

Chapter 03

Technical Administrator Guidelines

MDIA Circular No.3

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 ends 09 October 2018)
- Chapter 3 Technical Administrator Guidelines
- Chapter 4 Resident Agent Guidelines

The MDIA is pleased to announce the third round of consultation (Ref No.03/18) which is covering two areas, namely:

1. Chapter 3 of the MDIA Guidance Notes; and
2. Provision of Innovative Technology Arrangements and Innovative Technology Services in or from Malta

Concluding remarks

The consultation period is open to the public from 03 October 2018 until 17 October 2018. Interested parties are requested to submit their comments and feedback by email on info@mdia.gov.mt by not later than 17 October 2018.

Malta Digital Innovation Authority
03 October 2018

MDIA Public Consultation Ref No. 03/18

1. Chapter 3 – Technical Administrator Guidelines

The MDIA is making available for public consultation Chapter 3 – Technical Administrator Guidelines.

This Chapter has been drafted taking into consideration the proposed changes indicated in MDIA Public Consultation Ref No.02/18 Item 1(a).

Chapter 3 – Technical Administrator Guidelines shall apply to all interested applicants who wish to seek recognition from MDIA to act as Technical Administrators to Innovative Technology Arrangements as contemplated in the Innovative Technology Arrangements and Services Act, 2018¹.

The document is aimed to provide guidance to prospective applicants on:

- the scope of the Technical Administrator;
- powers of intervention of the Technical Administrator;
- recognition criteria;
- documents required for application;
- notification of changes to the Authority;
- role of Technical Administrator when the Innovative Technology Arrangement effects material changes; and
- engagement of the Technical Administrator

2. Provision of Innovative Technology Arrangements and Innovative Technology Services in or from Malta

Article 6 of the MDIA Act provides an overview of the purpose, functions and powers of the Authority. Specifically, sub-article (3)(a) states that the Authority shall "*regulate, monitor and supervise the provision of such innovative technology arrangements and innovative technology services in or from Malta*".

In this regard, the Authority is providing further guidance on the definition of "*in or from Malta*" as applicable to all prospective Innovative Technology Arrangements ('ITA') and/or Innovative Technology Service Providers ('ITSP') that wish to obtain recognition by the Authority.

¹ Chapter 592 of the Laws of Malta

Applicability of 'in or from' Malta to ITAs

An ITA Applicant must demonstrate to the Authority that the ITA has a reasonable element of substance in connection to Malta. This can be achieved by indicating to the Authority how:

- the development of the ITA has occurred or will be carried out in Malta; or
- the operations of the ITA will be carried out in or from Malta.

In determining whether an Applicant fulfils these criteria, the Authority will be particularly looking at operational factors connecting the ITA to Malta, these include, but are not limited to the following:

- the number and type of employees working in Malta;
- the extent of control and management of whose business is exercised and administered in Malta;
- personnel supporting the administration, accounting and financing or other aspects of the business of the ITA;
- the extent of the ITA development carried out in Malta; and
- development and running of specialised centres focussing, for example, on marketing, processing or customer service of the ITA.

Other factors that the Authority will also take into consideration, but on their own do not provide sufficient justification as operating in or from Malta, include the following:

- ITA Applicant being a registered legal organisation in Malta, demonstrating however that the legal organisation is not simply a 'shell';
- local Qualifying Shareholders;
- IP or copyrights registered in Malta;
- support of local ITSP i.e. having a local Technical Administrator and/or a local Systems Auditor;
- ongoing support of local public educational initiatives;
- provision of sustained traineeships, secondments or internships;
- ITA Applicant demonstrates it is supporting a local project with a positive socio-economic benefit relating to technology.

The above factors are not to be considered as exhaustive and the Authority will consider other forms of justification by ITA Applicants to demonstrate a reasonable element of substance in connection to Malta.

Applicability of 'in or from' Malta to ITSPs

In determining whether the ITSP Applicant has a reasonable element of substance in connection to Malta, the Authority requires that the following factors, *inter alia*, are satisfied:

- The ITSP has presence in Malta through the establishment of an operational legal organisation, office or branch (similar operational factors applicable in the case of ITAs, as described above, will also apply for ITSPs in determining the element of substance in connection to Malta)
- In the case where the ITSP is an individual, the registered ITSP must also be a resident in Malta besides the above requirements.

The above factors are not to be considered as exhaustive and the Authority will consider other forms of justification by ITSP Applicants to demonstrate a reasonable element of substance in connection to Malta.

