THE IMPLEMENTATION OF THE DIGITAL SERVICES ACT IN NORWEGIAN LAW

To: Norid AS

From: Advokatfirmaet Schjødt AS

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1. INTRODUCTION

Norid AS ("**Norid**") has asked Advokatfirmaet Schjødt AS ("**Schjødt**", "**us**", "**we**") to prepare a memo on the implementation of the Regulation (EU) 2022/2065 (the "**Digital Services Act**", "**DSA**") in Norwegian law. The memo contains an assessment of whether Norid is and should be subject to the provisions of the DSA, and especially whether Norid can be considered an "*intermediary service*".

2. BACKGROUND

On 15 December 2020, the European Commission submitted a draft of the DSA to the European Parliament. The European Parliament approved the DSA (together with the Digital Markets Act) on 5 July 2022, and the European Council gave its final approval of the DSA on 4 October 2022. The DSA was then published in the Official Journal of the European Union on 27 October 2022, and entered into force 20 days after this, i.e., on 16 November 2022. After the DSA was published in the Official Journal of the European Union, discussions regarding the DSA's relevance and the need for any exemptions were initiated in the ministries' special committee for EEA matters. It is expected that the DSA will enter into force in Norway on 1 January 2024 by implementation into the Norwegian eCommerce Act (the "**eCommerce Act**").

Norid is following the ongoing legislative processes regarding ICT security and other legislation that may impact Norid's responsibility as registry of the Norwegian country code top-level domains. In this memo, we intend to share relevant legal reflections related to revised and new provisions of the eCommerce Act. Norid's activities are not subject to the current eCommerce Act.

The DSA includes the following categories of providers:

- All intermediary services e.g., ISPs, caching, hosting
- Services that store content (hosting services) e.g., web hosting, cloud services, etc.
- Internet-based platforms (online platforms), except for micro and small businesses
- The largest Internet-based platforms (very large online platforms)

Norid is not comprised by any of these categories of providers. Thus, in principle, the implementation of the DSA into Norwegian law will not entail that Norid becomes subject to the legislation. However, recital 28 of the DSA has caused some uncertainty in this respect.

In recital 28, it is stated that (italics and emphasis added):

> *"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."*

The recital states that several providers may be subject to the legislation provided that these can be considered an intermediary service. The wording suggests that this may also apply to top-level domain name registries, depending on whether the service can be considered an intermediary service.

Norid is the registry for the Norwegian country code top-level domains .no (Norway), .sj (Svalbard and Jan Mayen) and .bv (Bouvet Island) and has, in accordance with the agreement with the international administrator of top-level domains, the right to assign, manage and register domain names under these top-level domains. Hence, the question arises as to whether recital 28 entails that Norid can be subject to the legislation after implementation of the DSA.

In light of recital 28, it is natural to address recital 29. Here, it is stated that (italics and emphasis added):

> *"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.****"*

The recital lists several types of services that under certain circumstances *can* be considered to fall within the DSA's scope. Finally, it is stated that whether an entity falls within or outside the scope of the DSA will depend on a specific assessment of the service' technical functionalities. This makes sense as the eCommerce legislation applies to different types of businesses and services. In addition, the DSA applies to companies in different countries. Consequently, each individual service and the service's functionalities must be assessed specifically to determine whether the service (and thus the specific legal entity) is subject to the DSA.

3. THE LEGAL IMPORTANCE OF RECITALS

As it is the recitals of the DSA that cause legal uncertainty, it is relevant to clarify the legal importance of such recitals. In the book "*Oversikt over EØS-retten*" (Eng.: Overview of the EEA law) (Arnesen et al) it is stated that the recitals can reflect the purpose of the legislation and at the same time explain the context in which the provisions are to be interpreted. Inter alia, it is stated that (office translation with italics and emphasis added):

> *"The so-called recitals, or "preamble" as it is also called,* ***can provide important interpretive contributions*** *in all respects,* ***even if the preamble itself is not part of the regulation and is thus not legally binding either****."*

Accordingly, the preamble can be useful support in the interpretation of the regulation's provisions but does not constitute an independent part of the regulation as such. This is also stated in other EU law literature. In the EU Parliament, the Council and the Commission's "Joint Practical Guide"[1], it was stated, inter alia, that (italics and emphasis added):

