

SUBSIDIARY LEGISLATION 418.05

**THE DIGITAL SERVICES (DESIGNATION AND
ENFORCEMENT) ORDER**

12th March, 2024

LEGAL NOTICE 66 of 2024.

1. (1) The title of this order is the Digital Services (Designation and Enforcement) Order. Citation and scope.

(2) This order implements various measures consequential to 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.

2. In this order, unless the context otherwise requires: Interpretation.

"the Authority" means the Malta Communications Authority established in accordance with the Malta Communications Authority Act; Cap. 418.

"Civil Court" means the Civil Court (Commercial Section) established by article 3 of the Civil Courts (Establishment of Sections) Order; S.L. 12.19.

"competent authority" means a competent authority, other than the Malta Communications Authority, designated under article 3 of this order;

"Digital Services Act" means 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.

3. In accordance with the provisions of Article 49(1) and (2) of the Digital Services Act, the Authority is designated as the Digital Services Coordinator for Malta; Designation of the Digital Services Coordinator and other competent authorities for the purposes of the Digital Services Act.

Provided that the provisions applicable to the Digital Service Coordinator set out in Articles 50, 51 and 56 of the Digital Services Act shall also apply to any competent authority which may be designated in accordance with this article when executing any provisions of the Digital Services Act which such competent authority is empowered to enforce.

4. The Authority when carrying out its tasks as the Digital Services Coordinator in Malta and a competent authority in relation to its tasks under article 3 shall: Requirements when performing tasks under the Digital Services Act.

(a) act in an impartial, transparent and timely manner, and shall have all the necessary resources to carry out such

tasks, including sufficient technical, financial and human resources to adequately supervise all providers of intermediary services falling within their competence;

(b) have sufficient autonomy in managing their budget within the overall limits of the budget in order not to adversely affect their independence when acting for the purposes of their tasks under the Digital Services Act; and

(c) act with complete independence and be free from any external influence, whether direct or indirect, and shall neither seek nor take instructions from any other public authority or any private party.

Orders to take action against illegal content issued under Article 9 of the Digital Services Act.

5. (1) A judicial or administrative authority that issues an order to take action against illegal content to a provider of intermediary services, shall, when issuing any such order, ensure that the order issued by it complies with the conditions listed in Article 9(2) of the Digital Services Act. If the order does not comply with one (1) or more of these conditions, that order shall be considered as null and void for the purposes of the Digital Services Act.

(2) Without prejudice to Article 9(3) of the Digital Services Act, the judicial or administrative authority issuing any order or, where applicable, the authority specified therein, in accordance with sub-article (1) shall, when doing so, transmit forthwith to the Authority a copy of the order, along with any information received from the provider of intermediary services concerning the effect given to that order.

(3) The judicial or administrative authority issuing an order to take action against illegal content to a provider of intermediary services in accordance with Article 9 of the Digital Services Act shall, where necessary, take any such enforcement measures as it may consider appropriate to ensure compliance with any such order.

(4) Any person applying to a court for an order requiring a provider of an intermediary service to take action against illegal content transmitted on the service provided by that provider, shall provide the court, in addition to any other information that the court may reasonably require further to any such application, with the following information:

(a) the electronic point of contact that the provider of the intermediary service has designated pursuant to Article 11(1) of the Digital Services Act;

(b) all the information listed in Article 9(2)(a)(i) to (v) of the Digital Services Act; and

(c) where the person is seeking a territorial scope beyond Malta, a description of the territorial scope sought, and any additional information required by the court to enable it to ensure that the scope is limited to what it considers to be strictly necessary.

6. (1) A judicial or administrative authority that issues an order to a provider of intermediary services for it to be provided specific information about one (1) or more individual recipients of the service shall, in issuing any such order, ensure that the order issued by it complies with the conditions listed in Article 10(2) of the Digital Services Act. If the order does not comply with one (1) or more of these conditions, the order shall be considered as null and void for the purposes of the Digital Services Act.

Orders to provide information issued under Article 10 of the Digital Services Act.

(2) Without prejudice to Article 10(3) of the Digital Services Act, the judicial or administrative authority issuing any order or, where applicable, the authority specified in that order, in accordance with sub-article (1) shall, when doing so, transmit forthwith to the Authority a copy of the order, along with any information received from the provider of intermediary services concerning the effect given to that order.

(3) The judicial or administrative authority issuing an order to provide information to a provider of intermediary services in accordance with Article 10 of the Digital Services Act shall, where necessary, take such enforcement measures as it may consider appropriate to ensure compliance with any such order.

(4) Any person applying to a court for the issuance of an order addressed to a provider of an intermediary service to provide information about one (1) or more recipients of an intermediary service provided by that provider, shall furnish the court, in addition to any other information that the court may reasonably require further to any such application, with the following information:

(a) the electronic point of contact that the provider of the intermediary service has designated pursuant to Article 11(1) of the Digital Services Act;

(b) all the information listed in Article 10(2)(a)(i) to (v) of the Digital Services Act; and

(c) an assessment that the information required is information that the provider of the intermediary service has already collected for the purpose of providing its service and is within the control of that provider.

