

## Review of Must-Carry Obligations

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Response to Consultation and Decision Notice

MCA/D/17-2763

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## EXECUTIVE SUMMARY

By virtue of this decision, the Malta Communications Authority (MCA) is imposing must-carry obligations on GO Plc's fixed line Internet Protocol Television (IPTV) network with respect to the carriage of all General Interest TV channels with immediate effect.

The justification for imposing must-carry obligations on GO's IPTV network is mainly based on the following factors:

- The number of subscribers on GO's IPTV network launched in 2011 has seen an increase of 16,387 subscriptions (from 5,954 to 22,341) between 2013 and the first half of 2016. This now equates to around 15% of the total number of pay TV subscribers. The amount of GO's IPTV subscriptions, coupled with the ongoing rapid uptake, reflects that the IPTV platform is now being used by a significant number of end-users.
- A survey carried out by the MCA between October and November 2015 confirms that the three prevalent TV broadcast networks (Digital Cable TV, Digital Terrestrial TV, and IPTV) are all used by their respective end-users as the principal means of receiving TV broadcasts.
- Imposing must-carry obligations on GO's IPTV network does not place an excessive or undue burden for GO to reserve part of the network capacity for the retransmission of the General Interest TV channels.<sup>1</sup>

This Decision follows the publication of a consultation document on 4<sup>th</sup> July 2016, with a five-week response period. Upon closure date the MCA received two responses, one from Melita Ltd (referred to as 'Melita') and the other from GO.

The responses did not, in effect, present any new material that could change the MCA's consultation proposal. Hence the decision, on the part of the MCA, is to confirm its consultation proposal to impose must-carry obligations on GO's IPTV network.

It is understood that the imposition of must-carry obligations on GO's IPTV network does not, in any way, equate to an additional burden on the part of the operator. It is to be noted that the General Interest TV channels are already being carried on GO's IPTV packages.

Must-carry obligations on Melita's Digital Cable TV network remain unchanged.

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<sup>1</sup> The current General Interest TV channels include: TVM, TVM 2, ONE, NET, F LIVING, XEJK, SMASH and PARLIAMENT TV.

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## DEFINITIONS

<b>General Interest TV channel</b>	A TV channel that is identified by the Broadcasting Authority (BA) as qualified to meet General Interest Objectives (GIOs) and thus entitled for carriage on the General Interest TV broadcast network and for 'must-carry status'.
<b>TV broadcast network or TV network</b>	An electronic communications network used for the distribution of television services.
<b>General Interest TV broadcast network</b>	The free-to-air Digital Terrestrial TV (DTT) broadcast network managed by Public Broadcasting Services Limited (PBS) and set up solely for the initial transmission of the digital and unencrypted General Interest TV channels (free-to-air).
<b>General Interest broadcaster</b>	An entity having editorial control over a General Interest TV channel.
<b>Pay TV operator or operator</b>	An undertaking, other than PBS, providing electronic communications networks used for the distribution of TV broadcast channels and offering TV services, normally against subscription.
<b>Commercial TV network</b>	A TV broadcast network other than the General Interest TV broadcast network.

## 1. INTRODUCTION

### 1.1 Purpose

This document represents the response to the consultation on the review of must-carry obligations on TV broadcast networks and the resultant decision. By virtue of this decision, the MCA is imposing must-carry obligations on GO's IPTV network with respect to the carriage of the General Interest TV channels with immediate effect.

### 1.2 Background

In December 2011 the MCA published *Guidelines* on determining which TV broadcast networks would be subject to must-carry obligations.<sup>2</sup>

In February 2012 the MCA issued a decision stating that GO does not need to be designated as having must-carry obligations on its terrestrial digital TV (DTT) network, whilst Melita was designated as having must-carry obligations of the six identified General Interest TV channels<sup>3</sup> on both its analogue as well as its digital cable TV networks.<sup>4</sup>

In September 2012 the BA granted an additional General Interest broadcasting licence to Xejk (previously called Calypso Music Channel) as the seventh General Interest TV channel.

In August 2013 the MCA decided that must-carry obligations should no longer apply to the Melita Cable analogue tier.<sup>5</sup> This decision was taken in light of the prevailing market conditions, which clearly indicated a consistent decline in the number of subscribers, reaching a rather low percentage amount of overall TV network subscriptions. Spectrum efficiency issues represented by obsolete analogue technology, together with an equivalently priced, as well as superior, digital offering by Melita, were key elements that had a significant bearing on the decision.

In October 2015, the BA granted an additional General Interest broadcasting licence to Parliament TV as the eighth General Interest TV channel.

Meanwhile, another significant development has also been observed since the last review of must-carry obligations in 2013, namely a substantial increase in GO's fixed line IPTV subscriptions. As a result of this development, in July 2016 the MCA consulted publicly in order to review the TV broadcast networks subject to must-carry obligations and proposed changes where necessary.<sup>6</sup>

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<sup>2</sup> [MCA's Must-Carry Obligations Guidelines](#) published on the 2<sup>nd</sup> December 2011.

