

Must-Carry Obligations

Designation of Obligations on Providers of Networks used for Television and Radio Distribution Services

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1 Executive Summary

Must-carry obligations require operators of certain TV broadcast networks that are used by a significant number of end-users as the main means to receive TV broadcasts, to reserve part of their network capacity for the retransmission of TV channels qualifying as meeting General Interest Objectives (hereafter 'GIOs'). The manner in which such obligations may be imposed is defined in regulation 49 of the Electronic Communications Networks and Services (General) Regulations, 2011 (hereafter 'the Regulations').

On the 1st September 2011, the MCA consulted on must-carry obligations where it proposed guidelines on how and when such obligations would be imposed on operators of electronic communications networks used for pay TV services. The Consultation was carried out against a backdrop of diverse TV broadcast networks and viewing platforms, technology advances in digital broadcasting as well as changes to the regulatory scenario.

Melita plc was the sole respondent to the Consultation. Having analysed and considered the views and comments received, on the 2nd December 2011 the MCA published its *Guidelines on Must Carry Obligations* (hereafter 'Guidelines') that decided how must-carry obligations will be imposed on a pay TV operator:

- 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.
- 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.
- 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 (hereafter 'GI') TV channels to be seamlessly available to all end-users of that network provided that no undue burdens are placed on end-users.
- 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.

In line with the above, the MCA has therefore reached the conclusion that GO plc does not presently need to be designated with must carry obligations of GI TV channels on its terrestrial digital TV network or on its fixed line IPTV network, while Melita Cable plc should presently be designated with must carry obligations of GI TV channels on both its analogue TV as well as its digital TV networks.

In effect, the current designations will neither impair the ability of GO plc subscribers to view GI TV channels, nor will they impose any new burden on Melita plc.

Operators subjected to must-carry obligations are required to:

- reserve sufficient network capacity for the retransmission of the GI 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 GI TV channels is of an appreciable and comparable quality to that of the initial (free-to-air) transmission.

The MCA intends to review the Guidelines, these designations and these must-carry obligations within three years. The MCA reserves the right to review before the end of the three year period, should significant developments in technology and/or the market take place to the extent that they would warrant an earlier review.

Definitions

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

2 Background

On the 2nd December 2011, the MCA published its *Guidelines on Must Carry Obligations* (hereafter 'Guidelines')¹ in which it decided how must-carry obligations will be imposed on a pay TV operator. This section provides a summary of the salient parts of the guidelines.

2.1 Must-Carry Rules

Generally speaking, TV must-carry rules require specified TV channels to be carried over certain TV broadcast networks. The specified TV channels typically enjoy must-carry status when such channels qualify as meeting clearly defined General Interest Objectives (hereafter 'GIOs'). Must-carry rules thus contain two aspects²:

- **must-carry status:** obligations concerning content, in particular the indication of channels which can enjoy the must-carry status; 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. the GI TV channels).

2.2 Obligations Concerning Content

GIOs³ equate to a public service remit, which remit is carried out in part by PBS, the national public service broadcaster, through its two TV channels TVM and Education 22. The remaining part of the remit complementing the PBS programming is entrusted to broadcasters⁴ of privately-owned TV channels. These private TV channels have been identified by the Broadcasting Authority (hereafter 'the BA') in terms with the Broadcasting Act⁵ as meeting GIOs, and have been issued with a GI broadcast content licence accordingly. Collectively, these public and private TV channels are referred to in the Guidelines as 'GI TV channels'.

Government appointed PBS as the network operator responsible for setting up, operating, and managing a DTT network for the initial transmission of the GI TV channels which is unencrypted, and thus available to all viewers on a free-to-air basis.

¹ The Guidelines may be accessed on MCA's website by following this link: <http://www.mca.org.mt/article/guidelines-must-carry-obligations>

² The first aspect, that relating to must-carry status, falls within the remit of the BA which is the national regulatory authority responsible for radio and TV content. The second aspect on must-carry obligations falls within the remit of the MCA, which is the national regulatory authority responsible for, *inter alia*, electronic communications networks and/or services.

³ GIOs have to do with the promotion of cultural diversity, provision of educational programming, provision of objective information to shape public opinion, and the need to guarantee a pluralistic media offer.

⁴ Favourite Channel, Net TV, ONE, and Smash TV.

⁵ See www.ba-malta.org.

2.3 Must-Carry Obligations

The most recent review of must-carry obligations emanates from a consultation that was carried out in 2007. The consultation dealt with, amongst other things, the licensing and transmission of the GI TV channels together with the associated must-carry obligations incumbent on pay TV operators. It articulated how the two aspects, GIOs and must-carry obligations, come together from both policy and implementation perspectives. The consultation led to the launch of Government's policy and strategy on broadcasting which meets GIOs in February 2009 ('the GIO Policy')⁶.

