

Review of Must-Carry Obligations

Consultation Document

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Table of Contents

	pg
1 Purpose and Scope	3
2 Legal Backdrop and Interpretation	5
2.1 Legal Framework.....	5
2.2 European Commission Guidance	5
2.3 Implications	6
3 Sector Status	7
4 Impact of a Seventh GI Channel	9
4.1 Obligation to carry by platforms other than Cable	9
4.2 Must-Carry Designation.....	10
4.3 ‘Must-Carry’ Obligations on Cable Platforms	11
4.4 ‘Must-Carry’ on Digital Cable	11
4.5 ‘Must-Carry’ on Analogue Cable	12
5 Proposed Way Forward	15
6 Request for Comments	18

1 Purpose and Scope

On the 2nd of December, 2011, the MCA issued guidelines on how it would determine must-carry obligations. On the basis of those guidelines, in February 2012 the MCA designated Melita Cable¹ as having must-carry obligations on both its cable analogue and digital platforms.

The Must-Carry guidelines specified that any subsequent must-carry obligation would be valid for three years. The MCA, however, reserved the right to review the situation before the end of the three year period should significant developments in technology and/or market take place, to the extent that they would warrant an earlier review.

The MCA guidelines were drawn up on the basis of six must-carry channels, as had been established in section 4.2.1 of the Government policy and strategy on broadcasting meeting General Interest Objectives (GIOs):

"An operator subjected to must-carry obligations will be required to carry the six GI TV channels on those networks used by a significant number of users as the principal means to receive TV broadcasts, as indicated by the MCA. This entails the operator to make available part of their network capacity for the retransmission of these channels."

In September 2012, the MCA was informed by the Ministry for Infrastructure, Transport and Communication that, on the initiative of the Ministry for Tourism and Culture, as the ministry responsible for broadcasting policy, the number of General Interest TV stations would be increased from six to seven.

In October 2012, the Broadcasting Authority informed the MCA that it had granted a General Interest (GI) broadcasting licence to Calypso Music Channel, as the 7th GI channel, after it had passed the relevant BA acceptance criteria.

The existing MCA determination with respect to must-carry was carried out on the premise that the number of GI channels was established at six. The addition of a seventh channel represents a significant development in the market and therefore the MCA sees the need to review its position in light of the possible impact that such a development may have.

¹ <http://www.mca.org.mt/service-providers/decisions/must-carry-obligations-designation-obligations-providers-networks-used-0>

Review of Must-Carry Obligations

Meanwhile, another significant development has been taking place in the Cable TV retail market, having to do with the ongoing migration of analogue cable TV subscribers to other platforms, mainly to Digital Cable TV. This migration gathered momentum throughout 2012, with the result that the number of analogue cable subscribers has now dwindled somewhat.

As a result of these developments, the MCA feels it is necessary to consult publicly again, in order to review the current obligations and propose changes where necessary.

2 Legal Backdrop and Interpretation

2.1 Legal Framework

The legal basis for imposing must-carry obligations is regulation 49 of the Electronic Communications Networks and Services (General) Regulations, 2011(SL 399.28 of the Laws of Malta) (hereafter 'Regulation 49') (see Appendix A) transposing Article 31 of the Universal Service Directive ('USD') (see Appendix B). Regulation 49 provides as follows:

"49(1) The Authority 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 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 subregulation (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.."

2.2 European Commission Guidance

The European Commission published guidance on must-carry obligations back in 2002². Amongst other things, according to the guidance, the extension of must-carry obligations to networks other than 'traditional broadcast platforms'³ would only

² http://ec.europa.eu/information_society/policy/ecomm/doc/current/broadcasting/working_doc_must_carry.pdf

³ The guidance identified cable, satellite, and terrestrial broadcasting as traditional "broadcast" platforms serving the principal means to receive television broadcasts, and that the vast majority of households will continue to use a

be legitimate if “a significant number of end-users were to use such networks as their principal means to receive television broadcasts.”⁴. This suggests that a threshold, in terms of number of households connected to a particular TV broadcast network, is to be reached before must-carry obligations may be applied. This is so as not to create disproportionate requirements on new entrants and on the development of new services.

With regards to remuneration, the guidance maintains that Member States are under no obligation to ensure remuneration for operators in return for must-carry obligations. Where remuneration is provided, Member States will however have to ensure that there is no discrimination between operators, and that it is applied in a proportionate and transparent manner. This provision aims to take account of the cost burden on commercial operators who need to reserve the network capacity required for retransmission of the GI TV channels.