<sup>3</sup> TVM, TVM 2 (previously called Education 22), Net TV, One TV, Smash TV and f Living (previously called Favourite Channel).

<sup>4</sup> [MCA's Decision on the designation of obligations on providers of networks used for Television and Radio Distribution Services](#) published on the 23<sup>rd</sup> February 2012:

<sup>5</sup> [MCA's Decision on the Review of Must-Carry Obligations](#) published on the 30<sup>th</sup> August 2013.

<sup>6</sup> [MCA's Consultation Document on the Review of Must-Carry Obligations](#) published on the 4<sup>th</sup> July 2016.

### 1.3 Must-Carry Rules

Must-carry rules require TV channels to be carried over certain TV broadcast networks. The specified TV channels qualify for must-carry status when they meet clearly defined General Interest Objectives (GIOs). Must-carry rules thus contain two aspects:

- **Must-carry status:** granted to broadcasters that provide a GIO television service as determined by the BA; and
- **Must-carry obligations:** obligations for pay TV operators to reserve a part of their network capacity for the retransmission of TV channels enjoying must-carry status (i.e. General Interest TV channels).

### 1.4 Obligations Concerning Content

GIOs equate to a public service remit, and are carried out primarily by PBS, the national public service broadcaster, through its two TV channels TVM and TVM 2. The remaining part of the remit complementing the PBS programming is entrusted to Parliament TV and broadcasters of privately-owned TV channels (f Living, Net TV, One TV, Smash TV and Xejk).

In line with the Broadcasting Act (Cap. 350 of the Laws of Malta), the BA has identified these eight TV channels as meeting GIOs and accordingly has issued each channel with a General Interest broadcast content licence. Collectively, these public and private TV channels are referred to as 'General Interest TV channels'.

PBS is appointed by Government as the network operator responsible for setting up, operating and managing a DTT network for the initial transmission of all the General Interest TV channels, in standard definition (SDTV) format, which is unencrypted and thus available to all viewers on a free-to-air basis.<sup>7</sup>

### 1.5 Legal Basis for Must-Carry Obligations

The legal basis for imposing must-carry obligations is regulation 49 of the Electronic Communications Networks and Services (General) Regulations (SL 399.28 of the Laws of Malta) which regulation states that<sup>8</sup>:

*"49.(1) The Authority [MCA] may impose reasonable "must carry" obligations for the transmission of specified radio and television broadcast channels and complementary services, particularly accessibility services to enable appropriate access for disabled end-users, on undertakings providing electronic communications networks used for the distribution of radio or television broadcasts channels to the public where a significant number of end-users of such networks use them as the*

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<sup>7</sup> PBS has an agreement with GO to establish and maintain a DTT network, on behalf of PBS, to transmit the General Interest TV channels on the frequency assigned to PBS (currently Channel 66 UHF which is planned to be replaced with Channel 43 UHF) for the transmission of all General Interest TV channels.

<sup>8</sup> This regulation transposed Article 31 of the Universal Services Directive.

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*principal means to receive radio and television broadcasts:*

*Provided that such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent.*

*(2) The Authority may determine, in a proportionate and transparent manner, the appropriate remuneration, if any, in respect of measures taken in accordance with sub regulation (1):*

*Provided that in doing so the Authority shall ensure that in similar circumstances there is no discrimination in the treatment of undertakings providing electronic communications networks.*

*(3) The Authority shall review "must carry" obligations on a regular basis"*

## 1.6 Must-Carry Guidelines

On the 2<sup>nd</sup> December 2011 the MCA published its *Guidelines on Must-Carry Obligations* (hereinafter referred to as the '*Guidelines*') which provided the framework for determining how must-carry obligations should be imposed on a pay TV operator.

The *Guidelines* which remain relevant in determining TV broadcast network operators subject to must-carry obligations are provided below for ease of reference:

**Guideline 1:** When determining which networks are used by a significant number of end-users, the MCA will consider the state of technological and market development, market structure, as well as target markets.

**Guideline 2:** When determining which networks are used as the principal means to receive TV broadcasts the MCA will take into account, amongst other factors, the number of end-users with connections to two or more TV broadcast networks.

**Guideline 3:** Where must-carry obligations place an excessive or undue burden on the operator of a particular network, the MCA will, where it deems appropriate, consider alternative measures for the General Interest TV channels to be seamlessly available to all end-users of that network provided that no undue burdens are placed on end-users.

**Guideline 4:** When determining whether remuneration for the retransmission of the General Interest TV channels should be provided, the MCA will need to satisfy itself that any remuneration provided can be justified.

## 1.7 Must-Carry Obligations

As stated in the *Guidelines*, when imposing must-carry obligations on providers of the respective networks used for television and radio distribution services a designated TV operator is required to:

- reserve part of the network capacity for the retransmission of the General Interest TV channels;



- 
- transmit complementary services, particularly accessibility services to enable appropriate access for disabled end-users; and
  - ensure that the transmission and picture quality of the General Interest TV channels is of an appreciable and comparable quality to that of the initial (free-to-air) transmission.