The GIO Policy maintains that a must-carry obligation is to remain incumbent on the operator of analogue and digital cable TV networks. The same policy argues that must-carry obligations on operators of DTT networks are not necessary when the Digital Switch Over (hereafter 'DSO') is completed, citing inefficient use of spectrum as predominant grounds for this direction⁷.

Complementing must-carry are 'must-offer' obligations incumbent on the broadcasters of the GI TV channels, placing an obligation for the channels to be included in the universal service package. Must-offer obligations require the broadcasters of these channels to offer their content, free of charge, to the operators of those TV networks subjected to must-carry obligations in order for such content to be universally available to the public⁸.

The MCA deems that the development of diverse TV broadcast networks and viewing platforms, accelerated by technology advances in digital TV broadcasting as well as a changing regulatory scenario, offers an opportunity to review must-carry obligations considering not only incumbent TV broadcast networks, but also new and emerging networks such as satellite and IP-based networks.

2.4 Legal Framework

The legal basis for imposing must-carry obligations is regulation 49 of the Regulations (see Appendix A) transposing Article 31 of the Universal Service Directive (hereafter 'USD') (see Appendix B). Regulation 49 provides that:

"(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

⁶ <http://www.mca.org.mt/consultation/policy-and-strategy-digital-broadcasting-meets-general-interest-objectives>.

⁷ End-users of commercial DTT services could also receive the initial transmissions of the GI TV channels through the same equipment used for receiving the commercial TV channels, assuming that the equipment supplied by the pay-DTT operators is compatible with the initial transmissions of the GI TV channels.

⁸ 'must-offer' requirements are laid down in article 7(2) of the Copyright Act (Chapter 415 of the Laws of Malta).

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. ”.

2.5 European Commission Guidance

The European Commission published guidance on must-carry obligations back in 2002⁹. Amongst other things, according to the guidance, the extension of must-carry obligations to networks other than ‘traditional broadcast platforms’¹⁰ would only be legitimate *if “a significant number of end-users were to use such networks as their principal means to receive television broadcasts.”*¹¹. 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.

2.6 Overview of the TV Broadcasting Sector

Analogue terrestrial TV transmissions were switched off on 31st October 2011. This event brought the DSO period to a close¹². TV channels are today broadcast on the following networks:

- Free-to-air Digital Terrestrial TV (hereafter ‘DTT’) network (GI TV broadcast network) operated by the national TV broadcaster, PBS.
- Commercial analogue and digital cable TV networks.
- Commercial DTT and Internet Protocol TV (hereafter ‘IPTV’) networks.

⁹ http://ec.europa.eu/information_society/policy/ecomm/doc/current/broadcasting/working_doc_must_carry.pdf

¹⁰ 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 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.

¹¹ European Commission Working Document on ‘Must-carry’ obligations under the 2003 regulatory framework for electronic communications networks and services’, 22 July 2002, pg 5.

¹² It should be noted that the DSO refers to the process of switching over Malta’s free-to-air analogue terrestrial television broadcasting service to digital. This process does not affect commercial decisions taken by undertakings regarding their pay TV services.

The vast majority of households (96.6%) are subscribed to a pay TV package with at least one of the local pay TV operators. Of these, it is 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 is a new service and consequently no statistics are presently available.

2.6.1 Free-to-air DTT network

The free-to-air DTT network, or GI TV broadcast network, is owned and managed by PBS. The network is set up solely for the initial transmission the six GI TV channels in digital and unencrypted (free-to-air): TVM, Education 22, Favourite Channel, Net TV, ONE, and Smash TV.

Around 3.4% (or 4,760) of all households rely solely on free-to-air broadcasts to receive and watch TV¹³. In addition to these households, all viewers with a DTTV tuner, including commercial DTTV subscribers, can also seamlessly view the six GI TV channels, given their transmission in unencrypted form.

2.6.2 Pay TV networks

Seventeen (17) channels are available on the analogue cable TV network. Although this service is no longer marketed by the cable TV operator, it is understood that it is still being operated to service its existing analogue subscriber base, which is substantial in number (13%).

Over 160 TV channels including 140 SD channels, 15 HD channels, 9 premium sports channels and 2 premium movies and series channels are available on the digital cable TV network.

The DTT network transmits around 60 SD digital TV channels, including 6 premium sports channels. The DTT network operator recently launched IPTV packages complementing its DTT packages, becoming the first operator to offer pay TV on both wireless and wired networks.

¹³ The results of the survey may be found by following this link:
<http://www.dso.org.mt/assets/files/DSO%20May%202011%20Survey%20Results.pdf>

3 Assessment of the Guidelines and Designations

3.1 TV networks used by a significant number of users

In Guideline 1 of the Guidelines the MCA established that “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.”

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.

3.2 TV networks used as principal means to receive TV broadcasts

In Guideline 2 of the Guidelines the MCA established 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 found that the number of households connected to both DTT services and either analogue or digital cable TV networks falls in the region of just 3.5%.

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.

