

Review of Television and Sound Broadcasting Regulatory Regimes

Consultation Paper

February 2018



Commerce and Economic Development Bureau

**Review of
the Broadcasting Ordinance (Chapter 562) and
the Telecommunications Ordinance (Chapter 106)**

Phase One

**Review of the Television and
Sound Broadcasting Regulatory Regimes
in Response to Infotainment Evolution**

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ABOUT THIS CONSULTATION PAPER

1. This consultation paper is issued by the Communications and Creative Industries Branch of the Commerce and Economic Development Bureau (CEDB) to seek the views of members of the public, the broadcasting industry and other stakeholders on the CEDB's legislative amendment proposals following a review of the television and sound broadcasting regulatory regimes, as enshrined respectively in the Broadcasting Ordinance (Cap. 562) (BO) and Part 3A of the Telecommunications Ordinance (Cap. 106) (TO), in response to the infotainment evolution.
2. This consultation pertains to Phase One of Government's legislative review of the broadcasting and telecommunications regulatory framework in light of technology evolution. This consultation paper is made up of seven chapters, focusing discussion on four major groups of **broadcasting regulatory issues** that are the subjects under review.
3. The Government aims to conduct consultation on recommendations arising from Phase Two of the legislative review later in 2018, focusing consideration on amendment proposals pertaining to the **telecommunications regulatory regime** as enshrined in the TO in light of technological advancements.
4. Please send your comments to us on issues covered in this consultation paper on or before **19 May 2018** by one of the following means:

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5. Electronic copy of this consultation paper is available on the website of the CEDB (<http://www.cedb.gov.hk/ccib>). All relevant Hong Kong ordinances are available for viewing and downloading on the websites of Hong Kong e-Legislation¹ and the Bilingual Laws Information System² maintained by the Department of Justice.
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¹ <https://www.elegislation.gov.hk/>

² <http://www.blis.gov.hk/eng/home.htm>

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List of Abbreviations

BA	Broadcasting Authority
BO	Broadcasting Ordinance (Cap. 562)
CA	Communications Authority
CAO	Communications Authority Ordinance (Cap. 616)
CE	Chief Executive
CE-in-C	Chief Executive in Council
DAB	Digital Audio Broadcasting
DP	Disqualified Person
DTT	Digital Terrestrial Television
Free TV	Domestic free television programme service
IoT	Internet-of-Things
LegCo	Legislative Council of the Hong Kong Special Administrative Region
Non-domestic TV	Non-domestic television programme service
Other licensable TV	Other licensable television programme service
OTT	Over-the-top
Pay TV	Domestic pay television programme service
TO	Telecommunications Ordinance (Cap. 106)
TV	Television
TV(A)O 1998	Television (Amendment) Ordinance 1998
TVO	Television Ordinance (repealed, formerly Cap. 52)
UVC	Unqualified Voting Controller

Chapter 1

Background on the Review of the Broadcasting Ordinance and the Telecommunications Ordinance

Background

1.1 In view of the rapid development of the broadcasting and telecommunications sectors, the Government is committed to modernising the regulatory framework in response to market needs and technological developments.

1.2 A staged approach has been adopted in the modernisation exercise. The First Stage took place in 2012, with the structural merger of the former Broadcasting Authority (BA) and the former Telecommunications Authority into the Communications Authority (CA), as the unified regulator of the two sectors, pursuant to the enactment of the Communications Authority Ordinance (Cap. 616) (CAO). At that stage, no substantive legislative changes to the regulatory and licensing regimes were introduced.

1.3 The Government is now embarking on the Second Stage of the modernisation exercise. The focus in this stage is on reviewing the legislative and regulatory regimes governing the broadcasting and telecommunications sectors in Hong Kong in light of technological developments.

Broadcasting and Telecommunications Related Legislation

1.4 The regulatory regime for the broadcasting sector in Hong Kong is mainly housed in the Broadcasting Ordinance (Cap. 562) (BO) with respect to television (TV) broadcasting, and Part 3A of the Telecommunications Ordinance (Cap. 106) (TO) as regards sound broadcasting.

1.5 The regulatory regime for the telecommunications sector is enshrined in the TO (except for Part 3A).

Broadcasting Regulatory Regime

1.6 The long title of the BO, which sets out the purpose of the

ordinance, reads, “[a]n Ordinance to license companies to provide broadcasting services, to regulate the provision of broadcasting services by licensees, and to provide for matters incidental thereto or connected therewith”.

1.7 The TV broadcasting licensing regime under the BO applies to the following four types of TV programme service:

- (a) “domestic free television programme service” (free TV);
- (b) “domestic pay television programme service” (pay TV);
- (c) “non-domestic television programme service” (non-domestic TV) (e.g. satellite TV); and
- (d) “other licensable television programme service” (other licensable TV) (e.g. hotel TV).

The BO explicitly exempts from licensing any programme service provided on the Internet³.

1.8 And, as aforementioned, sound broadcasting service is licensed under Part 3A of the TO.

1.9 TV (in particular free TV) and radio are highly pervasive, and have been the major sources of information, entertainment and education (infotainment) for the Hong Kong public for many years, before the emergence of Internet-based infotainment media. The policy and legislative intent of the BO and Part 3A of the TO has remained to, through licensing, protect children and public morals by regulating the contents of TV and radio programmes carried by the spectrum or network based media that could be broadcast at large to all Hong Kong households. Restrictions are also imposed on the control and management of the licensee companies to ensure that their services could meet the required standards of the community, and cater for local interest, taste and culture.

Telecommunications Regulatory Regime

1.10 The long title of the TO, which sets out the purpose of the ordinance, reads, “[t]o make better provisions for the licensing and control of telecommunications, telecommunications services and telecommunications apparatus and equipment”.

³ Section 5 of Schedule 3 to the BO.

1.11 Provisions under the TO (except for Part 3A) are generally technical in nature and technology-oriented, aiming to ensure the integrity and stability of telecommunications networks. To this end, the ordinance (except for Part 3A) provides for the licensing of telecommunications services, and establishment and maintenance of means of telecommunications. Its various objectives also include controlling use of radio apparatus, preventing interference, and managing radio spectrum and telecommunications numbers. In contrast to the BO, it has no content control and imposes no restriction on control and management of the telecommunications licensee companies as in the case of broadcasting licensees.

1.12 The underlying policy objectives of the regulatory regime for telecommunications are to maintain a level playing field in the market, to enable efficient use of the scarce spectrum and numbering resources and to ensure that consumers get the best services available in terms of capacity, quality and price.

Enactment History of the BO and the TO

1.13 The BO, the TO and their predecessor legislation were enacted decades ago upon the introduction of TV and telecommunications (e.g. telephone and radio) technologies in Hong Kong. The governing ordinances in respect of television broadcasting viz. the Television Ordinance (repealed, formerly Cap. 52) (TVO), the predecessor of the BO, as well as the foundation of today's TO as regards telecommunications, were put in place in the 1960s. A self-contained regulatory regime for sound broadcasting mirroring major provisions for TV broadcasting under the then TVO was codified into the TO as Part 3A in 1989.

1.14 The TVO/BO and the TO have undergone independent and separate evolutions and were reviewed and amended on different occasions in deference to respectively broadcasting and telecommunications policy considerations. Insofar as TV broadcasting is concerned, the introduction of the BO to replace the TVO in 2000 was already the most recent major attempt to update the regulatory regime. Operational experiences and stakeholders' feedbacks are such that certain provisions in the ordinances are dated and could not meet modern days' needs.

Review of Broadcasting and Telecommunications Regulatory Regimes

1.15 To cope with the rapid changes in technological settings and market landscape which have been taking place at an unprecedented pace in recent years, and with the unified regulator, the CA, established and in operation for a few years, it is an opportune juncture to conduct a review of both the BO and the TO (the Review).

1.16 To facilitate focused discussions on respectively the TV and sound broadcasting regulatory regimes on the one hand, and the telecommunications regulatory regime on the other, and to allow adequate time for stakeholders to reflect on the various policy issues and legislative amendment proposals raised, the Government is undertaking the Review in two phases.

1.17 Phase One will focus on the broadcasting (both TV and sound) regulatory regimes enshrined in the BO and Part 3A of the TO in response to the changes and challenges brought about by the evolution in infotainment. Phase Two will focus on the telecommunications regulatory regime as enshrined in the TO to cope with the advancement of telecommunications technologies including the imminent arrival of the fifth generation mobile communications (5G) services and application of such 5G services in the era of Internet of Things (IoT).

Phase One: Review of the Television and Sound Broadcasting Regulatory Regimes in Response to Infotainment Evolution

1.18 Under Phase One of the Review, the Government has scrutinised the existing statutory frameworks under the BO in respect of TV broadcasting and Part 3A of the TO in respect of sound broadcasting to see whether they dovetail with technological advancements and market developments, with a view to recommending improvement/relaxation measures for discussion with the public and the industry. In the course of the Review, we have revisited some of the underlying policy considerations in the extant legislation to see if they are capable of meeting the modern day operating environment given the constantly changing viewing habits of the public.