> *"The 'recitals' are the part of the act which* ***contains the statement of reasons for the act****; they are placed between the citations and the enacting terms. The statement of reasons begins with the word 'Whereas:' and continues with numbered points (see Guideline 11) comprising one or more complete sentences.* ***It uses non-mandatory language and must not be capable of confusion with the enacting terms****.*
>
> *Regulations, directives and decisions must state the reasons on which they are based.* ***The purpose is to enable any person concerned to ascertain the circumstances in which the enacting institution exercised its powers as regards the act in question*** *(see Case 24/62 Germany v Commission [1963] ECR 63), to give the parties to a dispute the opportunity to defend their interests and to enable the Community judicature to exercise its power of review.*
>
> *[…]*

[1] The guide can be read in the following link: https://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf

> *The recitals should constitute a genuine statement of reasons;* ***they should not set out the legal bases*** *(which must be in the citations)* ***nor should they repeat the passage in the provision*** *already cited as the legal basis which empowers the institution to act. Furthermore, recitals which do no more than state the subject-matter of the act or reproduce or even paraphrase its provisions without stating the reasons for them are superfluous or pointless."*

In other words, the recitals state the rationale on which the legal document is based. The EU uses informal and "non-binding" language in the recitals and the text should not contribute to uncertainty with regard to the material content of the provisions in the legislative act. The recitals shall therefore not state the legal basis as this already follows from the act. In summary, it seems natural to understand the recitals to merely indicate the rationale and possibly the politics for the legislative act. Hence, no legal bases are stated and individuals, businesses or authorities cannot base their rights or obligations on the recitals.

Furthermore, in *"The Law of recitals in European Community Legislation"* (Klimas, Tadas and Vaiciukaite, Jurate), it is stated that (italics and emphasis added):

> *"Recitals, at least in EC law, are supposed to be* ***rather general expressions of purpose****; such cannot readily justify reliance. We were gratified when we found that the received wisdom was incorrect, and that* ***recitals in EC law do not create legitimate expectations****.*
>
> *Thus de-mystified, the law of recitals in EC legislation falls within the realm of normality.* ***Recitals in EC law are not considered to have independent legal value,*** *but they can expand an ambiguous provision's scope.* ***They cannot, however, restrict an unambiguous provision's scope, but they can be used to determine the nature of a provision, and this can have a restrictive effect****. And the voidness of an EC legal act is traceable and due to political considerations, not legal ones."*

Accordingly, recitals must be understood as an expression of the directive's or the regulation's general purpose and are not considered to have independent legal value. According to the article's authors, however; recitals can be used to understand the purpose and character of a provision. In turn, this may result in restricting the scope of the provision. The same fundamental understanding is also relied on in several of the EU Court's cases e.g., in case C-134/08 Tyson Parketthandel (paragraph 16) where reference is made to case C-136/04 Deutsches Milk-Kontor (paragraph 32):

> *"In that regard, it must be borne in mind, first, that* ***the preamble to a Community act has no binding legal force*** *and* ***cannot be validly relied on either as a ground for derogating from the actual provisions*** *of the act in question or* ***for interpreting those provisions in a manner clearly contrary to their wording*** *(see, inter alia, Case C-136/04 Deutsches Milch-Kontor [2005] ECR I-10095, paragraph 32 and the case-law cited)."*

If a recital presumably is in conflict with the provisions of the regulation, the recital cannot be given any legal value.

Although recital 28 is not in direct conflict with the DSA's listing of legal entities that are comprised, it contradicts the current legal opinion in Norway that top-level domain registries such as Norid are not subject to the eCommerce legislation. As mentioned, a recital cannot be

used to extend the scope of a clear provision. In our view, this understanding is strengthened by the fact that recital 29 states that the specific service' technical functionalities must be assessed specifically to determine whether that service (and hence the legal entity providing the service) should be comprised.

4. WHAT ARE INTERMEDIARY SERVICES?

Norid's activities are not comprised by the current eCommerce Act. It is thus necessary to assess the reasons for why Norid might be considered to be subject to the DSA now. This assessment will depend on whether Norid in certain respects can be considered either a "mere conduit", "caching" or "hosting" provider.

The wording of the DSA Article 2 (f) is almost identical to the current eCommerce Act which implements the eCommerce Directive. It is thus natural to review the legal sources related to the eCommerce Act and what assessments were carried out in connection with the implementation of the eCommerce Directive.

