



NORID RUNS THE REGISTRY
FOR NORWEGIAN DOMAIN NAMES
norid.no

TRANSLATED FROM ORIGINAL LETTER

Ministry of Digitalisation and Public Governance
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Trondheim, April 2. 2024

The Scope of the DSA and Norid's Activities

The Regulation on a Single Market for Digital Services (Digital Services Act - DSA) is currently being assessed by the EEA/EFTA countries, and we have been made aware that the Ministry of Digitalisation and Public Governance is leading a working group assessing possible models for the national implementation of the Regulation. We refer to our meeting with the Ministry on 7 December 2023, and as discussed, we hereby share our legal assessments regarding the Regulation considering the technical functionalities provided Norid as the registry for the Norwegian top-level domains.

As part of our work on clarifying the scope of the DSA in relation to Norid's activities, we have on several occasions obtained advice from external legal experts. We attach for your information the legal analyses from the law firms Schjødt and Simonsen Vogt Wiig, respectively. Their legal analyses constitute part of the basis for the descriptions and considerations in this letter.

1. Descriptions of Norid's services: The domain name service and the registration service

Norid runs the registry for the Norwegian top-level domains (.no, in addition to .bv and .sj which have not been opened for registration). Norid's activities mainly consist of two tasks: running the domain name service for Norwegian top-level domains and administrating the registration service for Norwegian top-level domains. Both these tasks are related to the technical infrastructure of the internet.

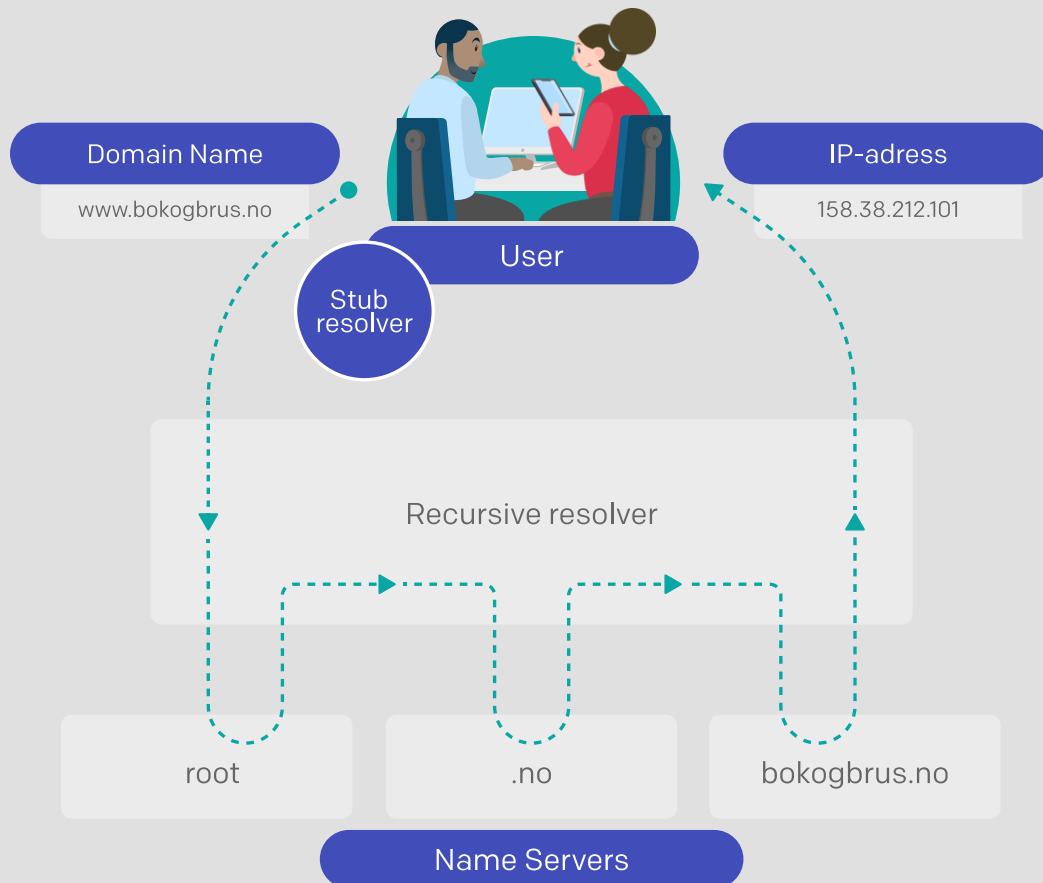
For an internet user, it is the services running on the technical infrastructure that is valuable, and not the infrastructure per se. The most popular services are websites and email, but it is also possible to make video and phone call over the internet, download files, access various databases, etc. Content is made available on the internet by means of a *content provider* uploading it to a server connected to the internet. When a user visits a website, the content of the website is sent from the server on which the content is hosted, to the user via the internet.