1.19 Improvement proposals arising from Phase One of the Review are set out in this consultation paper. Subject to the views received from the public, industry and other stakeholders, we aim to introduce an

amendment bill incorporating proposals that have received broad consensus into the Legislative Council (LegCo) in early 2019.

Phase Two: Review of the Telecommunications Regulatory Regime in Response to Advent of 5G Services

1.20 Phase Two of the Review centres on telecommunications regulatory matters under the TO. Improvement measures will be proposed seeking to ensure that the telecommunications control regime dovetails with the latest developments in telecommunications technologies, with particular regard to the advent of 5G services and their applications in the IoT era. We expect to launch public consultation for this phase later in 2018. Subject to the views from the public, industry and other stakeholders, we aim to introduce an amendment bill incorporating proposals that have received broad consensus into the LegCo in 2019.

Way Forward

1.21 We look forward to your participation in the public consultation on our proposed improvement measures under Phase One of the Review. Your valuable feedbacks would help us shape the future broadcasting policies and their implementation, which will have a profound impact on the mass public in Hong Kong given the pervasiveness and influence of our local TV and radio media, as well as the mid-term to long-term development of the local broadcasting industry, an important sector of the creative industries in Hong Kong.

Chapter 2

Phase One: Review of the Television and Sound Broadcasting Regulatory Regimes

Background

2.1 As the Chief Executive (CE) has emphasised in her 2017 Policy Address, in taking up the role of a facilitator, the Government should be visionary, should scrutinise existing policies and measures pursuant to policy objectives and remove obstacles for our industries, with a view to maximising the benefits for the community.

2.2 The broadcasting industry, including free TV, pay TV and sound broadcasting, has been an integral part of Hong Kong's creative industries. Throughout the past decades, the sector has nurtured numerous talents and professionals, including internationally renowned directors and superstars. Creative industries are a powerhouse that will drive our economy, add value to its further development and enrich Hong Kong's attractiveness as an international city. The Government is committed to putting in place an updated regulatory regime to facilitate innovation of, investment in and sustainable development of our broadcasting industry.

Hong Kong's Broadcasting Landscape

2.3 Broadcasting performs the important functions to inform, entertain and educate. Generally speaking, the broadcasting industry remains vibrant in Hong Kong, with a plurality of services offering viewers/listeners a wide array of infotainment choices:

Table 1 : Broadcasting Services in Hong Kong (as at 31 December 2017)

Type of Broadcasting Licensee / Channel	Number
• TV channels receivable in Hong Kong	444
• Free TV, pay TV and non-domestic TV licensees	19
• Free TV licensees	3
• Pay TV licensees	2
• Sound broadcasting licensees	2
• Digital TV channels	11
• Analogue TV channels	5
• Analogue radio channels	13

2.4 Nearly all households in Hong Kong can receive Digital Terrestrial TV (DTT) and analogue TV programme services (including free TV and pay TV). DTT has been developing well in Hong Kong since its rollout in late 2007. Spectrum or network based free TV services remain one of the most pervasive sources of infotainment in Hong Kong.

Table 2 : Coverage and Penetration Rates of Free TV, Pay TV and Sound Broadcasting (as at 1 November 2017)

Type of Media	Number / Percentage
• Penetration rate of free TV	About 95%
• Number of free TV households	2.41 million
• Coverage of DTT	About 99%
• Take-up rate of DTT	About 88% (as at end-2017)
• Penetration rate of pay TV	Over 85%
• Coverage of analogue sound broadcasting	All over Hong Kong

2.5 The broadcasting landscape in Hong Kong has undergone arguably the most rapid changes over the past five years or so since the introduction of commercial radio and TV broadcasting services in Hong Kong in 1940s and 1950s respectively. We witnessed the entry of two new free TV licensees, a first in decades, following the exit of a some 40-year-old free TV operator from the market, as well as the termination of a some 16-year-old pay TV licence. Applications for renewal of free TV, pay TV and sound broadcasting licences submitted by various incumbent licensees have been approved by the Chief Executive in Council (CE-in-C) under the extant licensing regimes in the BO and Part 3A of the TO for the operators to continue their operation. The Government decided in March 2017 that Digital Audio Broadcasting (DAB) service should be discontinued in Hong Kong following the surrender of the relevant sound broadcasting licences by the three former commercial operators ahead of the expiry dates of the licences and having considered the future of the DAB market.

2.6 On broadcasting technology development, the most notable one is perhaps the emergence of over-the-top (OTT) entertainment and TV services, which, as they are delivered to users via the Internet, are exempted from the licensing regime under the BO.

2.7 The blossoming of various forms of infotainment over the Internet and mobile platforms have not only changed the viewing habits of audience but also impacted on the market shares of traditional spectrum or network based broadcasters. The following tables seek to provide a glimpse of the changing viewing habits of the audience as well as the development of traditional and Internet-based infotainment technologies:

Table 3 : Viewing Habits for Free TV (2009-2017)

Year	Viewing in the Past Month	Number of Hours Per Day	Viewing on a Daily Basis
2009	96%	3.2 hours	85.6%
2014	91%	2.7 hours	75.7%
2017	91%	2.3 hours	71.8%

Table 4 : Summary of Development of Traditional Media and Internet-based Content Provision (since 1960s)

	Traditional Media ⁴	Internet
1960s-1980s	<ul style="list-style-type: none"> Analogue free TV (and radio) as the sole source of infotainment 	<ul style="list-style-type: none"> Internet services not yet available for commercial use in Hong Kong
1990s	<ul style="list-style-type: none"> Introduction of pay TV TV and radio continued to serve as major sources of infotainment 	<ul style="list-style-type: none"> Internet services started to be available in Hong Kong
2000s	<ul style="list-style-type: none"> 2007 – Start of free DTT broadcasting in Hong Kong, offering high-definition TV pictures 	<ul style="list-style-type: none"> Fixed-line broadband and mobile broadband started to be available Start of online broadcasting
Since 2010	<ul style="list-style-type: none"> 2012 – Start of DAB 2017 – End of DAB Keen competition from Internet-based new media 	<ul style="list-style-type: none"> Ubiquitous infotainment – Fast streaming of high-quality videos, online live broadcasting, OTT TV service, Internet TV and radio apps, etc.
Next	<ul style="list-style-type: none"> 4K broadcasting 	<ul style="list-style-type: none"> Enhanced user experience, and more new applications, e.g. augmented reality, etc. More new services anticipated with the advent of 5G services

⁴ Licensed spectrum or network based TV and sound broadcasting services.

2.8 It is notable that regarding traditional spectrum or network based broadcasting services, the advancement has been mostly confined to the improvement of resolution of pictures and quality of sound. On the other hand, with the rapid advancement of hardware technologies and speed of computer networks, Internet-based (or OTT) TV and sound (Internet TV and radio) programme services have undergone an unprecedented evolution: from desktop-bound, basic Internet applications such as simple web-browsing to ubiquitous, multifarious infotainment services. Their popularity has grown from strength to strength as Internet services and consumer gadgets become more accessible and affordable. OTT technology is evolving fast, with new applications coming up non-stop and potential for further development tremendous and far-reaching.

Imbalance in Regulatory Regimes

2.9 TV programme services provided over the Internet are not regarded as TV programme services under the BO and are specifically exempted from regulation thereunder⁵.

2.10 This is in line with the practices adopted by other advanced economies, i.e. no regulatory regime with licensing requirement as imposed on traditional media is applicable to TV programme services provided through the Internet. The control here is primarily on sanction against repulsive contents delivered to the public through the Internet as with other means such as printed books, video discs, etc. A similar regime is in place in Hong Kong through the Control of Obscene and Indecent Articles Ordinance (Cap. 390) and the Prevention of Child Pornography Ordinance (Cap. 579), etc.

2.11 Traditional broadcasting services, on the other hand, are subject to stringent controls under the existing regulatory regime. The BO (as well as its predecessor) is enacted to license companies to provide broadcasting services and to regulate provision of broadcasting services by licensees. A company satisfying the statutory requirements under the BO may apply for a licence, and only upon award of a licence can it provide the broadcasting service concerned in Hong Kong. The BO imposes stringent restrictions on free TV and pay TV licensees including a range of requirements on their control and management. Free TV

⁵ Section 5 of Schedule 3 to the BO.

licensees are also required to comply at all times with all licence conditions imposed including those on channel line-up, broadcasting hours and language, broadcast of specified types of programme such as current affairs and news, investment plan on programming and capital expenditure, submission of audited accounts, etc. There is no pre-censorship of broadcast programmes. Broadcast content is subject to post-broadcast complaint-driven handling procedures by the CA. Any breach by a licensee of the statutory provisions, licence conditions, codes of practice promulgated by the CA on programme and advertising standards, etc. is subject to sanction by the CA. Similar requirements are also imposed on sound broadcasting licensees under Part 3A of the TO, licence conditions and the CA's codes of practice.

