens to embrace transformation by leveraging digital tools.

In the specific framework of the Digital Networks Act, BSA supports an open innovation approach, prioritizing the existing voluntary collaboration between the European telecommunications sector and content and application providers (CAPs), as well as cloud computing and content delivery network (CDN) providers. This collaboration guarantees that European businesses have access to cutting-edge technologies, thereby enhancing competitiveness and innovation in the region.

[1] BSA's members include: Adobe, Alteryx, Asana, Atlassian, Autodesk, Bentley Systems, Box, Cisco, Cloudflare, CNC/Mastercam, Cohere, Databricks, DocuSign, Dropbox, Elastic, ESTECO SpA, Graphisoft, Hubspot, IBM, Informatica, Kyndryl, MathWorks, Microsoft, Okta, OpenAI, Oracle, PagerDuty, Palo Alto Networks, Prokon, PTC, Rubrik, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Workday, Zendesk, and Zoom Video Communications, Inc.

As far as the Digital Networks Act is concerned, **BSA recommends the following**:

- Safeguarding the scope of the Digital Networks Act by excluding cloud, CDNs, and CAPs from telecoms rules
- Limiting the scope of the general authorisation regime to providers of **public** electronic communications services
- Preserving the interconnection ecosystem by refraining from creating a (voluntary) cooperation mechanism

1. Safeguarding the scope of the Digital Networks Act: excluding cloud, CDNs, and CAPs from telecoms rules

BSA welcomes the attention the European Commission has shown towards improving overall cloud uptake and the modernization of digital infrastructure in Europe, as well as the willingness to align the Digital Networks Act with the objectives of the future Cloud and AI Development Act.

However, as it currently stands the DNA proposal may be interpreted as incorporating into the scope of European telecoms rules services fundamentally different from those currently covered by the European Electronic Communications Code (EECC), such as cloud services and Content Delivery Networks (CDNs), which are suppliers to Internet Service Providers (ISPs).

This idea poses strong concerns, as **both cloud services and CDNs are fundamentally different from telecommunications services**, and the suggestion that a form of "*convergence*" would exist between these services contradicts the fact that the technologies underlying each of them remain clearly distinct, and are, in fact, complementary to ISPs providing connectivity to end-users. Additionally, extending telecoms rules to all Internet ecosystem participants could lead to increased costs and reduced investment incentives within the EU[2], particularly against a background in which cloud services and CDNs are already heavily regulated under other EU legislation.

BSA therefore believes that it is of the utmost importance to amend the DNA proposal to ensure that under no circumstances may this Regulation be interpreted as including cloud services, Content Delivery Networks (CDNs) and Content and Applications Providers (CAPs) into its scope.

• *Clarifying the notion of "Digital Networks"*

As pointed out by BEREC in its initial assessment of the Digital Networks Act, the notion of 'digital networks' referred to in both the title of the DNA and under Recitals 5 and 16 is not clearly defined in the proposal:

- In the explanatory memorandum to the proposed Regulation, the European Commission states that "*digital networks*" would be "*undergoing a technological transformation whereby cloud and edge computing capabilities are becoming an integral part of connectivity infrastructure*".

[2] As highlighted in Analysys Mason's 2024 report, "*The European telecoms regulatory framework: not a good fit for the public cloud*"

- Recital 16 adds that "*the connectivity ecosystem is expanding*" via the "*technological transformation of electronic communications networks towards digital networks integrating cloud and artificial intelligence ('AI') based solutions"*.

BSA would therefore recommend co-legislators

- to clarify the meaning of "*digital networks*" referred to under Recitals 5 and 16, in light of the explicit Commission indication that "*the DNA does not seek to regulate cloud services*" (explanatory memorandum to the DNA, p.3), to **ensure that future interpretations of the Regulation do not give way to the potential inclusion of cloud services under the areas regulated by the Digital Networks Act**.

- ***Ensuring interconnection rules do not cover CAPs and CDNs***

Carrying out a joint reading of Article 2 and Recital 15, the DNA would appear to expand the notion of interconnection already provided under the EECC to include "*private networks including those owned or operated by content and application providers, including content-delivery infrastructures*". The DNA also refers to both "*private*" and "*public*" electronic communications networks, but lacks clarity in the definition of those terms, and fails to provide examples of which services and goods would be captured under which definition.

