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Panel on Home Affairs

Updated background brief prepared by the Legislative Council Secretariat for the meeting on 22 December 2015

Enhanced Measures against Shop Front Extensions

Purpose

This paper provides background information and summarizes major concerns expressed by members of the Panel on Home Affairs ("the Panel") in its previous discussions on the Consultation Document on "Enhanced Measures against Shop Front Extensions" ("the Consultation Document") issued in March 2014.

Background

2. Shop front extensions ("SFEs") broadly refer to the occupation of public places by shops, including food premises, in front of or adjacent to their premises for the purpose of conducting or facilitating business activities. Such extensions are very often at the expense of road access, safety and environmental hygiene, and affect the quality of city life. They usually cause nuisance, inconvenience and hazards to pedestrians and traffic.

Existing legal tools and their limitations

3. Currently, the Administration tackles the problem of SFEs through a four-pronged approach, namely -

- (a) law enforcement by individual departments, including the Food and Environmental Hygiene Department ("FEHD"), the Lands Department ("LandsD"), the Hong Kong Police Force ("HKPF") and the Buildings Department ("BD"), using powers under the relevant ordinances¹;

¹ The ordinances include section 4A of the Summary Offences Ordinance (Cap. 228) (for obstruction of public places); section 34C of the Food Business Regulation (Cap. 132X) (for conduct of food business outside licensed food premises); sections 22(1)(a) or 22(2)(a) of the Public Health and Municipal Services Ordinance (Cap. 132) (for obstruction of scavenging operations); section 83B of the Public Health and Municipal Services Ordinance (Cap.132) (for illegal hawking); section 6 of the Land (Miscellaneous Provisions) Ordinance (Cap. 28) (for erection of unauthorized structures on government land at shop front); and section 24 of the Buildings Ordinance (Cap. 123) (for erection of unauthorized building works attached to and supported by buildings).

- (b) joint operations led by District Officers for more complex cases involving several departments;
- (c) collaboration with the District Councils ("DCs"); and
- (d) public education and publicity.

4. According to the Administration, enforcement actions are taken by departments concerned in accordance with relevant ordinances to tackle SFEs under different situations. Many of the legal tools employed, however, have their specific intents and may not be very effective in tackling SFEs in certain circumstances. For example, section 4A of the Summary Offences Ordinance (Cap. 228) is a legal provision frequently invoked by FEHD in combating SFEs. Its deterrent effect is nevertheless limited by the long lead time of prosecution owing to the need for issuing summons as well as the light penalties imposed by the court.

5. According to the Administration, despite efforts made, the problem of SFEs persists. Proliferation of SFEs continues to compromise the safety and access of pedestrians, drivers and other street users.

Proposed enhanced measures against SFEs

6. In order to tackle SFEs more efficiently and effectively, the Administration has explored the possibility of introducing a fixed penalty system against SFEs in order to address the deficiency of the existing summons system and heighten the deterrent effect of penalties. The proposed fixed penalty system against SFEs is outlined in paragraphs 3.1 to 3.4 of the Consultation Document. The Administration has also proposed to enhance community involvement by capitalizing on DCs' knowledge of the district characteristics as well as the needs and aspirations of people in their district. Public education and publicity efforts will also be stepped up.

7. The above proposals are set out in the Consultation Document, which is prepared by HAD, in collaboration with FEHD, LandsD, HKPF and BD. HAD launched a public consultation exercise from 14 March to 14 July 2014 to seek public views on how problems associated with SFEs could be tackled more effectively.

Members' views and concerns on the proposed enhanced measures

8. The Panel discussed the Consultation Document with the Administration on 24 March 2014 and held a special meeting on 7 June 2014 to receive deputations' views on the subject. The outcome of the public consultation was

reported to the Panel on 9 January 2015. Members' major views and concerns expressed at these meetings are summarized below.

Criteria for determining the enforcement priority against SFEs

9. Given the complicated and controversial nature of the issue, some members were of the view that the Administration should not adopt a simple across-the-board approach to tackle the problems associated with SFEs. They considered it appropriate to give due regard to the views of DCs and to capitalize on their knowledge of the district characteristics and the needs and aspirations of people in their districts. In determining whether a tolerance level for SFEs should be set, the Administration should take into account the need of ensuring pedestrian access and safety.