To access content or other services on the internet, the user's machine must know the IP address of the server where the content is hosted, or the service is offered. This address is found by lookups in the global *domain name system*, *DNS*.



What happens behind the scenes when you look up a domain name?

Each domain name has a set of servers handling queries about addresses under the domain name. These machines are called **name servers**.

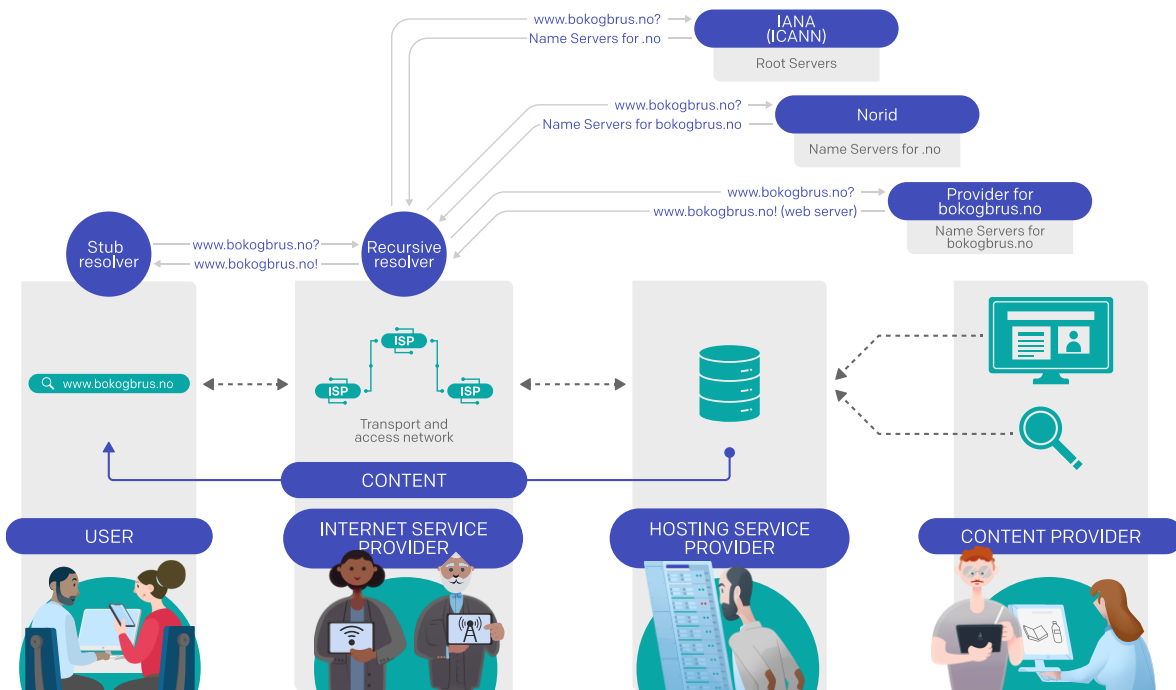


Example: You type the address `www.bokogbrus.no` in the address bar in your browser.

1. A small application in your device contacts a dedicated server set up to handle queries in the domain name system, a so-called recursive resolver (often operated by your internet service provider).
2. The recursive resolver is tasked with finding the IP address of `bokogbrus.no`. It forwards the query to one of the name servers for the top level of the domain name system, the so-called root. Root name servers only know the level below them in the hierarchy, and therefore returns a list of name servers for the top-level domain `.no`.
3. The resolver forwards the query again to one of the name servers for `.no`. These servers also only know the level below them and return a list of name servers for `bokogbrus.no`.
4. The resolver repeats the query to one of the name servers for `bokogbrus.no`, which responds with the IP address for `bokogbrus.no`.
5. The resolver forwards the IP address to your device. Once the browser is provided with the address, it contacts the web service at the address and downloads the websites you requested.



Norid provides the *domain name service for the Norwegian country code top-level domain .no*. The name servers provide information about which domain names are registered under the top-level domain, and which name servers they are associated with. Thus, Norid maintains a part of the technical infrastructure that makes it possible to use domain names ending with .no to obtain information about IP addresses of servers with content and services. The domain name system is, however, hierarchical. It is the lowest level of the hierarchy, the name servers for the individual domain names, that disseminate the information making it possible for the user to connect to the servers offering content or services over the internet.



