

LEGISLATIVE COUNCIL BRIEF

Telecommunications Ordinance
(Chapter 106)

Disqualified Persons in relation to Digital Broadcasting Corporation Hong Kong Limited (DBC)

INTRODUCTION

At the meeting of the Executive Council held on 20 January 2012, the Council ADVISED and the Chief Executive (CE) ORDERED that permission should be granted under section 13H(2)(b) of the Telecommunications Ordinance (Cap. 106) (the Ordinance) for DBC to enable Professor Arthur Li Kwok-cheung to exercise control of DBC as a director and Chairman of the Board of DBC notwithstanding his status as a disqualified person (DP) under the Ordinance, subject to the condition that Professor Arthur Li shall duly execute the undertaking as set out in paragraph 7 below and deliver the same to, and subject to the satisfaction of, the Secretary for Commerce and Economic Development on or before 1 March 2012, but that the permission shall be null and void and of no effect if the condition shall not have been fulfilled by 1 March 2012.

JUSTIFICATIONS

“Disqualified Person” Provisions under the Ordinance

2. Pursuant to section 13G(1) of the Ordinance, no DP, other than a person in respect of whom the reason for his being a DP was disclosed in the application of a licence, shall exercise control of a corporation that is a sound broadcasting licensee. A DP is defined under section 13A of the Ordinance which includes, among others, an “associate” of a domestic pay television programme service licensee within the meaning of section 2(1) of the Broadcasting Ordinance (Cap. 562) (BO). Under section 2(1) of the BO, an “associate” in relation to a domestic pay television programme

service licensee means, among others, a director of an associated corporation of the licensee and a relative of the director. Section 13H(2) of the Ordinance provides that on the application of a sound broadcasting licensee, the CE in Council may, if he is satisfied that the public interest so requires, permit the licensee to enable a DP to exercise control of the licensee. The purpose of the above provisions is to minimise the risks of media concentration, conflict of interest and editorial uniformity across different media platforms.

DBC's Application

3. DBC holds a sound broadcasting licence, granted by the CE in Council in March 2011, to provide digital audio broadcasting (DAB) services for a validity period of 12 years. DBC has applied for the CE in Council's permission to enable Professor Arthur Li to exercise control as a director and Chairman of the Board of the company vide its series of correspondences⁽¹⁾.

4. DBC submitted that Professor Arthur Li is a DP by virtue of his being an "associate" of PCCW Media Limited (PCCW Media), a domestic pay television programme service licensee. DBC submitted that Professor Arthur Li and Dr David Li Kwok-po are brothers. Dr David Li is currently an independent non-executive director of PCCW Limited (PCCW), which wholly owns PCCW Media through a number of intermediary companies and is an associated corporation of PCCW Media. Professor Arthur Li is therefore an "associate" of PCCW Media by virtue of his status as a relative⁽²⁾ of a director (i.e. Dr David Li) of an associated corporation⁽³⁾ (i.e. PCCW) of a domestic pay television programme service licensee (i.e.

(1) This include DBC's letter of 18 July 2011, as supplemented by letters of 15 September 2011, 30 September 2011 and 17 November 2011 and 30 December 2011, and the company's email dated 10 January 2011.

(2) Under section 1(1) of Schedule 1 to the BO, "relative" in relation to an individual means, inter alia, the brother of the individual.

(3) Under section 1(1) of Schedule 1 to the BO, "associated corporation" in relation to a voting controller, means, among others, a corporation which has influence over the voting controller being itself a corporation; and "influence", in relation to a corporation, means the power of a voting controller to ensure –

- (a) by means of the holding of shares or possession of voting power in or in relation to that or any other corporation; or
- (b) by virtue of any powers conferred by the memorandum or articles of association regulating that or any other corporation,

that the affairs of the first-mentioned corporation are conducted in accordance with the wishes of the voting controller.

PCCW Media). The appointment of Professor Arthur Li as director and Chairman of the company therefore requires the CE in Council's permission under section 13H(2) of the Ordinance.