In the eCommerce Act Section 3 (a), "service provider" is defined as "*a natural or legal person who provides information society services*". Further, "information society services" is defined in Section 1, second paragraph, where it is stated that (office translation with italics added):

> *"An information society service is*
>
> *a) any service which is normally performed for remuneration, and which is provided electronically at a distance and at the individual request of a recipient of a service and*
>
> *b) any service that consists of providing access to or transmitting information via an electronic communication network or of hosting information provided by the recipient of a service."*

Letter b is a reference to the intermediary services "mere conduit", "caching" and "hosting". This is also reflected in the eCommerce Act Section 15 on liability for damages and penal liability. Here, it is stated that (office translation with italics added):

> *"For service providers that transfer information, provide access to a communication network or store information, the general legal rules on liability for damages and criminal liability apply, unless otherwise follows from Sections 16-18."*

Hence, the eCommerce Act comprises all service providers which either transfer, temporarily store or store digital content. None of these alternatives cover Norid's activities. Norid has nothing to do with the digital content but is one of several actors who ensure that lookups can be made in the global domain name system (DNS).

5. ABOUT NORID'S ACTIVITIES

Top-level domain registries are only subject to the DSA to the extent that "their services qualify as 'mere conduits', 'caching' or hosting services", and this will depend on a specific assessment cf. recital 29. In the assessment of whether Norid is subject to the DSA, it is thus essential to understand what Norid's activities as a registry consists of.

For someone using the Internet, the value of the experience is created by the services that run on the technical infrastructure. The most well-known services are websites and e-mail, but it is also possible to connect video and telephone calls over the Internet, download files, log in to

various databases, control the heating in a house, etc. Content is made available online by a content provider uploading it to a server connected to the Internet. When a user visits a webpage, the content of the webpage is sent from the server on which the content is stored to the user via the Internet.

In order to access content or other services online, the user's computer must have the address of the server where the content is stored or the service is offered. This address is retrieved by lookup in the global domain name system.

All computers connected to the Internet have an IP address, which consists of a long series of numbers. Exchange of traffic between services and client systems over the Internet is based on these addresses. To simplify the use, a service is given one or more domain names, which are used both in the user interface and in system configurations. This also makes it possible to move a service to a new machine with a new IP address without having to inform those who use the service. The domain name system is a service that connects the domain name with the IP address of a service or device on the Internet.

As a registry, Norid registers domain names in line with the policy for assigning domain names (the domain name policy) under the relevant top-level domains and maintains a register of who has a right-of-use for the various domain names. In addition, Norid is responsible for managing the name service for the top-level domains. This service is part of the basic Internet infrastructure and is necessary for the assigned domain names to work. As a registry, Norid is also responsible for developing rules on the assignment of domain names under the top-level domains.

It must be distinguished between domain name administration on the one hand and services and content linked to the domain name on the other. Norid offers a service (*the name service* for .no) which provides information on which domain names exist under the top-level domain, and which name servers they are linked to. A *name server* is a computer that is permanently connected to the Internet, and which conveys technical information for one or more domain names. The name servers for the individual domain names convey the information that enables users to connect to servers that offer content or services on the Internet.

Neither Norid's name servers, nor the name servers for the individual domain name, store or provide the content itself. Norid's role ends where the role of the content providers and other service providers begins. This means e.g., that Norid is not considered an "intermediary service" under the current eCommerce Act and eCommerce Directive.

6. OUR ASSESSMENT

6.1 Is Norid subject to obligations of the DSA?

Norid has no responsibility for or ability to control access to communication networks. Neither does Norid store, nor function as a conduit for, digital content and is thus not a "mere conduit", "caching" or "hosting" provider.

In the Norwegian Supreme Court case HR-2019-1743-A, the question was whether the right to use the domain name popcorn-time.no should be confiscated in favour of the public purse. In this regard, the Supreme Court based its assessment on how domain names are administered in Norway and stated in paragraph 29 (unofficial translation with italics and emphasis added):

> *"The confiscated property is the right to use the domain name popcorn-time.no. Domain names are organisations' unique names on the Internet, and the letters «no»*

> *indicate* ***the national top-level domain – Norway – which is administered by Norid.*** *Upon registration in Norid, the applicant receives an exclusive right to use the domain name in line with the terms in Norid's name policy. In addition to being the name of a website, many domain names also function as signs. This is because domain names containing company names or trademarks are often perceived by the customers as an indication of commercial origin for products and services that are marketed or sold on the website.*