2.12 The following table highlights the differences between the regulatory systems for traditional media and OTT content providers:

Table 5 : Comparison of Regulation and Restrictions on Traditional Media and OTT Content Providers

	Traditional Media	OTT Content Providers
• Restriction on control and management of licensees	✓	×
• Content control	✓ (Through codes of practice issued by the CA; post-broadcast complaint-driven)	✓ (Through Control of Obscene and Indecent Articles Ordinance, etc.)
• Restriction on unqualified voting control (i.e. foreign investments)	✓	×
• Investment commitment	✓	×
• Positive programming requirements	✓	×
• Licence fees	✓	×

2.13 The regulatory regimes for traditional broadcasting services, which were designed in an era when TV and radio broadcasting services were almost the sole sources of infotainment for people in Hong Kong, remain intact to date. OTT and Internet content providers that have only emerged in the recent two decades, on the other hand, are not subject to any of such controls. The imbalance in the regulatory regimes is self-evident.

2.14 The imbalanced regulatory regimes and vigorous competition from the Internet platforms have made it increasingly difficult for traditional media to run their business. The business outlook of the operators in the mid-term to long-term will only be even more challenging if the status quo continues. As undertaken in the CE's Policy Address in October 2017, to provide a balanced competitive environment for the broadcasting market, and to leave more room for innovation and investment in order that the development of local free TV services can sustain, the Government will introduce amendments to the broadcasting-related ordinances with the aim of relaxing obsolete statutory requirements and rationalising the regulatory regime.

Differences in Modus Operandi

Traditional Media Broadcasting

2.15 Though much has been said about the keen competition from Internet-based content providers, traditional broadcasting services do have certain appealing characteristics and inherent advantages. For instance, the spectrum or network based delivery means, backed by well-established infrastructure and networks, offer stable broadcasting quality irrespective of the size of audience. Needless to say, such advantages come with significant capital investment and recurrent costs.

2.16 Because of their long history in Hong Kong, free TV and radio services are still highly pervasive and enjoy high penetration. It is undeniable that traditional media still have great influence as they can reach all households directly, and are accessible to all household members, regardless of age, easily and indiscriminately.

OTT Content Provision

2.17 Internet-based content provision is a media distribution practice that allows a streaming content provider to provide audio, video, etc. media services directly to the consumers over the Internet, bypassing (hence "over the top" - OTT) TV broadcasters who traditionally have been acting as a controller or distributor of such media content as well as the traditional medium such as TV spectrum.

2.18 Users can access OTT content through any Internet-connected devices such as smartphones, smart TVs, set-top boxes or gaming consoles, computers and tablets, etc. Some OTT services require a video to be downloaded first before playing; while other offer playing

before the download completes (i.e. streaming). Amongst all OTT media sources, OTT TV is one of the most prominent, with access being controlled through either an app or a separate OTT external unit, connected to a smartphone, computer or TV set to display picture and sound.

2.19 The following table compares the characteristics of the two media:

Table 6 : Comparison of Delivery and Reception of Content by Traditional Media and OTT Content Providers

Traditional Media	OTT Content Provision
<u>Delivery</u>	
<ul style="list-style-type: none"> • Stable quality irrespective of audience size 	<ul style="list-style-type: none"> • No guarantee of reception quality or download speed
<ul style="list-style-type: none"> • Higher operating cost (network or infrastructure investment and programming cost) 	<ul style="list-style-type: none"> • Lower operating cost
<ul style="list-style-type: none"> • Geographically bound (spectrum or fixed network for broadcast delivery within Hong Kong) 	<ul style="list-style-type: none"> • Ubiquitous, boundless
<ul style="list-style-type: none"> • Uni-directional, linear 	<ul style="list-style-type: none"> • Personalised, interactive
<ul style="list-style-type: none"> • Declining advertising income and influence 	<ul style="list-style-type: none"> • Increasing popularity and additional income sources (e.g. in-app purchases, subscriptions, online shopping, etc.)
<u>Reception</u>	
<ul style="list-style-type: none"> • Free (except pay TV) 	<ul style="list-style-type: none"> • Free (with Internet connection), but some premium programmes may require payment
<ul style="list-style-type: none"> • Fixed location on TV sets, fixed programmes at specified times 	<ul style="list-style-type: none"> • Anywhere, anytime, with any OTT device and content of personal choice

Criteria in Reviewing the Regulatory Regime

2.20 In considering the appropriate degree of control over different broadcast content carried by different media, we take into account the following major criteria:

- (a) Pervasiveness, Popularity and Influence
Whether broadcast content is easily assessable by local households and its degree of pervasiveness on the viewing public;
- (b) Impact on Minors
Whether broadcast content can easily reach and influence children and young people;
- (c) Personalised Content for Viewers/Listeners
Whether individual viewers/listeners may choose to access broadcast content of their choices anytime anywhere; and
- (d) Uniqueness/Presence of Alternatives
Whether the broadcasting service is unique and whether there are alternatives to replace such service, and the number/accessibility of such alternatives.

2.21 Generally speaking, the more pervasive (in terms of signal coverage and popularity), the more impactful, the more accessible (e.g. watchable by just turning on a TV set) and the more monopolised (in terms of the lack of alternative forms of infotainment/broadcasting) a service is, the higher the degree of control is warranted as the mass public, including children and young people, are more susceptible to its influence. Over the years, therefore, free TV services, as the major, unique sources of infotainment the reception of which is free and spontaneous upon installation of the equipment, are subject to the most stringent control, followed by pay TV and sound broadcasting.

2.22 We have scrutinised the existing statutory regimes for TV and sound broadcasting under the BO and Part 3A of the TO against the four aforementioned criteria. We conclude that the existing framework is proportionate and reasonable and should remain intact, i.e. the four types of TV service (see paragraph 1.7 above) should continue to be licensed under the BO, and sound broadcasting under Part 3A of the TO. To be commensurate with the accessibility and impact of and influence commanded by each type of the broadcasting services, free TV services should be subject still to relatively the most stringent control, to be followed by pay TV and sound broadcasting. Minimal restrictions should apply to non-domestic and other licensable TV services due to their small scale of operation and the fact that they do not target the Hong

Kong viewing public, or are only available for reception by a small number of local viewers. In line with international practices and in view of the enforcement difficulties involved, Internet TV and radio programme services should remain not subject to the licensing controls of the BO and Part 3A of the TO.

2.23 While keeping the existing statutory regimes under the BO and Part 3A of the TO intact, there is room for relaxation as regards individual restrictions imposed on traditional broadcasters. The objective is to provide a more balanced competition environment for traditional broadcasters to sustain their operations, and to continue to innovate and invest.

2.24 When the bulk of the extant legislative control was enacted back in the 1960s well before the advent and popularisation of the Internet, TV and radio were the only broadcasting services that could reach the public at large. With the rise of new media that enables access to multiple choices of infotainment specific to users' liking and taste at their own pace, traditional broadcasting service providers no longer command the same degree of influence that they used to have. Seen in this light, the existing stringent regulatory regime on traditional media is clearly outdated and is not commensurate with the latest market developments. The imbalance in regulation hinders innovation and long-term sustainability of the incumbent licensees, and deters newcomers from joining the industry.

2.25 In the ensuing chapters we will discuss possible relaxation measures that may go some way towards levelling the playing field. The aim is to maintain an adequate degree of control that public interest demands, while at the same time introduce amendments to encourage competition and innovation amongst companies operating traditional broadcasting services.

2.26 We have identified four groups of major broadcasting regulatory issues that are subject to review, as follows:

- (a) cross-media ownership restrictions;
- (b) foreign control restrictions;
- (c) requirement of a licensee being a non-subsidiary company;
and
- (d) licensing authority.

Our analysis and legislative amendment proposals are set out by topic in the chapters that follow.

Chapter 3

Cross-media Ownership Restrictions

Policy Objectives

3.1 It has been the Government's broadcasting policy to promote competition, encourage plurality of views and programming diversity. We seek to forestall concentration of media ownership and control, conflict of interest and editorial uniformity across different media platforms.

3.2 Under the existing regulatory regime, these policy objectives are manifested through the imposition of cross-media ownership restrictions under the BO and Part 3A of the TO. Specifically, "disqualified persons" (DPs) as defined under the BO and Part 3A of the TO, are disqualified from holding/exercising control over a free TV, pay TV or sound broadcasting licence/licensee, unless the CE-in-C is satisfied the public interest so requires.

3.3 We have to consider how these policy objectives should be appropriately manifested through legislative enactments in view of the changing circumstances vis-à-vis the viewing habits of the mass market and operating environment of the industry.

Existing Restrictions on and Scope of DPs under the BO

(I) Existing Provisions – Restrictions on DPs

3.4 Under the BO, restrictions are imposed on the ownership, control and investment in the licensed free TV and pay TV services, as follows:

- (a) a DP (including also a person who exercises control of a DP; an associate of a DP; and an associate of a person who exercises control of a DP) may not become the holder of a free TV or pay TV licence unless the disqualification was disclosed in the application for the licence⁶;

⁶ Section 3(1) of Schedule 1 to the BO.

