

## **Executive Summary**

### **Direct Investigation Regulatory Measures and Enforcement Actions against Illegal Extension of Business Area by Restaurants**

#### **Background**

Alfresco dining (for example, in piazzas, on pedestrian passageways or underneath footbridges) has always been popular among some people. Restaurant operation outside the boundary of licensed premises does not constitute a serious offence, but in densely populated districts where space is limited, such activities often lead to obstruction of streets, cause environmental hygiene and noise problems, and bring nuisance to upstairs and nearby residents. The Food and Environmental Hygiene Department (“FEHD”), the licensing authority of restaurants, has failed to effectively curb or contain the problem, despite its regulatory and enforcement actions. The Lands Department (“Lands D”) has also seldom taken enforcement actions against illegal occupation of Government land by restaurants, although it is responsible for land administration.

2. This direct investigation aims to identify any inadequacies and room for improvement in the current regulatory and enforcement regime.

#### **Our Findings**

##### ***Inefficient Use of Resources and Underapplication of Relevant Laws by FEHD***

3. FEHD’s enforcement actions against restaurants, including prosecutions for illegal extension of business area, are mainly carried out by its Health Inspectors (“HIs”), whose normal working hours are 8:30 am – 6 pm, Monday to Friday. In certain districts, Hawker Control Officers (“HCOs”) also participate in enforcement operations, but they just play a supporting role. HCOs work from 7 am to 11 pm on two shifts, seven days a week.

4. FEHD can put offenders to different charges according to the circumstances. If the licensee is at the scene and there is sufficient evidence to prove that he/she is operating outside the licensed premises, FEHD will invoke section 34C of the Food Business Regulation (Cap. 132X) to prosecute the licensee for “operating a restaurant otherwise than at the place delineated in the plan”. If there is no evidence to prove that the licensee operates business outside the licensed premises, but articles are placed in public areas by the restaurant causing obstruction, FEHD will prosecute the licensee for “street obstruction” pursuant to section 4A of the Summary Offences Ordinance (Cap. 228). If someone is selling cooked food on Government land or a common passageway and is not related to any restaurant nearby, FEHD will consider that

person's setup an unlicensed restaurant and prosecute that person for operating a restaurant without licence under section 31(1)(b) of the Food Business Regulation.

5. FEHD does not deny that its HCOs can also invoke section 83B(1) of the Public Health and Municipal Services Ordinance ("PHMSO") (Cap. 132) to prosecute the person for illegal hawking in the street. However, due to the division of work as mentioned above, FEHD has rarely asked its HCOs to take enforcement action under this legislation.

6. In our view, under the aforesaid arrangement, FEHD has not fully utilised the law enforcement power of its frontline staff, and has not made good use of its resources and all the relevant laws. Indeed, restaurants selling cooked food on Government land are no different from unlicensed itinerant hawkers selling snacks on pavements. Both are in essence illegal hawking activities in the street. HCOs have not only the statutory power to take enforcement action against them, but also the duty to stop them. Moreover, the shift duty hours of HCOs are much longer than the normal working hours of HIs. HCOs could effectively supplement HI's efforts in tackling the problem at night when illegal extension of business area by restaurants is especially rampant.

### ***FEHD's Lack of Determination and Objectives***

7. FEHD has been taking enforcement actions against restaurants with illegal extension of business area, through daily inspections, complaint investigations and raids. Our case analysis reveals that FEHD does take enforcement actions which might be as frequent as two to three times a month. Nevertheless, it mainly prosecutes offenders for "street obstruction", which is relatively a minor offence.

8. Apparently, FEHD is concerned only about its frequency of inspections and number of prosecutions. It has not set objectives and formulated strategies for enforcement actions. It does not deal with recalcitrant offenders with greater determination and increase its frequency of operations and change its mode of operation for more effective enforcement actions. As a result, its enforcement actions have been superficial and produced little results to curb the problem.

9. Furthermore, FEHD usually only prosecutes restaurants with illegal extension of business area, without arresting the culprits on the spot and seizing the articles involved. We understand that arrest and seizure require considerable manpower and other resources, and such actions might lead to confrontation between the law enforcers and the restaurant staff and customers. However, such actions have a stronger deterrent effect and should be taken especially against recalcitrant offenders.

10. Many restaurants start business even before having obtained a licence from FEHD; others continue to operate even after their licences have been suspended or cancelled under FEHD's Demerit Points System. For those unlicensed restaurants

with illegal extension of business area, FEHD conducts inspections once a week. Restaurants charged and convicted are normally fined by the Court. Nevertheless, our case study shows that the restaurant operators seemed not worried and continued to occupy public places for unlicensed operation. Although FEHD could have applied for a closure order from the Court against the unlicensed restaurants under section 128B of the PHMSO, this “trump card” has never been invoked to tackle those cases, which significantly weakens FEHD’s power of enforcement.

