

Hong Kong

July 2017

TVB RULING ON WHITEWASH WAIVER BY TAKEOVERS PANEL

Introduction and Background

On 10 May 2017, the Takeovers and Mergers Panel (**Panel**) ruled that a waiver of the general offer obligation (**Whitewash Waiver**) should be granted, subject to conditions, in relation to a share buy-back offer (Offer), which Television Broadcasts Limited (**TVB**) announced in January 2017.¹

On 24 January 2017, TVB announced (**First Announcement**) the Offer to buy back up to 31.51% of the issued TVB Shares at HK\$30.50 per share for a consideration of up to HK\$4,209 million. In another announcement on 13 February 2017, TVB reduced the maximum number of TVB Shares to be bought back to 27.40% of issued shares at an increased price of HK\$35.075, in order to maintain the same aggregate consideration.

Young Lion Holdings Limited (**YL**) has a beneficial interest in 26% of TVB Shares, and Ms. Mona Fong has a beneficial interest in 3.90% of TVB Shares consisting of a personal interest and a beneficial interest held through The Shaw Foundation Hong Kong Limited (**SF**). YL, Ms. Fong and SF together with certain non-shareholders comprise the “Young Lion Concert Party Group” (**YLCPG**), which has a combined beneficial interest in 29.9% of the issued TVB Shares. If YLCPG did not accept the Offer, then its combined shareholding would increase to up to 43.66% (as first announced) or 41.19% (as revised), thereby acquiring Control of TVB and triggering an obligation to make a mandatory general offer for all the other TVB Shares. As YL

stated that it did not intend to tender into the Offer, YLCPG, via TVB, applied for a Whitewash Waiver of that obligation, with TVB making the Offer conditional on a Whitewash Waiver being granted by the Executive (or, in its place, the Panel).

TVB holds a licence to provide a “domestic free television programme service” under the Broadcasting Ordinance (Cap. 562) (**BO**), and Schedule 1 of the BO places restrictions on the ownership and control of such licencees. Schedule 1 of the BO distinguishes between an “unqualified voting controller” (broadly, a non-Hong Kong-resident shareholder) and a “qualified voting controller”. Notwithstanding any provision of any other law, where votes cast by unqualified voting controllers exceed 49% of the total votes cast on a poll, the votes cast by unqualified voting controllers will, for the purpose of determining the question or matter, be reduced so that they amount to 49% of the adjusted votes cast.

The Ruling Sought

The Executive referred YLCPG’s application for a Whitewash Waiver to the Panel so as to determine whether a Whitewash Waiver should be granted (**Whitewash Question**) and if so:

- whether full details about the shareholding structure of YL should be disclosed in the circular in respect of the Offer and the Whitewash Waiver (**Disclosure Question**);
- whether concerns about the funding of the Offer can or should be addressed through disclosure in the circular (**Funding Question**); and

¹ Takeovers and Mergers Panel Ruling, 10.5.2017, [http://www.sfc.hk/web/EN/files/CF/pdf/Panel%20Decision/Final%20version%20170510%20\(clean\).pdf](http://www.sfc.hk/web/EN/files/CF/pdf/Panel%20Decision/Final%20version%20170510%20(clean).pdf).

- whether the scaling back provisions in the BO make any difference in the light of General Principle 1 of the Codes on Takeovers to treat all shareholders equally.

The Panel viewed the third question as part of the primary Whitewash Question, and the parties agreed that the Disclosure Question and the Funding Question only fell to be answered if the answer to the Whitewash Question was in the affirmative.

Whitewash Question

According to General Principle 1 of The Codes on Takeovers and Mergers and Share Buy-backs (**Codes**), all shareholders are to be treated even-handedly and all shareholders of the same class are to be treated similarly.

Rule 3.2 of the Share Buy-backs Code provides that if a shareholder has a material interest in a share buy-back which is different from the interests of all other shareholders, the Executive will normally require the share buy-back to be approved by a majority of the votes cast by all other shareholders at a general meeting of shareholders.

Rule 32 of the Share Buy-backs Code provides that if as a result of a share buy-back a shareholder's proportionate interest in the voting rights of an offeror increases, such increase will be treated as an acquisition for the purposes of the Takeovers Code.