Further, in paragraph 30, the Supreme Court referred to the previous judgement in Rt. 2009 p. 1011, where it was stated in paragraph 27 that (unofficial translation with italics and emphasis added):

> *"Domain names' similarity with other assets such as trademarks, suggests that domain names can be seized. Added to this is the need to be able to put a domain name out of function in order to stop a criminal act.* ***Norid does not control the contents of websites, nor does it have any mandate to react towards websites that may seem to breach the law; that is the task of the police or the judicial system.***

In line with current case law, Norid does not control the content of websites, nor does it have the authority to intervene against websites with potentially illegal content. Thus, it seems unnatural from a legal perspective if Norid now is to be comprised by an updated eCommerce legislation.

This legal situation is also reflected in the preparatory works for the amendments to the Marketing Control Act in 2020[2] (italics and emphasis added):

> *"A domain name comes into existence when an organisation or private person subscribes to the domain.* ***It is the domain subscriber who is responsible for what the subscription is used for****. Registration of a domain name only gives a right of use, not a right of ownership. The right of use is maintained as long as the subscription runs."*

Our conclusion is therefore that Norid is not subject to the DSA.

The DSA is intended to cover all EU/EEA countries, and the European registries are structured very differently and have different business models. Each registry is given different national responsibilities by its authorities and is given different mandates to enforce national legislation. Norway already has several Supreme Court judgements relying on that the Norwegian registry does not control or supervise content on websites, and thus that recital 28 does not have any effect in Norway. The situation might be different in other EU/EEA countries where the legislator may have a need to introduce such an exception. This is also illustrated by recital 29 stating that the assessment must be made "on a case-by-case basis".

6.2 Lack of proportionality in measures against domain names

The EU publication "Legal analysis of the intermediary service providers of non-hosting nature" is an in-depth article on the subject matter, which presumably is part of the material on which

[2] Prop. 8 LS (2019–2020) 2019–2020. Amendments to the Marketing Control Act etc. (implementation of Regulation (EU) 2017/2394 on consumer protection cooperation) and consent to the approval of the EEA Joint Committee's decision no. 172/2019 of 14 June 2019 on the incorporation of Regulation (EU) 2017/2394 into the EEA Agreement.

the DSA is based. However, the article does not take into account the above-mentioned judgements from the Supreme Court.

Furthermore, the article is not explicit as regards the categorisation of Norid's activities, but it states e.g., (italics and emphasis added):

> *"De lege ferenda, the question remains whether there ought to be such an exemption. If we consider DNS actors' proximity to the content risks, we need to distinguish inter alia between business and technical proximity, as mentioned above.* ***Indeed, it is possible that the providers of DNS-related services are in a business relationship with parties committing an infringement. The problem, however, is that registries and registrars are technically removed from infringing content which they neither store nor transport. As a result, they usually do not know about any illegal content, as they would need to investigate how domain names are used****."*

Norid does not know whether illegal content exists on .no domains and has in reality no ability to control this. Further, the article addresses the theoretical measures registries can implement, but which are considered not to be practically feasible (italics and emphasis added):

> *Moreover,* ***there are significant proportionality issues related to the measures DNS actors can take to manage content risks****. As described in section 2.3.5, registries or registrars can take various domain-name related measures, which however, often would be disproportionate, for two reasons. First,* ***the precision of such measures is low because a suspension affects all content to which a domain name points (for example all of wikipedia.org)****, which is overly broad. At the same time,* ***the suspension of the domain name only removes the "signpost", but the content itself will typically still be available at the machine*** *identified by the related domain names. Thus, suspension of a domain name is not a particularly effective measure for combating illegal content or information."*

The paragraph above indicates that measures that registries like Norid are able to implement will be disproportionate and ineffective. Norid is simply prevented from implementing targeted measures to remove the illegal content. The lack of proportionality in such measures is also reflected in the assessments of the consumer authorities' ability to require deletion of domain names in the Norwegian Marketing Control Act Section 43 d, where the Ministry points out the following in the preparatory works (office translation with italics and emphasis added):

> *"The registry for a top-level domain has the option to delete a domain subscription. This means that the domain name is removed from the domain name system, and the IP address of the service is not found when looking it up. Instead, the user gets an error message that the domain does not exist.* ***Deletion will affect all services under the domain and all the subdomains associated with it, but does not remove the content.*** *The service still exists, but it will be significantly less accessible, because most web users do not know the IP address and thus cannot access the content."*

In other words, deletion of domain names is so imprecise and ineffective for the purpose of targeting specific content and services that it is considered to constitute a disproportionate measure. In addition to the proportionality perspective, the arguments also have a clear basis in the aim to ensure Internet users' legal protection. In our view, an obligation to take down the

domain name would be so extensive that it might violate the domain subscriber's right to contradiction.

