

CONSUMER COUNCIL

Submission concerning the Application to the Competition Commission for a Decision under Section 9 of the Competition Ordinance in relation to a Pharmaceutical Sales Survey (AD/02NH)

1. The Consumer Council (Council) is pleased to provide its views to the Competition Commission (Commission) concerning the application (Application) from the Hong Kong Association of the Pharmaceutical Industry (HKAPI) to the Commission for a decision under section 9 of the Competition Ordinance (Cap. 619) (Ordinance) with regard to HKAPI's proposed pharmaceutical sales survey (proposed survey).

2. At the outset, the Council would like to indicate that the Council has neither access to nor experience of HKAPI's previous pharmaceutical sales survey data or pharmaceutical sales survey data from other alternative sources such as the IMS data mentioned in the Application. Nevertheless, the Council would like to put forward in this submission the Council's view on competition oversight of the Commission in relation to HKAPI's proposed survey or similar sales surveys in the Hong Kong economy.

Exchange and Disclosure of Competitive Sensitive Information

3. As the report details and samples shown in the Application, the proposed survey would be provided in the form of quarterly sales value to four different sectors (i.e. Government, Private, Trade and Macau), at individual company name level by total, pharmaceutical category, therapeutic class, and even for particular product name.

4. Despite the lack of market intelligence to inform whether the pharmaceutical companies participate in and provide data to the HKAPI's proposed survey on a voluntary basis would have any actual or potential competitive relationships with each other by the above-mentioned segmentation or classification, the exchange and disclosure of sales value information at individual company by name in the proposed survey and the sales survey report, in the opinion of the Council, already warrant competition concerns.

5. On the one hand, to the Council's understanding, unlike what HKAPI interprets in paragraph (34) of the Application, company sales value information should be competitively sensitive information. According to paragraph 6.39 of the Commission's Guideline on the First Conduct Rule (Guideline), "[c]ompetitively sensitive information includes information relating to price, elements of price or price strategies, customers, production costs, quantities, turnover, sales, capacity, product quality, marketing plans, risks, investments, technologies and innovations. Generally, information relating to price and quantities (information concerning sales, market shares, sales to particular customer groups or territories) is the most competitively sensitive."

6. On the other hand, the disclosure of sales value information at individual company by name in the sales survey report facilitates individual companies to identify competitively sensitive information (e.g. individual company's pharmaceutical sales value in total, relative market shares, sales value and shares by sector, class and product) pertaining to any specific company or competitor.

7. At the present moment, the Council does not form any view that the proposed survey has the object or effect of harming competition. However, the level of details provided in the sales survey report and competitive sensitive nature of the information to be exchanged and disclosed; and the fact that the information is exchanged via HKAPI, which according to its description in paragraph (15) of the Application is controlled by its members; make it of concern about the purpose of the proposed survey that may be achieved.

Claimed Benefits of the Proposed Survey for Economic Efficiency Exclusion

8. The Council understands that HKAPI wishes to obtain legal certainty that, should competition concerns arise from the operation of the proposed survey, the "economic efficiency exclusion" of the Ordinance applies. HKAPI claimed in the Application that the proposed survey and the sales survey report have satisfied all the requirements of the economic efficiency exclusion such as improving production and distribution, promoting economic progress, and allowing consumers a fair share of the resulting benefit.

9. In the absence of access to and experience of data from HKAPI, IMS or other alternative sources, the Council is not in a position to comment on the claimed benefits of the proposed survey for economic efficiency exclusion.

10. However, having reviewed the merely descriptive examples of benefits to be brought about by the proposed survey in the Application, it is deemed that there should be more concrete evidence and proof, together with quantifiable analyses and justifications, to substantiate the claimed benefits, particularly for the one on benefiting consumers with a fair share of efficiencies.

11. Moreover, as the proposed survey by HKAPI has been suspended for 3 years since 2015, a comparison of the economic impacts of the proposed survey to the market and the industry "before" and "after" the suspension should be made available for justification and assessment of the Application for economic efficiency exclusion. HKAPI, as the applicant, also needs to provide information as to whether the lack of the proposed survey and related data has adversely affected consumer interests.

Competition Oversight by the Commission

12. HKAPI mentions that there are other market surveys such as the one by IMS and that the data from HKAPI and IMS are generally complementary to each other; each may fill in the information gaps which other may not provide. Notwithstanding the benefits of the proposed survey as claimed, the Council considers that the

Commission should also analyse the implication of the co-existence of the proposed survey and other market surveys such as the one by IMS on market competition of pharmaceutical products. For instance, whether there would be any combined effect adding to the degree of competitive sensitivity. Study of experiences of relevant overseas economies is suggested to look into the defined scope and detailed exemptions for ensuring the resulting research and development benefits from surveys are given to the industry while still balancing the need to safeguard consumer interests.

Implication of the Decision

13. The Council is of the view that pharmaceutical companies, and other industries as well, can have multi-ways to gather market information such as from client feedbacks, third-party market research reports, government statistics and inventory control, which would be useful in giving them insights about the market movement and assisting them to develop their business strategies.

14. The decision under the Application, if made, may set a precedent for other market sales surveys in the Hong Kong economy. Given the competitive sensitive nature of the information to be exchanged and disclosed, if the Commission grants the economic efficiency exclusion to HKAPI's Application, the Commission must ensure for the public interest that HKAPI has met all the cumulative conditions of (i) improving production and distribution, promoting technical or economic progress, and allowing consumers a fair share of the resulting benefits; (ii) not imposing on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives in (i); and (iii) not eliminating competition in respect of a substantial part of the goods or services in question.

15. For the sake of transparency, the Council considers that any quantifiable evidence and beneficial effects for consumers from the proposed survey should be disclosed for public information.

Consumer Council
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