

**REVIEW OF THE REGULATORY ISSUES
RELATING TO THE CHANGES IN THE SHAREHOLDING
STRUCTURE OF TELEVISION BROADCASTS LIMITED (“TVB”)
IN 2015 AND 2016**

**MAJOR FINDINGS AND DECISION
OF THE COMMUNICATIONS AUTHORITY (“CA”)**

In May 2017, in the course of the hearing before the Takeovers and Mergers Panel (the “Panel”) of the Securities and Futures Commission (“SFC”) of TVB’s application for a whitewash waiver in relation to TVB’s plan to repurchase up to 120 million of issued shares from shareholders through a conditional tender offer, it came to the Panel’s attention that the Shareholders’ Agreement and the Relationship Agreement dated 22 April 2015 (collectively referred to as the “Relevant Agreements”) in relation to Young Lion Holdings Limited (“YLH”) might not have been provided to the CA for its consideration as part of two shareholding change applications submitted by TVB in January 2015 and February 2016 respectively (collectively referred to as the “2015 and 2016 Applications”). The Panel recommended that the SFC should provide the Relevant Agreements and a copy of the Panel’s ruling to the CA. The Relevant Agreements were subsequently provided by the SFC to the CA on 10 May 2017.

2. Following the SFC’s referral, the CA has reviewed and considered the implications of the non-disclosure of the Relevant Agreements for the CA’s consideration of the 2015 and 2016 Applications and the related regulatory issues under the Broadcasting Ordinance (Cap. 562) (“BO”). This note highlights the major findings and decision of the CA upon completion of its review¹.

BACKGROUND

Regulatory Framework

3. The BO provides for the regulatory framework governing the ownership and corporate control of domestic free television programme service (“free TV”) licensees and any person exercising control of such licensees. In

¹ This note is prepared as a summary and for general reference only. It shall not be taken as modifying or as a substitute for any part of the CA’s findings and decision which have been issued to TVB.

particular, Schedule 1 to the BO requires that a disqualified person (“DP”)² shall not exercise control of a free TV licensee unless the Chief Executive in Council, on application by the licensee, is satisfied that the public interest so requires and approves otherwise, and that, without the prior approval of the CA, an unqualified voting controller (“UVC”)³ shall not hold, acquire, or exercise or cause or permit to be exercised more than 2% of the total voting control of a free TV licensee.

4. The BO also provides for the definition of whether or not a person is “exercising control” of a licensee. Under section 1(6) of Schedule 1 to the BO, a person exercises control of the corporation if –

- (a) he is a director or principal officer of the corporation;
- (b) he is the beneficial owner of more than 15% of the voting shares in the corporation;
- (c) he is a voting controller of more than 15% of the voting shares in the corporation; or
- (d) he otherwise has the power, by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating that corporation or any other corporation, to ensure that the affairs of the first-mentioned corporation are conducted in accordance with the wishes of that person.

5. Condition 10.1 of TVB’s free TV licence (“TVB’s Licence”) provides that, unless otherwise approved by the CA, the licensee shall comply with the Licensee’s Proposal, including statements and representations regarding the shareholding structure of the licensee. Accordingly, TVB is required to apply for the CA’s prior approval for any change in its shareholding structure.

² Under sections 4 to 7 of Schedule 1 to the BO, in relation to a free TV licence, DPs include –

- (a) a licensee of one of the four categories of licences under the BO, namely, free TV licence, pay TV licence, non-domestic TV licence, and other licensable TV licence;
- (b) a sound broadcasting licensee;
- (c) an advertising agency;
- (d) a proprietor of a newspaper printed or produced in Hong Kong;
- (e) a person exercising control of (a) to (d); and
- (f) an associate of (a) to (e).

³ A voting controller who is not “ordinarily resident in Hong Kong” is an UVC.

Changes in the Shareholding Structure of TVB in 2015 and 2016

6. As at January 2015, YLH indirectly controlled 26% of the voting shares of TVB through its wholly owned subsidiaries. The shareholders of YLH were Innovative View Holdings Limited (“IVH”) (controlled by Dr Charles Chan (“Dr Chan”)), Profit Global Investment Ltd (“PGIL”) and P6 YL Holdings Limited (“P6”).