Overall, we believe that **the existing regulatory regime should remain intact for the purpose of regulating core telecommunications services**, which are the focus of the DNA, **and should not be extended to distinct underlying technologies,** such as CDNs or cloud services, just because they help improve network functionality or services.

Indeed,

- **CDNs assist internet service providers to efficiently manage traffic and avoid congestion**. CDNs are distributed systems of servers that temporarily store copies (caches) of often-requested online content. Based on commercial arrangements with internet access providers, operators of electronic communication networks and internet exchanges, CDNs co-locate their equipment in third-party data center facilities and rely on connectivity procured by third-party networks.

- **CDNs do not own transmission lines and rely on Internet Service Providers (ISPs), which own the last-mile access to end-users**. CDNs improve the speed and reliability of content delivery by caching content close to end users, but they are not electronic communication networks.

- Albeit less well (and at a higher cost), **networks could function without CDNs,** as they do not provide the underlying connectivity that enables the transmission of electronic signals. CDNs provide a wide range of benefits to the overall distribution of internet traffic, bringing content closer to end-users, improving latency and reducing cost and bandwidth use for website owners.

For these reasons, BSA invites co-legislators:

- To **clarify under Article 2 the definition of public electronic communications networks** by reinstating the notion of 'provider of electronic communications to the public', already foreseen

under the Open Internet Regulation, which is currently set to be repealed under the Digital Networks Act, **as well as by providing a definition of 'private electronic communications networks'.**

- To add a recital providing **detailed examples** to outline the difference between public electronic communications networks and private electronic communications networks. Such recital shall explicitly mention that networks owned or operated by content and application providers, including content-delivery infrastructures, are to be considered **private** electronic communications networks.

- To explicitly state that the notion of 'interconnection' does not concern any providers of electronic communications networks other than providers of **public** electronic communications networks. Content delivery networks (CDNs) and content and application providers (CAPs) provide essentially different services from providers of traditional telecommunications services, and should therefore not be subject to the same obligations under the Digital Networks Act.

- To specify under Article 2(29) that the notion of interconnection refers exclusively to providers of **public** electronic communications networks.

- To amend Recital 15 to reflect the notion that interconnection should only be understood as referring to the technical interconnection between **public** electronic communication networks, without bringing CAPs and CDNs in scope of the DNA.

2. Limiting the scope of the general authorization regime

The infrastructure and delivery methods of cloud, CDNs and telecommunications services are fundamentally different, and innovators in the application layer could be burdened with unnecessary regulations if network digitalization were to be approached from a 'same service, same rules' perspective by adding new rules to an already extensive body of existing digital legislation. Excessive regulation on the application layer would be counterproductive, stifling innovation by creating an overregulated business ecosystem, increasing the cost of application layer services, and ultimately impacting both businesses and consumers.

As a general approach, telecommunications services should not be equated with cloud-based services, and Number-based interpersonal communications services (NBICS) should not be placed under the same rules as Number-independent interpersonal communications services (NIICS). **BSA therefore welcomes the clarification, under Article 9(3), that the general authorization regime shall not apply to number-independent interpersonal communications services (NIICS**).

Overall, the existing regulatory regime should remain intact for the purpose of regulating core telecommunications services, which are its focus, and should not be extended to distinct underlying technologies such as CDNs or cloud services just because they help improve network functionality or services. Similarly, it should be explicitly stated that Title III on end-user rights should not apply to providers of commercial software, given that the end-users of commercial software are companies, and not consumers.

BSA sees as particularly worrying the Commission's implication that CDNs and CAPs may be captured under the general authorization regime within the meaning of Article 9. Indeed, **this principle would entail concerning outcomes**, such as equating providers of electronic communications to the public and providers of private electronic communications networks. **These potentially harmful consequences would also expand beyond Article 9**, forcing CDNs and CAPs to be subject not only to the general authorization regime, but also to the mandatory dispute resolution mechanism foreseen under Article 189.