2.3 Implications

The new situation, posed by the addition of a seventh GI channel, needs to be tested against the above legal provisions. Essentially there is the need to balance the rights of users to view the programming in question against the obligations of ‘must-carry’ operators to transmit them in light of the fresh development under discussion.

The elements to be tested are two. The first element addresses whether platforms in question are used by a significant number of users as their main means of viewership and whether reasonable alternatives exist. The second element deals with whether the new situation posed by the addition of a seventh must-carry channel introduces an additional burden on the designated operator, to the extent that a review of the existing arrangements is necessary.

In conducting a re-assessment of the situation it is also necessary to review key variables, essentially consisting in the number of users with respect to each platform being assessed as well as any technology and commercial aspects that may have changed in the meantime. While this assessment is being made only a year down the road, sector developments may be material enough as to influence a final outcome.

traditional “broadcast” platform for reception of broadcast channels in the foreseeable future. Notwithstanding rapid advances in communications technologies, these platforms even today still serve as the principal means to receive television broadcast channels by the vast majority of households.

⁴ European Commission Working Document on ‘Must-carry’ obligations under the 2003 regulatory framework for electronic communications networks and services’, 22 July 2002, pg 5.

3 Sector Status

The situation, as far as the number and types of transmission platforms are concerned, presents no material changes from the end of 2011. Analogue terrestrial free-to-air TV transmissions were switched off on the 31st October 2011, after the necessary switch-over to a GI DTT platform, thus bringing the digital switch-over ('DSO') period to a successful conclusion.

TV channels are today broadcast in Malta on the following networks:

- Free-to-air DTT network (GI 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 (ie. excluding subscriptions for commercial use) take-up of TV by platform, mid-way through 2011, had established that the vast majority of households (96.6%) were subscribed to a pay TV package with at least one of the local pay TV operators. Of these, it was estimated that:

- 13% subscribed to analogue cable TV services.
- 33% subscribed to digital cable TV services.
- 50% subscribed to the DTT services.
- 3.5% subscribed to DTT services and either analogue or digital cable TV services.

IPTV had just been launched and consequently no statistics were available at the time.

No household survey has been made since the one on which the above percentages are based, so it is not possible to make a direct comparison. However, latest statistics of actual subscriptions by platform indicate a steady decline of analogue subscriptions.

The latest figures (Q4, 2012) indicate that the number of analogue cable TV subscribers now stand at 8,516 out of a total population of Pay TV subscribers amounting to 147,896. This equates to slightly less than 6% of the total pay TV population. The decline of analogue cable subscriptions is therefore rather material.

Review of Must-Carry Obligations

This phenomenon can be explained by the fact that Melita is actively promoting an equally priced digital TV platform that is, at the same time, rather more content-rich. The switch from analogue cable to digital cable carries a one-time €20 installation charge per decoder but other than this, subscription fees are the same for both analogue and digital tiers.

As for number of channels, the Melita Digital Medium (M) tier markets 40 TV channels, whereas the similarly priced Analogue Cable tier airs 18 channels. The analogue tier is no longer marketed or sold by Melita, whose intention is to wind down this obsolete, bandwidth hungry technology as soon as practically possible.

4 Impact of a Seventh GI Channel

The addition of a seventh GI channel presents a significant change to the scenario on which the current Must-Carry designation is based. The following are the individual platforms that had been addressed in the December 2011 guidelines:

- Digital Terrestrial TV (DTTV)
- Digital Cable TV
- Analogue Cable TV
- IP TV
- Satellite TV

4.1 Obligation to carry by platforms other than Cable

The MCA had the following to say in its guidelines of the 2nd December 2011:

"Among others, the MCA will consider whether the imposition of a must-carry obligation on a particular operator will entail an excessive cost burden, as in the case of satellite operators.

In this regard, the MCA will, where it deems appropriate, consider proposals on the part of an operator subjected to a must-carry obligation, for alternative ways to convey the GI TV channels to their end-users. When considering any such requests, the MCA will be guided by the need to ensure that such channels will be seamlessly available to all end-users of that particular network with no undue burdens placed on end-users.

Furthermore, 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 GI 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 GI TV channels."

IPTV packages were deemed as not being used by a significant number of users at the time, and therefore one that is not yet subject to a must-carry obligation⁵.

The MCA feels that there has been no material change in the market as to warrant any change in approach to the application of must-carry obligations on the mentioned individual platforms.