7. On 30 January 2015, TVB applied for the CA’s approval for the proposed changes in its shareholding structure arising from the transfer of certain shares in YLH from P6 and PGIL to CMC M&E Acquisition Co Ltd (“CMC”). Upon completion of the proposed transaction, CMC, a company controlled by Mr Li Ruigang (“Mr Li”), would hold 32% of YLH’s voting shares and 69.4% of its non-voting shares. IVH (controlled by Dr Chan) would continue to hold 51% of the voting shares in YLH.

8. In February 2016, TVB applied for the CA’s approval for further changes in its shareholding structure arising from the disposal of shares in YLH by P6 to CMC. Upon completion of the proposed change to the shareholding structure of YLH, IVH would hold 56.5% of YLH’s voting shares, while CMC would hold 32% of the voting shares and 84.6% of the non-voting shares in YLH.

9. The CA relied on the information and documents that had been submitted by TVB in assessing the 2015 and 2016 Applications. In particular, the CA relied on the submitted information and documents as demonstrating that (a) Dr Chan, in controlling over 50% of the voting shares in YLH through IVH, would continue to be the voting controller of 26% of the voting shares in TVB; and (b) neither Mr Li nor CMC, who were acknowledged by TVB to be DPs, would exercise control of TVB upon completion of the proposed shareholding changes. On the basis of the information and documents submitted by TVB, the CA conducted its assessment of the 2015 and 2016 Applications and granted the approvals sought by TVB.

Review of the 2015 and 2016 Applications (the “Review”)

10. In submitting the 2015 and 2016 Applications, TVB did not disclose the Relevant Agreements to the CA, let alone draw the CA’s attention to their possible significance to the two applications. Accordingly, when the CA processed the 2015 and 2016 Applications, it assumed that the effects of the proposed changes to the shareholding structure were as submitted in the applications and that the information and documents provided by TVB supported the statements made and explanations given by TVB in the applications. Against such background, and in view of the SFC’s referral in May 2017, **the CA considered**

it necessary to examine the Relevant Agreements in consultation with its external legal advisers with a view to assessing whether there was prima facie evidence of any possible contraventions of the BO and TVB's Licence.

11. By its letter of 18 May 2017, the CA informed TVB of the conduct and purpose of the CA's Review. In the process, the CA sought information and clarifications from TVB on a number of matters, and obtained advice from its external legal advisers in assessing the effect of the Relevant Agreements and their implications for the CA's decisions in relation to the 2015 and 2016 Applications. The CA also invited TVB to make representations in line with the established procedures.

MAJOR FINDINGS

A. Pertinence of the Relevant Agreements to the CA's Consideration of the 2015 and 2016 Applications

12. The CA examined the Relevant Agreements, in particular those provisions which were directly relevant to the CA's assessment of the implications for the CA's decisions on the 2015 and 2016 Applications. Having considered TVB's representations and the available information, and taken into account the advice from its external legal advisers, the CA took the view that –

- (a) **the Relevant Agreements, containing among other things provisions governing the exercise of voting shares and non-voting shares, were materially relevant to the CA's consideration of the 2015 and 2016 Applications, in particular for the purpose of determining the control of the 26% voting shares in TVB;**
- (b) **it was arguable that the Relevant Agreements could be interpreted as requiring the aggregation of the voting shares and non-voting shares of the shareholders of YLH for the purpose of determining the availability of any rights under the Relevant Agreements.** While ordinarily the holding of non-voting shares per se would not be taken into account in determining the voting control of a company under the BO⁴, the CA noted that in the present case, the combination of the effect of the Relevant Agreements and the holding of substantial blocks of non-voting shares of YLH might be relevant to the determination of voting control; and

⁴ The term "exercise control", as it is used in the BO in relation to a holding of shares in a company, refers to the percentage of voting shares held in that company. A holding of non-voting shares per se would not normally be taken into account when determining the voting control of a company.