5. Unlike the BO, the Ordinance does not specify the matters that should be taken into account when considering the public interest for the purpose of DP applications. There is a precedent in November 2010 when the CE in Council, in the context of considering applications for sound broadcasting licences to provide DAB service, considered the DP applications of Metro Broadcast Corporation Limited and Phoenix U Radio Limited. In that case, the CE in Council took into account the following criteria –

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

These are the mandatory factors to be considered by the CE in Council pursuant to the BO in determining each application for DP to exercise control of a domestic free or pay television programme service licensee. In line with this precedent, similar reference was made to the BO in considering public interest in this application.

DBC's Justifications

6. DBC's justifications in support of the application are set out in paragraphs 7 – 9 below.

(A) Effect on competition in the relevant service markets

7. DBC submitted that Dr David Li is a non-executive director of PCCW and does not exercise any executive or managerial function in that company. DBC also submitted that Professor Arthur Li, if his appointment is approved by CE in Council, will oversee the operation of DBC as Chairman and member of the board of directors but will not participate in the daily operation of DBC. To further allay possible regulatory concern on cross-media control, DBC submitted that Professor Arthur Li agreed to give an undertaking that he will –

- (a) act independently from any of his relatives in the media industry;
- (b) exercise due care and attention to avoid editorial uniformity across different media platforms (including PCCW Media specifically); and
- (c) abstain from discussions and decisions in connection with matters concerning both DBC and PCCW Media.

We will require Professor Arthur Li to submit a legally enforceable undertaking on or before 1 March 2012.

(B) Extent to which listeners will be offered more diversified programme choices

8. DBC submitted that Professor Arthur Li's extensive experience in medicine, education and research, and relationship network with both local and global institutions in the academic and medical fields would enable him to provide professional advice on the medical and educational programmes of DBC, resulting in an enhancement of programme quality and more diversified programme choices to listeners.

(C) Impact on the development of the sound broadcasting industry and overall benefits to the economy

9. DBC submitted that Professor Arthur Li has extensive network and experience in both public and business sectors. He is currently Deputy Chairman of The Bank of East Asia Limited⁽⁴⁾ and an independent director of Shangri-La Asia Limited⁽⁵⁾. He was Vice-chancellor of The Chinese University of Hong Kong from 1996 to 2002 and Secretary for Education and Manpower from 2002 to 2007. DBC submitted that Professor Li would bring to DBC substantial management know-how, expertise and opportunities to form strategic partnership with academic institutes and innovators promoting the development of DAB services. DBC also

⁽⁴⁾ The Bank of East Asia Limited, a company listed on Hong Kong Stock Exchange, is principally engaged in provision of banking and related financial services. As at 15 November 2011, it had a market capitalisation of \$58 billion.

⁽⁵⁾ Shangri-La Asia Limited, a company listed on Hong Kong Stock Exchange, is principally engaged in operation of hotels. As at 15 November 2011, it had a market capitalisation of \$45 billion.

submitted that the experience of Professor Li in the public sector will enable him to advise DBC on regulatory and compliance issues.

Our Assessment

10. As regards the effect on competition in the relevant service markets, DBC and PCCW Media are operating in two distinct broadcasting markets (i.e. sound broadcasting and pay television respectively). They have different target audiences and are not in direct competition with each other. DBC and PCCW Media's positions in their respective markets are as follows –

- (a) DBC is one of the four new DAB operators and has just started to build its audience base from scratch⁽⁶⁾, as compared with the existing analogue licensees of the Hong Kong Commercial Broadcasting Company Limited and Metro Broadcast Corporation Limited; and
- (b) PCCW Media is a subscription television service operator in Hong Kong and had around 1 120 000 subscribers (43.9% market share) as at September 2011, as compared to 1 103 000 subscribers (43.3%) for Hong Kong Cable Television Limited, 168 000 subscribers (6.6%) for TVB Pay Vision Limited, and 159 000 subscribers (6.2%) for Hong Kong Broadband Network Limited⁽⁷⁾.

