

Chapter 04

Resident Agent Guidelines

MDIA Circular No.4

MDIA Public Consultation Ref No. 04/18

The MDIA is in the process of issuing a set of guidance notes aimed at assisting Service Providers and Innovative Technology Arrangements seeking recognition by the MDIA. These guidelines will be divided into four chapters as follows:

- Chapter 1 Systems Auditors Guidelines
(consultation period closed 02 October 2018)
- Chapter 2 Innovative Technology Arrangement Guidelines
(consultation period closed 09 October 2018)
- Chapter 3 Technical Administrator Guidelines
(consultation period closes 17 October 2018)
- Chapter 4 Resident Agent Guidelines

The MDIA is pleased to announce the fourth round of consultation (Ref No.04/18) which covers Chapter 4 of the MDIA Guidance Notes. These guidelines shall apply to all Service Providers and Innovative Technology Arrangements who submit an application for any form of recognition by the Malta Digital Authority who are not ordinarily resident in Malta. The document is aimed to provide guidance to prospective applicants on:

- the scope and applicability of the Resident Agent;
- eligibility criteria;
- information to be submitted to the Authority;
- the role of the Resident Agent;
- powers of the Resident Agent;
- liability of the Resident Agent; and
- resignation and removal of the Resident Agent.

Concluding remarks

The consultation period is open to the public from 10 October 2018 until 24 October 2018. Interested parties are requested to submit their comments and feedback by email on info@mdia.gov.mt by not later than 24 October 2018.

Malta Digital Innovation Authority

10 October 2018

Chapter 4 - Resident Agent Guidelines

Digital Innovation is, by definition, a rapidly evolving sector. These guidelines are expected to be updated to keep abreast with technology, regulatory and operational developments.

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1. Definitions

“Applicant”, within the context of this document, refers to an individual and/or a legal organisation applying for recognition as an Innovative Technology Arrangement (‘ITA’) or Innovative Technology Service Provider (‘ITSP’) with the Authority. For avoidance of doubt, where applicable, the term ‘Applicant’ shall also include an authorisation holder, following successful ITA certification or ITSP registration, with the Authority.

“Authority” refers to the Malta Digital Innovation Authority.

“Innovative Technology Arrangement”, also referred to as “ITA” within this document, is defined within the First Schedule of the Innovative Technology Arrangements and Services Act, 2018 (‘ITAS Act’). For the avoidance of doubt, this definition includes, inter alia, any ITA supporting an Initial Virtual Financial Asset Offering (‘IVFAO’), Providers of VFA Services or similar arrangements.

“Innovative Technology Service Provider”, also referred to as “ITSP” within this document, is defined to any provider of services listed in the Second Schedule of the ITAS Act.

“Lead Authority” refers to the “national competent authority” as defined within the Innovative Technology Arrangements and Services Act, 2018, which has a leading role within that application of the technology arrangement.

“Register of Recognitions” is an electronic register, also referred to as “the Register”, of all recognitions issued by the Authority, which recognitions shall include the certification of ITAs, and registration of Systems Auditors and Technical Administrators. The Register shall include all such details as the Authority shall consider necessary to identify the relevant Applicant and the activities being carried out. In addition, the Register shall be available to the public on the website of the Authority.

“Resident Agent” refers to the Resident Agent as defined in Article 15 of the Innovative Technology Arrangements and Services Act.

“Systems Auditor” (‘SA’) as defined in the Innovative Technology Arrangements and Services Act, 2018, and in line with further guidance issued by the Authority under Chapter 1 of the Guidance Notes.

“Technical Administrator” (‘TA’) as defined in the Innovative Technology Arrangements and Services Act, 2018, and in line with further guidance issued by the Authority under Chapter 3 of the Guidance Notes.

2. Appointment of a Resident Agent

2.1. Scope and Applicability

In line with Article 15(1) of the ITAS Act, an Applicant that is not Ordinarily Resident in Malta at the time of application for recognition with the Authority is required to appoint a Resident Agent. The application for recognition refers to the application for an ITA Certification or ITSP Registration with the Authority.

The phrase 'Ordinarily Resident in Malta' shall be construed to mean as defined in the Income Tax Act (Chapter 123) of Malta.

When there is no person involved in the administration of the Applicant who is resident in Malta, the Applicant, throughout its ITA certification or ITSP registration terms, as applicable, must ensure that a Resident Agent is validly appointed at all times.

