

Takeovers Panel's TVB ruling on whitewash waiver and disclosure of shareholding structure

10 May 2017

The Takeovers Executive (Note 1) notes that the Takeovers and Mergers Panel (Panel) has ruled that a waiver of the general offer obligation (a Whitewash Waiver) should be granted, subject to conditions, in relation to a share buy-back offer which Television Broadcasts Limited (TVB) announced in January 2017.

Background

TVB's offer announcement stated that Innovative View Holdings Limited (IVH), a company wholly-owned by Charles Chan Kwok Keung, holds 56.51% of the voting rights of Young Lion Holdings Limited (Young Lion), which in turn holds a direct interest in 26% of TVB's shares and an additional 3.9% indirectly with its concert parties (Note 2). Young Lion stated that it did not intend to accept TVB's share buy-back offer. The Young Lion concert group therefore applied to the Takeovers Executive for a Whitewash Waiver as its shareholding will increase from 29.9% to up to 41.19% as a result of TVB's share buy-back and thereby a mandatory general offer will be triggered by the Young Lion concert group under the Takeovers Code.

The Takeovers Executive referred the Whitewash Waiver application to the Panel, which met on 27 April 2017 to consider the matter. The Panel was invited to determine whether a Whitewash Waiver should be granted and if so, (i) whether full details about Young Lion's shareholding structure should be disclosed in the shareholders circular; (ii) whether concerns about the funding of the share buy-back offer can or should be addressed through disclosure in the shareholders circular; and (iii) whether the scaling back provisions in the Broadcasting Ordinance (Note 3) make any difference in light of the requirement in the Codes on Takeovers and Mergers and Share Buy-backs (Codes) to treat all shareholders equally (Note 4).

Disclosure of shareholding structure

The Panel ruled that full details of Young Lion's shareholding structure (Appendix A) should be disclosed in the shareholders circular as otherwise TVB shareholders would not be able to reach a fully informed decision on how control of the company would be exercised. The Panel stated that it is for the offeror, which in this case is Young Lion, to satisfy the Takeovers Executive that full disclosure has been made in relation to those persons who can significantly influence the exercise of control over TVB by Young Lion, directly or indirectly, via approval rights, voting rights, shareholder agreements or otherwise.

The Panel noted that Young Lion has 56,321,003 voting shares in issue which represent 10.61% of the economic interest in Young Lion and 474,474,999 non-voting shares in issue which represent 89.39%. CMC Holdings Limited (CMC), a company controlled by Mr Li Ruigang, holds both voting and non-voting shares and 79.01% of the economic interest in Young Lion, whereas IVH holds 56.51% of the voting shares but holds only 6% of the economic interest.

The Panel noted that Young Lion's shareholders have entered into two agreements, a Shareholders Agreement and a Relationship Agreement (Note 5), regulating certain aspects of their relationship and that as a result of these agreements certain decisions require the approval of shareholders holding a majority of all of Young Lion's voting and non-voting shares. Although IVH holds a majority of Young Lion's voting shares, the Panel noted that in fact CMC has the greatest influence over the appointment of directors of TVB. The Panel also noted that IVH does not control the composition of a majority of Young Lion's board, and it follows that IVH does not control Young Lion's voting decisions, including the voting of its 26% of TVB shares.

Under the Relationship Agreement, there are many situations in which the non-voting Young Lion 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 a company's non-voting shares have no real say except in situations which affect their class rights. The Panel also noted that CMC has the option to require IVH to sell its entire shareholding in Young Lion to a Hong Kong-resident third party of CMC's choice.

The Panel noted that whilst full details of the shareholding and ownership structure of Young Lion and a summary of the relevant arrangements between its shareholders should be made, this might not be sufficient. The Panel observed that TVB's offer announcement states that Mr Li Ruigang indirectly holds 86.19% of the "voting rights" of CMC. The Panel noted that this indicates the presence of another class of shares in CMC, a fact that was confirmed at the Panel hearing, and that Mr Li Ruigang may not have such a substantial equity interest in CMC and, in turn, in Young Lion and TVB. The Panel further noted that there may or may not be relevant agreements between CMC's shareholders which would affect the way it exercises its rights in relation to Young Lion and TVB and that no detailed submissions were received by the Panel on this point.

Funding of the share buy-back offer

As for the issues raised by the Executive relating to the funding of the share buy-back offer, 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 the Takeovers Code is that the announcement of an offer should include confirmation from the financial adviser that sufficient resources are available to satisfy the offer. The Panel noted that matters of disclosure under the Listing Rules or the Securities and Futures Ordinance are not matters for the Panel.

Ruling on Whitewash Waiver

The Panel noted that it is a statutory requirement under the Companies Ordinance that the TVB's share buy-back offer must be subject to an ordinary resolution of TVB shareholders in a general meeting. It follows that the vote on that resolution must be subject to the scale-back provisions of the Broadcasting Ordinance. Accordingly, in the particular circumstances of the case and in order to achieve the underlying purposes of the Codes, the Panel ruled that the Whitewash Waiver should be granted subject to a majority of votes being cast in favour of the resolution to approve TVB's offer (without adjustment). In the circumstances and to prevent the rules operating in an inappropriate manner and to achieve the underlying purposes of the Codes, the Panel decided that the Whitewash Waiver should not be put before TVB shareholders for a separate vote.

