

22 October 2019

For Immediate Release

**Competition Commission publishes Decision  
in relation to a proposed pharmaceutical sales survey**

The Competition Commission (Commission) today published a decision (Decision) under section 11 of the Competition Ordinance (Ordinance), finding that a proposed pharmaceutical sales survey (Proposed Survey) is not excluded from the first conduct rule by the economic efficiency exclusion<sup>1</sup> (efficiency exclusion). The Commission has published a Statement of Reasons, which sets out the reasons for its Decision.

The Commission made the Decision in response to an application (Application) under section 9 of the Ordinance received in January 2019 from the Hong Kong Association of the Pharmaceutical Industry (Applicant). The Applicant is an industry association of companies engaged in the research or development of pharmaceutical products and, according to its website, its members provide over 70% of the prescription medicines in Hong Kong.

The Application concerned the Applicant's proposal to conduct a survey to collect sales data from pharmaceutical companies on their prescription and over-the-counter pharmaceutical products in Hong Kong and Macau. The data would then be compiled into a sales survey report which would be published quarterly and made available for purchase, providing sales figures in different sectors and formulations. The Applicant sought a decision from the Commission confirming that the operation of the Proposed Survey in Hong Kong is excluded from the first conduct rule as a result of the efficiency exclusion.

*Handling of the Application*

On 1 February 2019, the Commission invited interested parties to make representations about the Application. The Commission received eight representations, including one confidential representation, during the consultation and has carefully considered these in assessing the Application. The seven non-confidential representations have been published on the Commission's website.

During the process, the Commission also liaised with the Applicant through issuing requests for information and holding a meeting to discuss views on the merits of the Application. The Applicant subsequently provided a written supplementary submission on the views expressed which the Commission has taken into account.

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<sup>1</sup> Section 1 of Schedule 1 to the Ordinance provides for a general exclusion from the first conduct rule for agreements which enhance overall economic efficiency. By virtue of section 6(2) of the Ordinance, this general exclusion also applies to concerted practices and decisions of an association of undertakings.

### *The Commission's findings*

Under the efficiency exclusion, the Applicant bears the burden of proving that the four cumulative conditions<sup>2</sup> of the exclusion are satisfied. In reaching its Decision, the Commission concluded that it was not demonstrated by the Applicant that the Proposed Survey met the conditions of the efficiency exclusion. This was particularly the case in respect of the first condition, which requires undertakings to provide convincing evidence of their efficiency claims. In relation to the third condition, the Commission found it unlikely that the inclusion of product level sales data in the Proposed Survey would be indispensable to achieve the efficiencies claimed.

The Commission also considered that, to the extent the Proposed Survey would permit product-specific sales data to be directly or indirectly discerned or robustly estimated by competing pharmaceutical product manufacturers, this would likely raise competition concerns under the first conduct rule. The Commission has however noted that the sharing of some other information in the Proposed Survey, such as company total sales data comprised of at least four products of a participant company, would be unlikely to raise competition concerns. While the Commission assessed possible competition concerns in its Statement of Reasons to provide clarity, it did not form a view on whether the Proposed Survey would give rise to a contravention of the first conduct rule, as this was beyond the scope of the decision required.

### *General principles on the exchange of information*

In the normal course of business, undertakings exchange information on a variety of matters with no risk to the competitive process. However, competition concerns may arise under the first conduct rule where competitors exchange competitively sensitive information. Generally, information relating to price or price strategies and quantities concerning sales, market shares, sales to particular customer groups or territories is the most competitively sensitive. On the other hand, the exchange of data which is historical, aggregated and anonymised or publicly available data is less likely to harm competition.

Whether or not the exchange of information gives rise to competition concerns depends on the circumstances of the case including the characteristics of the market, the type of information exchanged and other relevant factors.

The Decision and the Statement of Reasons are available in English and Chinese on the Commission's website at [www.compcomm.hk](http://www.compcomm.hk).

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<sup>2</sup> As stated in section 1 of Schedule 1 to the Ordinance, the efficiency exclusion applies where four conditions are met, i.e., the relevant agreement:

- (a) contributes to –
  - (i) improving production or distribution; or
  - (ii) promoting technical or economic progress [**first condition**], while allowing consumers a fair share of the resulting benefit [**second condition**];
- (b) does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives stated in paragraph (a) [**third condition**]; and
- (c) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question [**fourth condition**].