In addition, as provided by the ITAS Act, the following situations may arise in relation to applications for ITA Certification:

- if both an ITA Applicant and the respective appointed Technical Administrator are not resident in Malta, the appointment of a Resident Agent for the Technical Administrator shall satisfy the requirement to appoint a Resident Agent also for the respective ITA. This shall only be accepted by the Authority for as long as the Technical Administrator is engaged with the ITA, and the engagement of the Resident Agent made by the Technical Administrator makes clear reference that this also cover the relevant ITA; and
- when an ITA is made up of several constituent parts, for example DLT and smart contracts, each may obtain a separate ITA certification with the Authority. In such cases, the requirement to appoint a Resident Agent shall be deemed to cover all parts of the ITA if the engagement of the Resident Agent with reference to the main constituent part specifically names all the ancillary parts. In addition, the Resident Agent is required to confirm that the ITA Applicant is authorised to do so with reference to the said ancillary parts.

2.2. Eligibility criteria for a Resident Agent

An individual may be appointed as a Resident Agent only if the following criteria are satisfied:

- is an individual that is habitually resident in Malta;
- not be interdicted or incapacitated, or is an undischarged bankrupt;

- has not been convicted of any of the crimes affecting public trust or of theft or of fraud or money laundering or of knowingly receiving property obtained by theft or fraud; and
- has satisfied the Authority that he/she is a person capable of carrying out the functions of a Resident Agent.

If the proposed Resident Agent is a legal organisation, the same criteria shall apply. However, in line with Article 15(2) of the ITAS Act, a legal organisation shall not be deemed habitually resident in Malta if none of the following are habitually resident in Malta:

- the members of its board of administrators or secretary; and
- appointed senior officers, being the Chief Executive Officer, the Chief Operations Officer, or the Chief Technology Officer.

The European Commission has related 'habitual residence' to a person who has a strong link towards a particular country (or jurisdiction)¹. In determining habitual residence in Malta, there should be an element of permanence, in the sense that one has lived in Malta for a considerable amount of time, and intends to continue doing so for a long period of time. In this regard, the European Commission has put forward a list of factors that should be met in order to determine habitual residence, and these include, *inter alia*, the following:

- the family situation (status and connections);
- the length of time, permanence and domicile (the place where the applicant has his permanent residence and intends to live in it permanently);
- state of employment and taxes paid;
- the accommodation situation, in particular its permanence;
- reasons for person's move;
- the intent shown according to all the circumstances.

2.3. Information to be submitted to the Authority

The appointment of a Resident Agent shall be done in writing, in the form prescribed by the Authority, and evidence submitted to the Authority as part of the recognition application of the Applicant.

¹ <http://ec.europa.eu/social/main.jsp?catId=1121&langId=en&intPageId=4702>

If a Resident Agent is appointed, the Applicant shall include the following information as part of the respective recognition application to the Authority:

- Generic information on the Resident Agent, including a 'Fit and Proper Questionnaire', to allow the Authority to confirm eligibility in line with the criteria specified in Section '*2.2. Eligibility criteria for a Resident Agent*';
- An Acceptance Letter issued by the Resident Agent, and addressed to the Authority, formally accepting the appointment as Resident Agent for the respective Applicant. The Acceptance Letter shall make specific reference to the ITA and/or ITSP that the Resident Agent is representing; and
- Evidence of payment of the non-refundable Appointment of Resident Agents Processing Fee to the Authority.

In addition, in accordance with Article 15(4) of the ITAS Act, and in line with Section '*5. Resignation or removal of the Resident Agent*' below, the Authority must be notified in writing, using the prescribed forms, of all instances of resignation or removal of the Resident Agent.

In the cases where the Applicant replaces a Resident Agent, the Applicant shall provide to the Authority the same information listed above, as would be provided as part of the application process.

2.4. Refusal of a Resident Agent appointment

The Authority, in accordance with Article 15(5) of the ITAS Act, may at any time refuse or reject any notice of an appointment of a Resident Agent which it considers is not in compliance with the eligibility criteria, and in such case the Applicant shall immediately see to appoint another Resident Agent.

3. The role of the Resident Agent

3.1. Functions of the Resident Agent

As defined in Article 16(1) of the ITAS Act, the Resident Agent shall fulfil the following functions on behalf of the Applicant:

- (a) act as the channel of communication between the Applicant and the Authority, Lead Authority or other Maltese government department;
- (b) sign and file with the Authority, Lead Authority, or other Maltese government departments all declarations and forms required in terms of Maltese law; and

- (c) act as the judicial representative of the Applicant for judicial proceedings in Malta, and any notice whether by the Authority or any Lead Authority, sent to the Resident Agent at his last registered address, shall be deemed to have been duly received by and notified to the Applicant.

