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## **EXECUTIVE SUMMARY OF ASSESSMENTS OF THE SCOPE OF THE DSA**

### **1 Introduction**

Advokatfirmaet Simonsen Vogt Wiig ("we" or "SVW") assists Norid AS ("Norid") with legal assessments regarding compliance with regulatory requirements. Norid has asked us to assess whether the EU Digital Services Act<sup>1</sup> (hereinafter also the "DSA") will apply to Norid's services. To this effect, we have prepared a memo dated 1 March 2024, and the assessments and conclusions in that memo are summarized herein.

### **2 Norid's services**

To determine whether the DSA will apply to Norid's activities, we must assess whether Norid is a provider of "intermediary services", as discussed below. To carry out this analysis, we must first describe the services provided by Norid, as summarized below:

- Norid operates the registry for Norwegian top-level domains (.no, in addition to .bv and .sj which are not open for registration). Norid essentially provides two services: The name server service and the registration service.
- The name server service consists of Norid administrating the name servers for .no as part of the Domain Name System ("DNS"), i.e. the technical infrastructure that makes it possible to access content and services by using the relevant domain name instead of the IP address of the server where the content or service is stored. Norid does not store the content of websites etc. in connection with the administration of the name servers for .no.
- The registration service is linked to, but distinguishable from the name server service. Norid manages and administrates the Norwegian top-level domains and has the right to allocate domain names in accordance with the Norwegian Domain Name Regulations.<sup>2</sup> Norid is not a public administrative agency, and the allocation of domain name subscriptions is based on private law.

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<sup>1</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

<sup>2</sup> Regulations on domain names under Norwegian top-level domains of 1 August 2003 no. 990 Sections 2 litra b and 3 first paragraph.

### 3 Whether the DSA will apply to Norid's activities

#### 3.1 Introduction to the scope of the DSA

The DSA is an EU regulation that must be implemented into national law in order to apply in the EFTA countries, including Norway. As the DSA has not yet been implemented into Norwegian law, assessments must be made of the interpretation of the DSA as such. The DSA however builds on and partially amends the E-Commerce Directive (Directive 2000/31/EC). The E-Commerce Directive will still apply, but the intention is for the DSA to address changes and challenges resulting from developments over the past 20 years. The E-Commerce Directive has been implemented in Norwegian law through the E-Commerce Act. Therefore, it will also be relevant to consider how relevant definitions and terms used in both the DSA and the E-Commerce Directive are already incorporated into Norwegian law and interpreted in practice in relation to the E-Commerce Act.

The scope of the DSA is set out in Article 2 and several key terms are defined in Article 3.

DSA Article 2 reads:

1. *This Regulation shall apply to intermediary services offered to recipients of the service that have their place of establishment or are located in the Union, irrespective of where the providers of those intermediary services have their place of establishment.*
2. *This Regulation shall not apply to any service that is not an intermediary service or to any requirements imposed in respect of such a service, irrespective of whether the service is provided through the use of an intermediary service.*
3. *This Regulation shall not affect the application of Directive 2000/31/EC.*
4. (...)

Thus, the DSA applies to "intermediary services" that are offered to recipients established or located in the EU. The DSA does not apply to services that cannot be considered "intermediary services". The application of the DSA does not affect the application of the e-Commerce Directive.

An initial question to be clarified is then whether Norid's services constitute "intermediary services" within the meaning of the DSA. The term "intermediary services" is defined as follows in the DSA Article 3 point (g) [our underlining]:

- (g) 'intermediary service' means one of the following information society services:*
- (i) a 'mere conduit' service, consisting of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network;*
  - (ii) a 'caching' service, consisting of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request;*
  - (iii) a 'hosting' service, consisting of the storage of information provided by, and at the request of, a recipient of the service;*

It must be noted that the wording of the definition does not state, for example, that the services provided by registries shall always be considered as intermediary services. Rather, the provision indicates that it must be assessed on a case-by-case basis whether a specific service is included or not. To be an

intermediary service, one main criterion and one of three alternative criteria must be met. Firstly, the service must be an information society service. Secondly, the service must either be a 'mere conduit', 'cashing' or 'hosting' service. Whether the main criterion and one of the alternative criteria are met, depend on an interpretation of the service in question.