As such, BSA calls on co-legislators:

- To **clarify that the general authorization regime, on top of not applying to NIICS in general, shall not apply to CDNs, CAPs, and cloud services in particular**, either.
- To strictly limit the general authorization regime to providers of **public** electronic communications services by removing the sentence "*and providers of electronic communications networks used, wholly or mainly, for the purpose of providing electronic communications services or information society services available to the public*" from Article 9(2).
- To remove Recital 42 altogether, or at least restrict it to public electronic communications networks providers, so as to ensure that commercial CDNs are exempted from the general authorisation regime.
- To explicitly state, under Recital 43, that the general authorisation regime should not apply to networks that do not have the main purpose of supporting the provision of publicly available electronic communication or digital services.
- To amend Article 189(1) so as to ensure that CDNs and CAPs are not captured under the mandatory dispute resolution mechanism as a consequence of the expanded scope of the general authorisation regime under Article 9.
- To explicitly state that providers of B2B software shall not be subject to end-user rights and obligations under Title III of Part VI by amending Article 101.

3. Preserving the interconnection ecosystem by refraining from creating a (voluntary) cooperation mechanism

BSA welcomes the Commission's decision not to insert into the DNA proposal direct network fees / a 'fair share' mechanism, as requested by the vast majority of stakeholders in response to both the European Commission's White Paper "*How to Master Europe's Digital Infrastructure Needs?*" and the Call for Evidence for a Digital Networks Act.

In the White Paper, the European Commission had acknowledged that the IP interconnection market is characterized by direct and cooperative interactions between Content and Applications Providers (CAPs) and internet service providers (ISPs). In that instance, the Commission had observed in particular that there are "*very few known cases of intervention (by a regulatory authority or by a court) into the contractual*

relationships between market actors that generally functions well, and so do the markets for transit and peering."

However, and despite these preconditions, the DNA proposal introduces under Articles 191 to 193 a 'voluntary conciliation' system which would allow "providers of electronic communications networks or other undertakings active in the electronic communications or closely related sectors" to ask national regulatory authorities to convene a "*conciliatory meeting*" (Article 192(1)). Following the "*conciliatory meeting*", national regulatory authorities would involve the Body of European Regulators for Electronic Communications (BEREC) into the dispute. BEREC would then be tasked with issuing an opinion on the functioning of and cooperation within the interconnection ecosystem (Article 192(2)). Based on this opinion, the abovementioned national regulatory authorities would provide the parties to the dispute with options for next steps (Article 192(3)).

As the proposal currently stands, the conciliation mechanism would be voluntary. Unfortunately, though, **the mere existence of such mechanism carries the potential for confusion at best, and of unnecessary market disruption at worst**.

While BSA believes that it is positive that such mechanism would be voluntary, we also see a number of **challenges** with both its **implementation** and its **possible evolution** in the future.

Moreover, the "*voluntary*" nature of the conciliation mechanism relies on uncertain grounds. Indeed, the involvement of NRAs and BEREC in the conciliation mechanism is expected to create political and regulatory pressure on cloud and content providers to pay for peering, even if they do not partake in the voluntary scheme. This would lead cloud and content providers to feel somewhat compelled to partake in the conciliation mechanism, despite the original intention to make participation in such mechanism voluntary.

- *The DNA should avoid inefficiency in the interconnection market and/or the evolution of the voluntary conciliation mechanism towards a mandatory one*

BSA warns co-legislators against creating a 'conciliation mechanism' that public electronic communications networks may leverage against providers of electronic communications networks other than public:

- First, the DNA proposal fails to mention what would happen if one of the parties involved refused to take part in the voluntary conciliation mechanism, or to comply with the solutions proposed by the national regulatory authority at the end of the process. The unclear design of the procedure would thus entail **legal uncertainty for all the parties concerned.** It is worth noting that such lack of clarity was also highlighted in BEREC's Early Assessment of the Digital Networks Act.

- Furthermore, **the fact that the conciliation mechanism would be voluntary is likely to lead to intrinsic difficulties in its functioning**, namely when it comes to enforcing the decisions stemming from this mechanism.

- The DNA also foresees, under Article 193, the possibility that **the European Commission may modify the conciliation mechanism in the future**, should BEREC deem that such mechanism would be inefficient in its future report on the general ecosystem cooperation and on the functioning of the voluntary conciliation mechanism, expected 24 months after the application date of the DNA.

