

**For discussion
On 13 May 2014**

**Legislative Council
Panel on Food Safety and Environmental Hygiene**

**Regulatory Measures and Enforcement Actions against
Illegal Extension of Business Area by Food Premises**

Purpose

This paper briefs Members on the regulatory measures and enforcement actions implemented by the Food and Environmental Hygiene Department (FEHD) against illegal extension of business area by restaurants and other food premises, with a special focus on the new enhanced measures adopted or being considered in response to the Ombudsman's recommendations in his report of direct investigation published last year.

Background

2. Some patrons to restaurants would prefer outdoor dining, and some restaurants would seek to extend their business areas on to public places, sometimes illegally, to provide outside dining areas to meet such preference and accommodate more clients at the same time. Such illegal activities often lead to obstruction of public access, noise and environmental hygiene problems, thereby causing nuisance to residents nearby and other users of the public places. The problem is especially serious in certain built up areas.

3. As the licensing authority of food premises, FEHD has been tackling illegal extension of business area by food premises through the licensing system and enforcement under the Public Health and Municipal Services Ordinance (PHMSO), Cap. 132, the Food Business Regulation¹

¹ Breaches against section 34C of the Food Business Regulation, which prohibits licensees to carry on food business beyond the confines of the premises, are subject to a maximum fine of \$10,000 and imprisonment for three months.

(FBR), Cap. 132X, and the Summary Offences Ordinance² (SOO), Cap. 228. In addition to prosecution, FEHD may also impose administrative sanctions on licensees of the food premises under the Demerit Points System³ (DPS) for convicted offences under PHMSO and FBR, and under the Warning Letter System⁴ for breaches of licensing requirements or conditions.

Recommendations of the Ombudsman's Direct Investigation Report

4. The Ombudsman had earlier carried out direct investigation on the regulatory measures and enforcement actions against unauthorised extension of business area by restaurants. The report was published in May 2013. According to the investigation report, while FEHD had demonstrated that continuous enforcement actions have been taken, the Ombudsman considered FEHD's regulatory measures and enforcement system not effective.

5. The Ombudsman made a number of recommendations to enhance the regulatory and enforcement actions against unauthorised extension of business areas by restaurants. The major recommendations are summarised as follows –

- (a) to explore and consider setting up a taskforce and using diverse strategies to deal with unauthorised food operations in public places;
- (b) based on the situation of each district, to set objectives and formulate strategies for tackling illegal extension of business area by restaurants and to exercise more stringent control and conduct targeted raids on recalcitrant offenders, including making arrests and seizure of articles and applying for closure orders against

² For food premises causing obstruction to the public by placing articles in public place, FEHD officers may take prosecution pursuant to section 4A of the Summary Offences Ordinance. The maximum penalty is a fine of \$5,000 and imprisonment for three months.

³ Under the Demerit Points System, a pre-determined number of demerit points ranging from five to 15 (depending on the nature and severity of the offence) will be registered against a licensee upon conviction of an offence in relation to food safety and environmental hygiene under the Public Health and Municipal Services Ordinance and its subsidiary legislation. A licence will be suspended for seven days if 15 points are accumulated within a period of 12 months (first suspension) and 14 days if another 15 points are accumulated within 12 months from the date of the last offence that led to the first suspension (second suspension). If another 15 points are accumulated within 12 months from the date of the last offence that led to the second suspension, the licence will be cancelled.

⁴ Under the Warning Letter System, breaches of licensing requirements or conditions will result in issuing of verbal/written warnings to the licensee. Accumulation of three written warnings within a period of six months and detection of subsequent breaches will lead to cancellation of a licence.

unlicensed restaurants from the Court;

- (c) to seek the views and support from the District Councils (DCs) for gaining public recognition and reducing resistance from the offenders and suggest DCs designating suitable areas for alfresco dining; and to facilitate applications from restaurant operators for setting up outside seating accommodation at those spots;
- (d) to consider amending the relevant legislation to simplify the mechanism for appeal against suspension or cancellation of licences from three-tier to two-tier and to refrain from withholding the suspension or cancellation of licences pending appeals by restaurant licensees except under very special circumstances;
- (e) to lengthen the “observation period” before the issuance of provisional licence and consider extending the applicability of the non-standard licensing requirements of prohibiting encroachment on Government land to all premises under application for restaurant licences; and
- (f) to refuse to process, for a specific period of time, application made by an applicant (including his/her representative) whose restaurant licence has previously been cancelled due to repeated offences, for any restaurant or related licence in relation to the same premises.

Enhanced Regulatory and Enforcement Measures Adopted by FEHD

6. In view of the proliferation of unauthorised extension of business area by some food premises in various districts, FEHD has in recent years rolled out measures to enhance the effectiveness of enforcement and strengthen deterrence. Taking into account the recommendations in the Ombudsman’s direct investigation report, FEHD has introduced new and enhanced regulatory and enforcement measures with a view to better tackling the problem. The new and enhanced measures are set out below.

