No. 360

MALTA COMMUNICATIONS AUTHORITY

Explanatory Notes in relation to the Digital Services (Designationand Enforcement) Order, 2024[1]

1. Introduction

This document summarises and gives background information about the Digital Services (Designation and Enforcement) Order, 2024, hereinafter referred to as 'the Order'.

This Order is being made by the Minister for communications in accordance with the provisions of articles 37(1) and 46 of the Malta Communications Authority Act (Chapter 418 of the Laws of Malta).

2. Summary and background

This Order enforces the applicable norms under 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 (hereafter referred to as the 'Digital Services Act' or the 'DSA').

Whilst the norms of the DSA being an EU Regulation apply directly to Malta, Malta as an EU Member State is required to have in place national legislation that provides for the designation of the competent authorities responsible for ensuring compliance with the DSA, including one authority which is designated as the Digital Services Coordinator for Malta (hereafter referred to as the 'DSC'), and for the effective enforcement and implementation of the DSA in Malta.

The Order further provides for the extension of the jurisdiction of the Administrative Review Tribunal (hereafter the 'ART') in relation to contestations of regulatory decisions by a competent authority taken in accordance with its powers under the DSA.

3. Overview of the structure of the instrument

Article 1: Title and scope of the order.

Article 2: Interpretation of various terms used in the order.

Article 3: Designation of the Digital Services Coordinator and other competent authorities for the purposes of the Digital Services Act.

Article 4: Requirements when performing tasks under the Digital Services Act.

Article 5: Orders to take action against illegal content issued under Article 9 of the Digital Services Act.

Article 6: Orders to provide information issued under Article 10 of the Digital Services Act.

Article 7: Notification of an order issued under Articles 9 and, or 10 of the Digital Services Act.

Article 8: Providers of hosting services.

Article 9: Enforcement of the Digital Services Act by the Malta Communications Authority.

Article 10: Enforcement of the Digital Services Act by competent authorities designated by the order.

[1]These Explanatory Notes are in accordance with and for the purpose of article 3(2)(c) of the Small Business Act (Chapter 512 of the Laws of Malta).

Article 11: Investigative powers of the Malta Communications Authority and the competent authorities in relation to the Digital Services Act.

Article 12: Additional measures to bring about cessation of an infringement.

Article 13: Administrative penalties.

Article 14: Procedures for complaints relating to an infringement of the Digital Services Act.

Article 15: Obligation to inform competent public authority of any alleged illegal activity.

Article 16: Order extending the jurisdiction of the Administrative Review Tribunal to decisions taken by a competent authority.

Article 17: Amends the Second Schedule to the Malta Communications Authority Act.

4. Commentary on parts and articles of the legislation

The Order complements the Articles of the DSA by providing for the required norms whereby the DSC and competent authorities are designated and have the required enforcement tools to ensure compliance with the DSA.

Article 1: stipulates the title of the Order.

Article 2: provides for the interpretation of various terms used in the Order.

Article 3: provides for the designation of the Malta Communications Authority (hereafter the 'MCA') as the DSC in Malta.[2]

Article 4: lists the requriements that the MCA and any competent authority must follow in the performance of their tasks under the DSA.

Article 5: requires that a judicial or administrative authority that issues an order to act against illegal content to a provider of intermediary services ensures that the order issued complies with the requirements provided for in Article 9(2) of the DSA. If the order issued does not comply with one or more of these requirements, then the order is considered as null and void for the purposes of the DSA. Furthermore, the judicial or administrative authority concerned is required to transmit a copy of the order in question and any information received from the provider of the intermediary services, to the MCA.

Article 6: requires that a judicial or admininistrative authority that issues an order to a provider of intermediary services requiring that provider to provide specific information about an individual recipient of a service, must in doing so ensure that the order issued complies with the requirements provided for in Article 10(1) of the DSA. If the order issued does not comply with one or more of these requirements then the order is considered as null and void for the purposes of the DSA. Furthermore the judicial or administrative authority concerned is required to transmit to the MCA a copy of the order in question and any information received from the provider of the intermediary services.

Article 7: requires that any order issued under articles 9 and, or 10 of the DSA must be notified to the electronic point of contact designated by the provider of the intermediary services and to the MCA.

Article 8: requires that a provider of intermediary services in Malta whose services include or consist of the storage of information by the recipient of a service referred to in Article 6 of the DSA, shall notify the MCA about the provision of such a service.

Article 9: provides that the MCA is responsible for the enforcement of the provisions of the DSA in so far as this relates to its role as the DSC for Malta. This article further states that the MCA in the exercise of its regulatory powers under the DSA is not responsible for the taking of any enforcement measures in relation to the carriage of illegal content unless these relate strictly to its role as the DSC. This article further states that the MCA may consult any other pubic body in Malta as it may consider necessary in the exercise of its regulatory functions as a DSC.

[2]Unless stated otherwise any reference in these explanatory notes to the MCA should be construed as a reference to the MCA acting in its role of the DSC for Malta.

Article 10: enables a competent authority to take such measures as it may consider necessary in accordance with its powers under the DSA. In doing so, the competent authority is required to notify the MCA within two (2) working days of the issue of such measures.

Article 11: lists the investigative powers of the MCA and of the competent authorities in relation to providers of intermediary services including persons acting on their behalf, and persons who are acting for purposes related to their business, trade or profession, which powers include:

Requiring the provision of information relating to suspected infringements;
Carrying out inspections of premises used by such persons to examine or take information in relation to a suspected infringement; and
Asking any staff member or representative of such providers to give explanations in respect of a suspected infringement.

Article 12: lists the additional measures that the MCA or a competent authority may take to bring about the cessation of an infringement where the infringement has not been remedied or is continuing, and is causing serious harm which cannot be avoided through the exericse of other powers at law.

In such instances, the MCA or the competent authority should first require that management of the provider in question, without undue delay, examines the situation and adopts and submits an action plan with the necessary measures to terminate the infringement. If notwithstanding, the MCA or the competent authority considers that the infringement has not been remedied or is continuing, and is causing serious harm and the infrignement constitutes a criminal offence involving a threat to the life or safety of persons, then the MCA or the competent authority is required to apply to the Civil Court for the issue of an order for the temporary restriction of access of recipients to the service concerned, or if this is not technically feasibile, to the online interface of the provider of the intermediary service to which the infringement takes place.

Article 13: lists the maximum administrative penalties that the MCA or a competent authority may impose both in relation to one off administrative penalties and to periodic administrative penalties.

Article 14: empowers the MCA or any other competent authority to establish procedures for the making and resolution of complaints relating to infringements of the DSA.

Article 15: requires that a provider of an intermediary service who becomes aware of any illegal activity or information by a recipient of its service, promptly informs the competent public authority.

Article 16: states that the Prime Minister by virtue of his powers under article 37(1) of the Malta Communications Authority Act (Chapter 418 of the Laws of Malta) is extending the jurisdiction of the Administrative Review Tribunal to contestations of decisions taken by a competent authority under the DSA.

Article 17: Amends the Second Schedule of the Malta Communications Authority Act, listing the DSA as a law which is enforced by the MCA.

5. Concluding Section

All the articles of the Order shall come into force on the date of their publication in the Gazette. For any queries in this regard one may contact the Malta Communications Authority on 21336840 or on (dsa@mca.org.mt).

N.B. This Explanatory Note is not intended to be exhaustive description of the instrument nor a substitute thereof or a legislative supplment to it. This Note does not purport to be an authoritative ruling on the interpretaiton of this legislation.

12th March, 2024