#### **Network Capacity**

An operator subject to must-carry obligations is required to carry the General Interest TV channels on its network if this is used by a significant number of users as the principal means of receiving TV broadcasts, as indicated by the MCA.

This entails making part of its network capacity available for the retransmission of these channels. The reserved capacity must be sufficient to ensure that audiovisual quality is of an appreciable and comparable quality to that of the initial transmission via DTT<sup>9</sup> (refer also to Technical Parameters below).

#### **Complementary Services**

Regulation 49 of the Regulations allows for the must-carry obligations to include “*complementary services, particularly accessibility services to enable appropriate access for disabled end-users*”. The MCA requires the operator to retransmit alongside the respective General Interest TV channel:

- teletext and electronic programme guide (EPG) services, where applicable; and
- accessibility services as defined by the BA from time to time, and applicable to the General Interest TV channels.

#### **Technical Parameters**

The technical parameters by which the General Interest TV channels are to be retransmitted rest with the operator. The quality of the General Interest TV channels, however, impacts user experience and should match that of the initial transmission. Thus the picture quality of the General Interest TV channels should be of an appreciable and comparable quality to that of the initial (free-to-air) transmission.

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<sup>9</sup> A GI broadcaster is allotted enough bandwidth by the BA to transmit free-to-air in standard-definition (SD) TV format.

## 2. OVERVIEW OF THE TV BROADCASTING SECTOR

The situation, as far as the number and types of transmission platforms are concerned, presents no material changes from the last review carried out in 2013. TV channels continue to be broadcast on the following networks:

- Free-to-air DTT network (General Interest TV broadcast network) operated by the national TV broadcaster, PBS.
- Commercial analogue and digital cable TV networks.
- Commercial DTT and IPTV networks.

A survey of domestic (i.e. excluding commercial use) take-up of pay TV platforms carried out by the MCA between October and November 2015<sup>10</sup> showed that the vast majority of households (94%) are subscribed to a pay TV package with at least one of the local pay TV operators. The survey showed that 45% of households with a TV connection are subscribed to a Melita TV platform whilst 50% of households having a TV connection are subscribed to a GO TV platform. The actual subscriptions by platform between 2013 and H1/2016<sup>11</sup> are reflected in **Table 1** below:

<b>Table 1: Pay TV network subscriptions</b>				
<b>Pay TV Network</b>	<b>Subscriptions</b>			
	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>H1/2016</b>
<b>Melita</b>				
Analogue Cable TV services	7,495 (5%)	6,848 (5%)	6,092 (4%)	5,743 (4%)
Digital Cable TV services	73,172 (49%)	71,298 (48%)	72,622 (49%)	71,226 (48%)
<b>GO</b>				
DTT services	62,284 (42%)	57,478 (39%)	51,390 (34%)	48,653 (33%)
IPTV services	5,954 (4%)	12,256 (8%)	19,274 (13%)	22,341 (15%)
<b>Total Subscriptions</b>	<b>148,905</b>	<b>147,880</b>	<b>149,378</b>	<b>147,963</b>

Source: MCA Data Report Sheets

<sup>10</sup> Refer to the [MCA's Survey Results - Broadcasting Services](#) published in January 2016. It is noted that the survey considered private households and excluded business subscriptions. The survey results do not present the actual market share figures.

<sup>11</sup> Refer to the [MCA's Communications Market Review](#).

The analogue cable TV platform has continued to see a drop in the number of subscriptions. In the last review (2013) the MCA removed the must-carry obligation from the analogue cable TV platform in light of the prevailing market conditions, which clearly indicated that patronage was dwindling.

This was seen in the context of the existence of an equivalently priced digital offering that provides a larger number of channels, including the General Interest TV channels. It is easy to switch from the analogue tier to its digital cable equivalent from both a technology and a price standpoint. Spectrum efficiency issues represented by obsolete analogue technology also had a bearing on the decision to remove must-carry obligations from the analogue cable TV platform. As from September 2014 carriage arrangements on the analogue cable TV platform have been on a commercial basis, i.e. without any regulatory intervention of sorts. The number of active subscriptions is now at around 4% of total subscription levels.

The digital Cable TV and DTT platforms still retain a significant number of overall subscriptions. In addition IPTV subscriptions over the past two years have increased significantly. This can be explained by the fact that GO is actively promoting its IPTV platform which is more content-rich than its DTT platform and offers additional features including widgets, high-definition (HD) channels and simultaneous recording, amongst others.

## 2.1 Free-to-air DTT Network

The free-to-air DTT network, or General Interest TV broadcast network, is owned and managed by PBS. The network is set for the initial transmission of all the General Interest TV channels, as identified by the BA, in digital and unencrypted form (free-to-air). The channels in question are: TVM, TVM 2, f Living, Net TV, ONE TV, Smash TV, Xejk and, as from October 2015, the Parliament TV Channel.