- Against the background of a voluntary conciliation mechanism with no clear rules around enforcement, **BEREC's report may conclude**, contrary to the opinions that the institution has delivered so far, **that the general ecosystem cooperation is insufficient, and that the voluntary conciliation mechanism should therefore become mandatory** – something which would **ultimately amount to the introduction of network fees**, which would be both detrimental to the EU internet ecosystem and at odds with the EU's commitments in the US-EU framework on an agreement on reciprocal, fair and balanced trade.

- *The IP interconnection market does not need to be repaired*

  - As a general consideration, the voluntary conciliation mechanism was not part of the consultation exercises the European Commission carried out after the release of the White Paper and prior to the release of the Digital Networks Act. The proposal to introduce a voluntary conciliation mechanism was therefore put forward without relying on specific stakeholder input.

  - Moreover, Articles 191 to 193 **do not explain which issues may legitimately lead to an arbitration request**.

  - The potential causes for triggering the voluntary conciliation mechanism can be found under Recital 403, which states that "*agreements [...] concerning the hand-over of traffic should not lead to disproportionate or economically unsustainable investment needs for network providers, and the benefits arising from increased traffic should be shared in a manner conducive to continued investment, innovation and network resilience*".

  - Additionally, Recital 164 acknowledges that "*providers of electronic communications networks other than public*" would not have direct "*obligations on access and interconnection*", but it also states that those providers may be responsible for "*disproportionate or unsustainable investment needs for the receiving providers of public electronic communications networks*" due to the traffic that they "*hand over*" to public electronic communications networks "*in the form of peering or transit*". Recital 164 then adds that these matters may be addressed via the voluntary conciliation mechanism, incentivizing ISPs to bring "***disputes*" arising from what could be interpreted as the handling of normal internet traffic**.

  - The text of Recitals 164 and 403 appear at best at odds, and at worst **in open contradiction with BEREC Report's observation that the IP Interconnection market works well**, noting that "*a few IP-IC disputes have occurred since 2017*", "*the IP-IC bargaining situation between market players seems balanced*", and that the IP-IC ecosystem "*is still driven by functioning market dynamics and by the cooperative behavior of market players*."

- *Network fees and a dispute resolution mechanism are not a solution*

  - Both 'network fees' and a so-called dispute resolution or arbitration mechanism, which would inevitably lead to network fees, may have unintended consequences on numerous types of

stakeholders in the wider internet ecosystem[3], were the currently suggested voluntary mechanism become mandatory.

- As an example, third-party CDNs play a positive role in the EU eco-system by caching popular content locally, often in partnership with ISPs. This form of cooperation reduces the internet traffic ISPs must carry and allows consumers to have access to a more efficient service without paying extra costs. If CDNs were forced to pay network fees to ISPs, however, they would risk being pushed out of the EU market, thereby harming the entire European internet ecosystem, including ISPs and internet users.

- Furthermore, the introduction of a dispute resolution mechanism, especially if such mechanism were to become mandatory in the future, would undermine net neutrality and the EU's Open Internet principles. Such a mechanism would also jeopardize open access, and ultimately lead to the fragmentation of the Internet and the digital single market. As pointed out by a range of relevant stakeholders, very important protections for Net Neutrality came from the judicial interpretation of some essential recitals under the Open Internet Regulation. The decision not to include such recitals under the DNA is therefore worrying, as it risks strongly undermining the efficiency of Net Neutrality rules.

- Any form of interconnection fee would harm European businesses and consumers by driving up costs, limiting choice and access to information, and undermining the affordability, quality, and diversity of digital products and services available to them. **Interconnection fees, both direct and indirect, would only benefit large incumbent telecommunications providers, to the detriment of the entire European ecosystem, including end-users**.

For these reasons, BSA urges co-legislators:

- To ensure that **no arbitration mechanism, both voluntary and mandatory, and/or network fees, be included in the future DNA**.

- To **remove Articles 191-193, as well as their respective recitals, and particularly Recital 403,** from the current DNA legislative proposal.

- To amend Recital 164 to **ensure that providers of electronic communications networks other than public would not be subject to disputes arising from the handling of normal internet traffic**.

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[3] As shown in "*Study on the negative impacts of mandated dispute resolution in IP Interconnection*", Plum Consulting, 2025