Under Rule 32 of the Takeovers Code, the Executive will normally grant a Whitewash Waiver if the share buy-back is approved by shareholders in compliance with the requirements of the Share Buy-backs Code and in compliance with Note 1 on dispensations from Rule 26 and Schedule VI. According to Note 1, the Executive will normally waive the obligation if there is an independent vote at a shareholders' meeting. Further, pursuant to paragraph 2(e) of Schedule VI, such grant is subject to approval of the proposals by an independent vote at a meeting of the holders of any relevant class of securities.

According to section 2.1 of the Introduction to the Codes, the General Principles are expressed in broad general terms, and the Rules are to be interpreted to achieve their underlying purposes. Accordingly, each of the Codes, through the General Principles, may apply to situations not specifically covered by any Rule. Both the letter and spirit of the Rules must be observed, and the Executive and the Panel may modify or relax the application of a Rule if it considers that, in

the particular circumstances of the case, strict application of a Rule would operate in an unnecessarily restrictive or unduly burdensome, or otherwise inappropriate, manner.

The lawyers for TVB submitted: "if the Panel takes the view that due to General Principle 1 the Shareholders are not entitled to seek a Whitewash Waiver, then the Panel is in effect ruling that any vote required under the Takeovers Code cannot be put to Shareholders. The Company is of the view that the provisions of the Takeovers Code do and should apply to it like any other company."

The Panel agreed that the Codes should be interpreted and applied so that TVB is treated, so far as possible, "like any other company", but the Panel should not strictly apply a Rule without modification or relaxation if it would operate in an inappropriate manner and would not achieve the underlying purposes of the Codes.

A core component of the Codes is that an acquisition of control of a listed company should not take place without a general offer being made to all shareholders. A Whitewash Waiver of this core requirement can only take place under strict conditions, because otherwise a person could take control without making a general offer. Thus the Codes contain provisions whereby independent shareholders must have adequate opportunity to consent or object to the acquisition. This does not necessarily involve a shareholder vote in general meeting.

A Whitewash Waiver is not a right, but is a matter to be granted by the Executive or Panel, in its discretion, on such terms and conditions as it thinks fit to achieve the underlying purposes of the Codes. The Panel reasoned that shareholders of TVB should be aware of the requirements of the BO and its effect on TVB, but this does not mean that shareholders should expect the Executive or the Panel to rule that a Whitewash Waiver should be conditional on a vote at a general meeting if it would not achieve the underlying purposes of the Codes.

The Panel was of the view that the provisions of the BO with potentially highly disproportionate voting weights based on residency and turn-out of voters, are fundamentally at odds with the requirements of the Codes, and in particular the requirement of General Principle 1 that "all shareholders of the same class are to be treated similarly". Thus, the Panel was of the opinion that a waiver cannot be granted on the normal condition stated in paragraph 2(e) of Schedule VI. Further, if the underlying purposes of the Codes can be satisfied through the imposition of appropriate terms or conditions, then the procedures under the Codes should follow their normal course.

The Companies Ordinance requires that the Offer itself must be subject to an ordinary resolution of shareholders in general meeting. The voting on that resolution must be subject to the scale-back provisions of the BO.

Therefore, in the particular circumstances of this case, the Panel ruled as follows:

- That a Whitewash Waiver should be granted conditional upon the majority of votes cast at the general meeting on the resolution to approve the Offer (without adjustment of voting rights) having been in favour of that resolution.
- That no question on whether the Whitewash Waiver should be approved should be put to a vote of shareholders in general meeting.

The Panel considered this condition which modifies paragraph 2(e) of Schedule VI and Note 1 on the dispensations from Rule 26.1, to be appropriate in the circumstances.

Disclosure Question

General Principle 5 of the Codes states that shareholders should be given sufficient information, advice and time to reach an informed decision on an offer. No relevant information should be withheld. All documents must, as in the case with a prospectus, be prepared with the highest possible degree of care, responsibility and accuracy.