10. The Administration advised that given their local knowledge and close contacts with residents, DCs were well placed to advise the enforcement departments on the enforcement priority. In general, SFEs that posed imminent danger to pedestrians and traffic should be assigned a higher priority. On the other hand, SFEs that constituted a distinct characteristic and contributed to the vibrancy of the district might be assigned lower priorities or even tolerated, subject to the conditions that the SFEs concerned did not cause any imminent danger to pedestrians and traffic, and that the shop operators could exercise self-discipline by adhering to the level of extension agreed with the enforcement departments.

11. Some members expressed concern on whether objective yardsticks could be applied in assessing which SFEs constituted a distinct characteristic and contributed to the vibrancy of the district. They considered that it would not be easy to forge a consensus among various parties on whether discretion should be granted to any particular SFEs. The Administration explained that in drawing up the criteria for determining the priority of enforcement against SFEs, a host of factors, including (a) road access and safety of pedestrians, vehicles and other road users, (b) extent and nature of SFEs, (c) public hygiene and amenity, (d) effectiveness of past enforcement action, (e) instances of complaints, (f) district characteristics of the concerned area and (g) community feedback and aspirations, had to be taken into account.

12. There was a suggestion that the Administration should consider providing a platform where DC members, residents in the districts concerned, representatives of relevant trade associations and representatives of relevant government departments could discuss whether and how to set guidelines on the circumstances in which SFEs could be tolerated. The Administration responded that after discussion with relevant parties (including DCs, the District Management Committees, local resident organizations and representatives of

relevant trade associations) and with the agreement of relevant enforcement departments, there were at present eight locations in five districts where SFEs were tolerated subject to certain conditions set out by the enforcement departments concerned. These communication channels had been effective in forging consensus on the extent of tolerance for SFEs and resolving SFE cases.

13. Some members considered it important for the Administration to make clear to the public which SFEs might be/had been assigned lower enforcement priorities or even tolerated, and the rationale behind the Administration's decision of providing a tolerance level for some SFEs. The Administration would consider uploading relevant information onto the website to facilitate members of the public to understand the situation.

14. Some members considered that the Administration should formulate a clear enforcement policy against SFEs to ensure consistency in enforcement. They suggested that to ensure effectiveness and efficacy in abating SFEs, the Administration should continue to improve the existing multi-disciplinary enforcement regime. This apart, enforcement departments should conduct joint operations against SFEs more frequently.

The proposed fixed penalty system

15. At the special meeting of the Panel on 7 June 2014, some members and deputations from the catering and retail sectors expressed strong objection to the Administration's proposal of introducing a fixed penalty system. In their views, the proposal would bring adverse impact on their business operating environment, affecting, in particular, small-sized retail stores and food premises. Expressing doubt on the effectiveness of the proposed fixed penalty system in addressing the problem of SFEs given the complicated and controversial nature of the issue, there was a view that the proposed system might cater for straight-forward and clear-cut cases of SFEs. Some other members, however, considered that given the deficiency of the existing summons system (see paragraph 4), the proposed fixed penalty system might be a feasible option to solve the SFE problem. Some members considered that the Administration should strike a balance between aligning the enforcement criteria and exercising discretion, taking into account the circumstances of individual cases including whether or not the SFEs concerned were recurrent in nature and had caused obstruction that unduly inconvenienced or endangered road users. At the meeting on 9 January 2015, some members suggested that if the fixed penalty system was to be implemented, enforcement departments should adopt a "caution before enforcement" or "warning before prosecution" approach in handling SFEs. The Administration explained that the proposed fixed penalty system was not meant to be applied in a dogmatic and inflexible manner.

16. Some members pointed out that some frontline staff of FEHD had

expressed worry that they would be tasked to enforce the proposed fixed penalty system. In response to members' concern about the workload arising from the implementation of the fixed penalty system and enhanced public education and publicity, the Administration advised that the enforcement departments would issue enforcement guidelines, deploy additional resources to the enforcement teams and provide necessary training to frontline staff to facilitate their performance of enforcement and prosecution duties, etc. FEHD would carefully consider the views of its staff in working out the implementation and enforcement details of the fixed penalty system.

Proposed level of penalty

17. Some members enquired about the considerations to be taken into account by the Administration in proposing the level of fixed penalty under the new system. There was a view that any proposed fine must be proportionate to the nature and severity of the offence in comparison with other fixed penalties.

18. The Administration advised that at present, the penalties in most cases were insignificant when compared to the high rentals that shop operators would have to pay for use of any additional space. While public views would be sought on the level of fixed penalty in the public consultation exercise, the Administration would make reference to a number of factors outlined in the Consultation Document (e.g. the current level of fixed penalty (\$1,500) under the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570)).

