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Office of The Ombudsman*



*Direct Investigation Report
Food and Environmental Hygiene Department's
Rental Management of Market Stalls*

In the past three and a half years, the Office of The Ombudsman handled a total of 65 complaints about the Food and Environmental Hygiene Department (“FEHD”)’s management of public markets. Our direct investigation has found inadequacies in FEHD’s rental management of market stalls, which have resulted in the following unsatisfactory situations:



- (1) stall rentals lagging significantly behind the market levels;
- (2) great disparity in rentals (can be up to 90 times) between stalls in close proximity and of similar size, and despite the disparity, goods are sold at broadly similar prices;
- (3) perpetual tenancy renewal and succession arrangement affecting people’s right to bid for the operation of market stalls;
- (4) no limit set on the number of stalls that a tenant can rent, giving rise to abuses and reducing consumer choice; and
- (5) over a thousand stalls being withheld from letting out for years (up to 23 years) – a serious wastage of public resources.

The Ombudsman makes a total of six recommendations to FEHD for improvement. She urges the Department to review its rental management of public markets comprehensively.

The executive summary of the direct investigation report is at **Annex 1**.

***Direct Investigation Report
Food and Environmental Hygiene Department's
Regulation of Market Stalls***

The Office of The Ombudsman has received time and again public complaints about serious irregularities at stalls in public markets managed by the Food and Environmental Hygiene Department (“FEHD”). Many of those irregularities are perennial or recurrent.

There are four types of irregularities commonly found at public market stalls, namely: occupation of public passageways, unauthorised change of use of stalls, inadequate business hours, and subletting of stalls.

This direct investigation has identified the following inadequacies in FEHD’s regulation of markets stalls and handling of the above irregularities:

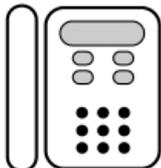


- (1) Inspections are too lax;
- (2) Proactive follow-up actions are inadequate;
- (3) Enforcement actions are too lenient;
- (4) Incomplete enforcement actions fail to tackle all related irregularities;
- (5) Inadequate supervision of contractors.

The Ombudsman makes eight recommendations to FEHD for improvement with a view to strengthening the Department’s regulation of public market stalls.

The executive summary of the direct investigation report is at **Annex 2**.

Enquiries



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Executive Summary Direct Investigation Report

Food and Environmental Hygiene Department's Rental Management of Market Stalls

Foreword

Markets are closely related to our everyday life. At present, there are 99 markets (hereinafter referred to as “public markets”) managed by the Food and Environmental Hygiene Department (“FEHD”), representing about 45% of all publicly and privately operated markets in Hong Kong.

2. The overall occupancy rate of stalls in public markets stands at 90%. However, in recent years there have been media reports and public complaints from time to time of serious problems of idling stalls in public markets. Many stalls are either not operating or used for storage only, without selling foods or commodities to the public. In this light, we have conducted this direct investigation to examine FEHD’s rental management of market stalls, with a view to making recommendations for improvement.

Our Findings

3. All stalls in public markets are owned by the Government and let out by designated means to interested parties for operation. Stall tenants sign tenancy agreements with FEHD usually for a term of three years.

4. Public markets in the urban areas and the New Territories used to be managed by the Urban Council and Regional Council respectively, adopting different versions of tenancy agreements (hereinafter referred to as the “UCTA” and “RCTA”). Upon dissolution of the two Councils in 2000, FEHD took over the management of public markets and has introduced another two versions of tenancy agreements (hereinafter referred to as the “FEHD Old TA” and “FEHD New TA”). Tenants are allowed to renew the tenancy of their stalls using the pre-existing version of tenancy agreement. As a result, all four versions of tenancy agreements still exist.