According to the Takeovers Code, directors of the offeree (TVB) must disclose their interests in equity share capital (voting or not) of the offeror (YLCPG, led by YL). Further, the circular to shareholders must contain disclosures of the shareholdings in the offeree company and in the offeror in which directors of the offeree company are interested, as well as in the case of shareholdings in the offeror company, holdings of equity share capital.

The First Announcement stated that:

- YL owns 100% of Young Lion Acquisition Co. Limited (**YLA**), which owns 100% of Shaw Brothers Limited (**SB**), which owns 26.00% of TVB.
- The voting shares in YL (**Voting YL Shares**) are owned as to 56.51% by Innovative View Holdings Limited (**IVH**), 32% by CMC M&E Acquisition Co. Ltd. (**CMCM**) and 11.49% by Profit Global Investment Limited (**PGI**).

- Charles Chan Kwok Keung (**Mr. Chan**), the Chairman of TVB, wholly-owns IVH.
- Li Ruigang (**Mr. Li**), who is a director of TVB, wholly-owns Gold Pioneer Worldwide Limited (**GPW**), which holds 86.19% of the “voting rights” of CMC Holdings Limited (**CMC**), which wholly-owns CMC M&E Holdings Ltd, which wholly-owns CMCM.
- 70% of the “equity interests” in PGI is held by Kun Chang Investment Co. Ltd. (**KC**), while the remaining 30% is held by Shin Tong Investments Ltd (**ST**). Directors and substantial shareholders of KC are all accustomed to act in accordance with the directions of Wang Hsiueh Hong (**Ms. Wang**).
- Ms. Wang is the spouse of Chen Wen Chi (**Mr. Chen**), a non-executive director of TVB.
- Mr. Chan, IVH, CMCM, PGI, YL, YLA and SB are parties to the Shareholders Agreement, to which Section 317 of the Securities and Futures Ordinance (**SFO**) applies.

Thus two directors of TVB (the offeree), Mr. Chan and Mr. Li, have interests in the shares of YL, and they should disclose in the circular their interests in the “equity share capital” (voting or not) of the “offeror” (YL).

The Panel must take into account General Principle 5 in determining what is “sufficient” and “relevant” information to enable shareholders to make an informed decision in the circumstances of each case.

There is a Shareholders Agreement dated 22 April 2015 between certain direct and indirect shareholders of YL, which refers to a Relationship Agreement between the same parties of the same date, together “regulating certain aspects of their relationship” in relation to YL and any subsidiaries. The Shareholders Agreement has been filed with the Stock Exchange and TVB in accordance with section 326(6) of the SFO, but the Relationship Agreement has not been so filed. Given the dependence of the Shareholders Agreement on the Relationship Agreement, it was apparent that an analysis of the Relationship Agreement would be necessary for a full understanding of the Shareholders Agreement and how these agreements relate to the acquisition and exercise of Control of TVB by YL in the event that the Offer is successful.

After the Executive had been unsuccessful in requesting a copy of the Relationship Agreement, on 23 March 2017 the Acting Chairman of the Panel directed that a copy of the Relationship Agreement be provided by YL (or TVB on its behalf) to the Panel by 4pm the following day. That direction was not complied with, and the Executive exercised powers to acquire from IVH a copy of the Relationship Agreement, which it received on 29 March 2017. The Panel noted its concerns regarding the difficulty the Executive and Panel experienced in obtaining the Relationship Agreement. General Principle 10 of the Codes requires all parties concerned with transactions subject to the Codes to co-operate to the fullest extent with the Executive, the Panel and the Takeovers Appeal Committee, and to provide all relevant information. Although a party can make submissions on the relevance of material requested by the Panel, it cannot simply refuse to supply material as this undermines the purpose of General Principle 10.

It is clear from the Shareholders Agreement that YL has two classes of shares, the Voting YL Shares and the Non-Voting YL Shares (together, **YL Shares**).

In the Panel's opinion, provisions from the Relationship Agreement indicate that although IVH has a majority of the Voting YL Shares, IVH only nominates one director of TVB, and CMC has the greatest influence of all the YL shareholders over the appointment of directors of TVB. It is possible that a shareholder who does not hold any Voting YL Shares but holds 10% of the total YL Shares would be entitled, subject to CMC's approval, to nominate a director of TVB.