One must distinguish between the administration of domain names on one hand, and the services or content associated with the domain name on the other. Neither Norid's name servers or the name servers of the individual domain names *host or disseminate the content itself*. Thus, Norid's role ends where the role of the internet service provider and other service providers begins.

In addition, Norid carries out the *registration of domain names* in accordance with applicable regulations for .no and maintains a registry over the usage rights for the various domain names. Norid does not execute administrative authority, and the allocation of domain names is based on private law. The registration of a domain name only affords a usage right, and not a right of ownership, to the domain. The usage right exists for the duration of the subscription, and Norid stores selected data about the subscriber and if relevant their contact person as part of the contractual relationship.

2. The Scope of the DSA

The Regulation concerns *intermediary services*, cf. DSA Article 2. There are two criteria that must be met to constitute an intermediary service, cf. DSA Article 3(g). Firstly, the service must be an *information society service* (see the definition in EU Directive 2015/1535). Secondly, the information society service must fall within one of the following categories:



- ‘mere conduit’ (for example internet access services)
- ‘caching’ (interim storage services)
- ‘hosting’ (storage services)

Registries or other actors in the domain market, such as domain registrars or entities providing domain name services, are not explicitly mentioned in the wording of the provision. Therefore, whether a service falls within the scope of one of the three categories, must be determined based on a case-by-case analysis of the service in question. Several Recitals in the DSA supports the interpretation that an assessment must be made on a case-by-case basis. Recital 28 states that services provided by registries and other actors in the domain market *may* fall within the scope of the legislation to the extent the services in the specific case are information society services and meet the conditions for one of the categories set out above.

“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...”

DSA Recital 28, our emphasis.

To the same effect, Recital 29 lists various types of services that, based on the circumstances, *may* fall within the scope of the DSA. However, whether a service is within or outside the scope of the DSA, depends on a concrete assessment of the technical functionalities of the service.

“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, <...> 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.”

DSA Recital 29, our emphasis.

Accordingly, the cited Recitals reinforce the interpretation that follows from the wording of DSA Article 3(g), namely that an assessment must be made on a case-by-case basis for the service in question. The key question is therefore whether the various actors in the domain market offer services with technical functionality that fall within the definition of an *intermediary service* within the meaning of DSA Article 3(g).

3. Norid’s services are not covered by the scope of the DSA

3.1 Norid’s services do not disseminate such information that the DSA intends to regulate

We consider that our services do not constitute information society services under the definition in EU Directive 2015/1535. Firstly, it is doubtful whether the services are “*normally provided for*



remuneration", as the definition requires, and secondly, because the services do not entail transmission of such data that the DSA presumes. We refer to the prevailing interpretation that registries do not provide information society services under the current e-commerce legislation, which uses the same wording as the DSA (see section 3.2 below).

In any case, we also consider that our services do not meet the second criterion in DSA Article 3(g) for constituting an intermediary service. Registries such as Norid are only covered by the DSA to the extent "*their services qualify as 'mere conduits', 'caching' or hosting services*", and this is subject to a case-by-case assessment of the technical functionalities of the services provided by Norid, as previously discussed.

A 'mere conduit' service is defined as "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". Neither Norid's domain name service nor registration service entails that Norid provides access to a communication network, and accordingly, the services are not covered by the last alternative of the definition.

A common denominator for the other alternatives - both for hosting, caching and mere conduit - is that the service entails a processing of information given by the service recipient ("information provided by a recipient of the service"). Based on the wording, it is only information provided by the service recipient, and not for example by the service provider, that is relevant.

We cannot see that the expression "information provided by a recipient of the service" has a statutory definition in the DSA. To interpret the meaning of this expression, it is therefore natural to analyse how it is otherwise used in the DSA. In for example Article 4 on mere conduit, "information provided by a recipient of the service" is mentioned in relation to a sender, a recipient and a content in the transmission of information. In Article 6 on hosting, "information provided by a recipient of the service" is mentioned in relation to illegal activities and illegal content. In our view, the context here indicates that "information provided by a recipient of the service" does not cover every kind of information. The information must have a content that is able to be transmitted from a sender to a recipient, where the content potentially can be linked to illegal activities or illegal content.

We consider that this interpretation aligns well with the purpose of the DSA of contributing 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 protection of fundamental rights, cf. Article 1(1) of the DSA. That the focus of the DSA is information that may constitute illegal content - and not merely technical information - is supported by the Recitals of the DSA.

"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. <...>"

DSA Recital 12

Norid is one of several actors that ensures that it is technically possible to use the global domain name system (DNS). The information that Norid receives from a service recipient in relation to the registration service and domain name service are limited to technical data related to the DNS and data necessary to establish a domain subscription. Our services do not store or



disseminate the digital content, neither in relation to the name service nor the registration service.