- (b) a DP cannot become or remain the holder of a free TV or pay TV licence or exercise control of a free TV or pay TV licensee, unless the CE-in-C is satisfied that the public interest⁷ so requires and approves otherwise⁸; and
- (c) a free TV or pay TV licensee shall not exercise control of a DP unless the CE-in-C is satisfied that the public interest so requires and approves otherwise⁹.

(II) Existing Provisions – Scope of DPs

3.5 Under the BO¹⁰, a DP is:

- (a) a licensee of one of the four categories of TV licences under the BO, namely, free TV licence, pay TV licence, non-domestic TV licence¹¹, and other licensable TV licence;
- (b) a sound broadcasting licensee;
- (c) an advertising agency;
- (d) a proprietor of a newspaper printed or produced in Hong Kong (i.e. local newspaper);
- (e) a person exercising control of (a) to (d); and
- (f) an associate of (a) to (e).

(III) Existing Provisions – “Exercise Control”

3.6 Under the BO¹², a person exercises control of a corporation if he:

- (a) is a director or principal officer of the corporation;
- (b) is a beneficial owner of more than 15% of the voting

⁷ Section 3(3) of Schedule 1 to the BO. For public interest, the CE-in-C must consider the following:

- (a) Effect on competition in the relevant service market;
- (b) Extent to which viewers will be offered more diversified TV programme choices;
- (c) Impact on the development of the broadcasting industry; and
- (d) Overall benefits to the economy.

⁸ Section 3(2) of Schedule 1 to the BO.

⁹ Section 33(1) of Schedule 1 to the BO.

¹⁰ Sections 4 to 7 of Schedule 1 to the BO.

¹¹ Except that, pursuant to section 4(1)(b) of Schedule 1 to the BO, a non-domestic TV licensee is not a DP in relation to a pay TV licence.

¹² Section 1(6) of Schedule 1 to the BO.

- shares in the corporation;
- (c) is a voting controller of more than 15% of the voting shares in the corporation; or
- (d) otherwise has power, by virtue of any powers conferred by instruments regulating that corporation or any other corporation, to ensure that the affairs of the first-mentioned corporation are conducted in accordance with the wishes of that person.

(IV) Existing Provisions – “Associate” and “Relative”

Associate

3.7 Under the BO¹³, an associate of a DP is defined as:

- (a) where the DP is an individual – (i) a relative of the DP; (ii) a partner of the DP or a relative of the partner; (iii) a partnership in which the DP is a partner; (iv) a corporation influenced by the DP, a partner of the DP or a partnership in which the DP is a partner; or (v) a director or principal officer of a corporation mentioned in (iv);
- (b) where the DP is a corporation – (i) an associated corporation; (ii) a voting controller who (A) influences the corporation and his relative, or (B) is a partner of the voting controller to whom or which sub-subparagraph (A) applies, and his relative; (iii) a director or principal officer of the corporation or of an associated corporation and the director’s and officer’s relative; or (iv) a partner of the corporation and the partner’s relative; and
- (c) where the DP is a partnership – (i) a member of the partnership and the member’s relative; (ii) a partner of the partnership and the partner’s relative, or relative of a member of the partnership if the partner is itself a partnership; (iii) a corporation influenced by (A) the partnership, (B) a partner of the partnership or (C) the partner’s relative, (iv) a corporation of which a partner of the partnership is a director or principal officer or (v) a director or principal officer of a corporation mentioned in (iii).

¹³ Section 1(1) of Schedule 1 to the BO.

Relative

3.8 The scope of “relative”¹⁴ under the definition of “associate” as mentioned above comprises:

- (a) spouse;
- (b) parent;
- (c) child, adopted child and stepchild;
- (d) sibling;
- (e) aunt and uncle;
- (f) cousin;
- (g) niece and nephew;
- (h) grandmother and grandfather;
- (i) sister-in-law and brother-in-law;
- (j) mother-in-law and father-in-law; and
- (k) daughter-in-law and son-in-law.

Existing Restrictions on and Scope of DPs under Part 3A of the TO

3.9 There are similar DP restrictions under Part 3A of the TO in respect of sound broadcasting licensees. In general, the control on DPs of sound broadcasting in the TO is slightly less stringent than that of free/pay TV broadcasting under the BO. The reason is that TV, with both sound and picture, can create a much bigger impact on viewers than that of sound broadcasting on listeners with sound alone.

3.10 Under the TO, a DP may not hold/exercise control of a sound broadcasting licence/licensee unless with the CE-in-C’s approval in the public interest¹⁵. Assumption and increase of control by a DP of a licensee must be approved by the CE-in-C¹⁶.

3.11 Under Part 3A¹⁷ of the TO, a DP is:

- (a) a free TV or pay TV licensee under the BO and their associates¹⁸;

¹⁴ Section 1(1) of Schedule 1 to the BO.

¹⁵ Section 13G of the TO.

¹⁶ Section 13H(1) of the TO.

¹⁷ Section 13A(1) of the TO.

¹⁸ The meaning of “associate” is as defined in section 2(1) of the BO.

- (b) another sound broadcasting licensee;
- (c) an advertising agent¹⁹;
- (d) a person who in the course of business supplies material for broadcasting by a sound broadcasting licensee;
- (e) a person who in the course of business transmits sound or TV material in Hong Kong or outside Hong Kong; and
- (f) a person who exercises control of (a) to (e), except a person who exercises control of an associate in (a).

Need for Review

3.12 Cross-media ownership restrictions were imposed upon the enactment of the TVO in 1964. Stringent cross-media restrictions were justifiable before as the very limited number of players in the broadcasting industry and sources of infotainment meant that the risks of editorial uniformity and conflict of interest were more real than apparent. With the proliferation of online infotainment and increased presence of multifarious Internet-based media outlets covering a range of different tastes, focuses and stances, the risk of editorial uniformity has been significantly reduced today. We see room to remove some of the obsolete categories of DP from the definition of DPs to facilitate the business development of the traditional broadcasting industry.

3.13 Also, operational experiences reveal that the existing categories of DP which include businesses that are not much related to mass broadcasting services, coupled with the wide catchment of the definition of “associate” thereunder notably the definition of “relative”, have at times created legal and technical breaches on the part of a licensee and the concerned DP just because of his/her connection with an extended family member in a specified DP business, despite that any negative impact on the editorial uniformity and media concentration is highly unlikely.

¹⁹ In the TO, the terminology is slightly different in that “advertising agent” is used instead of “advertising agency” as in the BO. That said, the two terms essentially refer to the same business.

3.14 Hereunder is an example of such a case:

Approval by CE-in-C was required for Mr A, who had been a director of a free TV licensee, to continue to exercise control of the licensee, as he was found to be an associate of a “DP” as his cousin (therefore a “relative” under the definition of “associate”), Mr B, was an independent non-executive director of an associated corporation of a hotel management company, which was an “other licensable TV” licensee, a DP under section 4 of Schedule 1 to the BO.

Given the remote relationship, and the fact that hotel TV service does not mainly target Hong Kong audience, the risk of Mr A causing any editorial uniformity was negligible, if any. Nevertheless, under the existing regime, approval from the CE-in-C was still required. The concerned free TV licensee had been in breach of the DP restrictions during the period before approval was granted by the CE-in-C and was sanctioned by the CA.

3.15 In this relation, we propose to narrow the scope of “DPs” (details are at *Section I* of this Chapter (paragraphs 3.16 to 3.39)) and narrow the scope of “relative” under the definition of “associate” (details are at *Section II* of this Chapter (paragraphs 3.40 to 3.45)).

Section I

Proposals to Narrow the Scope of “Disqualified Persons”

Background

3.16 At the time when the extant DP restrictions were drawn up, TV and radio were almost the sole, most influential sources of infotainment. There were understandable concerns over the creation of cross-media monopolies or editorial uniformity arising from conglomeration of broadcasting licensees, or a broadcasting licensee with an operator in a related business.

3.17 With the passage of time, the circumstances have changed. There is now a recognition of the need for the broadcasting licensees to

explore new business opportunities due to changing socio-economic conditions and business environment. The enactment of the BO in 2000, for instance, removed prohibition laid down in its predecessor, the TVO, on free TV and pay TV licensees operating other businesses that were not directly related to the broadcasting service and associated telecommunications services ancillary to the operation of TV broadcasting service²⁰.

3.18 In the same exercise, in view of the more liberalised and diversified broadcasting market, three categories of DP were removed from the definition of DPs, namely, (a) “a company which supplies material for broadcasting by a licensee”; (b) “a company which transmits sound or television material, whether within and without Hong Kong”; and (c) “a company which is the sole or dominant supplier of a public switched telephone service by wire to residential premises in Hong Kong”²¹.