(a) Enhanced enforcement and prosecution process

7. FEHD is conducting more frequent inspections and stepping up prosecution against illegal extension of business area by licensed food premises. Convicted food premises may also be sanctioned through the DPS. The prosecution process has been expedited. The court is provided with conviction records and additional information, such as the number of complaints received, concerns expressed by DCs, the areas occupied by illegal extension of food business and photos showing the irregularities, etc., so that the court may consider imposing a heavier sentence.

(b) Special task force

8. Since May 2013, FEHD has set up, on a pilot basis, a task force to pursue enhanced enforcement actions in selected districts (first in Tsuen Wan then extended to Kwai Chung) to strengthen the capacity of the districts to deal with the problem. The task force monitors closely the food premises in locations with a history of illegal extension of business area throughout the peak business hours during weekdays and holidays and takes stringent enforcement actions, including arrest and prosecution of offenders and seizure of the articles used. Since the deployment of the task force to Tsuen Wan and Kwai Tsing districts and up to end of March 2014, 72 and 71 prosecutions were taken respectively under FBR and SOO at these locations. In addition, FEHD had suspended ten food business licences for a period varying from seven to 14 days. FEHD had also cancelled eight food business licences under the current sanction systems.

9. The hard work of the task force is bearing fruit. The situation in Tsuen Wan and Kwai Chung has improved considerably. FEHD plans to set up additional task force teams later this year to tackle similar problems in other districts.

(c) Suspension and cancellation of licences

10. The execution of licence suspension and cancellation has been expedited. For recalcitrant offenders, FEHD will consider not to suspend the operation of the decision of licence suspension or cancellation pending determination of the appeals lodged to the Licensing Appeals Board (LIAB) or the Municipal Services Appeals Board (MSAB). For food premises which licences have been subject to suspension and cancellation by FEHD, a list of such food premises has been uploaded on FEHD's website for public information.

(d) Additional licensing requirements

11. In processing applications for a provisional licence for food premises with records of repeated prosecutions, FEHD will impose an additional licensing requirement demanding the applicants not to occupy areas beyond the confines of their premises. No provisional licence will be granted if such a requirement is not met. FEHD will immediately cancel a provisional licence without warning and will not process further the connected full licence application if the premises are found to have breached the aforesaid licensing requirement.

(e) Refusal of application

12. In respect of an applicant whose food business licence has previously been cancelled due to repeated illegal extension of business area, his application, or an application made by his representative, for the same type of licence in relation to the same premises will not be processed within 12 months from the date of cancellation of the licence.

(f) Applying for closure order

13. If business continues on the premises after cancellation of licence due to repeated offences and conviction, FEHD will take prosecution actions and consider applying for a court order under section 128B of the PHMSO to close the premises. In the course of applying for a closure order (CO), FEHD will stop processing the licence application until the court has handed down its decision. After a CO is granted by the court, FEHD will close the premises in question and publicise, through the media and FEHD's website, details of the unlicensed food premises thus closed.

14. With the above enhanced and new measures against illegal extension of business area, there have been more prosecutions and the number of food premises sanctioned for illegal extension of business area under the DPS and the WLS has increased. At the same time, the number of complaints against illegal extension of business area by restaurants has decreased. We believe that the enhanced regulatory measures of FEHD are effective in tackling the problem. The enforcement and complaint statistics for the past three years are set out at **Annexes I and II** respectively.

Consultation with District Councils

15. The Ombudsman also recommends that FEHD should consider proposing to DCs the designation of suitable locations for alfresco dining and deliberating with Home Affairs Department (HAD) on how to balance stakeholders' interests in the public consultation on applications for setting up outside seating accommodation (OSA).

16. In 13 districts where the problem of illegal extension of business area by food premises exists, FEHD has consulted the DCs concerned on the enhanced enforcement measures and proposals to designate spots for alfresco dining in suitable areas. Whilst all these DCs support FEHD's enhanced enforcement measures, most of them indicate that there are no suitable spots for alfresco dining in their districts.

17. In response to the views expressed by the trade in December 2012 on applications for OSA permission of restaurants, the Economic Analysis and Business and Facilitation Unit (EABFU) of the Financial Secretary's Office has set up a Working Group⁵ to review the process of applying for OSA permission. With a view to balancing stakeholders' interests when consulting the public on applications for setting up OSA for restaurants, FEHD is now working with the Working Group to strengthen the mechanism for considering objections to OSA application from the public.

18. As the licensing authority for food businesses, FEHD has been coordinating and approving applications for OSA for restaurants meeting the relevant requirements relating to land use, building safety, fire safety, planning and transport. Between 2002 and December 2013, FEHD had approved 313 applications for OSA.