The Authority is seeking feedback on these criteria and shall then be reflecting this guidance in Chapters 1, 2 and 3 as applicable.

Chapter 3 - Technical Administrator 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

“Administrator” is defined in Article 2 of the Innovative Technology Arrangements and Services Act, 2018 (‘ITAS Act’) and further guidance is also provided in the Fourth Schedule, Article 1.1, of the ITAS Act.

“Applicant”, within the context of this document, refers to an individual and/or legal organisation applying for recognition as a Technical Administrator with the Authority.

“Authority” refers to the Malta Digital Innovation Authority (‘MDIA’), as defined by the Malta Digital Innovation Authority Act, 2018 (‘MDIA Act’).

“Technical Administrator” (‘TA’) is defined in 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 ITA.

“Innovative Technology Arrangement”, also referred to as “ITA” within this document, as defined within the First Schedule of the Innovative Technology Arrangements and Services Act, 2018. For the avoidance of doubt, this definition includes, inter alia, any ITA supporting an IVFAO, Providers of VFA Services or similar arrangements.

“Register of Recognitions”, in line with Article 6 of the ITAS Act, 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 ITAS Act.

“Shareholder” is defined in the Fourth Schedule, Article 2.1, of the ITAS Act. In addition, the term “Qualifying Shareholder” is derived from Article 8(4)(a)(ii) of the ITAS Act.

2. Technical Administrator Scope

These guidelines apply to any interested parties, being individuals or legal organisations, that are applying for registration, or hold a Certificate of Registration with the Authority, to act as a Technical Administrator.

The Applicant interested in taking on the role of Technical Administrator shall apply to the Authority for their suitability to be registered.

The Authority may recognise an Applicant to act as a registered Technical Administrator only if the Applicant satisfies the requisite criteria included in the application – refer to Section '3. *Technical Administrator Recognition Criteria*' below.

In line with the Third Schedule of the ITAS Act, the registration of a Technical Administrator is valid for two (2) years from date of issue on condition that the Technical Administrator requirements are met during the registration term. Once registered by the Authority, the Technical Administrator is required to display the Certificate of Registration, as issued by the Authority, on its website (if available) as well as on any ITA with which the Technical Administrator holds an engagement.

2.1. Declaration to be issued by the Technical Administrator

As part of the application for ITA certification, in line with article 8(4)(c) of the ITAS Act, the Technical Administrator is required to submit a declaration that demonstrates to the Authority the ability of the ITA:

- to satisfy all pre-requisites for the ITA certification which may be granted to it by the Authority, in line with the ITAS Act;
- to meet standards on a continuing basis and to address critical matters, and how to address them, as are stated in the Guidance Notes issued by the Authority in the event they occur;
- to vary parameters or functionalities where the objective of the ITA is to address mandatory legal requirements which may reasonably be predicted to change over time; and
- with reference to matters, if any, upon which, the Technical Administrator; the Authority or Lead Authority; or any other designated individual, may be given the discretion or may be required to intervene and which are addressed by the software, all authorisations or powers required to carry out such interventions exist and operate as intended.

2.2. Power of intervention by the Technical Administrator

The registered Technical Administrator appointed by an ITA is required to possess the necessary knowledge and ability required to intervene in response to 'critical matters', which, as set out in Article 8(4)(d)(iii) of the ITAS Act, include:

- a material cause of loss to a user; and
- a material breach of law.

In the event of any intervention taken to address the above, the Technical Administrator must immediately inform the Authority and provide any relevant requested details regarding such an incident.

The Authority acknowledges that, in specific ITA implementations, the functionality to grant the Technical Administrator and the Authority, where applicable, power to intervene, as required in Article 8(4)(c)(iv) and Article 8(4)(d)(iii) of the ITAS Act, may not be technically feasible or justifiable. In this regard, when it is clearly justified as to why the implementation of such functionality cannot be achieved, the Authority reserves the right to vary this requirement. In doing so, subject to all other requirements being successfully met by the ITA Applicant, the Authority may issue an ITA certification that clearly states that the requirements of Article 8(4)(c)(iv) and Article 8(4)(d)(iii) of the ITAS Act are not being met. In addition, the ITA Applicant shall be required to disclose such limitation to all users as part of the Terms of Service.

The Technical Administrator must ensure that any intervention of the type described above is conducted in a transparent way as to provide adequate information (for example logs and an appropriate audit-trail) to the Authority and/or to the Systems Auditor when requested. The Technical Administrator is required to intervene in an effective manner to ensure that any 'critical matters' are satisfactorily addressed to the best of the Technical Administrator's abilities and to ensure they do not occur or re-occur.