Parties' full co-operation is expected

The Panel noted its concerns about the difficulty the Takeovers Executive and the Panel experienced in obtaining the Relationship Agreement from Young Lion (or from TVB on its behalf). The agreement was eventually provided by the Takeovers Executive to the Panel after the Executive exercised its statutory power to obtain it. The Codes require parties concerned with Codes transactions to co-operate to the fullest extent with the Takeovers Executive, the Panel and the Takeovers Appeal Committee, and to provide all relevant information. For Young Lion and TVB to simply refuse to provide the Relationship Agreement undermines the purpose of the Codes. The Panel also put on record its concern that Young Lion did not make available to the hearing one of its directors who might be familiar with its affairs and those of its shareholders, despite an earlier direction by the Acting Chairman to do so.

The [Panel's decision](#) can be found on the SFC's website (Note 6).

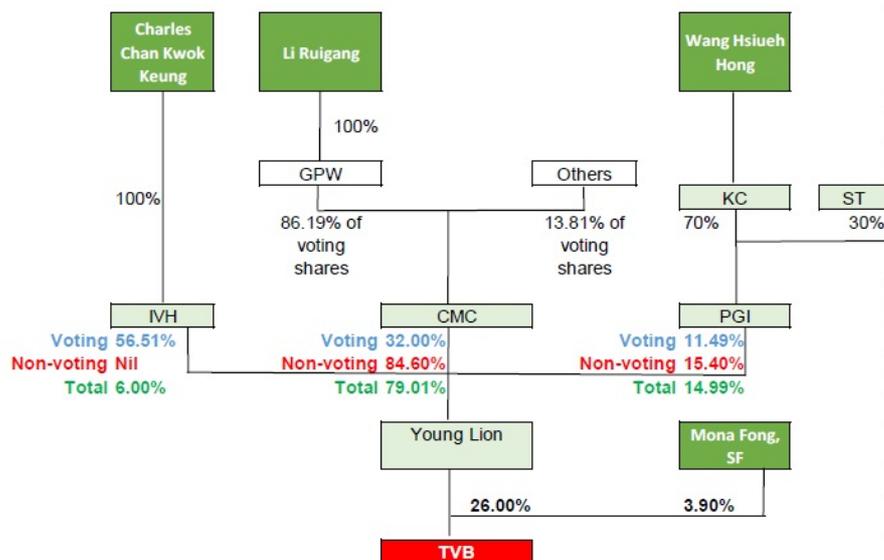
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Notes:

1. The Executive Director of the SFC's Corporate Finance Division or his delegate.
2. Young Lion's simplified shareholding structure is set out in Appendix A.
3. TVB is the holder of a licence under the Broadcasting Ordinance, which contains restrictions on voting by unqualified voting controllers (broadly, non-Hong Kong-resident shareholders) at general meetings. Where votes cast by unqualified voting controllers exceed 49% of the total, their votes shall, for the purpose of determining the question or matter, be reduced so that they amount to 49% of the adjusted votes cast. See section 19 of Schedule 1 to the Broadcasting Ordinance.
4. General Principle 1 of the Codes provides that all shareholders are to be treated even-handedly and all shareholders of the same class are to be treated similarly.
5. The Shareholders Agreement was filed with the Stock Exchange of Hong Kong Limited but with a schedule which sets out the interests in the voting and non-voting shares of Young Lion redacted, and this copy is available for public inspection. The Relationship Agreement, to which the Shareholders Agreement refers, was not filed.
6. The decision is available in the "[Regulatory functions – Listings & takeovers – Takeovers & Mergers – Decisions & statements](#)" section of the SFC website.

Appendix A

Simplified shareholding structure of Young Lion



Legend:

IVH: Innovative View Holdings Limited
 GPW: Gold Pioneer Worldwide Limited
 CMC: CMC Holdings Limited
 PGI: Profit Global Investment Limited

TVB: Television Broadcasts Limited
 KC: Kun Chang Investment Co. Ltd.
 ST: Shin Tong Investments Ltd
 SF: The Shaw Foundation Hong Kong Limited

TAKEOVERS AND MERGERS PANEL

Ruling

on an application for a waiver (“Whitewash Waiver”) of the obligation to make a mandatory general offer for the shares (“TVB Shares”) of Television Broadcasts Limited (“TVB”) under the Takeovers Code arising from an offer (“Offer”) under the Share Buy-backs Code and related matters