11. Lastly, according to FEHD’s records, the fines imposed by the Court for “operating a restaurant otherwise than at the place delineated in the plan” have usually been between \$2,000 and \$3,000, and those for “street obstruction” around \$1,000. The profits brought about by occupying public places for business are more than enough to offset the fines payable. Such punishment is clearly insufficient to deter illegal extension of business area by restaurants.

### ***Cumbersome Three-tier Appeal Mechanism under the Demerit Points System***

12. A restaurant licensee contravening the food or hygiene stipulations under the PHMSO or its by-laws is liable to prosecution and will be fined upon conviction. FEHD will also register demerit points against the licensee under its Demerit Points System. Accumulation to a certain number of demerit points may result in suspension or cancellation of the restaurant licence.

13. When suspending the licence of such a persistent offender, FEHD will publicise by way of a press release details of the restaurant, which will also be available on the GovHK portal and the FEHD website for public information.

14. Any restaurant licensee dissatisfied with a decision of licence suspension or cancellation may appeal to FEHD, and thereafter may further appeal to the statutory Licensing Appeals Board and eventually the Municipal Services Appeals Board. Taking advantage of the lengthy appeal process and FEHD’s discretion to suspend the implementation of the decision, the licensee can defer the effective date of licence suspension or cancellation. Meanwhile, the restaurant can carry on its business despite the continuing offence, thus undermining the effectiveness of the system of licence suspension or cancellation.

15. In a case in 2012, it took a total of 336 days to go through all the stages, from FEHD’s issuance of the notice of licence cancellation to the Municipal Services Appeals Board’s decision to dismiss the licensee’s appeal. Furthermore, in the same year, there was no successful appeal case at all. This shows that the current three-tier appeal mechanism is too cumbersome. A two-tier appeal mechanism should suffice.

### ***Narrow Coverage of “Non-standard Requirements” in Provisional Licence***

16. FEHD may issue a provisional licence to food premises which have satisfied all essential health, fire safety, ventilation and building safety requirements.

The licence applicant may then operate the restaurant for a limited period pending the issue of a full licence.

17. Since 2012, FEHD has adopted the following special measure for food premises located in black spots where illegal extension of business area is rampant and for those with multiple previous convictions for illegal extension of business area. On receiving their licence applications, FEHD will impose “non-standard requirements” in the provisional licences, prohibiting the applicants from encroaching on Government land or common passageways outside their premises. To ascertain whether an applicant has complied with the requirements, FEHD will check relevant records for the two weeks prior to the applicant’s declaration of compliance. It will only issue a provisional licence after confirming that the restaurant concerned has not been prosecuted for any “street obstruction” offence during the 14-day “observation period”.

18. We support the above special measure in principle but consider the coverage too narrow. After all, no provisional licence applicant or licensee should ever occupy Government land outside his/her premises. There is no reason why not all of them are subject to the special measure. Besides, while an “observation period” of 14 days can to some extent deter restaurants from illegal extension of business area, it is not long enough to have a strong effect.

### ***Lenient Licensing System***

19. Under the current licensing system, a person whose restaurant licence has previously been suspended or cancelled can still apply for a new licence afterwards without any restrictions, irrespective of whether that involves the same premises or the same restaurant name, provided that he/she has not voluntarily surrendered his/her former licence to evade the penalty of licence suspension or cancellation. We consider FEHD’s system too lenient. It does not duly consider whether the applicant is a “fit and proper person” to become a licensee.

### ***Lands D’s Inadequate Efforts to Curb Illegal Occupation of Government Land by Restaurants***

20. According to the division of departmental responsibilities agreed by the Steering Committee on District Administration (“SCDA”)<sup>Note</sup>, Lands D should tackle illegal occupation of Government land by articles of a “more permanent nature” (such as a fixed platform), while, FEHD will deal with movable articles of a transient nature. Since street obstructions by restaurants usually does not involve articles of a “more permanent nature”, Lands D seldom takes enforcement action in such cases.

---

<sup>Note</sup> SCDA is an inter-departmental high level committee set up by the Administration for the purpose of resolving district management issues.

21. Lands D has indicated that in cases where enforcement action is necessary, it will first post a notice under section 6(1) of the Land (Miscellaneous Provisions) Ordinance (Cap. 28), ordering the occupation of Government land to cease before the date specified in the notice. If the occupant complies at first but subsequently places the same or similar articles on the spot again, Lands D will have to post another notice, requiring the removal of the articles by a newly specified deadline. Lands D argues that it cannot just invoke the first notice to remove the articles and institute prosecution immediately. We have doubts about Lands D's interpretation of the law.