2.3. Other obligations of the Technical Administrator

In addition, the Technical Administrator has an ongoing obligation to inform the Authority when:

- a) there are any restrictions regarding the performance or the ability of the Technical Administrator to carry out the statutory duties; or
- b) the Technical Administrator is aware that the ITA is no longer compliant to the original ITA Certification scope.

Throughout the term that a Technical Administrator is registered with the Authority, the Technical Administrator, including any appointed resources, in case of a legal organisation, and/or delegates, will be expected to monitor and keep up-to-date with applicable legal requirements and guidelines issued by the Authority.

The Technical Administrator must be available for any request for information coming from the Systems Auditor or the Authority. A Systems Audit of the ITA will include a verification that the Technical Administrator has the necessary authorisations or powers granted by the ITA required to undertake the duties of a Technical Administrator.

3. Technical Administrator Recognition Criteria

As set out in Article 10(2) of the ITAS Act, a Technical Administrator may be an individual and/or legal organisation, which must satisfy the following criteria:

- be of good conduct and undertake successfully a fit and proper test as requested by the Authority (in the case of legal organisation, this is applicable to Qualifying Shareholders and any appointed Administrator);
- continuously undertake education on the subject matter;
- have sound knowledge of the applicable laws, standards, regulations and guidelines relevant to the Technical Administrator and the ITA;
- demonstrate that the Technical Administrator, including technical resources, have the relevant qualifications and experience within the technology field of the ITAs; and
- provide proof of sufficient technical resources, internally if a legal organisation, as an individual, through delegates, or with third party support to meet operational and compliance obligations and to meet the Authority and/or Systems Auditor requests.

In line with Article 15 of the ITAS Act, an Applicant that is not ordinarily resident in Malta is required to appoint a Resident Agent. Details of the appointed Resident Agent shall be provided to the Authority as part of the application for registration as a Technical Administrator. Refer to Chapter 4 'Resident Agent Guidelines' issued by the Authority for further guidance.

4. Technical Resources used by the Technical Administrator

In line with Article 9(7) of the ITAS Act, the innovative technology services provided by a Technical Administrator may be carried out by an individual and/or legal organisation, and, in doing so, the Technical Administrator may carry out such services:

- a) personally (in the case of an individual); or
- b) through resources of the legal organisation; or
- c) through delegates approved by the Authority; or
- d) through technology systems;

In this regard, as part of the application process, the Applicant is required to submit to the Authority information about the technical resources that will be used in the provision of the respective innovative technology services. Specifically, where the Applicant avails of (b) and/or (c), the Applicant is required to provide the Authority with adequate information to allow the Authority to confirm that such resources and/or delegates are fit and proper, and have the necessary qualifications and experience to provide the services.

5. Documents required for a Technical Administrator Application

An Applicant is required to complete and submit the relevant Application Form and remit the requisite fees to the Authority along with the following documentation:

- a general description of the Technical Administrator track record: in the case of an individual, a career history; in the case of a legal organisation, a corporate profile;
- shareholding/partnership structure if the Technical Administrator is a legal organisation, and in such cases, a 'Fit and Proper Questionnaire' shall be submitted for any shareholder holding more than twenty-five per cent (25%) of the voting shares of the legal organisation or any appointed Administrator;
- a 'Fit and Proper Questionnaire' for all individuals included under the application of the Technical Administrator, which include:
 - (i) any individual who will personally provide the innovative technology services;

- (ii) in the case of a legal organisation, any resources of the organisation; and
 - (iii) any delegates that are approved by the Authority.
- organisational structure and governance processes if the Technical Administrator is a legal organisation;
- evidence of payment of the non-refundable Technical Administrator registration fee.

The above is not an exhaustive list, and the Applicant shall provide all the necessary information as required in the relevant Application Form.

6. Material Changes

6.1. Changes to a Registered Technical Administrator

In line with Article 12 of the ITAS Act, an individual and/or legal organisation that holds a Certificate of Registration as a Technical Administrator, shall inform the Authority of any material changes. Within this context, material changes to the Technical Administrator shall include the following:

- a) any change in an Administrator of a relevant legal organisation (if the Technical Administrator is a legal organisation);
- b) any change in a qualifying shareholder (if the Technical Administrator is a legal organisation);
- c) any change in the person with reference to whom a certification or a Certificate of Registration has been issued. This shall cover, if applicable, any resources of a legal organisation and/or delegates that were included as part of the application for recognition.

