

LEGISLATIVE COUNCIL BRIEF

Broadcasting Ordinance
(Chapter 562)

Applications by Asia Television Limited (ATV) for approval of “disqualified persons” to exercise control of ATV

INTRODUCTION

At the meeting of the Executive Council on 16 May 2006, the Council ADVISED and the Chief Executive ORDERED that –

- A
- (a) no retrospective approval from 7 July 2000 to 1 June 2005 should be granted for the nine persons listed at Annex A to exercise control of ATV, who have become disqualified persons by virtue of being controllers of Hong Kong Phoenix Weekly Magazine Limited, a proprietor of a local newspaper as defined in the Broadcasting Ordinance (the Ordinance), or associates of the company or its controllers;
 - (b) under section 3(2)(b) of Schedule 1 to the Ordinance, approval should be granted for the nine persons as listed at Annex A to exercise control of ATV, who are disqualified persons by virtue of being controllers of Hong Kong Phoenix Weekly Magazine Limited, or associates of the company or its controllers, with effect from 2 June 2005 when ATV finally sought the Chief Executive-in-Council’s approval; and
 - (c) under section 3(2)(b) of Schedule 1 to the Ordinance, approval should be granted for the nine persons as listed at Annex A to continue to exercise control of ATV, who will become disqualified persons by virtue of being controllers of Hong Kong Phoenix Weekly Magazine Limited and Phoenix Satellite Television Company Limited, or associates of these two companies or their controllers, when Phoenix Satellite Television

Company Limited becomes a holder of a non-domestic television programme service licence.

2. For ATV's contravention during the period from 7 July 2000 to 1 June 2005 in paragraph 1(a) above, the Broadcasting Authority (BA) may consider issuing administrative warning or imposing regulatory sanction under the Ordinance and the domestic free television programme service licence of ATV.

JUSTIFICATIONS

Asia Television Limited

3. On 12 November 2002, the Chief Executive-in-Council renewed ATV's domestic free television programme service licence pursuant to section 11(1) of the Ordinance. ATV represents that Mr Chan Wing Kee and Mr Liu Changle are its major but indirect voting controllers through intermediary companies including Today's Asia Limited, Vital Media Holdings Limited and Dragon Viceroy Limited.

“Disqualified Person” Provisions under the Ordinance and the repealed Television Ordinance

4. Section 3(2)(b) of Schedule 1 to the Ordinance, which applies to a domestic free television programme service licence or a domestic pay television programme service licence, stipulates that a person shall not exercise control¹ of a licensee if he is a disqualified person (DP), unless the Chief Executive-in-Council, upon application by the licensee, is satisfied that the public interest so requires and approves otherwise. In relation to a domestic free television programme service licence, DP includes another licensee under the Ordinance, a sound broadcasting licensee under Part IIIA of the Telecommunications Ordinance (Cap. 106), an advertising agency and a proprietor of a newspaper (within the meaning of the Ordinance) printed or produced in Hong Kong, and their controllers and associates. In

¹ According to the Ordinance, a person “exercises control” of a corporation if that person is a director or principal officer, or a beneficial owner or voting controller of more than 15% of the voting shares, of that corporation; or 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.

sections 10(1)(f) and 11A(1)(b) of the repealed Television Ordinance (Cap. 52)², similar restrictions in relation to DPs were stipulated. The purposes of the DP provisions are to avoid conflict of interest, the build-up of monopoly in the media and editorial uniformity.

5. In the Ordinance, section 3(3) of Schedule 1 further provides that, in considering the public interest for the purposes of section 3(2), the Chief Executive-in-Council shall take account of, but not limited to, the following four factors –

- (a) the effect on competition in the relevant service market;
- (b) the extent to which viewers will be offered more diversified television programme choices;
- (c) the impact on the development of the broadcasting industry; and
- (d) the overall benefits to the economy.