The Relationship Agreement also contains provisions concerning the board of YL, which will be relevant to the decision of TVB shareholders, because it is the board of YL that decides how its TVB Shares shall be voted. The Panel was of the view that the Relationship Agreement's provisions indicate that although IVH has a majority of the Voting YL Shares, it does not control the composition of a majority of YL's board. Decisions of the board of YL (including voting on its TVB Shares) are made by simple majority with each director having one vote on each matter, and thus IVH does not control the voting decisions of YL.

Under the Relationship Agreement, there are many situations in which the Non-Voting YL Shares (of which CMC holds the majority) carry power of nomination, approval or disapproval amounting to de facto voting rights. This is very far from a normal situation in which the non-voting shares of a company have no real say except in situations that affect their class rights. The Panel was of the opinion that TVB shareholders

would be unable to make a fully-informed view on how the provisions of the Relationship Agreement would likely affect the exercise of Control of TVB without knowing the holdings of all YL Shares, including the Non-Voting YL Shares.

Non-Voting YL Shares represent 89.39% of its equity, and Voting YL Shares represent 10.61% of its equity. Mr. Chan, via IVH, owns 6% of the YL Shares (all of which are Voting YL Shares), while CMC, via its wholly-owned subsidiaries, owns 79.01% of the YL Shares, and Ms. Wang, via PGI, controls 14.99% of the YL Shares.

The Panel ruled that full details of the shareholding and ownership structure of YL and a summary of the relevant arrangements between its shareholders should be disclosed in the circular. The Shareholders Agreement and the Relationship Agreement should both be put on electronic display.

Such disclosure is necessary, but may not be sufficient. The First Announcement states that Mr. Li, via GPW, holds 86.19% of the "voting rights" of CMC. This indicates the existence of another class of shares in CMC, which was confirmed at the Panel hearing, and that Mr. Li may not have such a substantial equity interest in CMC and, thus in YL and TVB. Further, there may or may not exist relevant agreements between CMC's shareholders which would affect the way it exercises its rights in relation to YL and TVB. The Panel did not receive any detailed submissions on this point.

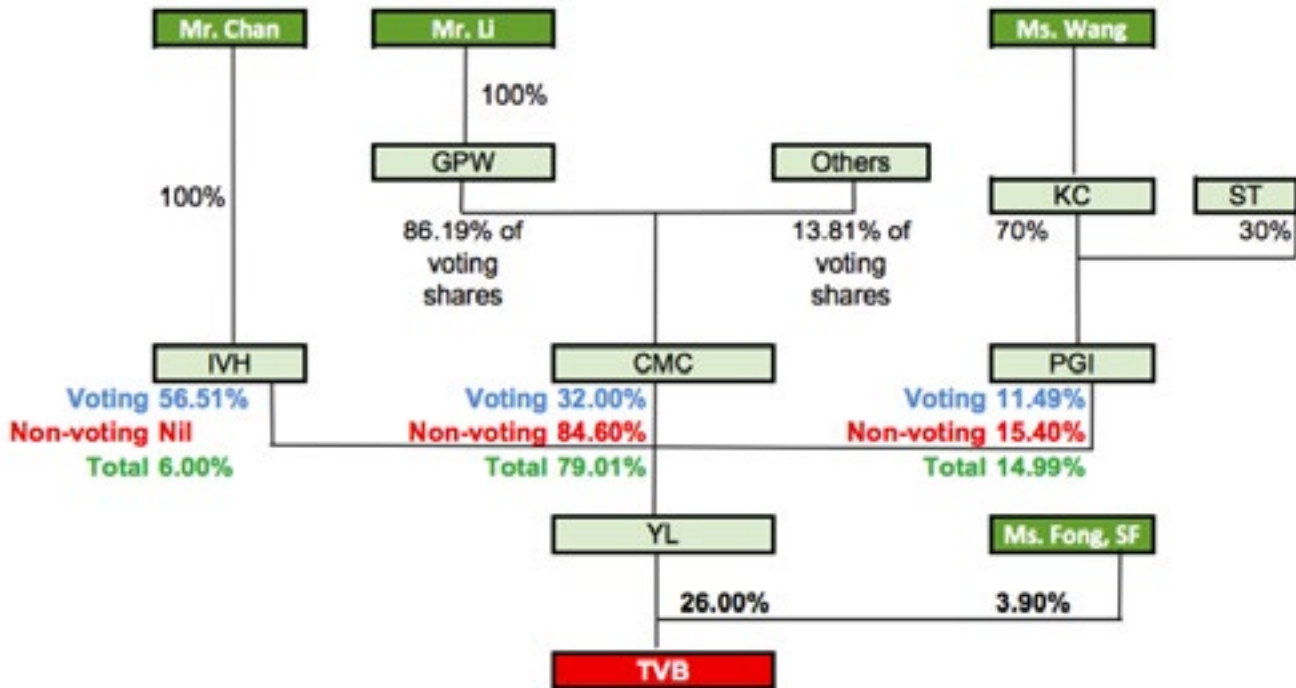
The Panel stated that it is for the offeror (YL) to satisfy the Executive that full disclosure has been made in relation to those persons who can significantly influence the exercise of Control over TVB by YL, directly or indirectly, via approval rights, voting rights, shareholder agreements or otherwise.