### 3.2 The main criterion: Information society service

The main criterion for Norid's activities to fall under the DSA is thus that Norid must be considered to provide an *information society service*. As previously mentioned, the DSA is intended to build on and partially adapt the E-Commerce Directive implemented in Norwegian law through the E-Commerce Act. Several of the key definitions in the DSA are similarly formulated in the E-Commerce Directive. Among these, the definition of "information society service" in the DSA is equivalent to that in the E-Commerce Directive.

Our clear understanding is that the prevailing interpretation and practice to date have been that Norid is not considered to fall within the scope of the term "information society service" set out in the E-Commerce Act. As outlined above, Norid's activities are twofold and relate to i) the name server service and ii) the registration service. According to our understanding, neither of these services naturally falls within the scope of the term "information society service" how this has been practiced in Norway.

The fact that Norid's activities as a registry entity are not considered to fall within the concept "information service provider" under the E-Commerce Act is also clearly expressed, among other in the preparatory works to the Norwegian Marketing Act, that includes references to the E-Commerce Act and that states among other that "[...] an 'information society service' is any service normally provided for remuneration, and which is transmitted electronically, over a distance and at the individual request of a service recipient, as well as any service consisting of providing access to, or transmitting information over, an electronic communications network, or being a network for data provided by the service recipient, cf. the E-Commerce Act § 1 paragraph 2 letter a and b. This means that both hosting service providers and internet service providers are generally considered "service providers" and thus covered by the exemption rules in the E-Commerce Act. Register entities for top-level domains are generally excluded from the exemption rules of the E-Commerce Act. The same applies to domain dealers, unless they also offer other activities that may involve storing or transmitting information and the specific service is considered an information society service under the E-Commerce Act § 1 paragraph 2." [our underlining].

Despite the principle that the DSA must be interpreted independently of the E-Commerce Directive and national implementations, it is likely that the Norwegian legislator will refer to interpretation and practice around the key concepts in the E-Commerce Act also when implementing the DSA into Norwegian law.

Further we notice that, for the definition of "information society services", the DSA refers to the definition of in EU Directive 2015/1535 Article 1(1) point (b), cf. the DSA Article 3 point (a) [our underlining]:

*'service' means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.*

*For the purposes of this definition:*

*(i) 'at a distance' means that the service is provided without the parties being simultaneously present;*

(ii) 'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

(iii) 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex I;

The provision sets out several criteria that must all be fulfilled for a service to be an Information Society service.

With regard to the criteria 'at a distance' and 'by electronic means', it is our view that these are likely met for Norid's name server service and the registration service, as these services are provided electronically without the service recipient being present where Norid operates. However, we do not consider that Norid's services meet the latter two criteria of "normally provided for remuneration" and "at the individual request of a recipient of services." In line with the definition quoted above, the criterion "at the individual request of a recipient of services" implies that the service must be delivered through the "transmission of data" upon individual request from a service recipient.

Even though it can be argued in principle that the function of the name server service and the underlying infrastructure of the name server support some form of transmission initiated upon request from a service recipient, the services provided do not involve any transmission of data as presupposed by the DSA. As explained above, the function of the name server service is solely to connect a domain name and an associated IP address. Although this activity involves processing of certain information about the domain name and some purely technical data related to it, this activity, in our understanding, can hardly be characterized as a transmission of data as such. The same applies to the registration service that in our view clearly does not involve any data transmission as presupposed by the definition.

Further, we do not believe that the condition "normally provided for remuneration" is applicable to Norid's services. Indeed, Norid charges for the registration service, but the payment is made by the domain dealers, while the domain dealers charge the subscribers. Norid does not receive any payment from the subscribers. Furthermore, the name server service itself is provided without Norid charging for it, neither from the domain dealers, subscribers, nor the public. We also note that in our view, the wording related to "normally provided for remuneration" is ambiguous and unclear. The corresponding term in the e-Commerce Directive was interpreted by the EU Court of Justice inter alia in the Mc Fadden decision (our emphasis):