3.2. Powers of the Resident Agent

In line with Article 17(1) of the ITAS Act, the Resident Agent shall have the power, on behalf of the Applicant, to:

- (a) sign and file applications, declarations, notices, returns and any other document required in terms of Maltese law;
- (b) apply for the certification of an ITA or for the registration of an ITSP with the Authority;
- (c) apply for the revocation or cancellation of a certification of an ITA or for the registration of an ITSP with the Authority, and to perform any other procedures in relation to such revocation or cancellation;
- (d) pay all relative fees and taxes payable in terms of Maltese law;
- (e) do all other things as may be considered conducive or ancillary for the certification or registration or other form of recognition under the ITAS Act or for the maintenance of such recognition;
- (f) authenticate documents issued by the Applicant; and
- (g) receive formal notification on behalf of the Applicant when notifications are required under the provisions of the ITAS Act, any guidelines issued by the Authority, or any other law or any agreement.

Although the Resident Agent has the power to apply for an ITA or ITSP recognition with Authority in the name of the Applicant, such Certificate of Recognition by the Authority, if granted, shall always be in the name of the Applicant. Nevertheless, the Resident Agent is allowed to take possession and hold such Certificate of Recognition for safekeeping.

The Applicant may restrict any of the powers of the Resident Agent. In such instances, the Applicant shall issue a declaration to this effect to the Authority as part of the application form, or in writing where a Certificate of Recognition has already been issued. Such limitation of powers shall also be referenced in the Acceptance Letter to be issued by the Resident Agent to the Authority. The limitation shall not have effect until it is filed and recorded in the Register of Recognitions held by the Authority.

Unless expressly prohibited from doing so in the terms of its own engagement with the Applicant, the Resident Agent may delegate and/or appoint another individual or legal organisation to act in specific matters on its behalf. This shall only be allowed provided that, in doing so, the Resident Agent will not be relinquishing the respective functions, powers and responsibilities described above.

The terms of engagement, and the appointment or removal or resignation, of a Resident Agent shall be recorded in the Register of Recognitions held by the Authority with reference to the ITA and/or ITSP.

4. Liability of the Resident Agent

In line with Article 16(2) of the ITAS Act, unless the Resident Agent has personally undertaken such liability in writing, or has wilfully, or recklessly, made a false declaration, the Resident Agent shall not be personally liable with respect to the following:

- any non-compliance by the Applicant with any law; or
- for any misrepresentation made in any submissions or documents issued by the Applicant, even if authenticated by the Resident Agent for the purposes of the application for recognition with the Authority or any other law.

In addition, the Resident Agent shall not be responsible for any court, legal or related costs in the event of any judicial proceedings filed against in capacity as judicial representative of the Applicant or any of its officers, by whosoever they may have been filed.

5. Resignation or removal of the Resident Agent

In line with Article 18(1) of the ITAS Act, a Resident Agent may resign from the appointment with a recognised ITA or ITSP by giving at least fifteen (15) days' notice in writing to the respective ITA or ITSP, and to the Authority. Similarly, a recognised ITA or ITSP may remove the appointed Resident Agent by giving at least fifteen (15) days' notice in writing to the Authority. All notifications to the Authority for the resignation or removal of the Resident Agent shall be made by using the prescribed forms/channels established by the Authority.

In the cases of Resignation or Removal of a Resident Agent, the ITA or ITSP shall seek to appoint a replacement Resident Agent within thirty (30) days from the date of notification to the Authority.

In addition, in the following situations, the Authority shall have the power to appoint, on a limited and temporary basis, a Resident Agent on behalf of the ITA or ITSP:

- a) in case of failure of the ITA or ITSP to appoint a Resident Agent. The temporary Resident Agent appointed by the Authority shall seek to establish contact with the Applicant who have duties in relation to the governance of the ITA or ITSP so they can appoint a Resident Agent of their choice
- b) where the ITA or ITSP is in default of his obligations under the ITAS Act. The Authority may apply to the Civil Court, First Hall for the appointment of a curator to act as Resident Agent until another Resident Agent is validly appointed or the ITA or ITSP ceases to be certified or registered.

In both cases noted above, the appointed Resident Agent by the Authority shall be an advocate with a valid warrant to practice law in Malta. Any costs incurred by the Authority in this regard shall be borne by the Applicant.



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