Need for Review

3.19 Almost two decades have gone by since the last amendments to the scope of the DPs in the BO in 2000. We see a need to revisit the restrictions amidst booming Internet TV programme services leading to the changing viewing habits of audience and operating environment for the market players. As explained in Chapter 2, the advent and popularisation of the Internet have totally changed the viewing habits of audience in the past two decades. Free TV, pay TV and radio are no longer the only sources, nor the most influential sources of infotainment, to many of the viewing public. In contrast, many people, in particular the younger generations, opt for other channels (e.g. OTT TV, Internet radio, etc.) as their primary sources of infotainment through which they can access anytime, anywhere, a wide array of selections fitting their schedule, personal interest and taste.

3.20 In the era of OTT infotainment, the chances of having a single licensee monopolising the whole media market would be slim. Editorial uniformity is highly unlikely and many would agree that over-supply of information through different media, online or offline, is more an issue. In reality, Internet TV and radio programme services, not being subject to any licensing regime, enjoy more flexible collaboration opportunities amongst various businesses and pose a formidable

²⁰ Section 10(1)(a) of the repealed TVO.

²¹ Section 2(1), definition of “disqualified person”, of the repealed TVO.

challenge to the traditional media in terms of market shares of audience and advertising revenue. The following table shows the increase in advertising revenue of digital media from 2013 to 2017 (from 8% to 17%). Some other stakeholder²² has even suggested that in 2016, advertising revenue of digital media (25%) already surpassed that of TV broadcasting service (16%).

Table 7 : Market Shares of Advertising Revenue by Different Media (2013 to Q3 of 2017)²³

Type of Media	2017 (up to Q3)		2016		2015		2014		2013	
	HK\$ Bn	%	HK\$ Bn	%	HK\$ Bn	%	HK\$ Bn	%	HK\$ Bn	%
TV	9.7	32%	11.9	30%	14.3	31%	14.4	32%	13.4	31%
Digital Media ²⁴	5.1	17%	5.2	13%	6.1	13%	4.5	10%	3.5	8%
Free Papers	4.7	15%	6.7	17%	6.5	14%	5.8	13%	5.7	13%
Paid Papers	3.7	12%	5.6	14%	6.9	15%	7.2	16%	7.4	17%
Outdoor	4.7	15%	6.0	15%	6.1	13%	6.3	14%	5.7	13%
Others (Magazines, Radio)	2.7	9%	4.4	11%	6.1	13%	6.7	15%	7.4	17%
Total	30.6		39.8		46		44.9		43.1	

Proposals

3.21 In view of the challenging operating environment for traditional broadcasters due to the changing market landscape and imbalance in the existing regulatory regime, we propose that the scope of DPs should be further adjusted to encourage cross-sector fertilisation and enable economy of scale so as to improve the long-term financial viability of traditional media operators.

(I) Proposed Revised Scope of “DPs” under the BO

3.22 Regarding the coverage of “DPs” under the BO, we consider that there is room for removing the following categories:

²² According to the jointly produced study by PricewaterhouseCoopers and Hong Kong Digital Marketing Association. See South China Morning Post, “Hong Kong’s online ad spend expected to double TV’s within five years”, 6 September 2017.

²³ Based on information from admanGo’s Adspend Reports.

²⁴ Interactive, desktop and mobile.

- (a) a non-domestic TV licensee;
- (b) an other licensable TV licensee;
- (c) an advertising agency; and
- (d) a proprietor of local newspaper.

(A) Removal of Disqualification of Non-domestic TV Licensee

3.23 The television programme service of a “non-domestic TV licensee” does not primarily target Hong Kong²⁵. Such service providers, e.g. regional satellite broadcasters, provide service to many other places outside Hong Kong and their subsistence does not rely on local advertising or subscription revenue. Some of such non-domestic TV services are even neither intended nor available for reception by the Hong Kong public. These services have no connection with the local media market. Inclusion or otherwise of such licensees in the scope of DPs would not affect the operating environment or landscape of the local broadcasting industry. Removing this category of licensees from the scope of DPs under the BO would not give rise to any policy concern over editorial uniformity.

(B) Removal of Disqualification of Other Licensable TV Licensee

3.24 The TV programme service of an “other licensable TV licensee” is either intended or available for reception by an audience of not more than 5 000 specified premises in Hong Kong, or in hotel rooms²⁶. In practice, such service is small-scale and is mainly provided to hotel rooms targeting tourists; foreign nationals living in or working in Hong Kong; or residents living in a locality. As such, removing this category of licensees from the definition of DPs would unlikely give rise to any policy concern over editorial uniformity.

(C) Removal of Disqualification of Advertising Agency

3.25 According to section 6 of Schedule 1 to the BO, (a) an advertising agency; (b) a person who exercises control of an agency; and (c) an associate of (i) an agency, or (ii) the person who exercises control of an agency, are DPs. Given the latest broadcasting landscape, it is

²⁵ Section 2(1) of the BO, definition of “non-domestic television programme service”, paragraph (b).

²⁶ Section 2(1) of the BO, definition of “other licensable television programme service”, paragraph (b).

worth considering whether this category should be removed from the scope of DPs.

3.26 As advertising is a major source of revenue for broadcasting licensees, there may be concerns from some quarters over possible abuse or conflict of interest if advertising agencies (as well as their associates, and those who exercise control over the agencies and the associates of those who exercise control over the agencies) are removed from the definition of DPs. The underlying concern stems from such scenario that, with the relaxation, an advertising agency might be able to offer preferential rates for advertisements broadcast on its “in-house channel”, or the broadcasters might refuse to take on advertisements other than those from the in-house agency. Let us examine how far these are real concerns in the Hong Kong context today.

3.27 With the abundance of infotainment sources alternative to traditional broadcasting channels, on top of new entrants to the traditional free TV market in the past few years, there is now a wide spectrum of choices for businesses to place their advertisements. In such a highly competitive market, it is doubtful if an advertising agency could sustain business on the basis of the operation of an “in-house channel”, or a TV channel could sustain its operation with only advertisements placed through its advertising agency. As such, the removal of an advertising agency, an associate of an agency, a person who exercises control over an agency, and an associate of a person who exercises control over an agency, from the definition of DPs would unlikely affect the local broadcasting landscape or give rise to conflict of interest concerns.

(D) Removal of Disqualification of Proprietor of Local Newspaper

3.28 According to section 7 of Schedule 1, (a) a proprietor of a newspaper printed or produced in Hong Kong; (b) a person who exercises control over a proprietor; and (c) an associate of (i) a proprietor, or (ii) a person who exercises control over a proprietor, are DPs. Given the latest broadcasting landscape, it is worth considering whether this category should be removed from the scope of DPs.

3.29 With the proposed relaxation, there may be concerns from some quarters over the possibility of the news and broadcast media joining forces, rendering them disproportionately influential, and powerful enough to dominate public opinions.

3.30 To address the concern in its proper context, some statistical background would help. Just on newspapers alone, more than 30 different printed newspapers and about 30 online newspapers are registered in Hong Kong. On top of that, one can easily obtain (instant) local and overseas news updates through various online media platforms. Given the existence of a large number of alternative information sources in various forms, it is rather unlikely that an alliance of broadcasting licensee(s) and newspaper(s) could dominate public opinions. The availability of choices will effectively guard against possible editorial uniformity. We therefore propose to remove a local newspaper proprietor, an associate of a proprietor, a person who exercises control over a proprietor, and an associate of a person who exercises control over a proprietor, from the definition of DPs (paragraph 3.28).

(II) Proposed Revised Scope of DPs under Part 3A of the TO

3.31 The scope of the DPs under Part 3A of the TO (paragraph 3.11) is slightly different from that of the BO (paragraph 3.5). Two major differences between the two ordinances are the inclusion of (a) “a person who in the course of business supplies material for broadcasting by a licensee”; and (b) “a person who in the course of business transmits sound or television material, whether in Hong Kong or outside Hong Kong” in the scope of DPs under Part 3A of the TO but not the BO.

3.32 We propose that the two categories of businesses mentioned in paragraph 3.31, as well as advertising agents, should be removed from the scope of DPs under Part 3A of the TO.

3.33 Proposed removal of the two categories in paragraph 3.31 is essentially a technical exercise to update and align the provisions in Part 3A of the TO with those in the BO. The list of DPs was first added to the TO pursuant to enactment of the Telecommunications (Amendment) Ordinance 1989 as part and parcel of a new self-contained regulatory regime under Part 3A for sound broadcasting services. It mostly mirrored the then DP list in the repealed TVO. While the DP list in the TVO had been amended subsequently on the occasion of enacting the BO in 2000 (paragraph 3.18), corresponding update was not made to the DP list under Part 3A of the TO.

(A) Removal of Disqualification of Person who in the Course of Business Supplies Material for Broadcasting by a Licensee (i.e. Programme Supplier)

3.34 For the proposed removal of “programme supplier” from the definition of DPs, the then rationale in support of the removal of the same category in enacting the BO in 2000 is equally applicable to the current case of sound broadcasting service, which was that, “as new services come on stream and viewers’ choice increases, the justification for barring programme suppliers to exercise control in a licensee in order to safeguard editorial or programme plurality is weakened²⁷”. Seventeen years on since 2000, the argument is equally valid to the TO.