Around 4% of all households rely solely on free-to-air broadcasts to receive and watch local TV. In addition to these households all viewers with a DTT tuner, including GO DTT subscribers, can also seamlessly view the General Interest TV channels, given their transmission in unencrypted form.

## 2.2 Pay-TV Networks

Melita's digital cable TV network carries the General Interest TV channels on all of its current packages:<sup>12</sup>

- The M plan: 44 digital TV channels, 5 HD TV channels and 48 Digital Music Channels & 16 Radio Stations;
- The L plan: provides 86 digital TV channels, 10 HD TV channels and 48 Digital Music Channels & 16 Radio Stations; and
- The XL plan: provides 124 digital TV channels, 12 HD TV channels and 48 Digital Music Channels & 16 Radio Stations.

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<sup>12</sup> Refer to Melita's website (December 2016): [https://www.melita.com/tv\\_category/tv-packages/](https://www.melita.com/tv_category/tv-packages/)

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GO's DTT network carries General Interest TV channels on all of its current packages.<sup>13</sup> The Gold package offers 50+ Digital TV Channels. The Silver package offers 40+ Digital TV Channels. The Bronze package offers 20+ Digital TV Channels. No HD TV Channels are offered on these packages.

GO's IPTV network carries General Interest TV channels on all of its current packages:<sup>14</sup>

- Gold Interactive: 100+ Digital TV Channels;
- Silver Interactive: 70+ Digital TV Channels;
- Bronze Interactive: 30+ Digital TV Channels.

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<sup>13</sup> Refer to GO website (December 2016): <https://www.go.com.mt/personal/tv/packages/tv-packages>

<sup>14</sup> Refer to GO's website (December 2016).

### 3. ASSESSMENT OF MUST-CARRY DESIGNATIONS

This section reviews the pay TV operators subject to must-carry obligations in view of the substantial increase in GO's IPTV subscriptions over the past two years. In reviewing the pay TV operators subject to must-carry obligations the MCA took into consideration the established *Guidelines*.

#### 3.1 TV Networks used by a Significant Number of Users

**Guideline 1** states that “when determining which networks are used by a significant number of end-users, the MCA will consider the state of technological and market development, market structure, as well as target markets.”

In line with *Guideline 1* the MCA considers that the commercial digital Cable TV and DTT broadcast networks continue to be used by a significant number of end-users to receive television broadcasts:

- **Melita - Digital Cable TV:** The digital Cable TV network launched in 2005 continues to enjoy a significant market share of households, estimated at 48% as at the end of Q2/2016 (equivalent to 71,226 subscriptions).
- **GO - Digital Terrestrial TV:** The commercial DTT network launched in 2005 continues to enjoy a significant market share of households, estimated at 33% as at the end of Q2/2016 (equivalent to 48,653 subscriptions).

The number of subscribers on GO's IPTV network launched in 2011 has seen an increase of 16,387 subscriptions (from 5,954 to 22,341) between 2013 and the end of the first half of 2016. This now equates to around 15% of the total number of pay TV subscribers. The amount of GO IPTV subscriptions, coupled with the ongoing rapid uptake, reflects that the IPTV platform is now used by a significant number of end-users.

As expected the analogue Cable TV platform has continued to see a drop in subscriptions and, as concluded in the 2013 must-carry review, the number of current subscriptions (5,743) cannot be considered as significant. This has to be seen in the context of spectrum efficiency issues represented by analogue technology and a suitable replacement offering available to the remaining analogue subscribers.

### 3.2 TV Networks used as Principal Means to Receive TV Broadcasts

**Guideline 2** states that “when determining which networks are used as the principal means to receive TV broadcasts, the MCA will take into account, *inter alia*, the number of end-users with connections to two or more TV broadcast networks”.

A recent survey carried out by the MCA between October and November 2015 found that only 5.5% of households are connected to two or more pay TV networks. This result confirms that the three prevalent TV broadcast networks - Digital Cable TV, DTT, and IPTV - are all used by their respective end-users as the principal means of receiving TV broadcasts.

### 3.3 Principle Of Reasonableness

**Guideline 3** states that “where must-carry obligations place an excessive or undue burden on the operator of a particular network, the MCA will, where it deems appropriate, consider alternative measures for the General Interest TV channels to be seamlessly available to all end-users of that network provided that no undue burdens are placed on end-users.”

In line with *Guideline 3* when imposing a must-carry obligation on a particular operator the MCA must consider, among others, whether the imposition of a must-carry obligation entails an excessive or undue burden on the operator of a particular network. In this regard the MCA, where it deems appropriate, considers proposals, on the part of an operator subject to a must-carry obligation, for alternative ways of conveying the General Interest TV channels to their end-users.

When considering any such requests the MCA is guided by the need to ensure that such channels will be seamlessly available to all end-users of that particular network with no undue burden placed on end-users.