ATV's Applications

6. ATV applies in writing to the Chief Executive-in-Council for approval of nine DPs, including Mr Liu Changle, Mr Chan Wing Kee, three intermediary companies as well as other persons as listed in Annex A, to exercise control of ATV. ATV represents that these nine persons, including individuals and companies, are DPs by virtue of being –

- (a) controllers of Hong Kong Phoenix Weekly Magazine Limited (Phoenix Weekly), or associates of Phoenix Weekly or associates of the controllers of Phoenix Weekly, from various dates since 12 May 2000; and
- (b) controllers of Phoenix Satellite Television Company Limited (Phoenix Satellite), or associates of Phoenix Satellite or associates of the controllers of Phoenix Satellite, upon the grant of a non-domestic television programme service licence³ by the BA to Phoenix Satellite in due course, in addition to their control of, or association with, Phoenix Weekly in (a) above. The BA's grant of licence to Phoenix Satellite should therefore be subject to the Chief Executive-in-Council's prerequisite approval for the

² Pursuant to section 44(1) of the Ordinance, the Television Ordinance (Cap. 52) was repealed on 7 July 2000.

³ "Non-domestic television programme services" broadly refer to television services that, in the opinion of the BA, do not primarily target Hong Kong.

DPs to exercise control of ATV, or else the DP provisions of the Ordinance would be breached.

The identity of these DPs, their respective control of or association with Phoenix Weekly, Phoenix Satellite and ATV and the relevant dates, as represented by ATV, are shown at Annex B.

B

Hong Kong Phoenix Weekly Magazine Limited

7. On 2 June 2005, ATV applied for the Chief Executive-in-Council's retrospective approval for nine DPs to exercise control of ATV. ATV states that Phoenix Weekly has been publishing a weekly called Phoenix Weekly Magazine since 12 May 2000. The magazine, which mainly contains news commentaries, cultural and financial news relating to Mainland China, Taiwan and Hong Kong, is primarily distributed in the Mainland and is not commonly available in Hong Kong.

8. As the magazine is produced in Hong Kong and is a newspaper within the meaning of the Ordinance, the proprietor of the magazine (i.e. Phoenix Weekly), the controllers of Phoenix Weekly, the associates of Phoenix Weekly as well as the associates of the controllers of Phoenix Weekly are DPs under the Ordinance. ATV reveals that the nine DPs have been exercising control of ATV from various dates after 12 May 2000 without the Chief Executive-in-Council's approval.

9. ATV would have been contravening section 10(1)(f) of the repealed Television Ordinance from 12 May 2000 to 6 July 2000, and/or section 3(2)(b) of Schedule 1 to the Ordinance from 7 July 2000, should the application for retrospective approval be unsuccessful in whole or in part. ATV apologises for its failure to apply for the Chief Executive-in-Council's prior approval and explains that this was due to inadvertence.

Phoenix Satellite Television Company Limited

10. Prior to the application in relation to Phoenix Weekly in paragraphs 7 to 9 above, ATV also applied for the Chief Executive-in-Council's approval for nine DPs to exercise control of ATV, in anticipation that should the BA grant a non-domestic television

programme service licence to Phoenix Satellite, these companies and individuals would become DPs under the Ordinance.

11. Phoenix Satellite has applied to the BA for a non-domestic television programme service licence. On 21 May 2005, the BA approved in principle to grant Phoenix Satellite a non-domestic television programme service licence. The licence will not commence until and unless the Chief Executive-in-Council grants an approval for ATV's application for the DPs to exercise control of ATV. The BA has made it clear to Phoenix Satellite that the approval in principle is without prejudice to any decisions that the Chief Executive-in-Council may make.

Public Interest Considerations

12. ATV's justifications in support of its applications for the DPs in question to exercise control of ATV, and our analyses on public interest considerations, are set out below.

(A) The Effect on Competition in the Relevant Service Markets

13. Phoenix Satellite and Phoenix Weekly, with their emphasis on clientele outside Hong Kong, are in markets completely different from the domestic free television market in which ATV until now only holds a modest position in respect of market share and influence. Allowing the nine common associates or controllers of these two companies to exercise control of ATV respectively would result in minimal, if any, change in ATV's mode of operation, shareholding, directorship and senior managerial personnel. In view of these, the impact of approving the applications on the competition in the domestic free television market is likely to be neutral.

14. Granting approval for ATV's applications would result in Phoenix Satellite taking up a non-domestic television licence for which the BA has already granted approval-in-principle. This would enhance competition in the non-domestic television market.