(B) Removal of Disqualification of Person who in the Course of Business Transmits Sound or TV Material in or outside Hong Kong

3.35 Likewise, for operators transmitting sound or TV materials within or outside Hong Kong, the then argument in support of removing this category from the BO in order to “enable diversification and cross-fertilisation of the telecommunications and broadcasting markets²⁸” is equally applicable in the current exercise.

(C) Removal of Disqualification of Advertising Agent

3.36 Similar considerations for removing disqualification of “advertising agency” in the BO (paragraphs 3.26 and 3.27) are equally applicable to the TO to justify removal of “advertising agent” from its list of DPs.

Effects of Proposals

3.37 If the proposed removal of certain DP categories from and modification of the scope of DPs in the BO and the TO are agreed and implemented, licensees of the three most pervasive media outlets, namely, free TV, pay TV and sound broadcasting services, will remain DPs who would continue to be disqualified from owning or exercising control of one another.

²⁷ The 1998 Review of Television Policy.

²⁸ Ibid.

3.38 Specifically, after the proposed relaxations, under the BO, DPs would be:

- (a) a free TV licensee;
- (b) a pay TV licensee;
- (c) a sound broadcasting licensee;
- (d) a person who exercises control over (a) to (c); and
- (e) an associate of (a) to (d).

3.39 And, under Part 3A of the TO, DPs would be:

- (a) a free TV licensee;
- (b) a pay TV licensee;
- (c) a sound broadcasting licensee;
- (d) an associate of (a) and (b); and
- (e) a person who exercises control of (a) to (c).

Section II

Proposal to Narrow the Scope of “Relative” under Definition of “Associate”

Background

3.40 As explained in paragraphs 3.4(a), 3.5(f) and 3.11(a), while a certain class of licensees or businesses are under the DP restrictions, a DP’s “associates”, and “associates” of a person who exercises control over a DP, are also subject to the same restrictions. This is the effect of a very wide net cast by the definition of “associate” (paragraph 3.7) in the BO, including the definition of “relative” (paragraph 3.8) which is the issue under review in this section.

Issue

3.41 The comprehensive definition of “associate” covers any business affiliates of a DP (e.g. a partner of a DP, a director or principal officer of a corporation influenced by a DP, etc. as set out in paragraph 3.7). The definition of “relative” thereunder seeks to extend the disqualification from holding/exercising control of a licence/licensee to all the familial relations (paragraph 3.8) of the DPs and the familial relations of the

business affiliates of the DPs.

3.42 There may be views from some quarters that in light of the Chinese settings in Hong Kong, disqualifications in terms of familial relations of DPs and familial relations of the business affiliates of the DPs should continue to be imposed. From our policy perspective, there is scope for refining the coverage of “relative” in view of actual operational experiences, where unintended breaches arose from extended familial relations only, with rather remote concern over editorial uniformity, and taking into account the fact that monopolisation by any familial or business group of any segment of the broadcasting sector that would prejudice editorial plurality nowadays is highly improbable. We hence see room for narrowing the existing scope of “relative”.

Proposal

To Narrow Scope of “Relative” under Definition of “Associate”

3.43 We propose that the definition of “relative” be confined to the immediate family members, namely,

- (a) spouse;
- (b) parent;
- (c) child, adopted child and stepchild; and
- (d) sibling.

3.44 In other words, (a) aunt and uncle; (b) cousin; (c) niece and nephew; (d) grandmother and grandfather; (e) sister-in-law and brother-in-law; (f) mother-in-law and father-in-law; and (g) daughter-in-law and son-in-law, are to be removed from the definition of “relative”.

Effects of Proposal

3.45 The proposed revised scope of “relative” will narrow the scope of “associate” and lower the risk of inadvertent breaches due to existence of indirect family relationships/kinship, without giving rise to possible concerns over editorial uniformity.

Chapter 4

Foreign Control Restrictions

Background

4.1 Given the high pervasiveness of TV and sound broadcasting, respective mechanisms are in place in the BO and Part 3A of the TO to ensure that licensees are controlled by local individuals or companies who are responsive to and cater for local audience's interest, taste and culture.

4.2 In Hong Kong, foreign control restrictions are generally applicable to free TV, pay TV and sound broadcasting licensees. The long-established foreign control restrictions regime does not impose ownership control per se but restricts persons and companies from exercising control of licensed broadcasters on the basis of residency requirement. Existing restrictions are set out below:

Existing Foreign Control Restrictions at a Glance
<ul style="list-style-type: none">• Residency requirement on a licensee (<i>Applicable to free TV, pay TV and sound broadcasting licensees</i>) (See paragraphs 4.4 and 4.5)
<ul style="list-style-type: none">• Residency requirement on a licensee's directors and principal officers (<i>Applicable to free TV, pay TV and sound broadcasting licensees</i>) (See paragraphs 4.6 and 4.7)
<ul style="list-style-type: none">• Residency requirement on quorum at directors' meetings (<i>Applicable to free TV and pay TV licensees</i>) (See paragraph 4.8)
<ul style="list-style-type: none">• Cap on aggregate voting shares (<i>Applicable to sound broadcasting licensees</i>) (See paragraph 4.9)
<ul style="list-style-type: none">• Attenuation of voting control at general meetings exercised by non-Hong Kong resident shareholders (<i>Applicable to free TV licensees</i>) (See paragraphs 4.14 to 4.16)
<ul style="list-style-type: none">• Requirement for the CA's prior approval if voting control by non-Hong Kong residents reaches 2%, 6%, 10% and above (<i>Applicable to free TV licensees</i>) (See paragraphs 4.18 to 4.24.)

4.3 We have reviewed each of the above existing foreign control restrictions. Details of the existing provisions, the review outcome and our recommendations are set out below.

Existing Provisions

(I) Requirements Applicable to Free TV, Pay TV, and/or Sound Broadcasting Licensees

(a) Residency Requirement on a Licensee *(Applicable to Free TV, Pay TV and Sound Broadcasting Licensees)*

4.4 Under section 8(4)(a)(i) of the BO, a free TV or pay TV licence shall not be granted to and held by a company unless it complies with the statutory definition of “ordinarily resident in Hong Kong”²⁹. That is to say, a majority of the directors who actively participate in the company’s direction have to be ordinarily resident in Hong Kong and each has been so ordinarily resident for at least one continuous period of not less than seven years; and that the control and management of the company is bona fide exercised in Hong Kong.

4.5 Under section 13F of the TO, a sound broadcasting licence may be granted to or held only by a company formed and registered in Hong Kong under the Companies Ordinance (Cap. 622)³⁰. It is also specified in the sound broadcasting licence that control and management of the licensee company has to be bona fide exercised within Hong Kong.

(b) Residency Requirement on Directors and Principal Officers of a Licensee *(Applicable to Free TV, Pay TV and Sound Broadcasting Licensees)*

4.6 According to section 8(4)(a)(iv) of the BO, except with the CA’s prior approval, the majority of directors and principal officers (including the principal officer in charge of the selection, production or scheduling of TV programmes) of a free TV or pay TV licensee must be for the time

²⁹ As defined in section 2(1) of the BO.

³⁰ Or a former Companies Ordinance as defined by section 2(1) of the Companies Ordinance (Cap. 622).

being ordinarily resident in Hong Kong and each must have been so ordinarily resident for at least one continuous period of not less than seven years. Also, the majority of the said directors are required to actively participate in the direction of the licensee company³¹.

4.7 While there is no similar stipulation in Part 3A of the TO, it is specified in the sound broadcasting licence that unless otherwise approved by the CA, the chairman and managing director and the majority of directors who take an active part in the control of the licensee shall be ordinarily resident in Hong Kong and each has been so ordinarily resident for one continuous period of at least seven years.

(c) Residency Requirement on Quorum at Directors' Meetings
(Applicable to Free TV and Pay TV Licensees)

4.8 According to section 8(4)(a)(iii) of the BO, a quorum of every meeting of the directors of the licensee company must have a majority of directors who is each for the time being ordinarily resident in Hong Kong and has been so ordinarily resident for at least one continuous period of not less than seven years.

(d) Cap on Aggregate Voting Shares
(Applicable to Sound Broadcasting Licensees)

4.9 According to section 13I(1) of the TO, the aggregate of the voting shares in a sound broadcasting licensee to or in which unqualified persons have, directly or indirectly, any right, title or interest, shall not at any time exceed 49% of the total number of voting shares in the licensee. A person shall be an unqualified person unless (a) he is a person who is for the time being ordinarily resident in Hong Kong and has at any time been resident for a continuous period of not less than 7 years or (b) that person is a company that is ordinarily resident in Hong Kong.

