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香港中環花園道
美利大廈一至二樓



COMMUNICATIONS
AND TECHNOLOGY BRANCH
COMMERCE, INDUSTRY
AND TECHNOLOGY BUREAU

1/F-2/F Murray Building
Garden Road
Central, Hong Kong

本局檔號 OUR REF : CTB(CR) 9/5/1 (06) Pt. 11
來函檔號 YOUR REF : CB1/PL/ITB
電話 TEL. NO. : 2189 2236
傳真 FAXLINE : 2511 1458
電子郵件 E-mail Address: echeung@citb.gov.hk

By Hand

4 August 2006

Clerk to Panel on
Information Technology and Broadcasting
3/F, Citibank Tower
3 Garden Road
Hong Kong

Attn: Ms Debbie Yau

Dear Ms Yau,

**Panel on Information Technology and Broadcasting
Follow-up to special meeting on 5 June 2006**

I refer to your letter of 6 June 2006 and append below our reply to your questions. The Administration has consulted the Secretariat of the Broadcasting Authority (BA) in preparing this reply.

(a) Procedures, approving authority, and related legislation

The details about the ownership and corporate control applicable to domestic free television programme service licensees under the Broadcasting Ordinance (BO) (Cap. 562) are set out in the attached background note submitted to the Panel for the meeting of 5 June.

As far as the regulation of the broadcasting industry is concerned, the relevant legislation is the BO. As explained in the background note, if the change in the shareholding of Asia Television Limited (ATV) involves the acquisition of more than 2% of the voting control by any unqualified voting controller (UVC), i.e., one who does not

satisfy the ordinarily-resident in Hong Kong requirement, prior approval by the BA is required pursuant to section 20 of Schedule 1 to the Ordinance. If the change involves the introduction of any disqualified person (DP)¹ exercising control of ATV, the Chief Executive in Council's prior approval is required pursuant to section 3(2) of Schedule 1 to the BO. According to the information submitted by ATV so far, the proposed acquisition is likely to have both UVC and DP implications.

Regarding procedures, a proposed UVC is required to submit its application to the BA for approval. For DP-related applications, the licensee has to submit the applications to the Chief Executive in Council for approval. Upon receipt of an application, the relevant approving authority will verify the information in the submission and seek clarification with the applicant if necessary. The respective factors of consideration that will be taken into account when considering the applications are set out in paragraphs 8 – 9 of the background note.

Under the present regulatory framework, there is no statutory requirement for the BA or the Administration to carry out public consultation before a decision is made.

(b) Impact of the proposed acquisition

Pending the making of the final decisions by the respective approving authorities, and without prejudice to the authority and discretion of the BA and the Chief Executive in Council when considering the applications, we set out our interim response to your questions below. Further information will be provided in a Legislative Council Brief in due course after the decisions are made:

(i) how would the effective interests in ATV be changed after the acquisition of shares by the Group, if approved?

According to the applications submitted to the BA and the Chief Executive in Council by ATV, Citic Guoan Group would hold 22.22% of all issued share capital of ATV through

¹ In relation to a domestic free television programme service licence, DPs include all licensees under the Ordinance, sound broadcasting licensees under Part IIIA of the Telecommunications Ordinance (Cap. 106), advertising agencies and proprietors of newspapers (within the meaning of the BO) printed or produced in Hong Kong, and their controllers and associates.

intermediary companies upon the completion of acquisition of shares.

(ii) the impact of such an acquisition on the broadcasting industry and local economy;

According to the BA Secretariat, when considering a UVC-related application, the BA will take into account, among other things, whether the approval will bring added value to the broadcasting scene.

Pursuant to section 3(3) of Schedule 1 to the BO, in considering the public interest for granting a DP-related approval, the Chief Executive in Council shall take account of, but not limited to, the following matters –

- (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.

The Administration will issue a Legislative Council Brief on the decision of the Chief Executive in Council, which includes the assessment on public interest.

(iii) whether the change in shareholding will affect ATV's editorial independence and programming policy; and

Regarding editorial independence, there is no pre-censorship of broadcast contents in Hong Kong. Editorial decisions rest with individual licensees. According to the BA Secretariat, when considering a UVC-related application, the BA will consider, among other things, whether the applicant will maintain and uphold the licensee's freedom of expression and editorial independence. Regarding programming policy, ATV is holding a domestic free television programme service licence which requires it to provide a service primarily targeting Hong Kong and to provide specific amounts of public interest programmes such as those for the elderly, children and young persons. A change in shareholding does not per se and necessarily affect a

licensee's obligation to comply with the relevant licence conditions. As long as the licence conditions are complied with, programming policy is a decision of a licensee.