*"That conclusion is borne out by recital 18 of Directive 2000/31 which states that, although information society services are not solely restricted to services giving rise to online contracting but extend to other services, **those services must represent an economic activity.***

*Nonetheless, it does not follow that a service of an economic nature performed free of charge may under no circumstances constitute an 'information society service' within the meaning of Article 12(1) of Directive 2000/31. The remuneration of a service supplied by a service provider **within the course of its economic activity does not require the service to be paid for by those for whom it is performed** (see, to that effect, judgment of 11 September 2014, Papasavvas, C-291/13, EU:C:2014:2209, paragraphs 28 and 29)."<sup>3</sup>*

<sup>3</sup> Case C-484/14, Tobias Mc Fadden v Sony Music Entertainment Germany GmbH, paragraph 40 and 41.

According to the Court, the service must represent an economic activity. Despite the Court seem to make a point to that a service may constitute an economic activity even though it is paid for by others than those for whom the service is performed, in our view it is far from clear from the decision what qualifies as an economic activity and what does not. Further, we note that the service assessed in the Mc Fadden decision was the operation of a wireless local area network (WLAN), and thus a service of a very different nature than those provided by Norid. Hence, in our opinion, the decision provides us only very limited guidance on how the condition "normally provided for remuneration" shall be interpreted in relation to Norid's services.

In summary, regarding the main criterion, "information society services", we believe that Norid's services does not qualifies as such. A conclusion in that direction would contradict a natural understanding of Norid's services and will also conflict with how the term "information society service" has been interpreted in Norwegian law through the E-Commerce Act. Furthermore, our interpretation of the legal definition "information society services" within the meaning of EU Directive 2015/1535 Article 1(1) point (b), cf. the DSA Article 3 point (a) clearly suggests that Norid's services do not meet the conditions that must all be met to fall in scope of the regulation.

### 3.3 Additional criteria: 'mere conduit', 'caching' and 'hosting' services

Regardless, even if one were to assume that Norid's services must be considered as information society services, this alone would not be sufficient for Norid to fall within the scope of the DSA. It is not sufficient that services are "information society services" to constitute an "intermediary service" within the meaning of the DSA. To be an intermediary service within the DSA's scope, at least one of the additional, alternative criteria must also be met.

As previously discussed, DSA Article 3 point (g) sets out three types of intermediary services, 'mere conduit', 'caching' and 'hosting', which entail the following:

- (i) a 'mere conduit' service, consisting of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network;*
- (ii) a 'caching' service, consisting of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request;*
- (iii) a 'hosting' service, consisting of the storage of information provided by, and at the request of, a recipient of the service[.]*

Accordingly, a hosting service entails storage of information that has been provided by and at the request of the service recipient. A caching service entails transmission of information provided by the service recipient in a communication network, and the transmission must involve automatic, intermediate and temporary storage of the information in question. The purpose of the caching is to make more efficient the onward transmission of the information to other recipients. A 'mere conduit' service is either 1) transmission of information provided by the service recipient in a communications network or 2) provision of access to a communication network.

Several of the recitals to the DSA mention registries and DNS services. Recital 28 states (our emphasis):

*Since 2000, new technologies have emerged that improve the availability, efficiency, speed, reliability, capacity and security of systems for the transmission, 'findability' and storage of data online, leading to an increasingly complex online ecosystem. In this regard, it should be recalled that providers of services establishing and facilitating the underlying logical architecture and*

*proper functioning of the internet, including technical auxiliary functions, can also benefit from the exemptions from liability set out in this Regulation, **to the extent that their services qualify as 'mere conduit', 'caching' or 'hosting' services.** Such services include, **as the case may be, wireless local area networks, domain name system (DNS) services, top-level domain name registries,** registrars, certificate authorities that issue digital certificates, virtual private networks, online search engines, cloud infrastructure services, or content delivery networks, that enable, locate or improve the functions of other providers of intermediary services. Likewise, services used for communications purposes, and the technical means of their delivery, have also evolved considerably, giving rise to online services such as Voice over IP, messaging services and web-based email services, where the communication is delivered via an internet access service. Those services, too, can benefit from the exemptions from liability, **to the extent that they qualify as 'mere conduit', 'caching' or 'hosting' services.***