⁵ Although the number of IPTV subscribers stand at 3,836, as at Q4, 2012, the same argument still applies.

4.2 Must-Carry Designation

The MCA Designated Melita Cable as having 'must-carry' obligations on the basis of the December 2011 guidelines. In the designation, on February 2012, the MCA justified its arguments on the following grounds:

"In line with the above guideline and the current make up of the TV broadcasting sector described in section 2.6, the MCA considers that the following three prevalent TV broadcast networks – analogue and digital cable TV, and DTT – are all used by a significant number of end-users as the principal means to receive TV broadcasts:

- **Melita plc - Analogue cable TV:** *The analogue cable TV network has been around since 1991 and until 2004 had a 100% market share of the pay TV market. Today it is still used by 13% (18,200) of households, which number the MCA considers to be significant.*
- **Melita plc - Digital cable TV:** *The digital cable TV network launched in 2005 today enjoys a significant market share of households hovering around 33% (46,200).*
- **GO plc - DTT:** *The commercial DTT network launched in 2005 captured a significant market share of households estimated at 50% (70,000). In this case, however, issues of spectrum efficiency and proportionality in application are taken into account."⁶*

On the criterion that 'must carry' should be imposed on TV networks used as a principal means to receive TV broadcasts, the designation determined that:

"This result confirms that the Melita plc and GO plc respective analogue cable, digital cable and DTT networks are all used by their respective end-users as the principal means for receiving TV."

The argument then went into the principle of reasonableness in application with the following conclusion:

"In this regard, 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."

⁶ Must-Carry Obligations - Designation of Obligations on Providers of Networks used for Television and Radio Distribution Services – Document No: MCA/D/12-0768 of the 23rd February 2012, Page 10

For the purposes of spectrum efficiency, therefore, GO plc is not being obliged to retransmit the GI TV channels on its DTT network; provided that the equipment supplied to its end-users to receive the pay TV channels continues to be seamlessly used to receive the initial transmissions of the GI TV channels."

The document finally went into the issue of remuneration and reached the following conclusion:

"...pay TV operators have a one-to-one relationship with their subscribers. In particular, operators providing wired services such as cable and IPTV have access to their subscribers' premises to install a connection to their network. Subscribers are typically charged to receive the GI TV channels which are normally packaged together with other channels.

Whilst acknowledging the fact 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 GI TV channels.

Given this model, the MCA considers it disproportionate for pay TV operators to be remunerated further by broadcasters or the State for the retransmission of the GI TV channels. Furthermore, any request on the part of an operator for any remuneration would need to be justified."

4.3 'Must-Carry' Obligations on Cable Platforms

The February 2012 designation thus identified the Digital and Cable TV platforms as being subject to 'must carry' obligations. Moreover, the designation determined that there should be no remuneration (by broadcasters to the cable network) for carriage.

The MCA now feels that developments are such as to warrant a review of the situation.

4.4 'Must-Carry' on Digital Cable

The latest subscriber figure on digital cable is 73,252 subscribers, translating into a 49.5% market share for the digital cable platform, which is the biggest market share. Both absolute numbers and percentage market share have declined marginally over 2011. Nonetheless, the digital cable platform still commands viewership by a significant number of users, who utilise it as their main means of TV viewership.

As far as reasonableness in the application of 'must-carry' is concerned, the addition of a seventh channel as a 'must-carry' channel on digital cable is not felt to constitute a significant burden on the cable operator. Melita Cable at the moment advertises a maximum of 155 TV channels on its XL package and a minimum of 40 TV channels on its M package. This would indicate adequate capacity to carry the seventh GI channel without any undue technological or commercial impact.

Melita have, in effect, already started transmitting this seventh channel on their digital platform, albeit under protest. This course of action confirms that:

1. The transmission of the seventh channel on the digital cable platform does not pose a significant technical issue for Melita and
2. Melita was ready, albeit with due reservations, to comply with the obligation to host a seventh GI channel, where this was technically and commercially feasible.

4.5 'Must-Carry' on Analogue Cable

Analogue cable TV subscriptions are currently down to 8,516, which represents a market share of slightly less than 6% of the entire TV subscription (domestic and business) market. In 2009, analogue cable TV enjoyed a market share of 20.58% of the same market. No service is sold any longer on this platform and Melita only allows for the continuation of the old analogue reception tier, which is the entry level tier, for which no decoder is required. All the other analogue 'value added' tiers that necessitated the use of a decoder have been discontinued. Melita intends to discontinue this service – effectively executing an analogue turn-off on cable – in a gradual fashion.