In its 2012 must-carry designation the MCA reached the following conclusion with regard to the principle of reasonableness on the commercial DTT network operator:

*“The MCA is conscious that under current circumstances, must-carry obligations on commercial DTT network operators would result in unnecessary duplication of TV transmissions. This, in turn, leads to inefficient use of spectrum.*

*For the purposes of spectrum efficiency, therefore, DTT operators would not be obliged to retransmit the General Interest TV channels on their DTT network; provided that the equipment supplied to their end-users to receive the pay TV channels can be seamlessly used to receive the initial transmissions of the General Interest TV channels.”*

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The MCA therefore does not impose must-carry obligations on GO's DTT network. To do so would amount to unnecessary duplication in the DTT transmission of the General Interest TV channels, with a resultant loss in spectrum efficiency, given that viewers can access the unencrypted PBS-run network over the same DTT set-top box. Retransmission of the General Interest TV channels by GO over its DTT commercial network would therefore be totally unnecessary. The situation has not changed since the 2013 review of must-carry obligations and therefore the MCA is of the opinion that this position does not warrant any change in approach.

The spectrum efficiency principle applied by the MCA in the case of GO's DTT platform, was similarly applied by the MCA in the case of the Melita Analogue platform, when the MCA removed must-carry obligations on the latter platform, even though the technological circumstances are not similar. In the case of Melita, the frequency spectrum passing over cable still remains finite and therefore remains a scarce resource. Given the potential alternative use of the capacity in question - be it for Digital TV or for high-speed broadband - and the fact that analogue cable subscribers had better digital alternatives to migrate to, the MCA determined that from an opportunity cost viewpoint it was not proportionate to maintain must-carry obligations over the analogue cable platform. The MCA has therefore been consistent in the application of the spectrum efficiency principle across platforms, albeit in different ways, given the underlying variations in technology.

In the case of Digital Cable TV and IPTV the imposition of must-carry obligations does not place an excessive or undue burden on the operators of the respective commercial networks. There is no excessive or undue burden for the operators to reserve part of their substantial network capacity for the retransmission of the General Interest TV channels. Neither is there any duplication of transmission, as in the case of GO's DTT network, referred to above.

Melita Cable currently advertises a maximum of 184 TV channels on its XL package and a minimum of 97 TV channels on its M package. In addition, all local TV stations (including the following local HD channels: TVM HD; TVM2 HD and NET HD) are included in both offers. This would indicate adequate capacity to carry the eight General Interest TV channels without any undue burden on the operator.

Similarly GO's IPTV currently advertises over 100 Digital TV Channels on its Gold Interactive package, over 70 Digital TV Channels on its Silver Interactive package and over 30 Digital TV Channels on its Bronze Interactive package. The IPTV network operator already carries all local TV stations (including all the local HD Channels - TVM HD, TVM2 HD, NET HD and ONE HD) through its 'Bronze Interactive TV', 'Silver Interactive TV', the 'Gold Interactive TV' packages. This would indicate adequate capacity to carry the General Interest TV channels without any undue burden on the operator.

### 3.4 Remuneration

**Guideline 4** states that ‘when determining whether remuneration for the retransmission of the General Interest TV Channels should be provided, the MCA will need to satisfy itself that any remuneration provided should be justified.’

Due to nature of the TV services provided, PBS (the General Interest TV broadcast network operator) and pay TV operators have adopted different remuneration models. As the General Interest network operator, PBS provides its unencrypted General Interest TV Channels on a free-to-air basis. This business model does not allow PBS to recover costs associated with the initial transmission of the General Interest TV channels from its viewers. It therefore seeks remuneration from the broadcasters of the General Interest TV channels carried over the General Interest TV broadcast network.

In contrast, pay TV (network) operators have a direct relationship with their subscribers. In particular, operators providing wired services, such as cable and IPTV, can access their subscribers’ premises for the purpose of installing a connection to their network. Subscribers are typically charged for receiving the General Interest TV channels, normally packaged with other channels.

Whilst acknowledging that must-carry obligations may place a cost burden on the undertaking, the MCA cannot ignore the fact that pay TV operators recover costs through subscription fees and are not required to pay any copyright fees associated with the retransmission of the General Interest TV channels.<sup>15</sup>

In its must-carry designation of 2012 the MCA concluded that it would be disproportionate for pay TV operators to be remunerated further by broadcasters or the State for the retransmission of the General Interest TV channels. Furthermore, any request on the part of an operator for any remuneration would need to be justified. This argument still holds today given that no material change in the financial models and relationships prevailing in that decision has since occurred.

### 3.5 Consultation Proposal

Based on the above assessment (also refer to the below table) the MCA concluded that must-carry obligations on Melita’s Digital Cable TV network for the carriage of the identified General Interest TV channels will continue to apply irrespective of any packages offered on this platform. In addition, the MCA proposed that must-carry obligations with respect to the carriage of the General Interest TV channels will apply to GO’s IPTV network irrespective of any packages offered on this platform.