Simplification of Appeal Mechanism

19. In the Ombudsman's direct investigation report, it is mentioned that licensees can defer the effective date of licence suspension or cancellation by taking advantage of the lengthy appeal process and the discretion of FEHD to suspend the implementation of the decision pending results of the appeals. The restaurant could then carry on its business notwithstanding continuing offences, and this would undermine the effectiveness of the system of licence suspension or cancellation.

⁵ The Working Group includes representatives from FEHD, Fire Services Department, Buildings Department, Lands Department, Planning Department, Housing Department, Transport Department, HAD and EABFU.

20. The Ombudsman noted that there was no successful appeal case against suspension and cancellation of food business licences relating to illegal extension of business area under the DPS in 2012 out of a total of 70 and 27 appeal cases to LIAB and MSAB respectively. The Ombudsman considers that the current three-tier appeal mechanism (including two statutory tiers as detailed in paragraph 22 below) is too cumbersome and that a two-tier appeal mechanism should suffice. The Ombudsman recommends that FEHD should consider amending the relevant legislation to simplify the current appeal mechanism.

Existing provisions with regard to appeal mechanism

21. Under section 125(1)(b) of the PHMSO, the Director of Food and Environmental Hygiene (DFEH) has the discretion to suspend or cancel a licence for the purpose of carrying out the objects of the Ordinance if the licensee has contravened the provisions of the legislation, or any requirement or condition to which the licence was subject.

Right of appeal

22. At present, a licensee dissatisfied with FEHD's decision to suspend or cancel its licence may –

- (a) make a representation to FEHD, as an administrative procedure, in seven days, or in four days for a serious breach;
- (b) appeal to LIAB against FEHD's decision within 14 days under section 125(9) of the PHMSO; and
- (c) in case LIAB upholds or varies FEHD's decision, appeal to the MSAB within 14 days under section 125B(4) of the PHMSO.

23. Under section 125(10) of the PHMSO, if an appeal is made, the licensing authority (i.e. DFEH) may in its discretion, suspend the operation of the decision of licence suspension or cancellation, pending the determination of the appeal.

Consideration

24. To follow up the Ombudsman's recommendation, we are exploring a proposal under which the scope for simplification of the appeal system will be confined to food business licences issued by FEHD under the FBR⁶, covering suspension or cancellation of licence under DPS as a result of convictions under the regulation. For these cases, the suspension or cancellation of licence will be proceeded with only after the licensees are convicted by the court in the first place, and the right of the licensees should be well protected under a simplified appeal mechanism by removing one layer of statutory appeal.

25. Specifically, we consider it more practical to remove MSAB and retain LIAB as the vast majority of the original decisions of FEHD and decisions of LIAB were upheld by MSAB⁷. We believe the proposed way forward would streamline the process without unduly undermining licensees' right of appeal.

Way Forward

26. To combat the problem of illegal extension of business area by food premises, FEHD will continue to keep the enforcement strategy under close review. Subject to Members' views and comments, we would develop further the proposal to simplify the appeal mechanism against FEHD's decision to suspend or cancel food business licences from the current two statutory tiers to one tier as proposed above. Our initial assessment is that it would involve legislative amendments to the relevant provisions in the PHMSO and the MSAB Ordinance. We will consult this Panel again when the relevant legislative amendment proposal is available.

⁶ Food business licences issued by FEHD under the FBR include those for food factory, restaurant, bakery, factory canteen, siu mei and lo mei shop, fresh provision shop, cold store, and composite food shop.

⁷ Among all suspension or cancellation cases that appealed to LIAB or MSAB between January 2011 and June 2013, it is noted that -

- (a) the majority of the 234 appeal cases to LIAB and MSAB are related to illegal outside seating accommodation (OSA), accounting for 73.5% of all appeal cases;
- (b) among all 137 appeal cases heard by LIAB, only one appeal was allowed and it was not related to OSA (it was a food hygiene case related to a food factory). LIAB upheld DFEH's decision in 84 cases (61.3%) and varied DFEH's decision in the remaining 52 cases (38%); and
- (c) among the 36 OSA cases heard by MSAB, it upheld LIAB's decisions in 34 cases (94.4%) and varied LIAB's decisions in 2 cases (5.6%) only. Both involved reduction in sanction but LIAB's decision was not reversed. In other words, the vast majority of the original departmental decisions and decisions of LIAB stood at the end.

Advice Sought

27. Members are invited to note the contents of this paper and provide their views and comments.

**Food and Health Bureau
Food and Environmental Hygiene Department
May 2014**

Prosecutions against illegal extension of business area by restaurants

Year	2011	2012	2013
Food Business Regulation, Cap. 132X Section 34C	871	1 123	859
Food Business Regulation, Cap. 132X Section 31(1)(b)	392	1 018	1 535
Summary Offences Ordinance, Cap. 228 Section 4A	1 736	1 115	1 163

**Complaint figures against illegal extension of
business area by licensed restaurants**

Year	2011	2012	2013
Number of complaints	6 223	4 955	4 648