Introduction and background

1. Save where the context requires, terms in this Ruling have the meaning defined in [The Codes on Takeovers and Mergers and Share Buy-backs](#). This Ruling has been translated into Chinese. If there is any inconsistency or ambiguity between the English and Chinese versions then the English version shall prevail.
2. The Panel met on 27 April 2017 to consider a referral by the Executive under section 10.1 of the Introduction to the Codes for a ruling, as the Executive considered that there were particularly novel, important or difficult points at issue. The hearing was non-disciplinary.
3. On 24 January 2017, TVB [announced](#) (“First Announcement”) the Offer to buy back up to 138,000,000 TVB Shares (31.51% of the 438,000,000 issued TVB Shares) at HK\$30.50 per share for a consideration of up to HK\$4,209m. By a further [announcement](#) on 13 February 2017, TVB reduced the maximum number of TVB Shares to be bought back to 120,000,000 (27.40%) at an increased price of HK\$35.075, to maintain the same aggregate consideration.
4. Young Lion Holdings Limited (“YL”) has a beneficial interest in 113,888,628 TVB Shares (26.00%) and Ms. Mona Fong (“Ms. Fong”) has a beneficial interest in 17,096,200 TVB Shares (3.90%) comprising a personal interest in 1,146,000 TVB Shares and a beneficial interest in 15,950,200 TVB Shares 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” or “YLCPG”. Accordingly, YLCPG has a combined beneficial interest in 29.9% of the issued TVB Shares.
5. If YLCPG did not accept the Offer, then its combined shareholding would rise 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 under Rule 26 of the Takeovers Code for all the other TVB Shares. YL had confirmed its firm intention not to tender into the Offer. Consequently, YLCPG, via TVB, has applied for a Whitewash Waiver of that obligation, and TVB will make the Offer conditional, inter alia, on a Whitewash Waiver being granted by the Executive (or, in its place, the Panel).
6. The Codes provide, as detailed later in this Ruling, that a Whitewash Waiver would normally be granted conditional on approval by independent shareholders on a poll in general meeting.
7. TVB is the holder of a licence to provide a “domestic free television programme service” under the [Broadcasting Ordinance](#) (“BO”, Cap 562 of the Laws of Hong Kong). [Schedule](#)

1 of the BO places restrictions on the ownership and control of such licensees, the relevant provisions of which may be summarised as follows:

- 7.1. Section 20(1) provides that an “unqualified voting controller” (broadly, a non-Hong Kong-resident shareholder) is required to obtain prior written approval from the Communications Authority (“CA”) if its holding crosses 2%, 6% or 10% of the issued TVB Shares. The Offer may result in shareholders crossing the relevant thresholds, requiring these shareholders to apply to the CA for consent retrospectively. If the CA does not approve the increase, it may give such directions as it considers appropriate, which may include directing a shareholder to dispose of TVB Shares.
- 7.2. Section 3 provides that a “disqualified person” (broadly, a person who is, is a director of, or holds over 15% of, another licensee, an advertising agency or a local newspaper) is restricted from holding more than 15% of the TVB Shares. The Offer may result in shareholders holding between 10.89% and 15% crossing over the 15% threshold.
- 7.3. Section 19 restricts the voting control that can be exercised by unqualified voting controllers at general meetings of TVB. 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 shall, for the purpose of determining the question or matter, be reduced so that they amount to 49% of the adjusted votes cast.
- 7.4. Section 20(2) provides that an unqualified voting controller whose shareholding exceeds 10% of TVB without the approval of the CA under Section 20(1)(a) shall not exercise in a general meeting voting rights exceeding 10% of all the voting rights in TVB.
8. There exists an agreement dated 22 April 2015 (“Shareholders Agreement”) between certain direct and indirect shareholders of YL, which in turn refers to a “Relationship Agreement” between the same parties of the same date, together “regulating certain aspects of their relationship” with regard to YL and any subsidiaries.

The Ruling sought

9. By a Panel Paper dated 16 March 2017, the Executive referred YLCPG’s application for a Whitewash Waiver to the Panel. The Panel was invited to determine whether a Whitewash Waiver should be granted in all the circumstances of this case (“Whitewash Question”) and if so:
 - 9.1. whether full details about the shareholding structure of YL should be disclosed in the circular (“Circular”) in respect of the Offer and the Whitewash Waiver (“Disclosure Question”);
 - 9.2. whether concerns about the funding of the Offer can or should be addressed through disclosure in the Circular (“Funding Question”); and
 - 9.3. whether the scaling back provisions in the BO make any difference in the light of General Principle 1 (“GP1 Question”).

10. In the Panel's view, the GP1 Question is part of the primary Whitewash Question. The parties agreed that the Disclosure Question and the Funding Question only fall to be answered if the answer to the Whitewash Question is in the affirmative.
11. Unsurprisingly given the complexity of the case, the Panel received voluminous submissions from the parties, all of which were given proper consideration. The omission of the bulk of those submissions from this Ruling does not indicate any lack of consideration. Section 16 of the Introduction to the Codes states that the purpose of publication of a Ruling is so that the activities of the Panel may be understood by the public. To make this Ruling understandable, the Panel must refrain from reciting or commenting on every statement made in submissions.

The Whitewash Question: provisions of the Codes

12. Section 1.2 of the Introduction to the Codes states:

"The primary purpose of the Codes is to afford fair treatment for shareholders who are affected by takeovers, mergers and share buy-backs. The Codes seek to achieve fair treatment by requiring equality of treatment of shareholders, mandating disclosure of timely and adequate information to enable shareholders to make an informed decision as to the merits of an offer..."

