

1 February 2019

Notice issued under section 10 of the Competition Ordinance of an application for a decision in relation to a proposed pharmaceutical sales survey

On 31 January 2019, the Competition Commission (“**Commission**”) received an application for a decision under section 9 of the Competition Ordinance (Cap. 619) (“**Ordinance**”) from the Hong Kong Association of the Pharmaceutical Industry (“**Applicant**”). Section 9 of the Ordinance allows undertakings to apply for a decision from the Commission as to whether a particular agreement is exempt or excluded from the application of the first conduct rule in section 6 of the Ordinance.¹

The Applicant proposes to collect and distribute certain data on the sales of prescription and over-the-counter pharmaceutical products in Hong Kong and Macau (“**Proposed Survey**”). The Applicant considers that the Proposed Survey will enhance overall economic efficiency within the meaning of section 1 of Schedule 1 to the Ordinance (“**Economic Efficiency Exclusion**”). The Applicant seeks a decision from the Commission confirming that the operation of the Proposed Survey is excluded from the first conduct rule as a result of the Economic Efficiency Exclusion (“**Application**”).

A non-confidential version of the Application is published on the Commission’s website along with this notice.

Making representations about the Application

By the present notice, the Commission is calling for representations about the Application and will consider any representations that are made to it.

¹ Further details of the applications regime may be found in the Commission’s *Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders*.

The **Annex** to this notice sets out issues and questions on which the Commission specifically invites representations. However, respondents are free to address other matters which they believe to be relevant to the Commission's assessment of the Application.

Any party wishing to respond to this notice should do so in writing no later than 6pm on **Friday, 29 March 2019**. Please email representations to Applications@compcomm.hk, with the case reference number AD/02NH quoted in the subject line of the email.

Representations may also be sent by fax or by post as follows:

By Fax: +852 2522 4997

By Post: Representations on Case AD/02NH
Competition Commission
Room 3601, 36/F Wu Chung House

Confidentiality

Representations received will be posted on the website of the Commission. If a representation contains confidential information, parties should provide a confidential version and, for publication purposes, a non-confidential version from which all confidential information has been redacted.

Annex

Background

1. The Application states that to carry out the Proposed Survey, the Applicant will ask its pharmaceutical company members to provide data relating to their sales in Hong Kong on a voluntary basis each quarter (“**Market Sales Survey**”). The data collected from participating companies will comprise sales data by value (i.e., sales in Hong Kong dollars) and by pharmaceutical product within the relevant quarter of the year. It will not contain information on prices, sales volumes, stock keeping units or patient numbers.²
2. The data will then be processed by the Applicant to produce a report available for purchase (“**Sales Survey Report**”). A sample of the proposed Sales Survey Report is provided in Annex 6 of the Application.
3. For these purposes, the data will be provided in the form of quarterly sales to four different sectors (Government, Private, Trade and Macau³) at the following levels:
 - a. total sales by individual company name;
 - b. total sales by individual company name for the category “prescription” only;
 - c. total sales by therapeutic class (at the ATC3 code level⁴), sub-divided by the categories “prescription” and “over-the-counter”;
 - d. sales by individual company name for particular therapeutic classes (at the ATC3 code level); and
 - e. sales by individual company name for particular product names.⁵

² See paragraphs 4 and 25 of the Application.

³ See paragraph 25(c)(i) of the Application.

⁴ The ‘ATC-3 code level’ refers to the World Health Organisation’s Anatomical Therapeutic Chemical (ATC) Classification system.

⁵ See paragraph 25 and Annex 6 of the Application.

4. The Market Sales Survey and Sales Survey Report (together the Proposed Survey) are similar to the Applicant's previous practice of carrying out surveys which was suspended in 2015⁶ ("**Past Surveys**").
5. According to the Applicants the Sales Survey Report will be accessible by:
 - a. pharmaceutical companies (that may or may not be members of the Applicant);
 - b. government or public bodies within or outside Hong Kong; and
 - c. academic institutions or medical professionals within or outside Hong Kong.⁷
6. The Applicants summarise the claimed benefits of the Proposed Survey as follows:
 - a. better, more efficient allocation of stock for existing products by pharmaceutical companies;
 - b. easier introduction of new products into the market by pharmaceutical companies;
 - c. enhanced marketing and distribution efforts of pharmaceutical companies;
 - d. greater investments in other patient welfare enhancing activities; and
 - e. development of public policy, academia and research and development generally.⁸

Questions on the Claimed Benefits of the Proposed Survey

Intention to subscribe to the Sales Survey Report

7. The Commission invites representations from persons (whether in the categories listed in paragraph 5 above or not) as to:

⁶ See paragraph 37 of the Application.