(B) The Extent to which Viewers will be Offered More Diversified Television Programme Choices

15. Phoenix's business, be it television business or publication, primarily targets the Mainland. Allowing the DPs to exercise control of ATV would therefore have minimal effect on the diversity of television programme choices in Hong Kong.

(C) The Impact on the Development of the Broadcasting Industry and Overall Benefits to the Economy

16. Phoenix Satellite indicates that the application for a non-domestic television programme service licence is one component of its business plans in Hong Kong. It is planning to expand its Hong Kong-based satellite television service for the region by expanding production activities. Phoenix Satellite's expansion plans, if realised, would involve recruiting additional staff in Hong Kong. The increased investment and job creation will benefit directly, though not significantly, Hong Kong's economy. Moreover, the expansion of Phoenix Satellite's business in Hong Kong will add to the critical mass that Hong Kong has as a broadcasting and media hub.

17. Therefore, in relation to Phoenix Satellite, allowing the DPs to exercise control of ATV would facilitate Phoenix Satellite's business plan in Hong Kong. This would also allow Phoenix Satellite, a well-established regional broadcaster, to join the Hong Kong family of television licensees, thereby reinforcing the business-friendly environment of Hong Kong and helping to position Hong Kong as a regional broadcasting and media hub, which is important and conducive to Hong Kong's further development as Asia's World City.

18. In relation to Phoenix Weekly, allowing the DPs to exercise control of ATV would not have any significant effect on the broadcasting industry and the overall economy of Hong Kong, but would not bring any disbenefit either.

19. The above assessment shows that approving ATV's applications would have little impact on the competition in the relevant markets and

programme choice for viewers, but can help reinforce Hong Kong's position as a broadcasting and media hub. The Chief Executive-in-Council approves ATV's applications with effect from 2 June 2005.

Assessment on ATV's Application for Retrospective Approval Starting from 12 May 2000

20. Notwithstanding the public interest considerations in paragraphs 12 to 19 above, we need to separately consider ATV's application for the retrospective approval for the DPs in relation to Phoenix Weekly to exercise control of ATV during the period from 12 May 2000 to 1 June 2005. If the application for retrospective approval is unsuccessful, the BA may impose regulatory sanction on ATV in accordance with the Ordinance, the repealed Television Ordinance and the domestic free television programme service licence of ATV as appropriate. Such sanctions include the inclusion of a correction or apology in ATV's licensed television programme service, financial penalty or suspension of licence, as the case may be. Alternatively, the BA may issue an administrative warning to the licensee.

21. For the period from 12 May 2000 to 6 July 2000 covered by the repealed Television Ordinance, retrospective approval cannot be given now for the DPs to exercise control of ATV as section 23 of the Interpretation and General Clauses Ordinance (Cap. 1) is not applicable to the grant of such approval under the repealed Television Ordinance. The BA has considered the matter and found that three of the nine DPs, namely Mr Liu Changle, Mr Cheung San Ping and Ms Kwok Kwan Ying, exercised control of ATV without the approval of the Chief Executive-in-Council during the period from 12 May 2000 to 6 July 2000. The BA has issued a warning to ATV to ensure compliance with the requirements concerning DPs at all times.

22. For the period from 7 July 2000 onwards when the Television Ordinance was repealed and the Ordinance has come into effect, the Chief Executive-in-Council may grant retrospective approval if the Chief Executive-in-Council is satisfied that the public interest so requires pursuant to section 3 of Schedule 1 to the Ordinance.

23. Pursuant to section 3 of Schedule 1 to the Ordinance, we have examined the case according to the four factors for public interest considerations as set out in paragraph 6 above. On balance, the Chief Executive-in-Council rejected the application for retrospective approval for the period from 7 July 2000 to 1 June 2005 (immediately before ATV finally sought the Chief Executive-in-Council's approval in respect of the nine DPs) for the reasons set out in paragraph 24 below.