22. We note that the notice issued under the above Ordinance clearly requires the occupant to "cease occupation" of the land, not just to "temporarily remove" the articles placed on the land. Accordingly, a notice posted should remain valid until the occupation substantively ceases. There is no reason why Lands D cannot rely on the notice to clear or confiscate any articles placed on the land and institute prosecution.

23. We also consider that Lands D, as the administrator of Government land, has an undeniable responsibility to control the occupation of Government land by restaurants for profit-making operation. Indeed, where a restaurant applies for setting up an alfresco dining area in a public place, FEHD's approval for the application is subject to Lands D's grant of a land tenancy. It is, therefore, inconceivable that Lands D does not actively take enforcement actions against illegal occupation of Government land by restaurants. The Department's current enforcement policy is incongruous with its land administration responsibility.

### ***Need to Promote Legitimate Alfresco Dining***

24. Restaurant licensees may apply to FEHD for setting up an alfresco dining area outside their premises. Such applications will only be approved after all relevant Government departments have given their consents and any public objections settled. The number of such applications has been small. In 2012, there were only 104 applications and only 17 were successful. Applications were refused mainly because objections from the local community had not been properly resolved.

25. We consider that the Administration should encourage more alfresco dining areas to be set up in a legitimate and regularised manner. This will not only bring more convenience to restaurant operators and customers, but also reduce the pressure on FEHD in taking enforcement actions. FEHD will then be able to concentrate its resources on tackling those cases causing serious environmental nuisance.

### **Recommendations**

26. The Ombudsman makes the following recommendations to FEHD and Lands D:

## ***FEHD***

- (1) to actively explore the best use of existing resources and relevant legislation, consider setting up a taskforce comprising HIs and HCOs, deploying more manpower and using diverse strategies to deal with unauthorised food operations in public places; before these could be implemented, to allow HCOs more participation in dealing with the problem so as to increase the Department's enforcement strength;
- (2) based on the situation of each district, to set objectives and formulate strategies for tackling illegal extension of business area by restaurants;
- (3) to conduct targeted raids on recalcitrant offenders, taking more frequent enforcement actions against them, making arrests and seizure of articles;
- (4) to exercise more stringent control on those unlicensed restaurants which persistently extend their business area outside their premises, conducting more frequent inspections and bringing more prosecutions, applying for closure orders from the Court, as well as publicising information about those restaurants through the media and uploading such information on FEHD's website for easy public access;
- (5) to continue to submit charge records of offenders to the Court in the hope that it would impose heavier penalties on them;
- (6) to consult the District Councils, which represent the local communities, on its enforcement plans, seek their views and support for the purpose of gaining public recognition and reducing resistance from those who are benefiting from illegal operations;
- (7) to consider amending the relevant legislation to simplify the mechanism for appeal against suspension or cancellation of licences from three-tier to two-tier;
- (8) except under very special circumstances, to refrain from withholding the suspension or cancellation of licences pending appeals by restaurant licensees; to draw up relevant assessment criteria and procedures;
- (9) to consider extending the applicability of the non-standard licensing requirements of prohibiting encroachment on Government land or common passageways to all premises under application for restaurant licences;

- (10) to lengthen the “observation period” before the issuance of provisional licence;
- (11) in respect of an applicant whose restaurant licence has previously been cancelled due to repeated offences, to refuse to process, for a specified period of time, his/her application, or an application made by his/her representative, for any restaurant or related licence in relation to the same premises;
- (12) to consider, in the long term, how to restrict applications from recalcitrant offenders for restaurant or related licences in relation to any premises;
- (13) to suggest to District Councils the designation of spots for alfresco dining in suitable areas, and to facilitate applications from restaurant operators for setting up outside seating accommodation at those spots;
- (14) to deliberate with Home Affairs Department on how to balance stakeholders’ interests with regard to public consultation on applications for setting up outside seating accommodation;

***Lands D***

- (15) to study with the Department of Justice how to more effectively exercise statutory powers to deal with illegal occupation of Government land by restaurants, in fulfilment of its responsibility as land administrator;
- (16) subject to the outcome of their study, to actively support FEHD in rigorous actions against recalcitrant offenders; and
- (17) subject to the outcome of their study, to review with SCDA the arrangement whereby Lands D only deals with illegal occupation of Government land involving structures of a “more permanent nature”.

**Office of The Ombudsman  
May 2013**