

# **Executive Summary**

## **Direct Investigation Report**

### **Food and Environmental Hygiene Department's Regulation of Market Stalls**

#### **Foreword**

The Food and Environmental Hygiene Department (“FEHD”) manages its markets (“public markets”) in two modes, namely, Direct Management and Outsourced Management. In those public markets under Direct Management (“Directly-managed Markets”), the market stalls are managed directly by FEHD staff. In those public markets under Outsourced Management (“Outsourced Markets”), the day-to-day market management (including management of market stalls) is carried out by contractors appointed and supervised by FEHD. Of the 99 public markets in the territory as at June 2018, 36 are Directly-managed Markets and 63 are Outsourced Markets.

2. In recent years, this Office has received from time to time public complaints about serious irregularities at public market stalls. Many of those irregularities are perennial or recurrent. In this light, we have conducted this direct investigation to probe into FEHD’s regulation of public market stalls, with a view to making recommendations for improvement.

#### **Enforcement Mechanism against Stalls with Irregularities**

3. Stall tenants in public markets must abide by the Public Health and Municipal Services Ordinance, the Public Markets Regulation (“the Regulation”) and their tenancy agreements. Frontline staff of Directly-managed Markets and Outsourced Markets conduct daily inspections at the stalls to monitor tenants’ compliance with those rules and regulations.

#### ***Enforcement Action against Stalls in Breach of Legislation***

4. If a stall is found in breach of legislation by frontline staff during daily

inspections, and the breach is not serious, a verbal warning will normally be given to the tenant on the spot. Senior FEHD staff of the district will then direct frontline staff to take follow-up inspection to check whether the breach has been rectified, or take law enforcement action against the tenant right away. FEHD's own market management staff at all levels have the statutory authority to institute prosecution against tenants who have contravened the law. Contractors' staff do not have such authority.

5. Moreover, FEHD has in place a mechanism under which a tenancy agreement of a stall can be terminated should the tenant breach the legislation ("Tenancy Termination Mechanism"). FEHD would consider terminating the tenancy of a stall if the tenant has been convicted of market offences for four times within a period of 12 months.

***Enforcement Action against Stalls in Breach of Tenancy Agreement***

6. FEHD regulates tenants in breach of tenancy agreements by way of a "Warning Letters System". If a stall is found in breach of tenancy agreement, frontline staff will first issue a verbal warning, giving the tenant concerned four days for rectification. Non-compliance with the verbal warning would lead to FEHD's issuance of a warning letter demanding rectification. In case the tenant still fails to comply, a second warning letter will follow. FEHD would consider terminating the tenancy of a stall if the tenant, having already received three warning letters within a period of six months, breaches the tenancy agreement for the fourth time.

7. Verbal warnings or warning letters issued under the "Warning Letters System" are valid for six months from the date of issue. During that period, if the tenant breaches the tenancy agreement again, FEHD can continue the enforcement action commenced earlier, without a need to reactivate the "Warning Letters System".

**Our Findings**

8. Complaint cases have revealed four common types of irregularities at public market stalls: occupation of public passageways, unauthorised change of use of stalls, inadequate business hours, and subletting of stalls. Our investigation has identified a number of inadequacies in FEHD's enforcement actions against those irregularities.

## ***Irregularity (1): Occupation of Public Passageways***

### **(1) Repeated Issuance of Ineffective Verbal Warnings**

9. Both the Regulation and the tenancy agreements contain provisions/clauses stipulating that tenants shall not occupy public passageways. A case shows that FEHD staff had been issuing two verbal warnings to a tenant almost every day for several months. Notwithstanding that, the tenant still occupied the public passageway and the breach persisted.

### **(2) Few Enforcement Actions Taken against Tenants Who Place Commodities Beyond Pre-set Boundaries**

10. In most public markets, stall boundaries are marked by yellow lines or display counters in front of or on the side of the stall. Any tenant who places commodities beyond the yellow lines or display counter violates the rule. Case studies have, however, revealed that owing to FEHD's lenient enforcement, tenants have developed a misconception that there is nothing wrong with such violation of the rule. This has made it all the more difficult for FEHD to take enforcement action.