- (c) TVB adopted an interpretation of the key provisions of the Relevant Agreements which the CA did not agree upon. Such differences underlined the fact that the provisions of the Relevant Agreements could give rise to different interpretations and that the CA's factual analysis of the position submitted by TVB in the 2015 and 2016 Applications might have been different if the Relevant Agreements had been disclosed to the CA and account had been taken of the provisions of the Relevant Agreements. **Had the Relevant Agreements been drawn to the CA's attention when it considered the 2015 and 2016 Applications, the CA would have raised questions about the meaning and effect of the provisions of the Relevant Agreements on the shareholding structure of TVB.**

B. Control of YLH, the Voting Controller of 26% of the Voting Shares of TVB

13. The fact that YLH indirectly controlled 26% of the voting shares in TVB at the time of the 2015 and 2016 Applications meant that **whoever had the ability to control YLH, whether by virtue of the Relevant Agreements or otherwise, would be able to indirectly control 26% of the voting shares in TVB.** Therefore, the question as to who controlled YLH was materially relevant to the CA's Review. Taking into account the representations made by TVB, including its submissions on the specific questions as to whether Dr Chan was the voting controller of 26% of the voting shares of TVB and whether Mr Li/CMC exercised control of TVB, the CA considered that –

- (a) Dr Chan indirectly held the majority of the voting shares in YLH through his shareholding in IVH. In addition, under the Memorandum and Articles of Association (“Articles of Association”) of YLH, it is YLH's board of directors (the “YLH Board”) which decides how votes in TVB are to be exercised. Currently, two of the five directors of the YLH Board are nominated by IVH;
- (b) **TVB submitted that there was an “understanding and practice”, as confirmed by the current directors of YLH, that Dr Chan would lead the YLH Board in relation to how votes in TVB were to be exercised;**
- (c) **all the directors of YLH attested to the existence of the above “understanding and practice” and that there were no documents which contradicted the directors' statements. Accordingly, on**

the balance of probabilities, the CA considered that there was insufficient evidence suggesting that TVB and the relevant parties had misled the CA in relation to the 2015 and 2016 Applications by stating that Dr Chan was and would continue to be the voting controller of 26% of the voting shares of TVB;

- (d) **to address the uncertainties as to the proper interpretation of the provisions of the Relevant Agreements, the CA considered that TVB should take necessary action to put beyond doubt that Dr Chan was the voting controller of 26% of the voting shares of TVB at the time of the 2015 and 2016 Applications and would continue to be so;**
- (e) Mr Li/CMC did not command a majority of the YLH Board, nor did they have the ability to do so under the Articles of Association or the Relevant Agreements. In addition, **there was no provision in the Relevant Agreements to the effect that Mr Li/CMC would have the power to ensure that TVB's affairs should be conducted in accordance with the wishes of any of them;**
- (f) as a result of the shareholding change in 2016, Mr Li/CMC held 32% of the voting shares and 84.6% of the non-voting shares in YLH, which represented 79.01% of the aggregated voting and non-voting shares of YLH. **The Relevant Agreements gave Mr Li/CMC a veto power in relation to a range of decisions of YLH, including the appointment of directors to the board of directors of TVB. That said, the CA noted that as a matter of law, the right to block decisions by exercising a veto power would not generally amount to "control" of a company as this term is used in the BO;**
- (g) on the basis that Mr Li/CMC did not exercise control of TVB at the time of the 2015 and 2016 Applications and were not exercising control of TVB thereafter as voting controller within the meaning of the BO, **the CA considered that there was no evidence suggesting that TVB and/or relevant parties were in breach of the restrictions on DPs or UVCs under the BO;** and
- (h) nevertheless, the CA noted that the Relevant Agreements, through the aggregation of voting and non-voting shares in YLH, gave Mr Li/CMC, through their large holding of non-voting shares, a veto power on some important decisions as mentioned above. **The CA considered that TVB should take necessary action to put beyond**

doubt that Mr Li and CMC did not exercise control of TVB at the time of the 2015 and 2016 Applications and are not exercising control of TVB as voting controller within the meaning of the BO.