(iv) whether and how the proposed acquisition, if approved, will enhance ATV's competitiveness

Whether and how the change in shareholding will enhance ATV's competitiveness is a matter for ATV's shareholders to judge. According to the BA Secretariat, when considering a UVC-related application, the BA will consider the financial ability of the applicant and the benefit which the applicant can bring to the operation of the licensee. Separately, when considering whether public interest requires an approval for DPs exercising control of ATV, the Chief Executive in Council will take into account the effect on the competition in the relevant service market. The assessment will be included in the Legislative Council Brief on the decision of the Chief Executive in Council.

Yours sincerely,



(Eddie Cheung)

for Secretary for Commerce, Industry and Technology

c.c.

CTEL
AA/SCIT
CEO(A)/CTB - w/o encl.

Background Note on Ownership and corporate control applicable to domestic free television programme service licensees

Introduction

Under the Broadcasting Ordinance (Ordinance)(Cap.562), there are four areas of ownership and corporate control applicable to a domestic free television programme service licensee, namely, -

- (a) fit and proper person requirement;
- (b) corporate status requirement;
- (c) ordinarily-resident in Hong Kong requirement; and
- (d) restrictions on disqualified persons.

Fit and Proper

2. It is our policy objective that a television programme service licensee and any person exercising control of it shall be and remain a fit and proper person. The requirement is laid down in section 21 of the Ordinance. Section 21(4) of the Ordinance also sets out the factors into be taken into account in determining a fit and proper person, including the person's business record, criminal record in respect of offences involving bribery, false accounting, corruption or dishonesty.

Corporate Status

3. Pursuant to section 8(1) of the Ordinance and the definition of "company" in section 2(1) of the Ordinance, a domestic free television programme service licensee must be a company incorporated in Hong Kong under the Companies Ordinance (Cap. 32). In addition, section 8(3) of the Ordinance stipulates that a domestic free television programme service licence shall not be granted to a company that is a subsidiary of a corporation so as to ensure that a licensee company remains an independent entity.

“Ordinarily resident in Hong Kong” requirement

4. The existing regulatory regime in Hong Kong does not restrict foreign ownership as such but limit or restrict the influence and control of a domestic free television programme service licensee by those who do not satisfy the “ordinarily resident in Hong Kong” requirement.

5. Briefly, “ordinarily resident in Hong Kong” means residence in Hong Kong for not less than 180 days in any calendar year, or residence in Hong Kong for not less than 300 days in any two consecutive calendar years. In relation to a company, it means the majority of the directors are ordinarily resident in Hong Kong continuously for not less than seven years, and the control and management of the company is bona fide exercised in Hong Kong.

6. A voting controller who is not ordinarily resident in Hong Kong is an “unqualified voting controller”. The statutory “ordinarily resident in Hong Kong” requirement and restrictions on “unqualified voting controller” are:

- (a) without prior written approval of the Broadcasting Authority (BA), an unqualified voting controller shall not hold, acquire, or exercise, or cause or permit to be exercised, 2% or more but less than 6%, or 6% or more but not more than 10%, or more than 10%, in the aggregate of the total voting control under section 20 of Schedule 1 to the Ordinance;
- (b) the votes cast by unqualified voting controllers who have voting rights, on a poll (if any) at a general meeting of the licensee company will be attenuated to 49% in accordance with the formula stipulated in section 19(1)(c) of Schedule 1 to the Ordinance (at **Annex**). The licensees are required to submit annual returns on compliance with this provision; and
- (c) unless with the prior approval of the BA in writing under section 8(4)(a)(iv) of the Ordinance, the majority of the directors and the principal officers, including the principal officers of the company in charge of the selection, production or scheduling of programmes, shall be each

ordinarily resident in Hong Kong for not less than 7 years.

7. According to the BA Secretariat, when considering whether prior approval should be granted under section 20 of Schedule 1 to the Ordinance (see para. 6(a) above), the BA will take account of the following considerations:

- (a) the financial ability of the applicant and the financial position of the licensee in question;
- (b) the benefit which the applicant can bring to the operation of the licensee and whether the approval will bring added value to the broadcasting scene;
- (c) whether the applicant is willing to give undertakings on its long term commitment to Hong Kong, and if approved, whether the licensee will continue to provide a service catering for the needs of the Hong Kong community;
- (d) whether the approval will result in control and management of the licensee being exercised outside Hong Kong; and
- (e) whether the applicant will maintain and uphold the licensee's freedom of expression and editorial independence.