Notification of an order issued under Articles 9 and, or 10 of the Digital Services Act.

7. Any order issued in accordance with this order shall in all instances as a minimum be notified to the electronic point of contact designated by the provider of the intermediary service pursuant to Article 11(1) of the Digital Services Act, and to the Authority.

Providers of hosting services.

8. Providers of intermediary services in Malta whose service includes or consists of the storage of information by recipients of the services as referred to in Article 6 of the Digital Services Act, shall notify the Authority in writing about their provision of such service as follows:

(a) in the case of those providers who already provide such service on the 17th February 2024, within seven (7) days of such date; and

(b) in the case of those providers who commence the provision of such service subsequent to the 17th February 2024, within seven (7) days from the commencement of such service.

Enforcement of the Digital Services Act by the Authority.

9. (1) Unless stated otherwise in this order, the Authority shall, in accordance with its powers at law, be responsible for the enforcement of the provisions of the Digital Services Act in so far as such enforcement relates to its role as the Digital Services Coordinator for Malta:

Provided that the exercise of any such powers by the Authority shall be without prejudice to the exercise of any regulatory powers as may from time to time be assigned to any other competent authority in accordance with this order:

Provided further that unless otherwise stated expressly in this order the assignment of the exercise of any regulatory powers to another competent authority shall be construed as conferring upon that competent authority the exclusive remit to enforce any such provisions of the Digital Services Act as may be assigned to it.

(2) Unless expressly provided for at law, the Authority shall not for the purposes of the Digital Services Act, be responsible for the taking of any enforcement measures relating to alleged illegal content, however so described, that may be carried online if not strictly in relation to its role as Digital Service Coordinator.

(3) The Authority may consult with any other public body, however so described, in Malta as it may consider necessary in the exercise of its regulatory tasks under this order, which other public body shall provide its input as required in writing within such reasonable period as the Authority may request considering the specific circumstances relating to any such consultation.

10. A competent authority shall take such measures in accordance with its powers at law as it may consider necessary to ensure compliance with the provisions of the Digital Services Act which it is empowered to enforce:

Enforcement of the Digital Services Act by competent authorities designated by this order.

Provided that when doing so the competent authority concerned shall, in writing within two (2) working days, inform the Authority of any measures that may have been taken by it to ensure compliance therewith.

11. (1) Without prejudice to its powers under the Malta Communications Authority Act, the Authority in the performance of its tasks as the Digital Services Coordinator in accordance with the Digital Services Act in relation to the provisions of the Act that it enforces, shall:

Investigative powers of the Authority and the competent authorities in relation to the Digital Services Act.
Cap. 418.

(a) require the providers of intermediary services, as well as any other person acting for purposes related to their trade, business, craft or profession that may reasonably be aware of information relating to a suspected infringement including organisations performing the audits referred to in Articles 37 and 75(2) of the Digital Services Act, to provide such information without undue delay;

(b) carry out inspections of any premises that such providers or such persons use for purposes related to their trade, business, craft or profession, in order to examine, seize, take or obtain copies of information relating to a suspected infringement in any form, irrespective of the storage medium; and

(c) ask any member of the staff or representative of such providers or such persons to give explanations in respect of any information relating to a suspected infringement and to record the answers with their consent by any technical means.

(2) A competent authority shall also have the powers of investigation listed in sub-article (1) in ensuring compliance with the provisions of the Digital Services Act which that authority enforces.

12. (1) The Authority in respect of providers of intermediary services that fall under its competence, or a competent authority in ensuring compliance with the provisions of the Digital Services Act which it enforces, where the exercise of its powers at law to bring about a cessation of any infringement by any such provider have been exhausted, and the infringement has not been remedied or is continuing and is causing serious harm which cannot be avoided through the exercise of its other powers at law, then the Authority or the competent authority concerned as the case may be, may in the first instance require the management body of such provider, without undue

Additional measures to bring about cessation of an infringement.

delay, to examine the situation, adopt and submit an action plan setting out the necessary measures to terminate the infringement, ensure that the provider takes those measures, and report to the Authority or the competent authority concerned as the case may be, on the measures taken.

(2) If the Authority or the competent authority, as the case may be, considers that a provider of intermediary services has not sufficiently complied with the requirements referred to in sub-article (1), that the infringement has not been remedied or is continuing and is causing serious harm, and that the infringement entails a criminal offence involving a threat to the life or safety of persons, then the Authority or the competent authority concerned as the case may be shall file an application to the Civil Court requesting the issue of an order for the temporary restriction of access of recipients to the service concerned by the infringement or, only where that is not technically feasible, to the online interface of the provider of intermediary services on which the infringement takes place.

(3) The Authority or the competent authority concerned as the case may be shall, unless it is acting upon the request of the European Commission referred to in Article 82 of the Digital Services Act, prior to filing an application to the Civil Court for the issue of an order under sub-article (2), invite interested parties to submit written observations to the Authority or the competent authority concerned as the case may be, within a period that shall not be less than two (2) weeks, describing the measures that it intends to request and identifying the intended addressee or addressees thereof.

