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## Prevention is better than cure: Hong Kong Competition Commission clarifies approach to information exchange

The Hong Kong Competition Commission (“**HKCC**”) recently published its decision relating to a proposed market sales survey by the Hong Kong Association of the Pharmaceutical Industry (“**HKAPI**”). The HKCC concluded that the proposed survey is not excluded from the prohibition against anti-competitive arrangements as it was unlikely to generate sufficient efficiencies to the benefit of consumers.

This is the first decision by the HKCC under section 11 of the Ordinance relating to economic efficiencies. As well as demonstrating the HKCC’s ability to swiftly review proposed conduct, the decision gives much welcomed and deeper insight into a yet untested area of the law.

Linklaters represented the HKAPI in its application to the HKCC.

### **HKCC’s Decision - would the proposed survey generate economic efficiencies?**

The HKAPI is an association representing the pharmaceutical industry in Hong Kong. Prior to the entry in force of the Competition Ordinance in December 2015, the HKAPI organised a sales survey amongst its members, collating and distributing various historic information on product sales. Given the inherent uncertainty of the legality of such a sales survey, the HKAPI sought confirmation from the HKCC before launching a new survey relating to data on prescription and over-the-counter pharmaceutical products in Hong Kong.

In January 2019, the HKAPI applied to the HKCC to clarify whether the proposed arrangements to conduct and publish a detailed data survey would be excluded from the First Conduct Rule (the provision of the Competition Ordinance dealing with anti-competitive arrangements).

The proposed survey arrangements would have seen HKAPI:

- collecting actual sales data by value at the product level from its member companies through a market sales survey. Information on prices, stock keeping units or patient numbers would not have been collected; and
- publishing a sales survey report on a quarterly basis based on the data collected. The report would have been available to any person on a regular subscription or an ad hoc basis, (“**Proposed Survey**”).

## Possible competition concerns raised by HKCC

The Competition Ordinance is essentially a “self-assessment” system. Businesses that consider the economic efficiencies exclusion applies to particular conduct do not need the HKCC to confirm so – the exclusion is automatic. However, there is a mechanism under the Ordinance to obtain confirmation/certainty for issues that are novel or raise unresolved questions of wider importance/public interest.

In such application processes, the HKCC’s role is not to decide whether the conduct would have been a contravention of the law – it is only the Competition Tribunal that can make such a determination. Instead, the HKCC is limited to assessing whether the conduct benefits from an exclusion on the basis of economic efficiencies.

Although it was not necessary for the HKCC to come to any conclusion on whether the Proposed Survey would give rise to a contravention of the First Conduct Rule, its decision considered various “theories of harm”. The HKCC conducted a detailed analysis of the potential anti-competitive effects if the Proposed Survey had been implemented.

As a starting point, the HKCC set out its general position on information exchange – as already outlined in its Guideline on the First Conduct Rule. The HKCC’s theory was that the Proposed Survey could have permitted the exchange of potentially competitively sensitive information between competing pharmaceutical companies.

The HKCC also concluded that the Proposed Survey is not excluded from the First Conduct Rule on the basis of economic efficiencies exclusion under the Competition Ordinance.

## Wider implications for businesses and trade associations

The HKCC’s decision provides further clarity on approach towards information exchange and provides deeper insight into the HKCC’s interpretation of the economic efficiencies exclusion. It is therefore likely to have an impact on the form and type of future surveys conducted by businesses and trade associations in Hong Kong.

Given that the HKCC appears to adopt a rather stringent and conservative approach, businesses do need to be alert to the risks of straying into illegal terrain. The HKCC noted a range of relevant factors to assessing the legality of information sharing with competitors.

- **Whether information exchanged is competitively sensitive information.** Information relating to price and quantities (concerning sales, market shares, sales to particular customer groups or territories) is generally regarded by the HKCC as the most competitively sensitive. In respect of the Proposed Survey, the only information submitted by participating companies and published by HKAPI would have been total

sales value aggregated at the product level. The HKCC reiterated in its decision that sales values is “*in itself among the most competitively sensitive*”. This indicates that HKCC is likely to question the legality of information exchange between competitors, even when it is relatively limited in scope.

- **The form, frequency and historical nature of the information exchanged.** The HKCC considered that there is likely to be competition concerns with the Proposed Survey as the data would not have been anonymised and very recent data would be shared frequently. Specifically, quarterly sales data with no more than a month’s delay is not considered “historical”. The quarterly frequency of the exchange was, in HKCC’s view, capable of softening competition between the market operators.
- **Level of aggregation.** The HKCC considered that sharing information at a product level is most likely to give rise to competition concerns, as it allows competitors to directly monitor their competing products. Where information exchange does not allow competitors to identify information relating to a specific product, the HKCC generally considers that such conduct is not problematic. For example, aggregated total sales value of a company by category may be acceptable on the basis that they are “general” data. Businesses however need to be cautious that there are “exceptions” where sharing of seemingly general data could give rise to concerns. Essentially, it depends on the number of products in each aggregated category and whether competitors may be able to identify information relating to a competing product.
- **Public or confidential nature.** It is possible that the HKCC would still consider publicly available/assessible information exchange problematic.
- **Characteristics of the market.** The HKCC also considered that competition concerns are heightened when a large proportion of sales in the relevant market is covered by the information exchange, and the relevant market is concentrated, as there is a greater likelihood for competitors to discern the conduct of their competitors through the information exchange practices.

In relation to the economic efficiency exclusion, the HKCC has adopted a high threshold in its assessment. To be able to rely on this exclusion, an undertaking has to not only demonstrate by way of cogent and compelling evidence that the arrangement could provide specific benefits, but also establish the causal link between the arrangement and the benefits.

The HKCC also publishes its decision within a relatively short time frame (less than a year after submission of the application by HKAPI). This shows a welcomed flexibility to handle and assess applications – giving businesses a reasonable expectation of a practical means of gaining legal certainty for proposed activities.

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