5. Regarding FEHD's rental management of market stalls, we have identified the following five inadequacies.

I. Low Level of and Great Disparity among Stall Rentals Result in Unlevel Playing Field for Tenants

6. For historical reasons, the rentals of market stalls are generally at a low level, and there is a great disparity in rentals among stalls. The rentals for 76% of the stalls are lower than the reference open market rental ("OMR") as assessed by the Rating and Valuation Department. This contributes to years of deficits amounting to hundreds of millions of dollars incurred by public markets. Moreover, in 24 public markets, there exist concurrently monthly rentals below \$200 and over \$9,000. Some pertain to stalls in close proximity to each other, with similar sizes and selling the same category of commodities – a situation of unlevel playing field for tenants.

7. We find that the rental mechanism and rental freeze measures of FEHD are the major factors leading to the low level of and great disparity among market stall rentals.

Rental Mechanism

8. At present, most occupied stalls have been let through restricted auction or open auction. Restricted auction is a concessionary measure offered by the Government, usually restricted to hawkers or tenants required to be relocated under Government policy or special circumstances. The upset prices for restricted auction are normally at 75% of the OMR level while those for open auction, open to general public, are normally at the OMR level. For stalls which have been left vacant for six months and eight months or longer, the upset prices for open auction are at 80% and 60% of the OMR level respectively. Where upset prices of stalls are below the OMR level, the successful bidders are likely to be able to secure tenancies at rentals lower than the OMR level.

9. Information shows that nearly half (47%) of the stalls were auctioned at upset prices below the OMR level. For such stalls, FEHD does not have any mechanism to gradually realign their rentals with the OMR level, and in effect has been allowing those stalls to enjoy the lower rentals for prolonged periods.

Rental Freeze Measure

10. In 1998, the Government reduced the rentals of public market stalls by 30% across-the-board. All rentals were frozen at that level for 19 years until 30 June 2017, with the freeze measure extended for several times in the interim. The prolonged rental freeze means that the rentals of those stalls let out years ago are lagging far behind the OMR level. There is also a great disparity in rentals between such stalls and those let out in recent years.

11. During the rental freeze period, the rentals of all market stalls remained unchanged, including the concessionary rentals offered to those itinerant hawkers who had surrendered their licences to the Government and hence been re-sited to public markets (“re-sited hawkers”). Such concessionary rentals were meant for the first three years of tenancy only. However, many “re-sited hawkers” have been paying concessionary rentals of little more than \$100 per month for over ten years. Examples show that of two stalls in the same market, of the same size, being close to each other, selling the same category of commodities and with their levels of OMR being more or less the same, the stall let out through open auction is paying a rental as much as 70 to 90 times of that of the stall enjoying concessionary rental.

Latest Practice

12. Since 1 July 2017, FEHD has put in place a transitional arrangement for rental adjustment. Stall rentals will be adjusted upon renewal of tenancy agreement or on the due date for rental adjustment as specified in the tenancy agreement. The adjustment is based on the average of the year-on-year rates of change in Consumer Price Index (A) (“CPI Change Rate”) over the past 12 months (i.e. the 12-month period preceding the six months before the renewal of tenancy agreement or before the due date for rental adjustment). Nevertheless, the adjustment range for “CPI Change Rate” has in fact been insignificant (between -0.6% and +2.5% from January to December 2017) and is hardly conducive to improving the current situation where stall rentals fall significantly behind the OMR. Besides, by adopting the “CPI Change Rate” as a single point of reference in rental adjustment without taking into account factors such as the disparity between actual rentals and the OMR, it would be difficult to eliminate the problem of great discrepancy in stall rentals.

13. We consider that FEHD should devise an effective and step-by-step rental adjustment mechanism in a comprehensive manner, with a view to resolving the

problems relating to market stall rentals so as to foster a healthier business environment enabling fair competition.

II. Automatic Tenancy Renewal Reduces Chances for Others to Rent Stalls

14. Under the current tenancy renewal system, FEHD will generally allow a tenant to renew his/her tenancy if he/she so wishes upon expiry of an existing tenancy. That means the stall concerned would not be put out for open auction.

15. Such system of automatic tenancy renewal, diminishing the chance for others to secure market stalls by open auction, may also undermine the motivation of stall tenants to improve their performance because of the lack of competition. This would in turn affect the competitiveness of public markets. We consider that FEHD should review this system of perpetual renewal of tenancy.