(4) The provider of intermediary services, the intended addressee or addressees and any other third party demonstrating a legitimate interest shall be entitled to participate in the proceedings before Civil Court initiated by the Authority or the competent authority concerned as the case may be, in accordance with sub-article (3).

(5) The Civil Court, on receipt of an application in accordance with sub-article (3) shall order the notification of the application with urgency onto the provider of intermediary services, the intended addressee or addressees and any other party that has demonstrated to the Authority or the competent authority concerned as the case may be, that it has a legitimate interest to participate in any such proceedings. Such persons shall be entitled to reply to the application within such period as the Civil Court may determine, which period shall not exceed ten (10) days or any lesser period as the Civil Court may deem appropriate in the circumstances, which period shall commence as from the date of notification onto such persons:

Provided that the Civil Court shall consider and determine any such application with urgency:

Provided further that without prejudice to this sub-article, the provisions of the Code of Organization and Civil Procedure for the hearing and determination of cases and of any appeal therefrom shall apply to any such action. Cap. 12.

(6) Any measure ordered in accordance with this article shall be proportionate to the nature, gravity, recurrence and duration of the infringement, without unduly restricting access to lawful information by recipients of the service concerned.

(7) Where the Civil Court issues an order for a temporary restriction of access, such restriction of access shall be for a period of four (4) weeks, subject to the possibility that the Court in its order may allow the Authority or the competent authority concerned as the case may be, to extend that period for further periods of the same length, subject to a maximum number of extensions as the Court may determine.

(8) The Authority or the competent authority concerned as the case may be shall only extend the period of four (4) weeks for a temporary restriction of access in accordance with sub-article (7) where, having regard to the rights and interests of all parties affected by that restriction and all relevant circumstances, including any information that the provider of intermediary services, the addressee or addressees and any other third party that demonstrated a legitimate interest may provide to it, it considers that the following conditions have been met:

(a) that the provider of intermediary services has failed to take the necessary measures to terminate the infringement; and

(b) that the temporary restriction does not unduly restrict access to lawful information by recipients of the service, having regard to the number of recipients affected and whether any adequate and readily accessible alternatives exist:

Provided that where the Authority or the competent authority concerned, as the case may be, considers that the conditions set out in paragraphs (a) and (b) have been met, but that it cannot further extend the period pursuant this sub-article, it shall submit a new request to the Civil Court as provided for in sub-article (2).

(9) The Authority or the competent authority concerned, as the case may be, shall ensure that any measure taken in exercise of its powers under this article shall be effective, dissuasive and proportionate, having regard, in particular, to the nature, gravity, recurrence and duration of the infringement or suspected infringement to which those measures relate, as well as the economic, technical and operational capacity of the provider of the intermediary services

concerned, where relevant.

Administrative
penalties.

13. Any administrative penalties that the Authority or a competent authority, as the case may be, may decide to impose in accordance with its powers at law for any infringement of any of the provisions of the Digital Services Act which it enforces, shall not exceed for each infringement:

(a) six per cent (6%) of the annual worldwide turnover of the provider of intermediary services concerned in the preceding financial year:

Provided that where the infringement relates to the supply of incorrect, incomplete or misleading information, failure to reply or rectify incorrect, incomplete or misleading information and failure to submit to an inspection, the administrative penalty that may be imposed shall not exceed one per cent (1%) of the annual income or worldwide turnover of the provider of intermediary services or person concerned in the preceding financial year; and

(b) in the case of a periodic administrative penalty payment, five per cent (5%) of the average daily worldwide turnover or income of the provider of intermediary services concerned in the preceding financial year per day, calculated from the date specified in the decision concerned.

Procedures for
complaints relating
to an infringement
of the Digital
Services Act.

14. The Authority or any other competent authority may decide to establish procedures for the making and resolution of complaints concerning an infringement of the Digital Services Act, which procedures shall be in accordance with Article 53 of the Digital Services Act and shall, amongst other matters, provide:

(a) for the form and procedures by which a complaint may be made;

(b) for the procedures to be followed in considering a complaint;

(c) for the procedures for determining whether the complaint should be transmitted to another authority in Malta or to a Digital Services Coordinator in another Member State of the European Union, including procedures for such transmission;

(d) for the procedures to be followed on notification of a complaint from a Digital Services Coordinator in another Member State of the European Union; and

(e) for the procedures by which the complainant and the provider of the intermediary service shall be informed of the

progress and outcome of the complaint.

15. Without prejudice to any of the provisions of the Digital Services Act or of this order, where a provider of an intermediary services becomes aware of any alleged illegal activity undertaken or information provided by a recipient of its service, that provider shall immediately inform the competent public authority of any such activity or information.

Obligation to inform competent public authority of any alleged illegal activity.

16. The Prime Minister by virtue of the powers conferred to him in accordance with article 37(1) of the Malta Communications Authority Act is hereby extending the jurisdiction of the Administrative Review Tribunal in relation to any contestation of any decision, however so described, given by a competent authority designated under article 3 of this order.

Order extending the jurisdiction of the Administrative Review Tribunal to decisions taken by a competent authority.
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