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<sup>15</sup> General Interest TV broadcasters cannot prohibit retransmission and cannot charge copyright fees for the retransmission of their content. These requirements emanate from the Copyright Act and from Broadcast Act respectively.



Authorised Provider under the General Authorisation Regime <sup>16</sup>	GO Plc		Melita Ltd	
TV Network	DTT	IPTV	Analogue Cable TV <sup>17</sup>	Digital Cable TV
<b>Guideline 1:</b> Network is used by a significant number of users	Yes	Yes	No	Yes
<b>Guideline 2:</b> Network is used as the principal means to receive TV broadcasts	Yes	Yes	Yes	Yes
<b>Guideline 3:</b> Alternative measures for the General Interest TV channels to be seamlessly available to all end-users of that network provided that no undue burdens are placed on end-users.	Satisfied	Not applicable	Not applicable	Not applicable
<b>Designation of Must-Carry Obligation</b>	No	Yes	No	Yes

<sup>16</sup> Undertakings authorised in accordance with the Electronic Communications Network and Services (General) Regulations to provide electronic communications networks used for the distribution of TV & Radio Distribution Services: <http://www.mca.org.mt/authorisations-licensing/register-authorized-undertakings>

<sup>17</sup> As from September 2014 carriage arrangements on Melita's analogue cable TV platform have been on a commercial basis i.e. with no must-carry obligations.

## 4. RESPONSES TO CONSULTATION

After the closing date of the consultation period the MCA had received two responses, one from Melita and the other from GO. An outline of the respondents' views and the comments made by the MCA is presented hereunder.

### 4.1 Respondents' Views

#### Melita's Response

Melita argued that the current situation, with only Melita as the sole network operator having must-carry obligations, is discriminatory. Melita claimed that must-carry obligations on its Digital Cable TV network is unduly burdensome and disproportionate since GO, as the authorised DTT operator in Malta, is gaining access to additional spectrum and getting remunerated for operating the General Interest TV broadcast network for PBS.

Whilst Melita noted that it is largely supportive on the move to impose 'must-carry obligations' on GO's IPTV network, Melita feels that this does not eliminate the undue burden imposed by the current situation. Melita thereby questioned why the proposed decision is only limited to GO's IPTV network and was not also extended to GO's DTT network. This especially when noting that GO's DTT network is used by a significant number of end-users as the principal means of receiving TV broadcasts.

#### *Assessment of must-carry designations*

Melita argued that must-carry obligations have a direct impact on network operators since they restrict the operator's ability to use its own network capacity freely and competitively. The capacity used for must-carry channels cannot be used for other services.

Melita noted that the MCA has always argued against remuneration for the retransmission of General Interest TV channels. However, Melita believes that such a conclusion needs to be seen in light of Regulation 49(2) whereby the MCA may determine, in a proportionate and transparent manner, the appropriate remuneration, if any, when imposing must-carry obligations. In addition, the MCA must ensure that in similar circumstances there is no discrimination in the treatment of undertakings providing electronic communications networks.

Melita argued that it is disproportionate when on the one hand Melita or any other operator is not remunerated for its must-carry obligations, whereas on the other hand GO is allowed to retain valuable spectrum on its DTT network, which it can use commercially and competitively as it wants, with no must-carry obligations. Additionally, Melita stated that GO is being remunerated for the provision of a network solution to provide these General Interest TV channels which facilitates the provision of its own commercial DTT solution to clients.

Melita claimed that this situation has created a discriminatory environment in the pay TV market, among undertakings providing electronic communications networks. Melita noted that it cannot

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agree with the MCA in its assessment that must-carry obligations on GO's DTT network will lead to an excessive or undue burden, more so when this is not assessed in light of the advantages it brings to GO in the competitive market.

Melita is of the opinion that a remuneration which is non-discriminatory, proportionate, transparent and cost-based should be payable to the network operators, and that given the undue advantage GO is being given because of its operation of the General Interest TV broadcast network for PBS, Melita should be similarly remunerated for inclusion of General Interest TV channels in its line-up.

### ***General Interest Objectives***

Melita acknowledged that the MCA has no direct remit on the designation of General Interest broadcast content licences, which are regulated by the BA. However Melita argued that given the direct impact on spectrum which may be utilised by a network operator, the argument as to what constitutes or not a General Interest TV Channel, is very much relevant to the current consultation.

Melita argued that the definition of GIO in the Broadcasting Act is very wide, including both generalist channels and 'niche' channels. This definition, in Melita's view, goes against the principles listed in the EU Universal Service Directive that must-carry obligations must be 'reasonable' and 'proportionate'.

Melita also argued that in order to meet the reasonableness and proportionality standards, the must-carry obligation must be limited to what is necessary and appropriate to achieve the specified GIOs. The number of broadcast channels and services which are granted must-carry status should be limited to what is required to protect or promote culture, the national or official language or pluralism. Melita claimed that the current status grants must-carry status to channels which may not necessarily reflect the GIO to be achieved.