III. Succession Still Allowed for Most Stalls, Thus Affecting Other People's Right to Bid for the Operation of Those Stalls

16. Following the policies established by the Urban Council and Regional Council in early years, if a tenant who signed a UCTA, RCTA or FEHD Old TA passes away during the tenancy period, his/her designated successor or next of kin can apply to FEHD for succession of tenancy of the market stall concerned.

17. There are a total of 7,874 market stalls subject to the UCTA, RCTA or FEHD Old TA, representing 61% of the occupied stalls. With FEHD allowing succession for so many stalls, the right for public to bid for the operation of those stalls is affected.

18. We consider that FEHD should set up a database on the records of approved succession applications, so as to assess how much the tenancy succession system actually affects people's right to bid for the operation of market stalls. FEHD should also review its processing of tenancy succession applications and consider the need to make suitable adjustments to keep up with the times.

IV. No Limit on the Number of Stalls to be Rented by a Single Person Gives Rise to Abuses and Reduces Consumers' Points of Purchase

19. As at 1 July 2017, there were a total of 9,206 tenants renting 12,899 stalls in public markets. About 8% of the tenants were renting three or more stalls, totalling 3,159 stalls, which represent 24% of all occupied stalls.

20. FEHD sets no limit on the number of stalls that can be rented by a single person. This allows a tenant to rent multiple stalls in close proximity, and/or sell the same category of commodities, within the same market. In one case, a tenant rented as many as 23 stalls but used them only for storage. There was another case where two tenants occupied 45% of the wet goods stalls of a market all for floral business. The absence of a limit to the number of stalls that a tenant can rent may give rise to abuses of stalls and reduce customer choice.

21. FEHD could consider setting a reasonable limit to the number of stalls that a tenant can rent in a market, taking into account the actual situation of individual public markets (for example, allowing a tenant to rent only up to a certain percentage of stalls in the same market for selling the same category of commodities).

V. "Frozen Stalls" Left Idle for Years, Resulting in Serious Wastage of Public Resources

22. There are a total of 1,193 stalls (8% of all the stalls in public markets) withheld by FEHD (hereinafter referred to as "frozen stalls") for such reasons as relocation of existing tenants who are affected by large-scale works being carried out in markets, or the Government's review of the future development and use of markets. Among the "frozen stalls", 60% were in five public markets, and they had been withheld from letting out for 4 to 23 years.

23. Cases show that FEHD could not successfully carry out improvement works in certain markets because the tenants had refused to relocate to other stalls. However, it is in fact stated in the RCTA, FEHD Old TA and FEHD New TA that when the Government carries out maintenance, repairs or improvement works in public markets, tenants should at the Government's request close their stalls or relocate to other stalls. In the light of public interest, FEHD should not set aside or delay works just because of some tenants' personal interests. If a tenant unreasonably refuses to relocate to another stall, FEHD is obliged to take enforcement action in accordance with the

tenancy condition.

24. We consider that in order to stop such further wastage of public resources, FEHD should include the same clause in all versions of tenancy agreements (including the UCTA) so as to spell out the Government's power and responsibility for carrying out works in public markets, and set out the requirements and rules for tenants.

Recommendations

25. In the light of the above, The Ombudsman urges FEHD:

- (1) to review the practice of setting upset prices below the OMR level at auctions;
- (2) to devise a comprehensive and effective rental adjustment mechanism;
- (3) to review the current tenancy renewal system to allow more opportunities for the public to bid for stall tenancies, at the same time giving priority to existing tenants with satisfactory performance;
- (4) to set up a database to keep records of tenancy succession applications and review the processing of such applications;
- (5) to set a reasonable limit to the number of stalls that a tenant can rent in a market, taking into account the actual situation of individual markets; and
- (6) to include the same clause in all versions of tenancy agreements to spell out the Government's power and responsibility for carrying out works in public markets, and set out the requirements and rules for tenants.

Office of The Ombudsman
August 2018

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
August 2018**