13. General Principle 1 of the Codes states:

"All shareholders are to be treated even-handedly and all shareholders of the same class are to be treated similarly."

14. Rule 3.2 of the Share Buy-backs Code states:

"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..."

15. Rule 6 of the Share Buy-backs Code states:

"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 and Rule 32 of the Takeovers Code shall apply."

16. Rule 32 of the Takeovers Code states in part:

"the Executive will treat an application for a waiver from the requirement to make a mandatory offer in accordance with Rule 26 as if it were an application for a whitewash waiver in accordance with Note 1 on dispensations from Rule 26. The Executive will normally grant such a waiver if:-

...

- (b) the share buy-back is approved in accordance with applicable shareholder approval requirements of the Share Buy-backs Code by those shareholders who could not become obliged to make a mandatory offer as a result of the share buy-back; and

- (c) a procedure on the lines of that set out in Note 1 on dispensations from Rule 26 of the Takeovers Code and Schedule VI is followed...”

17. Note 1 on dispensations from Rule 26 states in part:

“the Executive will normally waive the obligation if there is an independent vote at a shareholders’ meeting. For this purpose “independent vote” means a vote by shareholders who are not involved in, or interested in, the transaction in question.”

18. Schedule VI, titled “Whitewash Guidance Note” states in paragraph 2 that if a Whitewash Waiver is granted, such grant will be subject to:

“(e) approval of the proposals by an independent vote at a meeting of the holders of any relevant class of securities...”

19. Section 2.1 of the Introduction to the Codes states in part:

“The General Principles are expressed in broad general terms and do not define the precise extent or the limits of their application. The Executive and the Panel apply the General Principles in accordance with their spirit and may modify or relax the effect of the language to achieve their underlying purposes.

...

Although the Rules are expressed in more detailed language than the General Principles, they, like the General Principles, 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. Therefore, the spirit of the Rules must be observed as well as their letter and the Executive and the Panel may each 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 Whitewash Question: submissions and analysis

20. This was indeed a novel and difficult case and it was right that the Executive referred the application for the Whitewash Waiver to the Panel for a Ruling.

21. TVB has only one class of shares, although it may be argued that there are two variable classes of *holders* of those shares, namely “qualified voting controllers” and “unqualified voting controllers” under the BO. Their respective voting weights in general meetings depend not just on their declared residency but on the relative proportion of votes cast by the other class of voting controllers.

22. It is explicit in Schedule 1 of the BO that notwithstanding “any provision of any law”, if a question or matter is put to a poll in a general meeting, then it must be determined by scaling back the votes of unqualified voting controllers to 49% of the votes cast if they would otherwise exceed that threshold. In the extreme, this could mean that if only 1 qualified voting controller votes on a resolution, and if he votes only 1 share, then his vote would still be deemed to be 51% of the votes cast and his vote would alone determine the passage or veto of that resolution.

23. Freshfields Bruckhaus Deringer (“Freshfields”), on behalf of TVB, submitted that:

“General Principle 1 must be read in that context, and it is not for the Panel to withhold altogether certain privileges under the Takeovers Code simply because the law requires [TVB]’s affairs to be controlled in a particular manner.”

“By logical extension, 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, and that is the reasonable expectation of the Shareholders. All Shareholders are, or ought to be, aware of the requirements of the law that apply to persons acquiring shares in the Company.”

24. Setting aside the fact that it is YLCPG, not the shareholders, who are seeking a Whitewash Waiver, in the Panel’s view, that submission overlooks the broader context of the Codes. Investors in Hong Kong-listed companies, including TVB, have a legitimate expectation that the Codes will be interpreted and applied, so far as is possible, “to achieve their underlying purposes”. In that broader sense, the Panel agrees that the Codes should be interpreted and applied so that TVB is treated, so far as possible, “like any other company”.

25. It is precisely because of this that 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 (Introduction to the Codes, section 2.1).

26. The Codes exist, at their core, to require that when a person acquires or consolidates Control of a company, then a general offer must be made to all shareholders, regardless of their residency. This is articulated in General Principle 2, which states in part:

“If control of a company changes or is acquired or is consolidated, a general offer to all other shareholders is normally required.”

27. It is only under stringent conditions that such an obligation can be waived, because it results in a person attaining control without making a general offer. Once a person has attained Control of a company, shareholders, wherever they reside, have normally surrendered the choice of any future change of Control of that company to the controlling shareholder.

28. Accordingly, the Codes include provisions to ensure that independent shareholders have an adequate opportunity to consent or object to the acquisition of Control without the making of a general offer. This does not necessarily involve a shareholder vote in general meeting. For example, Rule 28.5 of the Takeovers Code on partial offers (an offer for some but not all of the outstanding shares) states in part:

“Any offer which could result in the offeror holding 30% or more of the voting rights of a company must normally be conditional... on approval of the offer, signified by means of a separate box on the form of acceptance specifying the number of shares in respect of which the offer is approved, being given by shareholders holding over 50% of the voting rights not held by the offeror...”