Melita noted that niche channels by definition are inherently contradictory to the notion of "general interest". Melita contends that when something is specialist by its very nature, like a niche channel, it cannot satisfy the requirements of GIO. It is also relevant to consider that viewers today watch content not channels, and that the viewing of video content is moving from linear broadcasts to on demand viewing worldwide. A material amount of the content being watched on these "niche" General Interest TV channels is readily available on the World Wide Web, often in better quality than that provided by the "niche" channel.

Melita recommended that the GIO criteria need to be assessed on a regular basis in order to strike the right balance between the restrictions on network operators imposed due to must-carry obligations and the benefits of achieving must-carry status of a number of selected channels. Melita claimed that this situation is leading to a disproportionate application of must-carry obligations, especially because network operators are not remunerated for carriage, something which Melita has always contested.

Melita noted that it is unclear as to what will be the situation when more content will move from Standard Definition (SD) to High Definition (HD), thus requiring high volume of spectrum. Spectrum is a scarce and costly resource, use of which is not limited to TV. Some of the General Interest TV

channels have begun to move to HD, and UHD-TV sets (ultra-high definition) have become widely available locally. While transmission protocols have become more efficient, inefficiency such as simulcasting SD and HD channels should be avoided.

Melita argued that in order to ensure that only 'reasonable' must-carry obligations are in force, operators should only be obliged to carry General Interest TV channels in SD format. Network operators need to plan the use of their spectrum well in advance, and it is recommended that further waste is avoided and no obligation on General Interest TV channels carriage in HD or UHD is imposed.

### GO's Response

In a rather short response, GO did not object to the imposition of must-carry obligations on its IPTV network, taking note that no further changes are being contemplated by the MCA to the must-carry arrangements under existing circumstances.

## 4.2 MCA's Comments and Clarifications

The MCA wishes to thank the two respondents for having taken an interest in its proposal and submitting their feedback. The responses received did not, in effect, present any new material that could in some way or another change the MCA's consultation proposal. In fact both Melita and GO are in agreement with, or do not object to, the imposition of a must-carry obligation on GO's IPTV network.

The MCA notes that GO is already carrying all the GIO channels on its IPTV platform and the above response is consistent with this state of affairs. The MCA has no comment to make on GO's response to the consultation, which is in line with the MCA's proposal and therefore makes no argument to which the MCA must provide any explanation.

Notwithstanding the fact that Melita is also in agreement with the MCA's proposal to impose must-carry obligations on GO's IPTV network, the MCA would like to clarify the other points made by Melita in its response to the consultation.

### **General Interest TV Broadcast Network**

In line with the Government's policy and strategy on broadcasting which meets GIOs,<sup>18</sup> Government opted for the setting up of a distinct General Interest TV broadcast network composed of one frequency (multiplex) to be managed by PBS.

PBS is appointed and licensed by the BA as the network operator responsible to run the General Interest TV broadcast network licensed by the MCA in terms of the Electronic Communications (Regulation) Act.<sup>19</sup>

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<sup>18</sup> Refer to Government's policy for digital broadcasting that meets GIOs:

<https://www.mca.org.mt/sites/default/files/attachments/consultations/2012/final-policy-gio-feb-2009.pdf>

<sup>19</sup> Refer to Article 40(1) of the Broadcasting Act, Cap 350.

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The commercial agreement between PBS and GO to operate the General Interest TV broadcast network, for the initial transmission of the 'free-to-air' unencrypted General Interest TV channels on the frequency assigned to PBS, falls outside the boundaries of must-carry obligations.

The General Interest TV broadcast network operated by GO on behalf of PBS is distinct from GO's commercial pay TV platform. PBS is free to negotiate outsourced network carriage services on a commercial basis with any other third party entity apart from GO or decide to set up and operate the network on its own accord. This aspect falls completely outside the scope of 'must-carry' obligations.

#### ***Principle of Reasonableness***

When imposing must-carry obligations on a commercial TV network operator, the MCA is required to ensure that there is no excessive or undue burden placed on the operator. In line with the conclusions reached in previous decisions, must-carry obligations on GO's commercial pay TV DTT broadcast network would place an excessive and undue burden on the operator. Given that GO's DTT viewer equipment can be seamlessly used to receive the initial 'free-to-air' transmissions of the unencrypted General Interest TV channels, must-carry obligations would result in the unnecessary duplication of TV transmission capacity. This would result in the inefficient use of spectrum which, as also acknowledged by Melita, is a scarce and costly resource, use of which is not limited to TV. Therefore in the interest of spectrum efficiency no must-carry obligations are imposed on GO's DTT broadcast network.

The MCA notes that following a review of must-carry obligations in 2013, carriage arrangements on Melita's analogue cable TV platform have been on a commercial basis as from September 2014 i.e. with no must-carry obligations. Spectrum efficiency issues represented by obsolete analogue technology had, amongst other reasons, a significant bearing on the MCA's decision to remove must-carry obligations, so as not to burden Melita with a disproportionate measure.