Since DBC and PCCW Media are operating in two separate broadcasting markets, and Dr David Li as an independent non-executive director of PCCW does not have control or influence over the daily operation of PCCW or PCCW Media, the proposed appointment of Professor Arthur Li as a director and Chairman of DBC is unlikely to bring negative impact on the competition landscape in the sound broadcasting service or the markets for domestic pay television programme services or subscription television services.

11. As regards the diversification of radio programme choices, while Professor Li will not participate in the daily operation of DBC, he would

⁽⁶⁾ DBC commenced building an audience base in August 2011 when it soft-launched its DAB service.

⁽⁷⁾ Hong Kong Broadband Network Limited's pay television service is provided on the Internet and does not require a licence under the BO.

offer solid and authoritative advice to the board on the programming strategy of DBC⁽⁸⁾.

12. As regards the impact on the development of the sound broadcasting industry, Professor Arthur Li is one of the founding shareholders of DBC who had provided funding for the conduct of feasibility studies and technical trials of DAB before DBC was granted a licence to provide DAB service. DAB is a new service, and further injection of capital may be required. The roll-out of network and production of new programmes would also require significant resources and expertise in both execution and delivery. DBC is still a fledgling company, and good corporate governance, to which Professor Li's managerial experience will contribute, is instrumental to the future development of the company. Given Professor Li's connection, expertise and experience in the private and public sectors, DBC should benefit from his appointment as director and Chairman, which will in turn have a positive impact on the overall development of DAB in Hong Kong. Professor Li's relationship with a non-executive director of an associated corporation of a pay TV programme service licensee is not likely to adversely impact on the development of the sound broadcasting industry.

13. As regards the benefits to the economy, the broadcasting and programming sector contributed an estimated \$5.4 billion of value added to the economy in 2010, representing around 0.3% of GDP. The proposed appointment of Professor Arthur Li, notwithstanding his DP status, is not likely to have any adverse impact on the overall economy.

14. The above assessment shows that the proposed appointment of Professor Arthur Li as a director and Chairman of DBC is likely to provide more programme choice in the sound broadcasting service market, without undermining the competition landscape in the broadcasting industry. Professor Arthur Li is merely related to an independent non-executive director of PCCW, not PCCW Media. No person will hold dual directorship in DBC and PCCW Media. The risk of editorial uniformity or media concentration is low. The undertaking provided by Professor Arthur Li, mentioned in paragraph 7 above, should allay possible concern on cross-media control.

⁽⁸⁾ In its licence application, DBC submitted that it would provide seven channels, viz, a Talk Radio Channel, an Ethnic Minorities Channel, a News & Market Update Channel, a Leisure Life Channel, a Community Service Channel and two music channels. On the Leisure Lifestyle Channel, DBC plans to provide programmes on healthcare and disease prevention for the grey-haired brigade, infant care, maternal health and childhood development and education.

15. On the other hand, DBC, as a new player in the market, should be able to benefit from the expertise and experience of Professor Arthur Li with his appointment as a director and Chairman in terms of enhancing its governance and development. This may have a positive impact on the development of DAB services in Hong Kong.

IMPLICATIONS OF THE PROPOSAL

16. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no economic, financial, civil service, productivity, environmental or sustainability implications.

PUBLIC CONSULTATION

17. There is no statutory requirement for the Administration to carry out public consultation before a decision in the public interest is made on an application for a disqualified person to exercise control of a sound broadcasting licensee. Like previous applications of the same nature, the same arrangement has been followed in this application.

PUBLICITY

18. The Administration will issue a press release on 20 January 2012. A spokesman will be available to answer media and public enquiries.

ENQUIRIES

19. For enquiries, please contact Mr Aaron Liu, Principal Assistant Secretary for Commerce and Economic Development (Communications and Technology)A, at 2810 2708.

**Communications and Technology Branch
Commerce and Economic Development Bureau
20 January 2012**