29. A Whitewash Waiver is not a right or a “privilege”. Shareholders of a company in a general meeting cannot order the Executive or Panel to do anything. Rather, the Executive or Panel, in its discretion, may grant a waiver on such terms and conditions as it thinks fit to achieve the underlying purposes of the Codes.

30. It is right that shareholders of TVB should be aware of the requirements of the BO that apply to TVB, including the voting provisions in general meetings, but it does not follow that they should expect the Executive or the Panel to submit a Whitewash Waiver to a vote at a general meeting if it would be inappropriate to do so or would not achieve the underlying purposes of the Codes.
31. In the Panel's view, 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, particularly the requirement of General Principle 1 that "all shareholders of the same class are to be treated similarly". The issue of residency does not enter into the Codes. Accordingly, the Panel considers that a waiver cannot be granted on the normal condition stated in paragraph 2(e) of Schedule VI.
32. At the hearing, TVB urged that the Panel either grant a Whitewash Waiver on the normal condition, or not grant it at all.
33. That is not what the Codes require the Panel to do. A firm intention to make the Offer has been announced, the Offer will be conditional on a Whitewash Waiver being granted, and an application for the Whitewash Waiver has been made. In the Panel's view, if the underlying purposes of the Codes can be achieved by imposing appropriate terms or conditions, then the Codes should be allowed to function, the Offer should move forward and the market would expect nothing less.
34. Regardless of the Codes, it is a statutory requirement under the Companies Ordinance 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.
35. Accordingly, in the particular, if not unique, circumstances of this case, **the Panel Rules** as follows:
 - 35.1. 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) having been in favour of that resolution.
 - 35.2. That no question on whether the Whitewash Waiver should be approved should be put to a vote of shareholders in general meeting.
36. The Panel recognizes that the condition imposed is a modification of paragraph 2(e) of Schedule VI and Note 1 on the dispensations to Rule 26.1. The Panel considers this to be appropriate in the circumstances to prevent the Rules operating in an inappropriate manner and to achieve the underlying purposes of the Codes.
37. Having answered the Whitewash Question in the affirmative, the Panel turned to the Disclosure Question and the Funding Question.

The Disclosure Question: provisions of the Codes

38. General Principle 5 of the Codes states:

"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.”

39. Rule 9.1 of the Takeovers Code states in part:

“Each document issued or statement made in relation to an offer or possible offer or during an offer period must, as is the case with a prospectus, satisfy the highest standards of accuracy and the information given must be adequately and fairly presented.”

40. Paragraph 1(b) of Schedule VI states:

“Where the word “offeror” is used in a particular Rule, it should be taken in the context of a whitewash as a reference to the potential controlling shareholders. Similarly, the phrase “offeree company” should be taken as a reference to the company...in which the actual or potential controlling position will arise.”

41. Accordingly, in the context of the Whitewash Waiver, the “offeree” is TVB and the offeror is YLCPG, led by YL. The following provisions lead to a conclusion that directors of the offeree must disclose their interests in equity share capital (voting or not) of the offeror.

42. Paragraph 4(k) of Schedule VI requires that the circular to shareholders must contain disclosures of shareholdings required by paragraph 4 of Schedule I and paragraph 2 of Schedule II.

43. Paragraph 2(ii) of Schedule II (on offeree board circulars) requires disclosure of:

“the shareholdings in the offeree company and in the offeror in which directors of the offeree company are interested;”

44. Note 3 to paragraph 2 of Schedule II states:

“the Notes to paragraph 4 of Schedule I apply equally to this paragraph 2 of Schedule II.”

45. Note 1 to paragraph 4 of Schedule I requires disclosure of:

“(b) in the case of shareholdings in the offeror company, holdings of:-

(i) equity share capital;...”

46. Note 3 to paragraph 4 of Schedule I states:

“References to directors being “interested” in shareholdings are interpreted in the manner described in Part XV of the Securities and Futures Ordinance (Cap. 571).”

The Disclosure Question: submissions and analysis

47. The Executive submitted that:

“In order to enable shareholders to reach an informed decision... it is essential for full disclosure to be made about Young Lion’s shareholding structure including full details of all the beneficial interests and arrangements, understandings and agreements between Young Lion’s shareholders (voting and non-voting).”