Our interpretation of the recital is that it is possible that DNS services, top-level domain name registration services and the like can fall within the scope of the DSA, but that is not necessarily the case. Whether a service qualifies, depends on a specific assessment of whether the service is either 'mere conduit', 'caching' and 'hosting' or neither of these. This must be determined for each service. Thus, recital 28 does not provide specific guidance as to whether *Norid's registration and name server services* fall within the scope. The recital only indicates that specific assessments must be made. We also refer to recital 29 of the DSA (our emphasis):

*Intermediary services span a wide range of economic activities which take place online and that develop continually to provide for transmission of information that is swift, safe and secure, and to ensure convenience of all participants of the online ecosystem. For example, 'mere conduit' intermediary services include **generic categories of services,** such as internet exchange points, wireless access points, virtual private networks, **DNS services and resolvers, top-level domain name registries,** registrars, certificate authorities that issue digital certificates, voice over IP and other interpersonal communication services, while generic examples of 'caching' intermediary services include the sole provision of content delivery networks, reverse proxies or content adaptation proxies. Such services are crucial to ensure the smooth and efficient transmission of information delivered on the internet. Examples of 'hosting services' include categories of services such as cloud computing, web hosting, paid referencing services or services enabling sharing information and content online, including file storage and sharing. Intermediary services may be provided in isolation, as a part of another type of intermediary service, or simultaneously with other intermediary services. **Whether a specific service constitutes a 'mere conduit', 'caching' or 'hosting' service depends solely on its technical functionalities, which might evolve in time, and should be assessed on a case-by-case basis.***

Based on its wording, the recital merely indicates that generally speaking, services such as DNS services and resolvers and top-level domain name registries *may* potentially constitute 'mere conduit'. The recital emphasizes that services within generic categories can vary and that whether a specific service is included or not, must solely be determined on a case-by-case basis taking into account the technical functionalities of the service in question. The cited recitals therefore merely stress what already follows from the wording of the DSA Article 3 point (g); whether a service falls within the scope must be decided on a case-by-case basis.

The question is then whether Norid's registration service and/or name server service are 'mere conduit', 'caching' or 'hosting' – or neither of these.

We first consider the second alternative of 'mere conduit', namely provision of access to a communication network. Norid's registration service entails that legal and natural persons can subscribe

to a domain name under .no subject to certain terms and conditions. The subscription will neither provide subscribers or others with access to nor prevent them from accessing the internet or other communication networks. Similarly, the provision of Norid's name server service will not afford the internet user access to the internet or other communication networks; the name server service will rather make it easier and more efficient to access content and services on the internet because the domain name can be used instead of the IP address of the server. Thus, we do not consider Norid's services to constitute access to a communication network.

A common requirement for the other alternative criteria – both for 'mere conduit', 'caching' and 'hosting' – is that the service entails processing of *information provided by a recipient of the service*. That the information must be provided by the recipient of the service indicates that information provided by others, such as by the service provider, is irrelevant. However, beyond this, the wording of DSA Article 3 point (g) provides limited guidance on the interpretation of the term. The term is not defined in the DSA. Therefore, to understand the meaning of the terms, we must refer to the context of the term and how it is used elsewhere in the DSA. For example, in Article 4 on 'mere conduit', the term is used in relation to a sender, a recipient and a content in the transmission of the information.<sup>4</sup> Similarly, in Article 6 on hosting services, the term is used in relation to illegal activities and illegal content.<sup>5</sup> In our interpretation, the context the term is used in elsewhere in the DSA indicates that "information provided by a recipient of the service" does not encompass any possible type of information. The information must have a modicum of meaning or content that can be or be linked to illegal activities or illegal content.