⁷ See paragraph 21 of the Application.

⁸ See paragraph 44 of the Application and the paragraphs which follow. See also Annex 13 of the Application which is said to provide examples of the first three of these benefits.

- a. whether, prior to its suspension in 2015, they subscribed to receive Past Survey data from the Applicants, including how many times/editions they subscribed to; and
 - b. whether they plan to subscribe to the Sales Survey Report should it be published.
8. For those who previously subscribed to the Past Surveys and/or plan to subscribe to the Sales Survey Report, the Commission invites representations on:
- a. how they used and/or intend to use the data provided in those surveys, with reference to the specific level/category of survey data⁹ relied upon;
 - b. whether the data provided did or will inform their pricing decisions and, if so, how;
 - c. what, if any, benefits they identify in subscribing to those surveys, specifying the benefits of the various levels/categories of survey data and the frequency of the data (i.e., that it is available on a quarterly basis);
 - d. their views on the specific examples of benefits given by the Applicants,¹⁰ including whether the Sales Survey Report is likely to achieve these benefits and the degree to which they may (or may not) apply in their individual case; and
 - e. whether, if they subscribed to the Past Surveys, they experienced any particular difficulties following its suspension in 2015.

In each case, the Commission would particularly welcome specific illustrations or any other evidence on which such views are based.

9. For those who fall within the categories listed in paragraph 5 (above) but nonetheless do not plan to subscribe to the Sales Survey Report, the Commission invites representations on:
- a. the reasons why they do not intend to subscribe to the Sales Survey Report; and

⁹ As set out in paragraph 3 above.

¹⁰ See paragraph 6 above, and paragraphs 44 to 62 and Annex 13 of the Application.

- b. their views on the example of benefits given by the Applicants.

Potential alternative sources of market data

10. The Applicant's highlights that IMS Chinametrik Ltd ("IMS") provides market data on the pharmaceutical industry in Hong Kong. The Commission invites views both from those who subscribe to receive such IMS data, or considered subscribing to receive such IMS data but decided not to do so. In particular the Commission invites representations on:

- a. the reasons for the decision whether or not to subscribe to the IMS data;
- b. whether, if the Applicant's Sales Survey Report becomes available, they will continue to subscribe only to receive the IMS data, switch, or subscribe to both, and the reasons for this decision;
- c. what they perceive to be the key differences between the data provided by IMS compared to the data proposed to be provided in the Sales Survey Report (possibly in reference the Applicant's Past Surveys), including by reference to:
 - i. its specificity; and
 - ii. the relative benefits and drawbacks;¹¹ and
- d. any effects arising from the suspension of the Past Surveys observed in relation to IMS, including but not limited to its pricing and product offering.

Questions on the level of detail provided in the Sales Survey Report and its competitive sensitivity

11. Paragraph 3 above describes the level at which data will be provided in the Sales Survey Report. Annex 6 of the Application provides an illustration to this effect. In relation to the benefits claimed by the Applicant set out in paragraph 6 above, the Commission invites representations on:

¹¹ See in particular the points raised by the Applicants in relation to IMS data in paragraph 49 of the Application.

- a. the extent to which these benefits require the data to be provided at the level of an individual participant company and/or product level rather than remaining aggregated at ATC3 level; and
- b. examples or other forms of evidence that illustrate advantages that arise or are strengthened by the Sales Survey Report, including any benefits relating to the sharing of data at the company and product name level which have not been identified as a benefit in paragraph 6 (above).

12. The Applicant at paragraph 26 states *“the competitive sensitivity of the aggregated data will effectively be reduced to a level that would not affect independent decision-making by pharmaceutical companies with regard to their actions in the market.”* The Commission invites representations on:

- a. any competition concerns arising from the Sales Survey Report, in particular in relation to pharmaceutical companies gaining access to the data of other pharmaceutical companies with respect to particular products, ATC3 classes or sectors. This could include any reduction in the vigour of competition between pharmaceutical companies, due to such companies being able to detect any shifts in their competitors’ pricing or any other strategic changes; and
- b. what, if anything, does the Sales Survey Report allow pharmaceutical companies to learn, discern or confirm about their competitors’ total sales at the stock keeping unit or package level, pricing decisions, sales volumes, or patient numbers? The Commission would welcome specific illustrations or any other evidence.