19. Expressing reservations about the proposal to apply a uniform penalty to all businesses irrespective of their size and scale, some members were of the view that the Administration should consider adopting a tiered penalty system. They considered that for the sake of fairness, heavier penalties should be imposed if SFE offences were committed by large establishments and the stacks of goods were placed on fairly crowded walkway/carriageway during busy hours. Some other members, however, objected to the proposed adoption of a tiered penalty system under which the level of penalty be scaled on the basis of business size and the location of SFEs. In their view, apart from exploring the possibility of introducing a fixed penalty system against SFE offences, the Administration should make sustained efforts in public education and publicity.

20. There was also a suggestion that the Administration should consider progressively increasing the penalty level for repeated offenders. The Administration advised that if the proposed fixed penalty system was to be implemented, according to the legal advice obtained by the Administration, penalty notices could be issued to the same shop operator again if the problem was not rectified within a reasonable period of time. Details of the prosecution policy including guidelines would be worked out in consultation with

enforcement departments at a later stage if the proposed fixed penalty system was supported by the community.

Street management problems

21. Pointing out that SFEs were only one of the many problems associated with street management, some members expressed concern about the problem of obstruction of public places/walkways by goods or articles left unattended (e.g. easy mount frames for displaying commercial publicity materials and illegally parked bicycles). There was a suggestion that the Administration should take the opportunity to also address the problems associated with street management in its endeavours to address SFEs.

22. The Administration responded that street management was a common problem to many districts. While it fell within the ambits of various enforcement departments, enforcement actions would be taken in accordance with the relevant Ordinances. The current proposal was mainly about how the Administration could tackle SFEs more effectively.

Direct investigation conducted by the Office of The Ombudsman

23. Members may wish to note that the Office of The Ombudsman had commenced a direct investigation into the regulatory measures and enforcement actions against street obstruction by shops, and published a report in June 2014. The Ombudsman basically supported the adoption of the proposed fixed penalty system and recommended that a more rigorous enforcement strategy be adopted to keep SFEs at bay. An executive summary of the direct investigation is at **Appendix I**.

Latest development

24. The Administration will consult members on the Administration's enhanced measures against SFEs including the legislative proposal for implementation of a fixed penalty system at the next meeting on 22 December 2015.

Relevant papers

25. A list of the relevant papers on the Legislative Council website is in the **Appendix II**.

Office of The Ombudsman

Executive Summary

**Direct Investigation into
Regulatory Measures and Enforcement Actions
against Street Obstruction by Shops**

Background

Display and sale of goods outside shops is common in Hong Kong. This often causes obstruction of streets and brings inconvenience and even danger to pedestrians as they are forced to walk on the carriageway. Moreover, the associated environmental hygiene problems are a cause for concern. Nevertheless, the regulatory measures and enforcement actions of Government departments are generally ineffective. Consequently, the problem of street obstruction by shops persists and is worsening.

2. This direct investigation aims to examine in depth any inadequacies in the Administration’s regulatory measures and enforcement actions against street obstruction by shops and to make recommendations for improvement.

Our Findings

Government Measures for Tackling the Obstruction Problem

3. To tackle the various types of illegal activities relating to street obstruction by shops, the inter-departmental Steering Committee on District Administration (“SCDA”), chaired by the Permanent Secretary for Home Affairs, reached a consensus in 2009 regarding the exercise of enforcement powers under the relevant legislation by the departments concerned:

| Illegal Activity | Relevant Legislation | Enforced by |
|---|---|---|
| Merchandise causing obstruction, inconvenience or danger to any person or vehicle in public place | Section 4A of the Summary Offences Ordinance (“street obstruction provision”) | Mainly the Food and Environmental Hygiene Department (“FEHD”) |

| Illegal Activity | Relevant Legislation | Enforced by |
|---|---|------------------------------|
| On-street illegal hawking | Sections 83B(1) & (3) of the Public Health and Municipal Services Ordinance (“PHMSO”) (“illegal hawking provision”) | FEHD |
| Placement of articles, causing obstruction to scavenging operations | Section 22(1)(a) or 22(2)(a) of PHMSO | FEHD |
| Structure (e.g. platform, ramp or steps) occupying Government land | Section 6(1) of the Land (Miscellaneous Provisions) Ordinance (“L(MP)O”) | Lands Department (“Lands D”) |
| Unauthorised structure projecting from external wall of building | Section 24(1) of the Buildings Ordinance | Buildings Department (“BD”) |

4. For complicated cases that involve the jurisdictions of different departments and for “black spots” of street obstruction, the District Offices (“DOs”) under the Home Affairs Department would coordinate inter-departmental joint operations. As at December 2013, there were 45 “black spots” of street obstruction in the territory.