24. Under section 39(2) of the Ordinance, ATV is required to submit annually a statutory declaration to the BA showing whether or not any DP has exercised any control in ATV during the year. The onus of complying with the legislation is on the licensees. However, ATV has not disclosed to the BA or the Government that there are DPs in relation to Phoenix Weekly exercising control of ATV until 2 June 2005. ATV's inadvertence in overlooking the statutory restriction for a prolonged period reflects the lack of due diligence of its management in ensuring compliance. Granting a retrospective approval may send a wrong signal to the industry that we are not enforcing the statutory provisions seriously.

IMPLICATIONS OF THE PROPOSAL

C 25. The proposal has economic implications as set out in paragraphs 16 and 19 above and financial implications as set out in Annex C. It is in conformity with the Basic Law, including the provisions concerning human rights. It has no civil service, productivity, environmental or sustainability implications.

PUBLIC CONSULTATION

26. We have consulted the BA.

PUBLICITY

27. We will issue a press release today. A spokesman will be available to answer media and public enquiries.

ENQUIRIES

28. For enquiries, please contact Mr. Eddie Cheung, Principal Assistant Secretary (A) for Commerce, Industry and Technology (Communications and Technology), at 2189 2236.

Communications and Technology Branch
Commerce, Industry and Technology Bureau

16 May 2006

Annex A

**Disqualified Persons (including Individuals and Companies)
to Exercise Control of Asia Television Limited (ATV)**

- (a) Mr Liu Changle;
- (b) Today's Asia Limited;
- (c) Vital Media Holdings Limited;
- (d) Dragon Viceroy Limited;
- (e) Mr Cheung San Ping;
- (f) Mr Chan Wing Kee;
- (g) Mr Wang Wenhuan;
- (h) Ms Kwok Kwan Ying; and
- (i) Ms Yin Xuebin.

Annex B

Identity of Disqualified Persons (DPs) and Their Respective Control of or Association with Hong Kong Phoenix Weekly Magazine Limited (Phoenix Weekly), Phoenix Satellite Television Company Limited (Phoenix Satellite) and Asia Television Limited (ATV)

<i>Persons (including Individuals and Corporations)</i>	<i>Reasons for being a DP under the repealed Television Ordinance and the Broadcasting Ordinance</i>	<i>Exercising control of ATV as DP since</i>	<i>Approval required to exercise control of ATV as –</i>
(a) Mr Liu Changle	Director, beneficial owner and voting controller of more than 15% of the voting shares of Phoenix Weekly and Phoenix Satellite, also director of (b), (c) and (d)	12 May 2000	Director of ATV, and beneficial owner and voting controller of more than 15% of the voting shares of ATV
(b) Today's Asia Limited	Beneficial owner and voting controller of more than 15% of the voting shares of Phoenix Weekly and Phoenix Satellite	28 March 2003	Beneficial owner and voting controller of more than 15% of the voting shares of ATV
(c) Vital Media Holdings Limited	Associated corporation of (b)	28 March 2003	Beneficial owner and voting controller of more than 15% of the voting shares of ATV
(d) Dragon Viceroy Limited	Associated corporation of (b)	28 March 2003	Beneficial owner and voting controller of more than 15% of the voting shares of ATV
(e) Mr Cheung San Ping	Director of (b), (c) and Phoenix Satellite Television Holdings Limited, the associated corporation of Phoenix Weekly and Phoenix Satellite	12 May 2000 to 7 December 2000, and since 12 June 2002	Director and principal officer of ATV
(f) Mr Chan Wing Kee	Director of (b)	28 March 2003	Director and principal officer of ATV, and beneficial owner and voting controller of more than 15% of the voting shares in ATV
(g) Mr Wang Wenhuan	Director of (b), (c) and (d)	28 March 2003	Director of ATV
(h) Ms Kwok Kwan Ying	Director of (d) and relative of (a)	12 May 2000	Director of ATV
(i) Ms Yin Xuebin	Relative of (g)	28 March 2003	Director of ATV

Financial Implications

Upon the grant of a non-domestic television programme service licence by the BA, Phoenix Satellite will be required to pay an annual licence fee on a full-cost recovery basis. The annual fee currently applicable to the licence being sought by Phoenix Satellite, as set out in the Broadcasting (Licence Fees) Regulation, is \$56,600. The additional workload arising from the administration of the new licence will be absorbed by the Television and Entertainment Licensing Authority.