3.3 Principle of reasonableness

In Guideline 3 the MCA established 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 GI TV channels to be

seamlessly available to all end-users of that network provided that no undue burdens are placed on end-users.”

As stated in Section 2.6.1, all viewers with a DTTV tuner, including commercial DTTV subscribers, can seamlessly view the six GI TV channels, given their transmission in unencrypted form.

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.

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.

Nonetheless, 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.

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 operators¹⁴.

3.4 Remuneration

In Guideline 4 the MCA established that “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.”

Due to nature of the TV services provided, PBS (the GI TV broadcast network operator) and pay TV operators have adopted different remuneration models.

In the case of PBS, the law requires that PBS provides the services on a free-to-air basis. This business model does not allow PBS to recover its costs associated with the initial transmission of the GI TV channels from its viewers. It therefore seeks remuneration from the broadcasters of the GI TV channels.

In contrast, 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 channels¹⁵.

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.

3.5 Coming into force and duration

The designations in Appendix A and the must-carry obligations in Appendix B shall come into force with immediate effect.

The MCA intends to review the guidelines, the designations in Appendix A, and the must-carry obligations in Appendix B within three years. The MCA reserves the right to review these 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.

¹⁵ GI 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.

Appendix A: Providers of Networks used for Television and Radio Distribution Services Designated with Must-Carry Obligations

Authorised Provider under the General Authorisation Regime	GO plc		Melita Cable plc	
	DTTV	IPTV	Analogue Cable TV	Digital Cable TV
Guideline 1: Network is used by a significant number of users.	Yes	No	Yes	Yes
Guideline 2: Network is used as the principal means to receive TV broadcasts	Yes	Not Applicable	Yes	Yes
Guideline 3: 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.	Satisfied	Not Applicable	Not Satisfied	Not Satisfied
Designation of Must-Carry Obligation	No	No	Yes	Yes

Appendix B: TV Must-Carry Obligations

In line with the Guidelines the MCA is imposing the following must-carry obligations on providers of the respective networks used for television and radio distribution services as designated in Appendix A:

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

Network capacity

An operator subjected to must-carry obligations is required to carry the six GI TV channels on the 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.

The capacity required will be sufficient to ensure that audiovisual quality is of an appreciable and comparable quality to that of the initial transmission via DTT (see also 0 *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 Commission guidance identifies teletext as one such broadcast service complementing the TV channel(s).

The MCA requires the operator to retransmit alongside the respective GI TV channel:

- teletext and EPG services, where applicable; and
- those accessibility services, as defined by the BA from time to time and applicable to the GI TV channels.

Technical Parameters

The MCA acknowledges that the technical terms by which the GI TV channels are to be retransmitted rests with the operator. The quality of the GI TV channels however impacts user experience and should match that of the initial transmission. Thus the picture quality of the GI TV channels should be of an appreciable and comparable quality to that of the initial (free-to-air) transmission.

The MCA will consider studying the matter further in cases where the quality of retransmission and/or audiovisual fails to reach the levels comparable to that of the initial transmission.

Appendix C: Regulation 49 of the Electronic Communications Networks and Services (General) Regulations, 2011

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.

Appendix D: Article 31 of the Universal Service Directive

1. Member States 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 under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcast channels to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcast channels. Such obligations shall only be imposed where they are necessary to meet general interest objectives as clearly defined by each Member State and shall be proportionate and transparent.

The obligations referred to in the first subparagraph shall be reviewed by the Member States at the latest within one year of 25 May 2011, except where Member States have carried out such a review within the previous two years.

Member States shall review "must-carry" obligations on a regular basis.

2. Neither paragraph 1 of this Article nor Article 3(2) of Directive 2002/19/EC (Access Directive) shall prejudice the ability of Member States to determine appropriate remuneration, if any, in respect of measures taken in accordance with this Article while ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks. Where remuneration is provided for, Member States shall ensure that it is applied in a proportionate and transparent manner.

Further guidance as to which networks might be covered by the Article may be found in recitals:

(45) Services providing content such as the offer for sale of a package of sound or television broadcasting content are not covered by the common regulatory framework for electronic communications networks and services. Providers of such services should not be subject to universal service obligations in respect of these activities. This Directive is without prejudice to measures taken at national level, in compliance with Community law, in respect of such services.

Recital – Directive 2009/136/EC

(48) Legal "must-carry" obligations may be applied to specified radio and television broadcast channels and complementary services supplied by a specified media service provider. Member States should provide a clear justification for the "must carry" obligations in their national law so as to ensure that such obligations are transparent, proportionate and properly defined. In that regard, "must carry" rules should be designed in a way which

provides sufficient incentives for efficient investment in infrastructure. "Must carry" rules should be periodically reviewed in order to keep them up-to-date with technological and market evolution and in order to ensure that they continue to be proportionate to the objectives to be achieved. Complementary services include, but are not limited to, services designed to improve accessibility for end-users with disabilities, such as videotext, subtitling, audio description and sign language.