Based on a contextual interpretation of the wording and considerations of the regulatory purposes, we consider that the expression "information provided by a recipient of the service" is not intended to apply to services that do not disseminate any content in a communication network, but merely facilitates the technical functionality of the DNS protocol, as Norid's services do. Accordingly, Norid's services fall outside the definitions of "mere conduit" "caching" and "hosting" services and are not intermediary services within the meaning of the DSA.

Thus, Norid is not covered by the scope of the DSA.

3.2 Norid does not have the mandate for assess the legality of content and is not in the scope of the current E-commerce Act

The wording of DSA Article 3(g) is nearly identical with the definition of information society service in the current e-Commerce Act, which implements the e-Commerce Directive. The prevailing interpretation in Norway is that registries, like Norid, do not provide information society services and are therefore not subject to the e-commerce legislation. We are not responsible for nor have the possibility to control access to communication networks. Norid's technical functionality (as detailed above) is not changed since this legislation was adopted.

In accordance with applicable case law, Norid does not control illegal content on websites, nor has the authority to interfere vis-à-vis websites with potentially illegal content.

"The similarity domain names have with other assets such as for example trademarks, indicates that domain names can be seized. Further to this is the need to be able to set a domain out of function to avoid the continuation of legal offences. Norid does not control the content of websites and does not have any mandate to react vis-à-vis websites that may seem to break the law; that is up to the police and legal system."

HR-2009-01692-U, referred to in HR-2019-1743-A, our translation and emphasis.

This legal position is also indicated in the preparatory works for the amendments to the Marketing Control Act in 2020¹ (our translation and emphasis).

"A domain name is established when an organisation or an individual creates a subscription for the domain. It is the subscriber who is responsible for what the subscription is used for. Registration of a domain name only affords a usage right, not a right of ownership. The usage right is maintained for the duration of the subscription."

The preparatory works emphasise the need for proportionality when assessing whether to implement measures against domain names to remove digital content, as the measures may have significant consequences. To ensure proportionality and legal safeguards, the courts have the authority to process such cases².

¹ Prop. 8 LS (2019-2020) Chapter 13.4.1 page 100.

² Marketing Control Act Section 43. Similar provisions are set out in the Tobacco Harm Act Section 36 d, the Broadcasting Act Section 2-12, the Alcohol Act Section 9-4. An exception is the Medical Products Act which gives the Norwegian Medical Products Agency authority to issue orders without a court order. This is based on considerations of matters of life and health.



3.3 Why are registries mentioned in the DSA Recitals?

The European registries are created differently and may be afforded different national responsibilities and varying mandates to enforce local legislation. Norway already has multiple Supreme Court decisions establishing that the Norwegian registry does not exercise control over content on websites. The situation may be different in other EU/EEA countries. That some registries can fall within the scope of the DSA while others fall outside the scope, is supported by the wording of DSA Article 2 and 3 and Recitals 28 and 29 which indicate that the assessment must be made "on a case-by-case basis".

4. Registrars and the DSA

As set out in the Domain Name Regulations³, Norid shall leave parts of the registration process to the registrars. These are companies that have entered into agreements with Norid on the right to market domain name subscriptions under the .no domain. The registrars assist companies and individuals with applying for domain names, and they administer the domain name subscription on behalf of the subscriber, e.g. by extending or terminating it. They are a link between the registry and the subscriber and provide guidance to the subscriber on what is necessary to subscribe to a domain name.

Registrars compete in offering the best assistance to subscribers in terms of ordering and maintaining domain name subscription with Norid. Even if Norid has not assessed the technical functionality used by each registrar to connect to Norid's registration service, it is difficult to imagine how the concrete execution of the tasks of a registrar⁴ may be covered by the definitions of the DSA.

However, most registrars offer their customers various additional services related to use of the domain name, such as web hosting, email, and tools to create websites. This means that even if an actor is not covered by the DSA due to their tasks as a registrar, they may have other roles and services they offer which is covered. For example, Telenor is an internet provider, a hosting service provider, and a registrar.

Norid would be happy to provide more information about registrars and the market distribution. However, we do not maintain an overview of the services provided by our registrars beyond their task as a registrar.

Best regards
Norid AS

Hilde Thunem
CEO

Attachments

- Implementation of the DSA in Norwegian law - legal analysis by the law firm Schjødt
- The scope of the Digital Services Act - legal analysis by the law firm Simonsen Vogt Wiig

³ Domain Name Regulations Section 5.

⁴ The registrar's tasks are further described in Norid's Registrar agreement:
<https://teknisk.norid.no/en/bli-forhandler/forhandleravtalen/>