6.3 Consequences if Norid is subject to the obligations of the DSA

Although our view is that it is quite clear that the implementation of the DSA cannot result in Norid being subject to the legislation, it is beneficial to emphasize why Norid *should not* be subject to such a legislative structure.

Firstly, it is essential that the DSA entails that Norid would possibly be subject to a completely new legal regime, as Norid is not subject to the current eCommerce Act.

Norid's role and activities indicate that Norid cannot be considered a general intermediary service, cf. also section 4 above. In addition, the positive effect of Norid being subject to the legislation is very limited, cf. section 6.2. If Norid were to be considered comprised by the DSA, it would have a number of unfortunate practical, technical and legal consequences for Norid and also challenge the domain subscribers' right to due process.

As an example, the duty to "notice and take-down" in the case of illegal content may be highlighted. Firstly, as a registry Norid is technically deprived of the ability to discover illegal content, as Norid neither stores nor transports the content. Consequently, Norid has no opportunity to discover illegal content linked to a domain without conducting major investigations.

Further, it is difficult to reconcile Norid's possible duty to "notice and take-down" with the principle of proportionality. This is because Norid's possibilities to take measures against a specific website are not very precise, cf. section 6.2. Taking down a domain name is not a measure that can target only part of an website or service, and it can also be perceived as unfair to the domain subscriber. In addition, the DSA entails a risk of taking down content which later turns out to be legal.

Again, it may be useful to consider the discussions in the preparatory works to the revision of the Norwegian Marketing Control Act in 2020, where the Ministry emphasized the need for proportionality in cases where the consumer authorities should be able to order deletion of domain names. These assessments go beyond the subject matter of this memo but do nevertheless illustrate the current perception of the legal responsibility of registries. As a consequence, the Ministry chose to leave the final assessment of such cases to the courts, with the exception of infringements in the Norwegian Medicines Agency's supervisory area (office translation with italics added):

> *"It is essential to ensure proper processing of difficult and principled issues about removing online content, and in the Ministry's assessment this would be best ensured by the courts being given the authority, as this would ensure a thorough treatment of the cases in two instances."*

Accordingly, it seems legally and systematically unfortunate if a company such as Norid should be obliged to implement measures that even public authorities only may initiate with statutory authority, and in most cases would involve proceedings in the courts.

In addition, Norid does not have the ability to remove the illegal content. Only those who supervise the content can effectively remove it. The obligation to "notice and takedown" should therefore be the responsibility of those who provide the digital content.

7. FINAL REMARKS

Implementation of the DSA into Norwegian law will require adjustments to the current eCommerce Act, as well as new provisions for today's Internet-based services and platforms. The DSA will have financial and administrative consequences with new rights and obligations, and consequently there is also a need to avoid legal unclarity.

The legislative process should be thorough and open. The need to avoid legal uncertainty makes it important that the revision of the eCommerce Act is based on current law. In the legislative process, there is an opportunity to clarify the implementation of the DSA within the scope of the national latitude cf. recitals 28 and 29. The legislator must, however, base the legislative process on the EU doctrine of legal sources with regard to e.g., the legal effect of recitals.

In addition, it is essential that the assessment is carried out within the framework of the recitals. Both recitals 28 and 29 include major reservations and emphasize the need to specifically assess different companies and services. In our opinion, this is reasonable as the registries may be structured differently across European countries, particularly with regard to technical and practical functionalities and delegated authority and competence.

As mentioned in section 3 of this memo, recitals express the political rationale for the legislative act and shall not be considered to state or to supplement the legal basis. Rights and obligations should therefore not be deduced from a recital. Since the definition in the current eCommerce Act and the eCommerce Directive are roughly identical to the DSA Article 2 (f), it also seems legally illogical that a relatively worded recital should change this perception.

If the legislator agrees with our understanding as set out in this memo, we consider it desirable and beneficial that the understanding is emphasized when implementing the legislative act, either directly in the text of the law or in the preparatory works. This is for the avoidance of future doubt with regard to the question of whether Norid is subject to the DSA.