### **(3) "Tenancy Termination Mechanism" Fails to Produce Deterrent Effect**

11. During the 42-month period between January 2015 and June 2018, there were only eight cases of stall tenancies being terminated through the "Tenancy Termination Mechanism". Cases show that even prolonged obstruction of public passageway would not result in termination of stall tenancy because FEHD would seldom prosecute a tenant four times in 12 months. Unless FEHD takes stricter enforcement action against irregularities of tenants, the "Tenancy Termination Mechanism" would simply not be functional.

## ***Irregularity (2): Unauthorised Change of Use of Stalls***

### **(1) Frontline Staff Turning a Blind Eye to Obvious Irregularities**

12. It is stipulated in the tenancy agreements that tenants, without prior permission, shall not use their stalls for purposes other than the prescribed use. Besides, the Regulation provides that tenants, without prior permission, shall not carry out alterations to their stalls or any fixtures or fittings of their stalls ("Alterations

Provision”).

13. A case reveals that some tenants had altered their stalls designated for selling food into office, cold storage or workshop. We find it inconceivable that the frontline staff should fail to notice such obvious irregularities during their daily inspections.

(2) Reactivation of “Warning Letters System” Necessary as a Result of Inadequate Monitoring

14. A case shows that inadequate monitoring and follow-up by FEHD staff on unauthorised change of use of a stall had resulted in the need to reactivate the “Warning Letters System”, as the irregularity was not reported again until more than six months after a warning letter had been served. That has undermined the effectiveness of enforcement under the System and its deterrent effect.

(3) Casual Acceptance of Rectification of Irregularities

15. A case shows that when FEHD conducted follow-up inspections after issuing verbal warnings or warning letters to the tenants for unauthorised change of use of their stalls, the Department easily accepted the irregularities as having been rectified, whereas in fact the tenants used only a small part of their stalls for displaying prescribed commodities and/or trading counter. We find such practice of FEHD too sloppy and perfunctory.

(4) Failing to Take Enforcement Action against Non-compliance with Alterations Provision

16. Unauthorised change of use of a stall may also involve contravention of the Alterations Provision. For example, a cold storage would need electrical connections and ceiling boards may be required for converting a stall into an office. However, a case shows that FEHD had only taken enforcement action against some stalls for unauthorised change of use but made no effort to follow up on their contravention of the Alterations Provision. In effect, FEHD was conniving at the unauthorised alterations of the stalls.

### ***Irregularity (3): Inadequate Business Hours***

#### **(1) No Enforcement Action Taken against Stalls That Do Not Meet Minimum Number of Days of Operation**

17. It is stipulated in the tenancy agreements that tenants shall not close the stall or suspend operation for seven days or more in any calendar month unless written permission from the Government is obtained (“Operation Clause”).

18. A case reveals that prior to our investigation, FEHD had not taken any enforcement action against quite a number of stalls that had violated the Operation Clause. The situation was extremely unsatisfactory.

#### **(2) Failing to Formulate Guidelines on Enforcement against Fake Operation of Stalls**

19. Some market stalls appear to be faking operation. For example, a small quantity of commodities are displayed outside the stall without any person selling them. Since FEHD has not drawn up any specific guidelines on what constitutes a stall being in operation, frontline staff during their day-to-day inspections may find it difficult to decide whether enforcement action is warranted.

#### **(3) Failing to Deal with Problem of Inadequate Business Hours Arising from the “Single Tenant, Multiple Stalls” Scenario**

20. Currently, FEHD sets no limit on the number of stalls that can be rented by a single tenant. Some tenants who have violated the Operation Clause claim that they are unable to operate concurrently the multiple stalls they rented, and made that an excuse for not operating some of the stalls or operating them for short durations only. We consider it necessary for FEHD to seriously review this lack of restriction on the number of stalls that a tenant can rent.