5. The Administration may exercise discretion to allow some shop operators to extend their business area to designated areas in front of or adjacent to their shops (“tolerated areas”), provided that such areas have the agreement of the District Council (“DC”)/District Management Committee or that a consensus has been reached between FEHD, together with other relevant departments, and the shop operators. There are currently “tolerated areas” in 8 localities.

6. From the information that we have gathered, our case studies and site observations, we have identified the following inadequacies in the regulatory measures and enforcement actions of the departments concerned.

Compartmental Mentality and Lack of Accountability

7. The problem of street obstruction by shops is a street management issue. Currently, FEHD, Lands D and BD are responsible for taking enforcement actions within their own jurisdictions against different types of illegal activities relating to the problem. The departments tend to think that they are collectively accountable for the problem and hence to adopt a compartmental attitude. None of them seem to be

willing to actively take up total responsibility and to make serious efforts to find a complete solution to the problem. Sometimes, they just procrastinate until inter-departmental joint operations are coordinated by DOs.

FEHD's Predominant Use of Warnings Proved Ineffective

8. FEHD usually applies the strategy of “warning before prosecution” in its enforcement actions against shops causing street obstruction. We consider FEHD’s repetitive warnings to have no effect whatsoever on habitual offenders. Upon receiving warnings, the offenders will rectify their irregularities temporarily. But once the FEHD officers are gone, they relapse. By contrast, prosecutions may lead to penalties and, therefore, have a stronger deterrent effect. However, records revealed that prosecution:warning ratio of the FEHD is low- only about 1:6; and in some localities, the ratio is even as low as 1:49.

Illegal Hawking Provision Seldom Invoked and Merchandise Rarely Seized by FEHD

9. For display and sale of merchandise outside shops, FEHD can in fact prosecute the shop operators by invoking the “illegal hawking provision”, which empowers the Department to seize the merchandise. However, FEHD usually applies the “street obstruction provision” instead, which does not empower the Department to seize merchandise. FEHD has explained that seizure of merchandise requires more manpower and other resources, and can easily trigger confrontation between its enforcement officers and the shop operators. While we understand the difficulties involved, FEHD should not shy away from exercising its statutory power. The public would find it unacceptable if such an effective enforcement tool falls into disuse.

10. FEHD has also indicated that according to legal advice, its enforcement officers must obtain substantive evidence, for example, cash transactions taking place outside the shop, before they can invoke the “illegal hawking provision” to initiate prosecutions. We consider that, even so, it should not be difficult for the Department’s officers to collect such evidence since selling and buying of goods outside shops are very common. All it needs to take is close surveillance.

11. By contrast, FEHD normally does not hesitate to prosecute itinerant hawkers for illegal hawking and seize their merchandise. However, when shop operators conduct their business on the Government land adjoining their shops, the

Department usually does not treat that as illegal hawking. FEHD's enforcement strategy is clearly inconsistent and unreasonable. It is particularly unfair to itinerant hawkers.

Long Lead Time for FEHD's Prosecution and Light Penalty

12. In recent years, over 90% of FEHD's prosecutions against shops for street obstruction were instituted by invoking the "street obstruction provision". With this kind of prosecutions, it normally takes several months before a summons can be issued and a court hearing held. Moreover, the average fine imposed by the court for the offences is only around \$500 to \$700, which has little deterrent effect. Compared with the profits that can be gained by extending the business area of the shop, the penalty is negligible.

13. This has prompted Government to consider a fixed penalty system. We believe that such a system can help deal with cases of street obstruction more quickly and effectively. However, the departments concerned must at the same time devise a stringent enforcement strategy to maximise the effectiveness of the fixed penalty system. They must not again come up with all sorts of excuses for lax enforcement.

Lands D's Cumbersome Enforcement Procedures

14. According to L(MP)O, before prosecuting a person who illegally occupies Government land, the District Lands Office ("DLO") concerned of Lands D must give him/her advance notice. At present, Lands D's enforcement procedures provide that if the person removes the articles occupying the Government land before the specified deadline, even though the articles are found occupying the land again afterwards, DLO should issue the person a fresh notice instead of removing the articles right away or instituting prosecution. Many shops take advantage of this limitation in Lands D's enforcement procedures. Upon receipt of DLO's notice, the shops would temporarily remove the articles in question to meet DLO's requirement, only to put them back afterwards. That would not result in DLO's seizure of the articles or prosecution. We consider that such enforcement procedures is against the spirit and intent of the provisions of L(MP)O, which state that the occupier must "cease occupation" of Government land and not just temporarily remove the articles that occupies the land. Lands D's current enforcement procedures are too cumbersome and clearly unable to resolve the problem of continual illegal occupation of Government land by shops.