Meanwhile, Melita offers an equally priced package on its digital tier, the Medium 'M' Package which, however, offers 40 channels against the analogue product, which currently shows 18 channels, among which six GI channels.

Melita's digital 'M' package is clearly meant as a migration vehicle for subscribers to shift from analogue to digital. It is being offered at the same price as the old analogue reception (entry tier) package. Currently, the only additional expense for subscribers who opt to switch from analogue to the equivalent digital cable package is a one-time €19.99 installation fee per set-top box.

Given the one-time nature of this expense, it is felt that the digital offering does not present any significant barrier for subscribers to migrate from analogue to digital cable. This factor, which is, most likely, the primary cause for the dwindling number of analogue cable subscribers, is deemed as being of enough significance as to necessitate a review of the must-carry obligation on analogue.

In effect, given these two related factors, namely that analogue and digital packages are (bar the one-time fee) equally priced and that the numbers of analogue subscribers has, over the past two years, dwindled significantly to just under 6% of the commercial TV market, the justification for a 'must-carry' requirement on analogue cable is put into question.

The six 'must-carry' channels currently being transmitted on analogue, were all effectively present on the analogue cable entry tier for several years. Five of them have always been 'must-carry' channels and the sixth – Favourite TV - was carried on analogue on commercial basis until recently. The February 2012 designation effectively only changed the status of Favourite Channel, when it was included along with the other five as a 'must-carry' channel. In terms of physical broadcasting space requirements, however, there were no increases on the analogue tier when the February 2012 designation was made. This state of affairs was a particularly important factor that influenced the MCA's decision to retain 'must-carry' on the analogue cable platform at the time.

The addition of a seventh channel on the analogue tier inevitably means that additional spectrum for this GI channel will have to be made available on the analogue tier. In terms of opportunity cost, this channel comes at the expense of the potential forfeiture of some ten digital channels, or of significant bandwidth that would otherwise be used for the provision of high-speed broadband. Such a situation would be far from ideal.

There are therefore a number of options that can be considered, namely that:

1. The seventh channel is added to the analogue tier under the same terms and conditions, that is, for free, as with the other GI broadcasters. This solution is not reasonable on the Cable operator, given that additional resources are now required to carry the GI channels, in the form of an additional frequency. As stated, this carries a sizeable opportunity cost.
2. The seventh channel is added to the analogue tier but payment for carriage is now introduced for all GI channels on the analogue platform in order to compensate for the additional costs borne by Melita in taking on this additional broadcast. Quite apart from the difficulty in establishing the significant opportunity cost of the additional frequency required for the broadcast transmission, this would result in added costs to broadcasters, without their being able to seek compensation for their transmission rights, given their GI status.
3. The third option is to remove 'must-carry' on analogue completely, given the ease of switching to the commercially equivalent digital tier. This would, on the one hand, remove the existing guarantees for broadcasters with respect to transmission on this platform. On the other hand, however, broadcasters could negotiate with the cable operator on viewing rights.

All told therefore, given the ease of switching for viewers – from both a technical and a financial standpoint - to a superior and equally priced product, the surviving analogue package can now be considered as seamlessly interchangeable with the digital offering.

From the point of view of reasonableness, it is felt that there is no compelling justification to continue imposing 'must-carry' obligations on the analogue tier.

It is therefore recommended that the must-carry obligation on the analogue cable tier be revoked and that any relationship between the TV stations in question and the cable operator, on this platform, proceeds on a commercial basis from an established date. Option 3 above is therefore being proposed as the recommended option.

5 Proposed Way Forward

As indicated in the previous section, the MCA is proposing that the Must-Carry obligation with respect to all seven GI stations is removed from the Melita Cable analogue tier.

The justification for this removal is reiterated as follows:

1. The analogue cable tier is no longer marketed by Melita, given the obsolete nature of the underlying technology. The number of existing subscribers is dwindling consistently. Whilst what constitutes a significant number of users remains a subjective issue, the existing number of subscribers, added to the constant downward trend in analogue subscriptions, makes the number of users (under 6% of the total pay TV population) rather less significant than was previously the case (some 13% in 2011).
2. The previous point has to be seen in the context of the existence of an equivalently priced digital offering that provides a larger number of channels, including the seven GI channels. It is easy to switch from the remaining analogue tier to its digital cable equivalent from both a technology and a price standpoint. There is therefore a suitable replacement offering available to analogue cable subscribers.
3. The addition of a seventh channel on the analogue tier would entail the use of an entire frequency with concomitant opportunity costs of a significant nature, given that spectrum capacity on the cable network is finite and is also contended by digital Cable TV and cable broadband, both of which are much more efficient and provide significantly more value added than analogue cable TV.

