

# 立法會 *Legislative Council*

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## **Panel on Food Safety and Environmental Hygiene**

### **Background brief prepared by the Legislative Council Secretariat for the meeting on 14 July 2015**

#### **Enforcement against illegal outside seating accommodation by restaurants**

#### **Purpose**

This paper provides background information on issues relating to enforcement against illegal outside seating accommodation ("OSA") by restaurants and summarizes the main views and concerns of members of the Panel on Food Safety and Environmental Hygiene ("the Panel") on the subject.

#### **Background**

2. According to the Administration, the Food and Environmental Hygiene Department ("FEHD") has been tackling illegal OSA by food premises through the licensing system and enforcement under the Public Health and Municipal Services Ordinance (Cap. 132) ("PHMSO"), Food Business Regulation<sup>1</sup> (Cap. 132X) ("FBR"), and Summary Offences Ordinance<sup>2</sup> (Cap. 228) ("SOO"). In addition to prosecution, FEHD may impose administrative sanctions on licensees of the food premises under the Demerit Points System<sup>3</sup> ("DPS") (for

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<sup>1</sup> Breaches against section 34C of FBR, 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.

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

<sup>3</sup> Under DPS, 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 PHMSO 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.

convicted offences under PHMSO and FBR) and the Warning Letter System<sup>4</sup> ("WLS") (for breaches of licensing requirements or conditions).

3. In May 2013, the Office of The Ombudsman ("The Ombudsman") released a direct investigation report entitled "Regulatory Measures and Enforcement Actions against Illegal Extension of Business Area by Restaurants" ("the Ombudsman Report"). In the Ombudsman Report, FEHD was criticized for failing to effectively curb or contain illegal extension of business area by restaurants and the Lands Department for its failure to make adequate efforts to take enforcement actions against illegal occupation of Government land by restaurants. In The Ombudsman's view, FEHD had not set objectives and formulated strategies for enforcement actions and as a result, its enforcement actions had been superficial and produced little results to curb the problem.

4. At the Panel meeting on 13 May 2014, the Administration briefed members on the regulatory measures and enforcement actions implemented by FEHD against illegal extension of business area by restaurants and other food premises. Members were advised that FEHD had introduced new and enhanced regulatory and enforcement measures in response to the recommendations made by the Ombudsman Report. These measures included, among other things, enhancing the enforcement and prosecution process, setting up a special task force in selected districts (first in Tsuen Wan and then extended to Kwai Chung), and expediting the execution of licence suspension and cancellation. To speed up the execution of licence suspension and cancellation, the Administration was considering introducing a legislative proposal to simplify the appeal mechanism against FEHD's decision to suspend or cancel food business licences from the current three tiers<sup>5</sup> (which included FEHD, the Licensing Appeals Board ("LIAB") and the Municipal Services Appeals Board ("MSAB")) to two tiers by removing MSAB. The Administration advised that FEHD would consult the trade on the Administration's proposal and the Administration would consult the Panel when the relevant legislative amendment proposal was available.

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<sup>4</sup> Under WLS, 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.

<sup>5</sup> 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 PHMSO; and (c) in case LIAB upholds or varies FEHD's decision, appeal to MSAB within 14 days under section 125B(4) of PHMSO.

## **Members' concerns**

5. Members' main views and concerns on the enforcement against illegal OSA by restaurants expressed at the Panel meeting on 13 May 2014 are summarized in the ensuing paragraphs.

### Enforcement against illegal OSA by restaurants

6. While members generally supported FEHD's enhanced enforcement against illegal extension of business area by restaurants, members were concerned whether FEHD had properly handled the public's complaints against nuisances caused by these restaurants during non-office hours. Noting that in the Administration's view, the problem of illegal extension of business area by food premises in Tsuen Wan had improved significantly following the introduction of a special task force to pursue enhanced enforcement actions, members urged the Administration to set up special task forces in other districts that were having similar problems.

7. The Administration advised that FEHD had regularly conducted surprise inspections on food premises during non-office hours (including night time, weekends and public holidays) in various districts based on information provided by complainants as well as intelligence collected through FEHD's inspections. Additional resources had been earmarked for setting up additional teams under the special task force to tackle similar problems in other districts. Priority would be given to districts where the problem was more serious, such as Yuen Long.

### Proposed simplification of the appeal mechanism

8. Members were concerned that some licensees might take advantage of the lengthy appeal process under the current three-tier appeal mechanism to defer the effective date of licence suspension or cancellation. While some members expressed support for the Administration's consideration of simplifying the procedures for licence suspension and/or cancellation, there was another view that any amendments to the appeal mechanism should only be made after sufficient consultation with the trade.

9. According to the Administration, the Ombudsman Report considered the current three-tier appeal mechanism too cumbersome. FEHD had been considering the merits of simplifying the current three-tier appeal mechanism. Its initial assessment was that it would be more practical to remove MSAB and retain LIAB since the vast majority of FEHD's original decisions on licence suspension or cancellation cases and decisions of LIAB on these cases were upheld by MSAB. The Administration also considered that this proposed

simplification would streamline the process without unduly undermining licensees' right of appeal. FEHD would proceed to consult the trade shortly and would revert to the Panel when the drafting of the legislative proposal was ready.

#### Facilitation of outside seating accommodation

10. Members expressed grave concern that the extension of business area by restaurants had been an unresolved issue for many years, and urged the Administration to strike a proper balance between strengthening control of illegal extension of business area by restaurants and facilitating applications from restaurant operators for setting up OSA. Some members were of the view that the Administration should find more suitable spots for OSA of restaurants, and a more flexible approach should be adopted in taking enforcement actions so that restaurants could carry on with their business as long as the problems of noise nuisances and street obstruction were not serious.

11. The Administration advised that following the release of the Ombudsman Report, FEHD had consulted District Councils ("DCs") concerned regarding proposals to designate spots for OSA in suitable areas in 13 districts where the problem of illegal extension of business area by food premises existed. However, most of these DCs indicated that there were no suitable spots for OSA in their districts.

#### **Latest development**

12. The Administration will update the Panel on the latest development of enforcement against illegal OSA by restaurants at the meeting on 14 July 2015.

#### **Relevant papers**

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

## Appendix

### Relevant papers on Enforcement against illegal outside seating accommodation by restaurants

Committee	Date of meeting	Paper
Panel on Food Safety and Environmental Hygiene	13.5.2014 (Item VII)	<a href="#">Agenda</a> <a href="#">Minutes</a>

Council Business Division 2  
Legislative Council Secretariat  
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