Restrictions on Disqualified Persons

8. Persons or companies engaged in or are associated with certain types of businesses are not allowed to hold a domestic free television programme service licence or exercise control¹ of such a licensee unless the Chief Executive in Council (CE in C), on application by the concerned licensee, is satisfied that public interest so requires and approves otherwise. They are defined as “disqualified persons” under the Ordinance and the relevant provisions are set out in Part 2 of Schedule 1 to the Ordinance. Disqualified persons prohibited from exercising control of a domestic free television programme service licensee are:

¹ “Exercise control” means, inter alia, to be a director or a principal officer of the company or to be a beneficial owner or voting controller of more than 15% of voting shares in the company.

- (a) another television programme service licensee;
- (b) a sound broadcasting licensee;
- (c) an advertising agency;
- (d) a proprietor of a newspaper (including magazine) printed or produced in Hong Kong; and
- (e) persons exercising control of (a) and (d) above, as well as their associates.

9. Pursuant to section 3(3) of Schedule 1 to the Ordinance, in considering the public interest for granting the approval, the CE in C shall take account of, but not limited to, the following matters –

- (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.

**Communications and Technology Branch
Commerce, Industry and Technology Bureau
May 2006**

Responses to questions raised by the Clerk to the Legislative Council Panel on Information Technology and Broadcasting

Agenda Item I (A) Disqualified Persons

(a) *What are the circumstances leading to the recent revelation that the nine persons listed in question have been disqualified persons exercising of ATV since May 2000?*

1. Phoenix Satellite Television Company Limited (Phoenix), a satellite television station which uplinks its television services from Hong Kong, has been providing television services for the Region since 1996. Phoenix's services formed part of the television services licensed under the non-domestic television programme service licence held by STARVISION Hong Kong Limited. There were nine directors, principal officers and intermediary companies who are either exercising control of both ATV and Phoenix or being associates with those exercising control of the companies. They are not disqualified persons in relation to ATV by reason only of the fact that they exercise control (or being associates with those exercising control) of both ATV and Phoenix as long as Phoenix is not a broadcasting licensee, nor engaging in advertising, newspaper (including magazine) publishing business.
2. Phoenix decided to apply for a non-domestic television programme service licence for its own satellite television service and submitted an application to the BA, the licensing authority for such a licence, in February 2005. According to the statutory definition of "disqualified persons" of the Ordinance, the granting of a non-domestic television programme service licence to Phoenix will render the nine persons/companies disqualified persons in relation to ATV. These nine persons/companies should resign from their positions in ATV or relinquish their shares of ATV to comply with the law. Alternatively, ATV may apply for the approval of CE in C for them to continue to exercise control of ATV.
3. ATV chose to apply for the approval of CE in C for the nine persons concerned to exercise control over ATV as disqualified persons,

alongside with Phoenix's application for a non-domestic television programme licence. When exercising due diligence in scrutinizing the application, the Television and Entertaining Licensing Authority (TELA), acting as the BA Secretariat, found that Phoenix has been publishing a magazine called Phoenix Weekly Magazine since May 2000. Although the magazine is primarily circulated in the Mainland, it is published and printed in Hong Kong and therefore falls under the statutory definition of "newspaper" under the Ordinance. As such, the nine concerned persons and companies have been disqualified persons since May 2000 by reason of the fact that they are exercising control of a newspaper or being associates with those exercising such control. ATV should have requested them to relinquish control of the magazine, or failing which to resign from their positions in ATV or relinquish their shares of ATV upon the publication of the magazine. Otherwise, ATV should have applied for CE in C's prior approval for them to continue exercising control of ATV before the publication of the magazine. The BA Secretariat has sought explanation from ATV on the lapse in complying with the statutory requirement. ATV admitted inadvertence in writing and applied for retrospective approval by the CE in C for the concerned disqualified persons to exercise control of ATV.

- (b) *What are the statutory/administrative obligations, if any, on the domestic free television programme service licensee (i.e. ATV) and the regulator (i.e. the BA) in respect of any DP exercising control of the licensee? What is BA's regulatory role in ensuring licensees' compliance with the requirements under the Broadcasting Ordinance and monitoring irregularities on the part of the licensees?*
4. The onus of complying with the statutory provisions on restrictions in relation to DPs rests with the licensees. Section 39(2) requires a domestic free (or domestic pay) television programme service licensee to submit annual statutory declarations showing whether or not any disqualified person has exercised any control in the licensee during the year to which the return relates. Section 9 of Schedule 1 to the Ordinance empowers the licensee to investigate if a person or company is a disqualified person. After receiving the particulars

obtained under this section, the licensee shall give them to the BA within 15 days pursuant to section 9(4) of Schedule 1 to the Ordinance.

