

## **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:

<b>Illegal Activity</b>	<b>Relevant Legislation</b>	<b>Enforced by</b>
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")

<b>Illegal Activity</b>	<b>Relevant Legislation</b>	<b>Enforced by</b>
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**  
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