C. Non-disclosure of the Relevant Agreements at the time of the 2015 and 2016 Applications

14. The CA had a legitimate concern over the potential effects of the Relevant Agreements and their non-disclosure on the CA's decisions on the 2015 and 2016 Applications. Taking into account TVB's representations and the available information, the CA considered that –

- (a) **in processing any shareholding change application submitted by a licensee, the onus is manifestly on the licensee concerned to ensure that all relevant information and documents are provided to the CA to enable the CA to make an informed assessment as to whether the licensee and persons exercising control of it would continue to comply with all the applicable statutory requirements under the BO, if the proposed changes in shareholding structure are to be approved;**
- (b) **in submitting the 2015 and 2016 Applications, TVB did not disclose the Relevant Agreements to the CA, let alone draw the CA's attention to their possible significance to both of the applications;**
- (c) TVB should have been aware of the importance of complying with the requirement to provide all the relevant information and documents to the CA to facilitate the CA's consideration of the 2015 and 2016 Applications;
- (d) while TVB asserted that a redacted version of the Shareholders' Agreement was available for inspection at the library of the Hong Kong Stock Exchange, the Relationship Agreement was not readily available;
- (e) although the CA had legitimate concerns about the non-disclosure of the Relevant Agreements by TVB and the implications of this for the CA's consideration of the 2015 and 2016 Applications, on balance **there was insufficient evidence showing any deliberate attempt on the part of TVB or the relevant parties to withhold the Relevant Agreements from the CA. Based on the available information, the non-disclosure of the Relevant Agreements may have resulted**

from an error of judgment; and

- (f) **had the Relevant Agreements been disclosed to the CA in the 2015 and 2016 Applications, the CA would have asked TVB to take appropriate action to address the problems arising from the interpretation of the provisions of the Relevant Agreements.** This underlined the need for TVB to take necessary action in order to put beyond doubt the interpretation of the provisions of the Relevant Agreements.

THE CA'S DECISION

15. Having taken into account the relevant facts and circumstances, TVB's representations as well as the advice from the external legal advisers of the CA, the CA decided that –

- (a) **TVB and the relevant parties should be requested to put in place sufficient safeguards to address the uncertainties as to the proper interpretation of the Relevant Agreements which have been identified in the course of the Review. In this regard, the CA has secured the following deeds of undertakings and statutory declarations:**
- (i) deeds of undertaking provided by YLH and the parties to the Relevant Agreements to put beyond doubt that (1) Dr Chan was a voting controller of 26% of the voting shares of TVB at the time of the 2015 and 2016 Applications and continues to be so; and (2) Mr Li and CMC did not exercise control of TVB at the time of the 2015 and 2016 Applications and are not exercising control of TVB as voting controller;
- (ii) statutory declarations made by directors and shareholders of YLH that the “understanding and practice” that it was Dr Chan who led the YLH Board in relation to how votes in TVB were to be exercised had been in place at all material times; and deeds of undertaking that they will continue to abide by such “understanding and practice”. In addition, TVB should procure any new directors and shareholders of YLH to provide deeds of undertaking to the satisfaction of the CA that they will abide by such “understanding and practice” on a continuing basis; and

- (iii) a deed of undertaking provided by TVB that it will inform the CA of any proposed changes to the Relevant Agreements or the Articles of Association or of the intention to enter into any agreements or arrangements which may have a bearing on the deeds of undertaking and/or statutory declarations provided by TVB, YLH and its shareholders and directors;
- (b) **given the significance and pertinence of the provisions of the Relevant Agreements and their non-disclosure to the CA's consideration of the 2015 and 2016 Applications, the approvals granted for the 2015 and 2016 Applications be revoked; and**
- (c) **meanwhile, as the CA was satisfied that sufficient safeguards in the form of the statutory declarations and deeds of undertaking as set out in (a) above were put in place, TVB was allowed to submit a new shareholding change application in relation to the changes in the shareholding structure of TVB in 2015 and 2016. Approval of the new application was granted subsequently.**

**Communications Authority
27 September 2019**