Underlying Policy Objectives

4.10 The requirements above seek to ensure that not only must the licensee be a bona fide Hong Kong company, decisions at its board meetings are made by a majority of those ordinarily resident in Hong Kong; and those responsible for the day-to-day operation and management of the licensee, including personnel responsible for making

³¹ Section 8(4)(a)(ii) of the BO.

selection, production or scheduling of TV programmes, are local residents who would have the interest of the Hong Kong people at heart.

Proposal

4.11 We have reviewed the requirements in (a) to (d) above and are satisfied that they remain effective in meeting our long established policy objective of ensuring that the control and management of free TV, pay TV and sound broadcasting licensees are vested in local hands.

4.12 We therefore propose to maintain the status quo with the above provisions.

(II) Additional Requirement Applicable to Free TV

4.13 Given the highest degree of pervasiveness of free TV services among the traditional broadcasters, there are two additional requirements that help ensure control of free TV licensees be held in the hands of local people.

(a) Attenuation of Voting Rights at General Meetings Exercised by Non-Hong Kong Resident Shareholders

4.14 The first additional requirement that is imposed on free TV licensees in deference to its highest degree of pervasiveness among the traditional broadcasters concerns the attenuation of voting controls at the general meetings of the licensees.

4.15 The provision works in this manner: at any general meeting of a free TV licensee, where total voting control exercised on a poll by unqualified voting controllers³² (UVCs) (i.e. a voting controller of a licensee company who is not ordinarily resident in Hong Kong) in aggregate exceeds 49% of the total voting control exercised by both qualified and unqualified voting controllers, the voting control of UVCs will be attenuated to 49% in accordance with a specified formula³³.

4.16 This requirement provides flexibility for attracting foreign investment into our free TV market, while ensuring that our free TV programmes would continue to cater for local interest, taste and culture at

³² As defined in Section 1(1) of Schedule 1 to the BO.

³³ Section 19(1) of Schedule 1 to the BO.

the same time. The underlying principle is to ensure that local people have the ability to control free TV broadcasters, yet permitting foreign investment on terms that aim to restrict voting control only. In other words, foreign companies may invest in local free TV licensees, subject to the requirement that they do not constitute a majority in decisions-taking at any general meetings of the licensees.

Proposal

4.17 We consider that the requirement has by and large worked effectively in attaining our policy objective and we recommend that the provision should remain intact without any amendments.

(b) Requirement for the CA's Prior Approval if Voting Control by Non-Hong Kong Residents Reaches 2%, 6%, 10% and above

4.18 According to section 20(1) of Schedule 1 to the BO, a non-Hong Kong resident shareholder must seek the CA's prior approval in order to hold, acquire or exercise 2% (to 6%), 6% (to 10%), 10% and above of the voting control of a free TV licensee.

Policy Objective

4.19 The purpose of the approval mechanism is to enable the CA to conduct the necessary assessment whenever there is interest from foreign investors in investing in Hong Kong's broadcasting market up to certain levels of voting control in a free TV licensee. The CA would examine whether the proposed acquisition of shares of a free TV licensee would lead to changes in the control and management of the licensee or whether the whole acquisition is for bona fide investment purposes.

4.20 When considering whether prior approval should be granted for a foreign acquisition of shareholding in a free TV licensee which entails influence on the control and management of the licensee company, the CA will usually take into account the financial ability of the applicant and the financial position of the licensee concerned, the benefits to be brought to the licensee and the broadcasting scene, the applicant's long term commitment to Hong Kong and the licensee's assurance to provide a service catering for the needs of the Hong Kong community, whether the control and management of the licensee company will be bona fide exercised in Hong Kong and whether the licensee's freedom of expression and editorial independence will be upheld.

4.21 In the course of considering the continued effectiveness of this provision in meeting our policy objective, we have looked into its enactment history. The requirement that acquisition of shareholding by non-Hong Kong residents shall require prior approval from the CA (and the then BA before 1 April 2012) has been in place for almost 30 years through the enactment of Television (Amendment) Ordinance 1988 (TV(A)O 1988) and remains intact to date. Over the years, adjustments have been made to the range of shareholding thresholds that trigger the approval requirement to dovetail with the industry's development needs on a number of occasions.

4.22 Under the TV(A)O 1988, restriction was imposed to ensure that shareholding of non-Hong Kong residents in a free TV licensee must not exceed 10% ("the 10% rule"), and prior approval from the then BA must be sought for increase of every 2% in shareholding below that. With the 10% shareholding cap, in effect, a non-Hong Kong resident shareholder had to seek the BA's prior approval whenever he reached 2%, 4%, 6% and 8% of shareholding ("the 2% rule").

4.23 To facilitate investment by non-Hong Kong residents while maintaining restriction on foreign control, the Government removed the 10% rule in 1993, and subjected shareholding at or above the 10% threshold to the prior approval of the BA. With the 2% rule remaining in place, the threshold percentages that were subject to the BA's approval became 2%, 4%, 6%, 8% and 10%. Prior approval from the BA had to be sought for every increase above 10%.

4.24 In 2000, when the BO was enacted and the TVO was repealed, in view of the industry's concern that the then prevailing incremental approach in obtaining the BA's approval was too cumbersome, the thresholds were amended to the existing "2%, 6%, 10% and above".

Issue

4.25 The existing foreign investment control regime which prohibits any non-Hong Kong resident shareholder from holding, acquiring or exercising or causing or permitting to be exercised 2%, 6%, 10% and above of the shareholding in a free TV licensee without the prior approval of the CA has served our policy objective well, and will remain intact.

4.26 One observation from the CA's operational experiences is that there has been no lacking of interest of foreign investors in investing in Hong Kong's free TV market just for pure investment purposes. These

non-Hong Kong resident investors are not interested in influencing or getting involved in the day-to-day business of the free TV licensees, and would usually acquire voting control in a free TV licensee along the 2% to 4% range. Under the existing regime, the starting point of 2% of voting control that requires CA's prior approval seems to be on the low side, creating undue regulatory burden and time compliance cost on investors which acquire shareholding in free TV licensee for pure investment purpose.

Proposal

To Adjust Threshold Percentages of Shareholding in Free TV Licensee by Non-Hong Kong Residents Requiring Prior Approval of the CA

4.27 To encourage investment and facilitate injection of new capitals in the free TV market, we propose to adjust the shareholding thresholds that trigger the CA approval process from the 2%, 6%, 10% and above, to 5%, 10%, 15% and above.

4.28 The proposed starting point of 5% ties in with the requirement under the Securities and Futures Ordinance (Cap. 571) for listed companies to disclose shareholding of 5% or above³⁴. The higher-end threshold percentage of 15% ties in with the definition of a person who "exercises control" under the BO (paragraph 3.6). Once an investor has acquired in aggregate 15% or more of the voting control of a free TV licensee, he will be subject to another set of stringent scrutiny, including checking whether he is a DP and a "fit and proper person"³⁵ under the BO. Under this proposal, when the foreign acquisition goes beyond 15% of the total voting control, the CA's approval would be required for each increase, however insignificant it may be, and the stringent vetting as mentioned above shall continue to apply on each occasion.

Effects of Proposal

4.29 Under our proposal, the existing foreign control restrictions regime remains intact, with only minor refinements of the threshold percentages of foreign investments that are subject to the prior approval of the CA. We trust that the adjustment would simplify the approval

³⁴ Section 310(1)(a), read together with sections 313(1) and 315(1)(a), of the Securities and Futures Ordinance (Cap. 571).

³⁵ Under section 21(1) of the BO, a TV licensee and any person exercising control of it shall be and remain a fit and proper person.

requirement and reduce the compliance burden on investors while maintaining the suitable control in the system given the stringent scrutiny by the CA when an investor seeks to influence the control and management of the licensee.

Chapter 5

Requirement of Licensee Being a Non-subsidiary Company

Background

5.1 Given the pervasive influence of free TV and sound broadcasting, the BO and Part 3A of the TO impose control measures to ensure that the licensees would focus on their broadcasting businesses under minimal influence or interference by other related entities. There are prohibitions in the BO³⁶ and Part 3A³⁷ of the TO on the grant of a free TV/sound broadcasting licence to a company which is a subsidiary³⁸ of a corporation.

Underlying Policy Considerations

5.2 These provisions were first enacted through the TV(A)O 1988 and the Telecommunications (Amendment) Ordinance 1989. Their main objective is to ensure that a commercial TV/sound broadcasting licensee should be an independent company whose sole business is the operation of a TV programme service/sound broadcasting service and that the licensee's advertising and/or subscription revenue could be accurately assessed for the purpose of calculating royalty payment. Regarding the assessment of royalty, abuse might arise in that the licensee might shift revenue to its sister companies in order to minimise its royalty payments. There is also concern that possible interference or conflict of interest with the parent company or other member companies in the same group of the licensee might arise should the licensee be allowed to be a subsidiary company.

Issues

5.3 The circumstances under which the provisions were drawn up close to 30 years ago were markedly different from the market situation today. First and foremost, in a competitive market of today, market forces will likely drive licensees to explore new business opportunities to ensure long-term sustainability. Bearing in mind that it requires

³⁶ Section 8(3) of the BO.