48. The First Announcement states:
- 48.1. YL owns 100% of Young Lion Acquisition Co. Limited (“YLA”), which owns 100% of Shaw Brothers Limited (“SB”), which owns 26.00% of TVB.
 - 48.2. 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”).
 - 48.3. Charles Chan Kwok Keung (“Mr. Chan”), the Chairman of TVB, wholly-owns IVH.
 - 48.4. 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.
 - 48.5. 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”).
 - 48.6. Ms. Wang is the spouse of Chen Wen Chi (“Mr. Chen”), a non-executive director of TVB.
 - 48.7. 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.
49. Two directors of TVB, (the offeree in the context of the Whitewash Waiver), namely Mr. Chan and Mr. Li, have interests in the shares of YL. It follows from the citations of the Codes above that they should disclose in the Circular their interests in the “equity share capital” (voting or not) of the “offeror” in this context, YL.
50. But the answer does not end there. Whatever the detailed provisions of the Schedules to the Codes, the Panel must have regard to General Principle 5 in determining what is “sufficient” and “relevant” information to enable shareholders to reach an informed decision in the circumstances of each case.
51. The Panel notes that the Shareholders Agreement, being an agreement to which Section 317 of the SFO applies, has been filed with the Stock Exchange and TVB pursuant to [Section 326\(6\)](#) of the SFO and is available for public inspection, albeit not online. The Relationship Agreement, to which the Shareholders Agreement refers, has not been so filed.
52. The Shareholders Agreement makes clear that YL has two classes of shares, the Voting YL Shares and non-voting shares (“Non-Voting YL Shares”), together, “YL Shares”. However, s317 of the SFO relates only to voting shares, and the Panel was informed that Schedule 2 of the Shareholders Agreement, which tabulates the contemporaneous interests in both classes of shares at 22 April 2015, has been redacted in the version available for inspection. In any event, those shareholdings have since changed.
53. Pursuant to the Shareholders Agreement:
- 53.1. Any conversion from Non-Voting YL Shares into Voting YL Shares, or vice versa, requires “Super-Majority Approval”, the meaning of which is set out in the Relationship Agreement.
 - 53.2. “Super-Majority Approval” is also required for the determination of the allocation of Voting YL Shares and Non-Voting YL Shares in the case of a pre-emptive issue of shares of YL.

- 53.3. If the Relationship Agreement is terminated, then so is the Shareholders Agreement.
- 53.4. Following a 12-month lock-up period which has expired, CMC has the right to require IVH to sell all (but not less than all) of its Voting YL Shares to any third party ordinarily resident in Hong Kong for cash at “Open Market Value”, which is defined for all YL Shares (voting or not) to be the 30-day volume-weighted average price of the underlying TVB Shares attributable to the YL Shares, less the pro rata net debt (or plus the pro rata net cash) of YL attributable to the YL Shares.
54. Given the dependence of the Shareholders Agreement on the Relationship Agreement, in advance of the Panel hearing, it was apparent to the Acting Chairman of the Panel that, *prima facie*, a reading of the Relationship Agreement would be necessary for a full understanding of the Shareholders Agreement and together, how these agreements relate to the acquisition and exercise of Control of TVB by YL in the event that the Offer is successful. It was for this reason, after the Executive had been unsuccessful in requesting a copy of the Relationship Agreement, that on 23 March 2017 the Acting Chairman directed that a copy of the Relationship Agreement be provided by YL (or TVB on its behalf) to the Panel by 4pm the next day.
55. That direction was not complied with, but the Executive exercised powers under Section 179 of the SFO to obtain from IVH a copy of the Relationship Agreement, which it received on 29 March 2017. The Executive then provided the Relationship Agreement to the Panel.
56. The Panel notes with some concern the difficulty the Executive and the Panel experienced in obtaining the Relationship Agreement. General Principle 10 of the Codes states:
- “All parties concerned with transactions subject to the Codes are required to co-operate to the fullest extent with the Executive, the Panel and the Takeovers Appeal Committee, and to provide all relevant information.”
57. In the Panel’s view, if the Executive, or the Panel, determines that unreceived information is, or may be, relevant, then having regard to the statutory secrecy obligations of both, the information should be provided forthwith. It is always open to parties to make submissions on the relevance of material provided, but to simply refuse to provide it undermines the purpose of General Principle 10.
58. On inspection, the Relationship Agreement has several provisions which, in the Panel’s view, will be relevant to the decision of TVB shareholders. These include but are not limited to provisions that:
- 58.1. For so long as YL has the power, directly or indirectly, to cause the nomination of 4 directors to the board of TVB, 1 shall be nominated by IVH (initially, Mr. Chan), 1 by PGI (initially, Mr. Chen), 1 by CMC (initially, Thomas Hui) and 1 by a fourth shareholder, who no longer has holdings in YL. That director was eventually replaced by Mr. Li, on the nomination of CMC.
- 58.2. There is also provision that if YL can nominate further directors to the board of TVB, then CMC shall identify any subsequent additional nominees as may be appointed.
- 58.3. A new shareholder with 10% or more of either the total YL Shares or the Voting Shares shall be entitled to nominate an individual, subject to the approval of CMC

(but notably, not subject to the approval of IVH), to the TVB board in place of the selling shareholder's nominee.