We consider that this interpretation aligns with the purpose of the DSA:

*The aim of this Regulation is to contribute to the proper functioning of the internal market for intermediary services by setting out harmonised rules for a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected.*<sup>6</sup>

Recital 12 of the DSA provides further guidance on this purpose (our emphasis):

*In order to achieve the objective of ensuring a safe, predictable and trustworthy online environment, for the purpose of this Regulation **the concept of 'illegal content' should broadly reflect the existing rules in the offline environment**. In particular, the concept of 'illegal content' should be defined broadly to cover **information relating to illegal content, products, services and activities**. In particular, that concept should be understood to refer to information, irrespective of its form, that under the applicable law is either itself illegal, such as illegal hate speech or terrorist content and unlawful discriminatory content, or that the applicable rules render illegal in view of the fact that it relates to illegal activities. Illustrative examples include the sharing of images depicting child sexual abuse, the unlawful non-consensual sharing of private images, online stalking, the sale of non-compliant or counterfeit products, the sale of products or the provision of services in infringement of consumer protection law, the non-authorized use of copyright protected material, the illegal offer of accommodation services or the illegal sale of live animals. In contrast, an eyewitness video of a potential crime should not be considered to constitute illegal content, merely because it depicts an illegal act, where recording or disseminating such a video to the public is not illegal under national or Union law. In this regard, it is immaterial whether the illegality of the information or activity results from Union law or from national law that is in compliance with Union law and what the precise nature or subject matter is of the law in question.*

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<sup>4</sup> DSA Article 4 (1) point (a) to (c).

<sup>5</sup> DSA Article 6 (1) point (a) and (b).

<sup>6</sup> DSA Article 1(1).

The recital underlines what we understand to be at the core of the scope of the DSA, namely information that may constitute illegal content or relate to illegal activities.

It must thus be examined whether the information provided by the recipient of Norid's registration and name server services constitutes "information provided by a recipient of the service". We note that only information provided by the service recipient, and not by for example Norid, is of relevance.

In terms of the registration service, it is possible to argue that the subscriber and/or the registrar is the service recipient. In any case, the information provided by these actors is very limited. In brief, the information concerns identification data (e.g. name) and contact data, the domain name and technical information relating to the domain name and the subscription. With regard to the name server service, Norid only receives the *.no domain name* from the recipient of the service (which we consider to be the internet user that is using DNS to look up a *.no domain name*).

In our view, this type of information is not information intended to fall within the term "information provided by a recipient of the service". It is not or to a very limited extent possible for this information in itself to be illegal content or relate to illegal activities. The information Norid receives, does not relate to content per se, but is intended as basic contact information and technical information necessary to maintain the subscription. As previously discussed, Norid has no involvement with the content of the websites or services with *.no* subscriptions. The administration and management of the registration service and the name server service do not afford Norid the possibility to transmit or control the content on such websites or services. Even if Norid de-registers the domain name linked to a server storing illegal content or relating to illegal activities, the content will not be deleted and the illegal activity will not cease, the server will only not be as easily accessible.

Our interpretation is therefore that based on the wording, context and purpose of the DSA, the DSA's definition of "intermediary service" is not intended to encompass services such as Norid's name server and registration services that are not intended to transmit any content, only enable the technical functionality of the DNS protocol. Therefore, we consider that Norid's services do not include "any "information provided by a recipient of the service" within the meaning of DSA Article 3 (g), and therefore, that Norid's services do not meet any of the alternative additional criteria for an "intermediary service".

Based on these considerations, our conclusion is that Norid's services are not intermediary services within the meaning of the DSA, and Norid falls outside the scope of the DSA.

This conclusion does not entail that no domain name system services, top-level domain name registry services or the like fall within the scope of the DSA. Our understanding is that registries across the world may have varying responsibilities and provide services with different technical functionalities and scope than Norid. As stated above, it must be assessed separately for each service whether or not it is covered by the DSA.

To summarize, our interpretations of the scope of the DSA are that:

- Domain name system services, top-level domain name registry services etc. cannot automatically be considered as intermediary services. Whether a service is an "intermediary service" within the meaning of the DSA must be assessed based on the nature and technical functionalities of the service in question.
- Based on the nature and functionality of the services provided by Norid, Norid's services cannot be considered as information society services as defined in the DSA. Our assessment is that Norid



does not provide access to a communication network nor transmit or store any relevant information provided by a recipient of the service, based on an interpretation of the wording, context and purpose of the DSA provisions. Thus, we consider that Norid's services are outside the scope of the DSA.

- Services provided by other registries may or may not be within the scope of the DSA. This must be assessed on a case-by-case basis.