5. The abovementioned statutory requirement for submission of annual compliance returns by licensees enables the BA to monitor their compliance. Like other broadcasting regulators, the BA expects that licensees act in good faith in making statutory declarations when compiling regulatory returns and exercising due diligence in complying with the law and regulations. The BA Secretariat exercises due diligence in scrutinizing compliance returns submitted by licensees and if it has reasonable doubt on the accuracy of the information submitted, it will verify it with the licensees. If the BA Secretariat reasonably suspects that there may be disqualified persons exercising control of the licensee, it may, pursuant to section 10(1) of Schedule 1 to the Ordinance obtain information from the concerned persons or, pursuant to section 10(5) of the same Schedule, direct the concerned licensee to exercise its powers of investigation under section 9 of the same Schedule.
 6. If the BA has found a contravention by a licensee, it may consider taking the following action:
 - (a) issue administrative advice or warning to a licensee;
 - (b) issue, pursuant to section 24 of the Ordinance, a direction to the licensee requiring it to take necessary action in order to comply with the statutory provisions; and
 - (c) impose appropriate sanctions ranging from financial penalty (section 28 of the Ordinance), directing a licensee to include in its service a correction or apology (section 30 of the Ordinance), suspend (section 31 of the Ordinance), or, subject to the outcome of an inquiry, recommending to the CE in C to revoke a licence (section 32 of the Ordinance).
- (c) *What sanctions, if any, are being contemplated against ATV for its contravention during 7 July 2000 to 1 June 2005? Has any action been taken? What factors are taken into consideration by the BA/Administration in deciding the sanctions to be imposed on ATV?*

7. The Administration has informed the BA of the CE in C's decision. As explained in the response to the preceding question, the BA will consider appropriate action to be taken. According to the BA Secretariat, in deciding the appropriate action to be taken, the BA would take account of all relevant factors, including the number of previous breaches against the particular provision by the licensee, duration and gravity of the breach, precedent sanctions for similar cases and mitigating factors, if any.

Agenda Item I(B) Announced acquisition of ATV's shares by Citic Guoan Group

- (a) The Administration/BA's comments, if any, on the proposed acquisition which has been reported in the press and on ATV's website.*
8. The BA has not yet received any ATV's applications relating to the announced acquisition of ATV's shares by the Citic Guoan Group. The BA and the Administration (if the approval of CE in C is required) will process the applications according to established procedures.
 - (b) Please explain the statutory requirements/restrictions on ownership and corporate control applicable to domestic free television programme service licensees.*
 - (c) What are the restrictions on non-resident ownership of domestic free television programme service licensees? Under what circumstances would the approval of the Chief Executive in Council/BA be required in respect of non-resident ownership of domestic free television programme service licensees? What factors are taken into consideration when considering whether or not such approval should be given?*
9. Please refer to the Background Note.

The BA will consult the public on, among other things, major

regulatory issues before making decisions according to the promulgated procedures.

**Communications and Technology Branch
Commerce, Industry and Technology Bureau
May 2006**

Broadcasting Ordinance (Cap. 562)
Schedule 1

**DISQUALIFICATION FOR HOLDING DOMESTIC FREE OR PAY
TELEVISION PROGRAMME SERVICE LICENCES AND
RESTRICTION ON VOTING CONTROL OF VOTING
CONTROLLERS**

PART 3

**RESTRICTIONS ON VOTING CONTROL HELD BY
UNQUALIFIED VOTING
CONTROLLERS (NOT APPLICABLE IN RELATION TO
DOMESTIC PAY
TELEVISION PROGRAMME SERVICE LICENCE)**

19. Restrictions on percentage of voting control of unqualified voting controllers

(1) Subject to subsection (2), notwithstanding anything contained in the memorandum or articles of association of a licensee or any provision of any law apart from this section, where any question or matter is to be determined by a poll at any general meeting of the licensee, the following shall apply-

- (a) no vote shall be cast on the poll, whether in person or by proxy, other than by or by proxy on behalf of any person who, at the time of the general meeting, is a registered shareholder of voting shares of the licensee in respect of which a document mentioned in section 22(1)(b) has, in accordance with any direction in that behalf issued by the Broadcasting Authority under section 30, been completed and returned to the licensee;
- (b) where the total voting control exercised by unqualified voting controllers would otherwise exceed, in the aggregate, 49% of the total voting control exercised on the poll by both qualified

and unqualified voting controllers, the votes cast on the poll by unqualified voting controllers shall, for the purpose of determining the question or matter, be reduced by multiplying those votes by the percentage determined by the formula specified in paragraph (c);

(c) the formula for the purposes of paragraph (b) is-

$$\frac{1}{B} \times \frac{(49 \times A)}{51} \times 100$$

where A = the percentage of the total votes cast on the poll, the voting controllers of which are qualified voting controllers;

B = the percentage of the total votes cast on the poll, the voting controllers of which are unqualified voting controllers.