- 58.4. Each of the nominees on the TVB board shall not exercise their board vote to remove the other nominees without the prior consent of the nominating shareholder.
59. In the Panel's view, these provisions collectively 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 also possible that a shareholder with none of the Voting YL Shares but 10% of the total YL Shares would still be entitled, with the approval of CMC, to nominate a director of TVB.
60. The Relationship Agreement also has provisions relating to the board of YL which, in the Panel's view, 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 from time to time. These include but are not limited to provisions that:
- 60.1. The board of YL shall comprise (up to) 7 directors, of which 1 shall be nominated by IVH, 1 by PGI, 2 by CMC, 1 by the former fourth shareholder, and 2 Hong Kong-resident "Independent Directors" (the Panel was informed that currently, there are 5 directors of YL, 2 of whom are representatives of IVH, 2 from CMC and 1 from PGI. There are no Independent Directors).
- 60.2. The appointment of the Independent Directors of YL is subject to "Majority Approval".
- 60.3. If a new shareholder of YL holds at least 10% of either the total YL Shares or Voting YL Shares, then it may nominate a director to YL, and at the same time an additional director shall be appointed subject to "Majority Approval".
- 60.4. Each director of YL has 1 vote on each matter requiring a board decision (including procuring the voting of any TVB Shares held by YL or its subsidiaries). Decisions are made by simple majority and the chairman of YL does not have a casting vote.
- 60.5. "Majority Approval" means approval of holders of at least 70% of the total YL Shares, regardless of voting rights.
- 60.6. "Super-Majority Approval" means approval by the holders of at least 95% of the total YL Shares, regardless of voting rights.
- 60.7. There are various "Reserved Matters" requiring a Majority Approval or a Super-Majority Approval. Many of these would not be relevant to TVB shareholders as they relate to the internal governance of YL, but some are, including the transfer of any TVB Shares by YL, which would require a Super-Majority approval (except in compliance with certain exit arrangements for certain shareholders of YL).
61. In the Panel's view, these provisions indicate that although IVH has a majority of the Voting YL Shares, as a result of the Relationship Agreement, it does not control the composition of a majority of the board of YL. Decisions of the board of YL, including voting of TVB Shares, are made by simple majority, so IVH does not control the voting decisions of YL.
62. Freshfields, for TVB, submitted:
- "It is firstly without any legal or regulatory basis and totally arbitrary for the Executive to require non-voting interest to be disclosed when it is clear that such

information is not required to be disclosed under the relevant laws and regulations. It would be an attempt for a regulator to override the laws and regulations which have long been set in stone.”

“The Company does not consider the additional disclosure of private governance arrangements and non-voting shares in Young Lion to be in any way meaningful for Shareholders and significantly beyond the requirements of the Takeovers Code. Accordingly, the Company is not willing to publish an Offer Document with this additional disclosure included.”

63. In the Panel’s view, that submission is wrong on a number of levels:

63.1. As noted above, the Schedules to the Codes do require disclosure in the Circular of Mr. Chan’s and Mr. Li’s interests in Non-Voting YL Shares as well as Voting YL Shares.

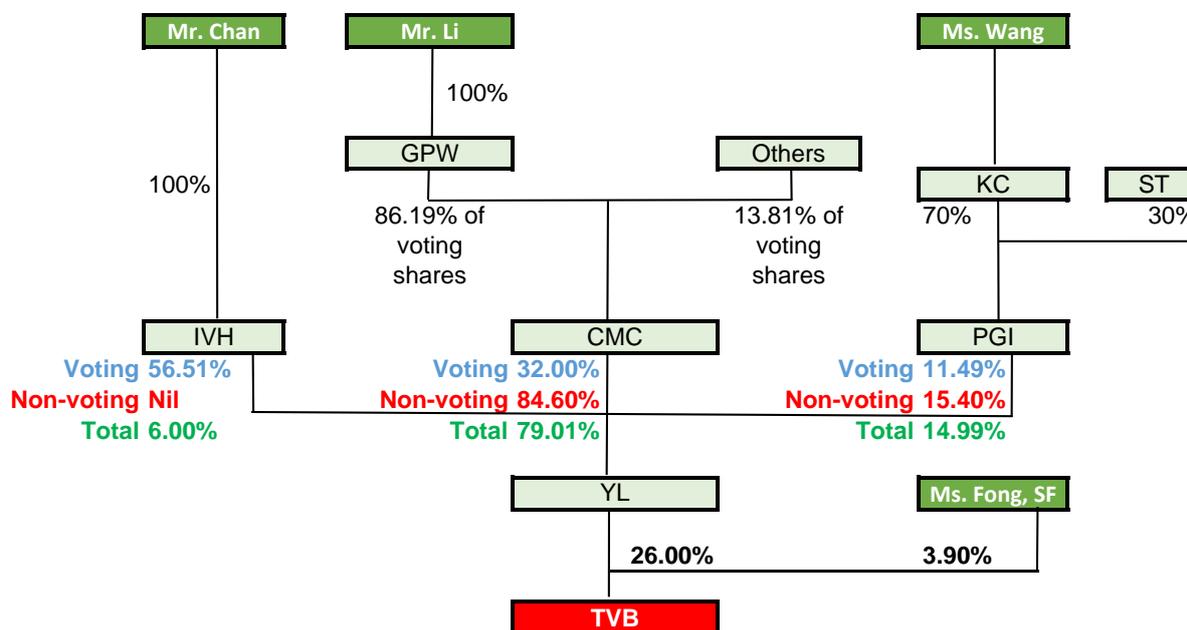
63.2. The Codes are not “set in stone” but, as stated in their Introduction, must be interpreted and applied, with appropriate relaxations or modifications, so as to achieve their underlying purposes.