#### **(4) Need to Continue Exploring Feasibility of Stipulating Minimum Daily Business Hours in Tenancy Agreement**

21. The current tenancy agreements do not stipulate the number of daily business hours for stalls. FEHD had once proposed to add a clause to the tenancy agreements requiring every stall to be open for business for not less than six hours per day, but that

aroused strong objections from tenants. Hence, FEHD considers it necessary to carefully study the feasibility of introducing such a clause. However, it is a fact that some stalls are open for business only briefly every day. FEHD may consider setting different standards on the minimum daily business hours for different types of stalls, taking into account their business nature and needs. It should also work harder to canvass tenants' support.

(5) Necessary to Eradicate Problem of Idling Stalls

22. FEHD takes the view that the phenomenon of idling stalls is associated with the issue of long-standing low rentals. The Department indicates that it would comprehensively review the mechanism of rental setting and adjustment. We consider that FEHD should also look into the correlation between stalls in breach of the Operation Clause and the markets where they are situated, their location and the types of commodities sold, so as to collect data for long-term planning in the future.

*Irregularity (4): Subletting of Stalls*

(1) Failing to Detect Non-display of Business Registration Certificates at Stalls during Routine Inspections

23. FEHD primarily relies on the registered name on the business registration ("BR") certificate to judge whether a stall has been sublet. It is stipulated in the tenancy agreements that a tenant shall display the BR certificate registered in his/her own name at a conspicuous position in the stall. However, in one case, FEHD, over five years of routine inspections, had failed to detect breach of the above tenancy clause by a stall in not displaying its BR certificate.

(2) Systemic Loophole Allowing Sublessees to Operate Stalls in Guise of Registered Assistants

24. It is stipulated in the tenancy agreements that tenants shall not assign, transfer or sublet their stalls. Tenants who engage employees or agents to carry on business at their stalls must have them registered with the Government ("registered assistants"). FEHD has not set any restrictions on the number or identity of registered assistants. This has created a systemic loophole: tenants may sublet their stalls, and the sublessees then operate the stalls in the guise of registered assistants, thereby circumventing any regulatory action under the tenancy agreements.

(3) Lack of Requirement for Display of BR Certificates in Some Versions of Tenancy Agreements

25. There are currently four versions of tenancy agreements for market stalls. Two of them do not include any requirement on the tenants to display BR certificates at their stalls. Therefore, market frontline staff in their daily inspections have difficulty in instantly identifying whether the stall operators are actually the tenants who hold the relevant BR certificates. This affects the efficiency of their inspections.

***Conclusion***

26. To conclude, we have identified the following inadequacies in FEHD's regulation of public market stalls:

- (1) Inspections are too lax to effectively ensure tenants' compliance with the rules and regulations.
- (2) Proactive follow-up actions are inadequate, thereby allowing irregularities to persist.
- (3) Enforcement actions are too lenient to produce any deterrent effect.
- (4) Incomplete enforcement actions fail to tackle all related irregularities.
- (5) Inadequate supervision of contractors leads to ineffective regulation of tenants.

**Recommendations**

27. The Ombudsman urges FEHD:

***Overall Recommendations***

- (1) to review the existing items for daily inspection and redetermine a suitable inspection frequency for each item, and step up its monitoring of frontline staff;

- (2) to strictly instruct market management staff at all levels to actively tackle and diligently follow up on all irregularities found at market stalls;
- (3) to fully review the *modus operandi* of its staff and those of the contractors, and require all staff to rigorously inspect and pursue cases of tenants persistently and/or seriously in breach of the rules and regulations, and to strictly adhere to the established enforcement guidelines;
- (4) to strengthen supervision of and remind market management staff at all levels to carry out thorough enforcement actions against different irregularities detected at the same stall;

### ***Specific Recommendations for Tackling Different Irregularities***

#### **Inadequate Business Hours**

- (5) to continue studying the feasibility of stipulating minimum daily business hours of stalls in tenancy agreements;
- (6) to study why some stalls have been idling for prolonged periods and formulate a strategy to tackle the problem;

#### **Subletting of Stalls**

- (7) to review the registered assistants system and consider setting suitable conditions and restrictions on the identity of registered assistants; and
- (8) by way of revising the tenancy agreements, to require all tenants to display their BR certificates at their stalls.

**Office of The Ombudsman  
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