The MCA had established a series of guidelines for the determination of which network would be obliged to carry GI broadcasters and under what conditions. These are reiterated below for ease of reference:

Guideline 1. *When determining which networks are used by a significant number of 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, inter alia, 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 GI 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 GI TV channels should be provided, the MCA will need to satisfy itself that any remuneration provided can be justified.*

It therefore follows that, mainly on the basis of the above guidelines, the continued existence of a must-carry obligation on the Melita analogue tier, given new circumstances, no longer obtains. Even if it did, there could be justification for Melita⁷ to make a claim for carriage on the analogue tier, given the additional costs involved in extending analogue transmission of the GI network from six to seven channels.

On the basis of the above it is therefore being proposed that the must-carry obligation on analogue cable no longer subsists and that such a decision would come into effect on the date of its publication. It is, nonetheless, acknowledged that there must be a period of transition so that all parties involved adjust to the new scenario.

On the one hand, Melita Cable and the current six GI broadcasters being carried under the existing must-carry obligation would need to discuss their future commercial relationship on analogue cable, keeping in mind the respective commercial interests in retaining a presence on this outgoing technology platform. The seventh channel, which is not being carried, may also consider commercial discussions with Melita for eventual inclusion on this platform on commercial basis, if it so decides.

Given that the existing six channels are already being carried, it is being proposed that these should be given a transition period of twelve months in order to make the necessary assessment on whether or not to retain a presence on the analogue cable platform and, in case of a decision, to retain a presence, to thereafter discuss any terms of carriage with Melita, as may be the case.

This transition period is important not only for the cable network operator and broadcasters involved, but also for subscribers to familiarise themselves amply with the situation and decide accordingly what they want to do.

Given the change in conditions, Melita should ensure that any analogue subscribers opting out of the reception tier, following the removal of must carry obligations, are not penalised or in any way impacted negatively if the opt-out clashes with any existing contractual relationship.

It is therefore proposed that, following the lapse of a calendar year from the date of the MCA decision to remove the must-carry obligation on the analogue cable platform, the cessation of the 'must-carry obligation' will come into effect. Melita will no longer be obliged to carry any GI station on its analogue cable platform under 'must-carry' rules from that date onwards.

The seventh GI channel does not form part of the current must-carry decision and has no transitional issues to address on analogue cable. Melita will therefore not be required to carry Calypso on its analogue cable tier on a Must-Carry basis during the transitional period.

⁷ Any such claim would still need to be backed up by a solid case, for further consideration to be taken by the MCA.

Review of Must-Carry Obligations

Melita is, nonetheless required to carry Calypso on its digital cable platform on the same terms and conditions as the other six GI channels that it currently carries.

As per the December 2011 guidelines, and subsequent February 2012 designation, the other existing platforms remain not liable to must-carry obligations.

6 Request for Comments

The MCA would like to seek the views and comments from the industry, members of the public and other interested stakeholders on the regulatory framework to be used by the MCA in a fully liberalised and multi-operator postal environment.

Respondents should clearly link each view or comment to the relevant section. Any proposed amendments or revisions should be clearly explained and supported by respondents. Supporting material may be placed in an annex.

All views and comments should be submitted in writing in soft copies (such as Microsoft Word or PDF Format), and should reach the MCA by the **24th May, 2013**. Respondents are required to include their personal or company particulars, correspondence address, contact number and email address in their submissions.

The MCA will make public all or parts of any submissions made in response to this consultation and disclose the identity of the source. Respondents are required to clearly mark any part of the submission that is considered commercially sensitive and place the information separately as an annex to the submission.⁸ The MCA will not disclose information identified as commercially sensitive or confidential but will take them into consideration in its review.

All comments should be addressed to:

**Chief, Policy and Planning
Malta Communications Authority
Valletta Waterfront
Floriana FRN1913, Malta
Tel: +356 21 336840
Fax: +356 21 336846**

Soft copies should be made via email to: info@mca.org.mt

Respondents may also submit a hardcopy via fax to fax number: (356) 21 336846.

⁸ In accordance with the MCA's confidentiality guidelines and procedures published on the MCA's website.