63.3. In the Panel’s view, given the numerous situations in which the Non-Voting YL Shares come into play as part of the total YL Shares in the Relationship Agreement, TVB shareholders would be unable to reach a fully-informed view on how those provisions would likely affect the exercise of Control of TVB without knowing the holdings of all YL Shares, not just Voting YL Shares. Under the Relationship Agreement, there are many situations in which the Non-Voting YL Shares 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, or interests in a mutual fund or limited partnership, have no real say except in situations which affect their class rights.

64. As submitted by Freshfields, there are 474,474,999 Non-Voting YL Shares, representing 89.39% of its equity, and 56,321,003 Voting YL Shares, representing 10.61% of its equity. Mr. Chan, via IVH, owns 6.00% of the YL Shares (all of which are Voting YL Shares), 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.

65. Therefore CMC, on its own, can give a 70% “Majority Approval” within the meaning of the Relationship Agreement. In the case of a “Super-Majority Approval”, by holders of 95% of the YL Shares, Mr. Chan, via IVH, would have a veto, but as noted above, CMC has the option to require IVH to sell its entire shareholding to a Hong Kong-resident third party of its choice.

66. In summary, omitting intermediate holding companies and based on the information submitted to the Panel, the ownership structure of YLCPG above TVB is as shown below:



67. In the particular circumstances of this case, **the Panel Rules** that full details of the shareholding and ownership structure of YL and a summary of the relevant arrangements between its shareholders (including but not limited to the provisions identified in this Ruling) should be disclosed in the Circular. The Shareholders Agreement and the Relationship Agreement should both be put on electronic display.

68. Disclosure of that information is necessary, but may not be sufficient. As noted above, the First Announcement states that Mr. Li, via GPW, holds 86.19% of the “voting rights” of CMC. This indicates the presence of another class of shares in CMC, a fact that was confirmed at the Panel hearing, and that Mr. Li may not have such a substantial equity interest in CMC and, in turn, in YL and TVB. There may or may not be relevant agreements between the shareholders of CMC that would affect the way it exercises its rights (including its Majority Approval rights and its nomination rights) in relation to YL and TVB.

69. No detailed submissions were received by the Panel on this point. While the Panel recognises that there should not be an endless pursuit of a river to its multiple tributaries, it is for the offeror (in this case, YL) to satisfy the Executive that full disclosure has been made in relation to those persons who can, via approval rights, voting rights, shareholder agreements or otherwise, directly or indirectly, significantly influence the exercise of Control over TVB by YL.

70. YL, as the leader of YLCPG, was the applicant, via TVB and in turn via Freshfields, for the Whitewash Waiver that was referred to the Panel. In this regard, the Panel wishes to place on record its concern that YL did not make available to the hearing a director of YL who might be familiar with the affairs of YL and its shareholders, despite an earlier direction by the Acting Chairman to do so.

The Funding Question

71. The Executive, in its submissions, made much about the fact that, on 23 September 2016, TVB [announced](#) a proposed issue of debt securities, with further details

[announced](#) on 29 September 2016, and that the net proceeds were about US\$495.37m (about HK\$3,841m), similar to the amount that 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 expansion of the Group’s digital new media business and other capital expenditures, to make strategic investments and for its general corporate purposes.”

72. No mention of any possible buy-back offer was made in those announcements, and it was disputed as to whether one was in contemplation, although it was clear to the Panel from submissions that substantive preparatory work began very soon after the completion of the Notes issue, which was [announced](#) on 11 October 2016, if not before.

73. Nevertheless, matters of disclosure under the Listing Rules or the SFO are not matters for the Panel. The cash resources of any company (whatever their source) 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 by the financial adviser or by another appropriate third party that resources are available to the offeror sufficient to satisfy full acceptance of the offer.”

74. The First Announcement, on 24 January 2017, contained the required confirmation, and the Executive did not dispute that TVB has sufficient resources. When pressed to clarify its “concerns about the funding of the Offer”, the Executive, in the Panel’s view, was unable to identify a relevant issue under the Codes.

Footnote

75. In the course of the hearing, it became apparent that the information that was determined to be relevant under the Codes, particularly certain provisions of the Shareholders Agreement and the Relationship Agreement, may not have been provided to the CA in the course of its review of TVB and YL under the BO. While broadcast licensing considerations are irrelevant to the interpretation of the Codes, the Panel notes that under section 17.1 of the Introduction to the Codes, subject to its statutory secrecy obligations, “the SFC may from time to time give information received by it to other regulatory authorities, so that they can discharge their own duties.” While it is not for the Panel to determine the relevance or otherwise of this information to the BO, the Panel recommends that the SFC provides the Shareholders Agreement, the Relationship Agreement and a copy of this Ruling to the CA, so that it can discharge its duties.

10 May 2017

Parties and advisers present at the hearing:

The Executive

TVB

Freshfields – legal advisers to TVB

Haldanes – legal advisers to TVB

Merrill Lynch (Asia Pacific) Limited – financial adviser to TVB

Platinum Securities Company Limited – financial adviser to TVB and YL

John Scott, SC – Counsel to the Panel