GO's DTT broadcast network is limited in channel capacity when compared to both Melita's Digital Cable TV and GO's IPTV networks. In fact over the past years there has been an ongoing decline in GO's DTT subscriptions (refer to **Table I** above) given the transition to its IPTV platform which is more content-rich and offers additional features. The MCA therefore does not agree with Melita's view that GO has an unfair advantage in the TV broadcasting market, as a result of its DTT network not being subject to must-carry obligations.

In the case of Melita's Digital Cable TV network and GO's IPTV network, the imposition of must-carry obligations does not place an excessive or undue burden on the operators of the respective commercial networks. There is no excessive or undue burden for the operators to reserve part of their substantial network capacity for the retransmission of the General Interest TV channels. Neither is there any duplication of transmission, as in the case of GO's DTT network.

#### ***Remuneration***

The MCA maintains that it would be disproportionate for pay TV network operators subject to must-carry obligations to be remunerated for the retransmission of the General Interest TV channels.

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Subscribers of pay TV operators are charged for receiving the General Interest TV channels which are normally packaged with other channels. In addition, pay TV operators recover costs through subscription fees and are not required to pay for copyright fees associated with the retransmission of the General Interest TV channels.<sup>20</sup>

Must-carry obligations on GO's IPTV network, in addition to Melita's Digital Cable TV network, ensures that in similar circumstances there is no discrimination in the treatment of undertakings providing electronic communications networks.

The MCA notes that despite the removal of must-carry obligations on Melita's analogue cable TV platform, Melita is still utilising a significant amount of spectrum bandwidth for the voluntary retransmission of six of the General Interest TV channels on this pay TV<sup>21</sup> platform.

### ***General Interest Objectives***

As noted by Melita in its response to the consultation, the BA is the authority responsible for determining which TV Channels are eligible for meeting the GIO status. The award of GIO status is granted by the BA on the basis of qualifying criteria in line with the Broadcasting Act and the General Interest Objectives (Television Services) (Selection Criteria) Regulations.<sup>22</sup>

These aspects are therefore outside the remit of the MCA, moreover they fall outside the scope of this decision. Melita are nonetheless free to make the necessary representations with the BA. Meanwhile the MCA has the responsibility to ensure that commercial TV network operators subject to must-carry obligations, amongst other things, reserve part of their network capacity to broadcast TV channels enjoying a must-carry status.

### ***Transmission of General Interest TV channels***

In its response to the consultation Melita argued that in order to ensure that only reasonable must-carry obligations are in force, operators should only be obliged to carry General Interest TV channels in SD format. The MCA notes that the initial transmission of General Interest TV channels is currently in SD format. Operators subject to must-carry obligations are currently required to ensure that the quality of the General Interest TV channels matches that of the initial transmission.

As noted by Melita, HD TV sets are becoming more popular<sup>23</sup> and local TV channels have started to become available in HD format. In fact the current local HD channels are being transmitted on both

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<sup>20</sup> Refer to Article 7(2) of the Copyright Act, Cap 415 whereby the right to authorise or prohibit cable retransmission shall not apply when the transmission is made in Malta: (a) if the retransmission is in pursuance of a 'must carry' requirement in conformity with the Electronic Communications (Regulation) Act; and (b) if and to the extent that the transmission is made for reception in the area in which the cable retransmission may be received.

<sup>21</sup> TVM, TVM2, ONE, NET, SMASH and F LIVING

<sup>22</sup> Refer to LN 240 of 2011 – General Interest Objectives (Television Services) (Selection Criteria) Regulations - <http://www.ba-malta.org/file.aspx?f=95>

<sup>23</sup> In a survey carried out by the MCA between October and November 2015 it resulted that 67% of Maltese households have at least one HD TV set [57% in 2013 & 28% in 2011].

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Melita Digital Cable TV network and GO's IPTV network on a commercial basis. The MCA notes that a transition to higher TV formats (such as HDTV) as a mode of transmission that meets GIOs depends on number of factors that would need to be taken into consideration. Such a transition to higher TV formats would be subject to an eventual review of the current policy on broadcasting meeting GIOs.

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## 5. DECISION NOTICE

In light of the outcome of the consultation process, as articulated in the previous section of this decision, the MCA has determined that there has been no development to put into question its proposal to impose must-carry obligations on GO's IPTV network.

Thus, it is hereby determined that must-carry obligations on GO's IPTV network shall come into force with immediate effect.

Must-carry obligations on Melita's Digital Cable TV network will remain unchanged.

Must-carry obligations on Melita's Digital Cable TV network and on GO's IPTV network will continue to safeguard the carriage of all the General Interest TV channels and continue to ensure the universal availability of General Interest content in Malta.

The MCA reserves the right to carry out a review of must-carry obligations on a pay TV network operator should significant developments, in technology and/or market take place, arise.