The Panel expressed its concern that YL did not make available to the hearing one of its directors who might be familiar with the affairs of YL and its shareholders, notwithstanding an earlier direction by the Acting Chairman to do so.

Funding Question

The Executive, in its submissions, highlighted that on 23 September 2016, TVB announced a proposed issue of debt securities, with additional details announced on 29 September 2016, and that the net proceeds were about US\$495.37 million (about HK\$3,841 million), a figure similar to what would be paid out if the Offer is accepted in full. The two announcements stated that the proceeds: "are expected to be used to fund the

The Ownership Structure of YLCPG Omitting Intermediary Companies



expansion of the Group’s digital new media business and other capital expenditures, to make strategic investments and for its general corporate purposes.”

The announcements did not make any reference to any possible buy-back offer, and it was disputed as to whether one was in contemplation. However, it was evident to the Panel from submissions that substantive preparatory work began very soon after (if not before) the completion of the Notes issue, which was announced on 11 October 2016.

However, matters of disclosure under the Listing Rules or the SFO are not matters for the Panel. The Panel found that whatever the source of a company’s cash resources, they are generally fungible, and all that is required of offerors in this regard under Rule 3.5 of the Takeovers Code is that the announcement of an offer should include confirmation from the financial adviser that sufficient resources are available to satisfy full acceptance of the offer. TVB complied with Rule 3.5 in that the First Announcement included the requisite confirmation. Further, the Executive did not dispute that TVB has sufficient resources.

TVB’s Subsequent Action

TVB announced² on 17 May 2017 that it will be applying to the High Court of Hong Kong for leave to commence judicial review of (i) the Panel’s decision that the granting of the Whitewash Waiver should be made conditional on the outcome of the Shareholder vote on the Offer (without adjustment), and (ii) the ruling that no question on whether the Whitewash Waiver should be approved should be put to a separate vote of Shareholders in general meeting. The leave application and the substantive hearing of the judicial review are scheduled to take place in September 2017.³

TVB chief executive Mark Lee Po-on reportedly stated⁴ that TVB cannot meet the condition imposed by the Panel “without adjustment” of voting rights which means that TVB is not allowed to scale back the voting shares. This is in breach of the requirements of the BO.

2 TVB Announcement, 17.5.2017, <http://www.hkexnews.hk/listedco/listconews/SEHK/2017/0517/LTN20170517723.pdf>.
 3 TVB Announcement, 29.6.2017, <http://www.hkexnews.hk/listedco/listconews/SEHK/2017/0629/LTN20170629845.pdf>.
 4 SCMP, “Hong Kong broadcaster TVB to seek judicial review of whitewash waiver ruling by SFC”, 17.5.2017 <http://www.scmp.com/business/companies/article/2094709/hong-kong-broadcaster-tvb-seek-judicial-review-whitewash-waiver>.

In relation to the Panel's ruling that the waiver should not be put to a separate shareholders' vote, Lee stated that allowing a separate vote on the waiver was a condition listed in TVB's buy-back proposal in January, and the ruling made the offer uncertain.

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