Whenever such changes occur, the holder of the Technical Administrator Certificate of Registration shall provide the Authority with the necessary information to review and approve such changes. This information shall be similar in nature, to the extent applicable, to what an Applicant is requested to submit as part of the application process.

6.2. Changes to a Certified ITA

For the purpose of the obligations of a Technical Administrator as set out in Article 12 of the ITAS Act and further explained in these Guidelines, "material changes" with reference to an ITA arrangement shall include:

- a) any alterations of any of the software on which an assurance has been provided by a Systems Auditor;
- b) any development altering the rights of users;
- c) any development altering the rights, authorisation and powers of the technical administrator or the Authority;
- d) any change in the Technical Administrator;
- e) any change in an administrator of a relevant legal organization;
- f) any change in a Qualifying Shareholder;
- g) any change in the individual with reference to whom a certification has been issued.

Prior approval of the Authority

If the certified ITA affects any of the changes listed in (a), (b) and (c) above, and cannot provide a confirmation by a Systems Auditor (registered by the MDIA) that such changes do not impact the last Systems Audit Opinion issued on the ITA, then such changes will require the prior approval of the MDIA.

The Technical Administrator (unless this task is performed by the ITA, or other Innovative Technology Service Provider) is required to document and report such changes to the Authority. The Authority shall review the proposed changes and following its assessment will communicate the outcome to the Technical Administrator (or to the ITA, or other Innovative Technology Service Provider, if applicable).

Notifications to the Authority

If the Certified ITA affects any of changes listed in (a), (b) and (c) above, and a Systems Auditor (registered by the MDIA) confirms that such changes do not impact the last Systems Audit Opinion, the Technical Administrator (unless this task is performed by the ITA, or other Innovative Technology Service Provider) is required to provide the Authority with the particulars of the change, as well as, any applicable fees, within thirty (30) days of such changes.

The Technical Administrator will be requested by the holder of the ITA Certificate to document these changes, confirming the continuing validity of his declaration issued for the purpose of the ITA certification, so as to be reported to the Authority.

7. Technical Administrator Engagement

In line with Chapter 2 of the Guidance Notes (*Innovative Technology Arrangement Guidelines*) issued by the Authority, an ITA shall have a Technical Administrator, registered with the Authority, in office at all times. Details of the Technical Administrator/s appointed shall be provided as part of the ITA Application Form.

The Technical Administrator will be appointed by the ITA from a list of registered Technical Administrators published by the Authority, known as the Register of Recognitions. Any ITA certification issued by the Authority will include the registered Technical Administrator appointed by the ITA.

The Technical Administrator and the ITA Applicant should not be the same person. On the other hand, the Technical Administrator may be an employee of the ITA.

At any point in time, an ITA may appoint one or more Technical Administrators. In the case where more than one Technical Administrator is appointed, such Technical Administrators may be assigned responsibility for the whole, or a designated part, of an ITA.

The Authority requires an ITA to appoint a registered Technical Administrator to be in office at all times. In case of unavailability, all duties and obligations must be delegated to an adequate temporary replacement possessing the necessary system knowledge, skills and abilities, including being also a registered person with the Authority. For each ITA engagement, the Technical Administrator must possess the necessary knowledge and expertise on the particular ITA needed to comply with the Technical Administrator duties set out in the ITAS Act and any guidelines issued by the Authority.

Should the Technical Administrator resign or should the ITA terminate the appointment of the Technical Administrator, the Technical Administrator must inform the Authority immediately. The Technical Administrator remains responsible for the obligations related to that ITA until the notification is filed with the Authority.

8. Revocation, cancellations or Suspension of a Technical Administrator

The Authority reserves the right to remove or suspend any Technical Administrator from the registered list in case of unsatisfactory performance or any breach of the obligations related to the Technical Administrator registration with the Authority.

In line with Article 35 (1) of the MDIA Act, in case of revocation, cancellation or suspension, the Authority shall give the Technical Administrator no less than twenty-five (25) days to show cause for the suspension or revocation of its registered license not to take place.

The Authority may revoke the registration with immediate effect, by written notice to the Technical Administrator, when the Technical Administrator maliciously or due to gross negligence fails to report to the Authority serious failures on the part of one or more ITAs with respect to which the Technical Administrator has carried out Technical Administrator duties, provided that the Authority shall, at its sole discretion, determine what amounts to a serious failure on the part of a Technical Administrator.



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