Difference in Enforcement Priorities of Lands D and BD

15. Lands D and BD are respectively responsible for dealing with shopfront platforms occupying Government land and unauthorised structures on the sides or at the top of shops. The two departments have their own considerations and different enforcement priorities. In particular, if the unauthorised structures on the sides or at the top of shops are within the dimensions tolerated by BD, the Department will refrain from taking enforcement action and, therefore will not promptly conduct a joint operation with Lands D to remove the platform and the unauthorised structures concurrently.

Lax Regulation of “Tolerated Areas”

16. As local situations and public views vary from district to district, it may not be appropriate to apply the same enforcement strategy across the board. DCs, which are familiarised with the knowledge of the districts, are well poised to advise the Administration in drawing up their respective enforcement strategies that would strike a balance between the interests of different stakeholders, taking into account such factors as traffic flow and safety and the business of shops. We agree in principle that the setting up of “tolerated areas” with the respective DC’s support is a reasonable concessionary arrangement.

17. However, shops often break the rules by extending their business area well beyond the “tolerated areas”, and yet FEHD adopts a very lax enforcement approach, with a prosecution:warning ratio as low as 1:49. Surely, it is FEHD’s duty to take strict enforcement action against all those who blatantly disregard the rules and to ensure that the extent of street obstruction is contained within the “tolerated areas”.

18. Some people are of the opinion that setting up “tolerated areas” is conniving at the wrongs and the shop operators might take for granted that they can occupy public space outside their shops. Furthermore, allowing those shops to occupy such Government land at no cost amounts to preferential treatment and is unfair to shops elsewhere that are subject to prosecution for street obstruction; this may even make it difficult for frontline staff to take enforcement action against the latter. We deem it advisable for the Administration to take reference from overseas experience and consider enhancing the “tolerated area” mechanism such that besides having to obtain the DC’s support, shops would need to pay Government a reasonable

fee for enjoying the use of “tolerated areas”, with the rights and obligations of the shop operators clearly laid down.

Recommendations

19. In the light of the above findings, The Ombudsman makes the following recommendations to the departments concerned:

SCDA

- (1) to appoint one of the departments with enforcement powers as the lead department to tackle the problem of street obstruction by shops, and to instruct the other departments to assist and cooperate with it;
- (2) as a longer-term measure, to consider setting up a “one-stop” joint office for tackling the problem of street obstruction by shops;
- (3) when introducing the fixed penalty system, to require the departments concerned to devise a stringent enforcement strategy to maximise the effectiveness of the new system;
- (4) to consider enhancing the “tolerated areas” mechanism such that besides having to obtain the DC’s support, shops would need to pay Government a reasonable fee for enjoying the use of “tolerated areas”;

FEHD

- (5) to adjust its enforcement strategy for stronger deterrent effect, taking rigorous enforcement actions against habitual offenders, who should be prosecuted immediately for non-compliance, rather than being warned again and again;
- (6) to step up efforts to collect evidence for more prosecutions and seizure of merchandise under the “illegal hawking provision” for stronger deterrent effect;

- (7) to take strict enforcement action against those shops which extend their business area beyond the “tolerated areas” and to ensure that the extent of street obstruction is contained within the “tolerated areas”;

Lands D

- (8) to expedite Government’s study and legislative amendments for stepping up enforcement actions and strengthening the deterrent effect of the law against continual illegal occupation of Government land by movable articles, with a view to plugging the existing loophole in the enforcement procedures; and

Lands D and BD

- (9) to adjust their respective enforcement priorities for joint efforts to increase their efficiency in coping with cases of street obstruction; to consult the Development Bureau where necessary.

**Office of The Ombudsman
June 2014**

Appendix II

Relevant papers on Shop Front Extensions

| Committee | Date of meeting | Paper |
|-----------------------|------------------------|---|
| Panel on Home Affairs | 24.3.2014 (Item V) | Agenda Minutes |
| | 7.6.2014 (Item I) | Agenda Minutes |
| | 9.1.2015 (Item V) | Agenda Minutes |

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