

## **Bills Committee on Broadcasting (Amendment) Bill 2003**

### **Administration's Response to the Issues Raised at the Meeting on 6 January 2004**

#### **Purpose**

To set out the Administration's response to the issues raised by Members and Assistant Legal Advisor (ALA) during the clause-by-clause examination of the Bill at the meeting on 6 January 2004.

#### **Definition of "unauthorized decoders" (Para. 4 of Minutes)**

2. Members raised that service providers might offer bundled telecommunications and pay television services to consumers where television subscription might or might not be required to be paid. In this connection, Members asked if the scope of the proposed definition of "unauthorized decoder" would also cover:

- (a) decoders lawfully obtained for receiving pay TV programme services which were provided to the user as a premium gift or as part of a bundled service the fees for which were integrated and no separate subscription was required to be paid; and
- (b) other types of unauthorized devices or other means of receiving encrypted signals of pay TV programmes for which the subscription fees were waived.

3. The proposed definition of "unauthorized decoder" deals with illicit devices that enable users to view encrypted television services without payment of a subscription where a subscription is required to be paid. Decoders provided by the service providers in the normal course of business are not likely to become "unauthorized decoders". In the above scenario (a), if the subscription fee is subsumed under an integrated service fee, it means that the consumer has paid for the television service,

nonetheless he/she may not know the exact amount for each service in the bundle. In the above scenario (b), if the subscription fee is waived, it means no subscription is required to be paid. Hence the device in question would not fall within the definition of “unauthorized decoder”. We do not intend to target such decoders as they are not devices circumventing encryption technology to avoid payment of a subscription fee.

**Proposed section 6(1)(a) (concerning the offence of manufacture and supply of unauthorized decoders) and 6(1)(b) (concerning the possession or use of unauthorized decoders for commercial purposes)**  
(Para. 6 of Minutes)

*Interpretation of the term “business”*

4. Members were concerned whether the term “business” should receive a liberal or a restrictive interpretation. As pointed out in paragraph 3 of “Administration’s Response to the Comments of the Legal Adviser to LegCo Bills Committee Dated 10 October 2003” (LC Paper No. CB(1)181/03-04(05)), the term “business” in “trade or business” should be interpreted to refer to the narrow sense of commercial transactions rather than the general sense of all activities. Our policy intent is that non-business and domestic offenders should only be subject to civil liabilities at this stage.

*Implications of the expressions “in the course of trade or business” under proposed section 6(1)(a) and “for the purpose of, or in connection with, trade or business” under proposed section 6(1)(b)*

5. As explained in the “Administration’s Response to the Comments of the Legal Adviser to LegCo Bills Committee Dated 16 August 2003” (LC Paper No. CB(1)2525/02-03(04)), the expression “in the course of trade or business” in the proposed section 6(1)(a) refers to the act of importing, exporting, manufacturing, selling, offering for sale or letting for hire an unauthorized decoder as a transactional business activity. Generally, it refers to the commercial activities of import, export, manufacture, sale, offer for sale or let for hire unauthorized decoders.

6. As regards the proposed section 6(1)(b), we have previously indicated that we will add “any” before “trade or business” to cover *any* trade or business<sup>1</sup>. Thus, “for the purpose of, or in connection with, *any* trade or business” will cover any act of possession or use of unauthorized decoders for the “purpose” of or “in connection with a trade or business”<sup>2</sup>. Furthermore, for “in connection with *any* trade or business”, there must be some nexus between the act and the carrying on of the trade or business<sup>3</sup> and one must look at the main purpose of the act<sup>4</sup>. This should serve our purpose of catching all commercial users of unauthorized decoders.

*Scope of offence of “possession” or “use” of an unauthorized decoder under proposed section 6(1)(b)*

7. Members were concerned whether the scope of offence of “possession” or “use” of an unauthorized decoder under proposed section 6(1)(b) was wider than the Administration’s policy intent of sanctioning the “use” of an unauthorized decoder to view pay TV programmes. As explained in “Administration’s Response to the Comments of the Legal Advisor to LegCo Bills Committee Dated 10 October 2003” (LC Paper No. CB(1)181/03-04(05) ), we have indeed widened the scope to prohibit the act of “possession” in addition to “use” of unauthorized decoders for commercial purposes. This will more effectively achieve our legislative intent because while it is difficult to catch a person actually using an unauthorized decoder, it could be relatively easier to collect evidence against a person in possession of an unauthorized decoder.

**Communications and Technology Branch  
Commerce, Industry and Technology Bureau  
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<sup>1</sup> It is also our intention to add “without lawful authority or reasonable excuse” to the proposed section 6(1)(b) to avoid catching innocent commercial operators like recycling businesses or scrap metal dealers.

<sup>2</sup> Interpretation of “in connection with any trade or business” –  
Hattrick (A) & Co. v R [1923] AC 213 (New Zealand decision)  
Asian Imaging Ltd. V Commissioners of Custom & Excise [1989] VATTR 54 (London VAT Tribunal)

<sup>3</sup> ITP (London) Ltd. V Winstanley [1947] 1 ALL ER 177 (UK decision)

<sup>4</sup> R v Tam Ming Chu [1991] 1 HKC 505 (Hong Kong High Court)