³⁷ Section 13F(b) of the TO.

³⁸ The definition of "subsidiary" has the same meaning as in the Companies Ordinance (Cap. 622).

considerable capital investment and recurrent resources to operate a TV or radio station, adequate and stable financial support, in many cases from parent companies, is of vital importance in ensuring the sustainability of the business of the licensees. Also, royalty payment is no longer required under the BO and sound broadcasting licences and the licence fee chargeable is not calculated according to the revenue of a licensee.

5.4 In point of fact, though not being subsidiary companies per se, some newly licensed free TV operators are guaranteed financial support by their “parent”/related companies to ensure their continuous operation and development through the arrangement of trusts. Such guarantee is crucial not only for the licence applicants but also for satisfying the CA in making its recommendation to the CE-in-C on the new licence applications, and the CE-in-C, as the licensing authority, that the new entrants will remain financially sound to operate its licensed free TV services over a 12-year validity period of the licence. The requirement for a free TV licensee to be a non-subsiary company may hinder the ability and flexibility of the licensees in securing the necessary financial support of their operations and may even discourage prospective licensees from entering the broadcasting market.

Proposal

To Remove the Requirement

5.5 We consider it justifiable to remove the restriction on the non-subsiary requirement on free TV licensees and sound broadcasting licensees. Possibility of conglomerates controlling free TV licensees or sound broadcasting licensees, or interference or conflict of interest amongst member companies should be unlikely as such moves will undermine the editorial choice and programme quality of the concerned licensee, lowering its competitiveness in the prevailing highly competitive market with multiple players and an abundance of Internet infotainment sources. In contrast, potential newcomers will find it easier to raise funds for their business with the proposed relaxation.

5.6 Accordingly, we propose to dispense with this non-subsiary company requirement by repealing the relevant provisions from the BO and Part 3A of the TO.

Effects of Proposal

5.7 With the relaxation, licensees will be given the flexibility in arranging the corporate structure of their businesses and in exploring

other related business opportunities. The measure will lower the entry barrier into the market, and help licensees sustain their businesses in the long run.

Chapter 6

Licensing Authority

Background

6.1 The main objectives of the BO and Part 3A of the TO are to license companies to provide TV and sound broadcasting services, and to regulate the provision of such broadcasting services by licensees. The licensing system is in place because TV (in particular free TV) and radio are highly pervasive and are major sources of infotainment in Hong Kong. The objective of the licensing regime is to protect public morals and children as they can easily access programmes broadcast by licensees.

6.2 While broadcast content is not subject to pre-censorship, the quality and standard of programmes are assured by way of the licensing regime. Different aspects of the licence applicants and the proposed licensed services are carefully scrutinised before the licensing authorities decide whether licences are to be granted and on what terms.

6.3 The licensing regimes in the BO and Part 3A of the TO are designed in such a way to ensure that the licensing authority is commensurate with the degree of influence and pervasiveness of the broadcasting service to be licensed. Generally speaking, the more influential a service is, the greater the need for wider public interest considerations and hence the higher in the hierarchy should be the licensing authority.

Existing Provisions

6.4 Under the extant regime, the most pervasive broadcasting services, i.e. free TV, pay TV and sound broadcasting, are subject to a two-tier scrutiny system for licence application and renewal. Licence application and renewal application have to be made to the CA, which would process the application in accordance with the statutory requirements and established procedures, before making its recommendation to the CE-in-C as to whether a licence should be granted or renewed and if so, on what terms. The discretionary power as to whether or not to grant or renew a licence is vested in the CE-in-C.

6.5 For broadcasting services that only target viewing public outside Hong Kong, or a relatively small number of people in Hong Kong, the

discretionary power as to whether to grant or renew a licence is vested in the CA. Specifically, the CA is the authority for granting (and renewal) of non-domestic TV licences (covering TV service not primarily targeting Hong Kong) and other licensable TV licences (covering TV service targeting a relatively small number of local audience or hotel rooms). Summary of the existing licensing authority hierarchy is set out below:

Summary of Existing Licensing Authority Hierarchy	
<u>CE-in-C (After Considering the CA's Recommendations)</u>	
<ul style="list-style-type: none"> • Free TV; • Pay TV; and • Sound broadcasting service 	
<u>CA</u>	
<ul style="list-style-type: none"> • Non-domestic TV (e.g. satellite TV); and • Other licensable TV (e.g. hotel TV) 	

Proposal

To Maintain the Status Quo

6.6 Though OTT and other Internet TV and radio programme services are gaining their prominence, traditional media (free TV, pay TV and sound broadcasting) are still highly pervasive and accessible to all in the family, young and old. The degree of pervasiveness of the three types of media (as at 1 November 2017) is recapitulated in the following table:

Type of Media	Number / Percentage
• Penetration rate of free TV	About 95%
• Number of free TV households	2.41 million
• Coverage of DTT	About 99%
• Take-up rate of DTT	About 88% (as at end-2017)
• Penetration rate of pay TV	Over 85%
• Coverage of analogue sound broadcasting	All over Hong Kong

6.7 We are of the view that the existing regime with the CE-in-C being the licensing authority for free TV, pay TV and sound broadcasting

licences should remain intact, taking into account the high pervasiveness of these services. We also consider that the CA should remain the licensing authority for non-domestic TV licences (covering TV service not primarily targeting Hong Kong) and other licensable TV licences (covering hotel TV service), given the much less influence on the Hong Kong viewing public that they weave.

Effects of Proposal

6.8 Maintaining the status quo should have minimal impact on the operation of existing licensees and potential applicants.

Chapter 7

Summary of Recommendations

7.1 A list of our legislative amendment proposals are set out below as aide-memoire:

(I) Cross-media Ownership Restrictions

- (a) To narrow the scope of “DPs” (including an associate of a DP, a person who exercises control over a DP, and an associate of a person who exercises control over a DP) who are restricted from holding/exercising control of free TV, pay TV and sound broadcasting licences/licensees, by removing the following categories from the definition of DPs in the respective ordinances:

Under the BO

Categories of DP to be removed:

- (i) Non-domestic TV licensee (e.g. satellite TV);
- (ii) Other licensable TV licensee (e.g. hotel TV);
- (iii) Advertising agency; and
- (iv) Proprietor of local newspaper.

Categories of DP to be retained:

- (i) Free TV licensee;
- (ii) Pay TV licensee; and
- (iii) Sound broadcasting licensee.

Under Part 3A of the TO

Categories of DPs to be removed:

- (i) Advertising agent;
- (ii) A person who in the course of business supplies material for broadcasting by a sound broadcasting licensee; and
- (iii) A person who in the course of business transmits sound or television material in Hong Kong or outside Hong Kong.

Categories of DPs to be retained:

- (i) Free TV licensee;
 - (ii) Pay TV licensee; and
 - (iii) Sound broadcasting licensee.
- (b) To narrow the scope of “relative” under the definition of “associate” of DPs under the BO³⁹:

Retention of the following familial relations:

- (i) Spouse;
- (ii) Parent;
- (iii) Child, adopted child and stepchild; and
- (iv) Sibling.

Removal of the following familial relations:

- (i) Aunt and uncle;
- (ii) Cousin;
- (iii) Niece and nephew;
- (iv) Grandmother and grandfather;
- (v) Sister-in-law and brother-in-law;
- (vi) Mother-in-law and father-in-law; and
- (vii) Daughter-in-law and son-in-law.

(II) Foreign Control Restrictions

- (a) To adjust threshold shareholdings in free TV licensees by non-Hong Kong residents that require the CA’s prior approval from 2%, 6%, 10% and above, to 5%, 10%, 15% and above.
- (b) To retain all the existing residency requirements on a licensee and its director and principal officers, as well as the attenuation rule of containing voting control of non-Hong Kong resident shareholders at general meetings to 49% at all times.

³⁹ The only reference of “associate” in Part 3A of the TO is the “associate” of free TV and pay TV, and its definition there is as defined in section 2(1) of the BO.

(III) Requirement of Licensee Being a Non-subsidiary Company

To remove the requirement that free TV and sound broadcasting licensees must be non-subsidiary companies.

(IV) Licensing Authority

To maintain the status quo:

CE-in-C to grant/renew:

- (i) Free TV licence;
- (ii) Pay TV licence; and
- (iii) Sound broadcasting licence.

CA to grant/renew:

- (i) Non-domestic TV licence; and
- (ii) Other licensable TV licence.

7.2 Subject to the outcome of the consultation and consensus reached amongst stakeholders and the public, we will pilot an amendment bill into the LegCo to implement the amendments as early as possible. It is our plan to make the new provisions applicable to existing licensees immediately upon commencement of the amendment ordinance so that they can benefit from the relaxed regulatory regime as early as practicable. We will work out the transitional arrangements in consultation with the Department of Justice in preparing the amendment bill.

~ The End ~

