

# Kluwer Competition Law Blog

## Hong Kong court confirms bar on standalone private actions in competition cases

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The Hong Kong Court of First Instance rejected a claim that it had jurisdiction to determine whether a trade association violated the Competition Ordinance.

The court reasoned that determination of a breach of the Competition Ordinance was reserved for the Competition Tribunal. In the absence of a right of standalone private action under Hong Kong competition law, arguments for breach of the competition rules brought by the plaintiff could not be made in the Court of First Instance. The court also refused to transfer the case to the Competition Tribunal, without providing a test or an indication of the necessary threshold for such a transfer.

This case confirms it is not possible to bypass the statutory bar on standalone private actions by combining competition arguments with other arguments in a legal action.

### **Background**

In a dispute between a travel agent (“**Loyal Profit**”) and the Travel Industry Council (“**TIC**”), Loyal Profit claimed that certain directives of the TIC violated the Companies Ordinance and the Competition Ordinance.

Loyal Profit also challenged the TIC’s “Registered Shops Scheme” on competition grounds. Under this scheme, travel agents who are members of the TIC may only bring inbound tour groups to shops registered with the TIC. Registration must be made by the travel agents before they may arrange for tour groups to visit these shops. In turn, the registered shops must offer full refund protection to visitors. The TIC’s explanation for the scheme is that it is designed to protect the reputation of Hong Kong as a “shopping paradise” and support the tourism industry.

The plaintiff also challenged rules aimed at preventing “forced shopping” (whereby tour groups offer free or heavily discounted tours, and are remunerated on commissions paid by the shops where they bring the tourists). However, these rules were not challenged on competition grounds.

Loyal Profit’s argument under the Competition Ordinance is that the Registered Shops Scheme is anti-competitive because “it interfered with competition between shops”.

Section 108 of the Competition Ordinance prohibits “independent actions”, meaning proceedings brought in any Hong Kong court independently of the Competition Ordinance, and where the cause of action is a contravention of a conduct rule. Loyal Profit tried to circumvent this prohibition by asking the court to confirm that the Registered Shops Scheme (1) breaches the TIC’s Memorandum of Association, which explicitly prohibits the TIC from “interfering in any way with initiative and enterprise based on fair trading”; and further (2) breaches the Memorandum of Association *because* the scheme contravenes the Competition Ordinance.

### **Ruling**

Loyal Profit’s argument was dismissed in the Court of First Instance. According to Mr Justice Harris, the Competition Ordinance clearly provides that only the Competition Tribunal can determine whether there has been a breach of the Competition Ordinance, and only the Competition Commission (not private parties) can bring a complaint of infringement of competition rules to the Competition Tribunal for adjudication.

Yet the court went beyond the jurisdictional argument, stating that even if it were in a position to rule on a competition law argument, the plaintiff would *at a minimum* have to articulate a base case for breach of the Competition Ordinance, in a manner similar to what the Competition Commission itself would do. As Loyal Profit did not even attempt to make such a case, its case could not succeed in any event.

In setting out the base case that the plaintiff would have to develop, the court noted that arguments on anti-competitive effects would require taking into account the legal and economic context, the nature of the goods or service affected, as well as the real conditions of the functioning and the structure of the market or markets in question. The court cited the *TVB* case,<sup>[1]</sup> and the European Court of Justice’s *OTO* case (a case concerning a trade association and regulatory body for accountants in Portugal).<sup>[2]</sup> The Court of First Instance further found, based on the UK competition precedent *Sainsbury’s v MasterCard*<sup>[3]</sup> and the *TVB* case, that in a private action, the articulation of the competition argument must follow a three-step process: (1) the identification of the relevant market; (2) the articulation of a theory of harm; and (3) a counter-factual analysis.

Finally, Mr Justice Harris refused to transfer the case to the Competition Tribunal, without much explanation, stating simply “[t]his I will not do. On the basis of the evidence before me I am unable to form the necessary view that there is a matter to be investigated by the Competition Tribunal.”

### **Key takeaways**

Under the Hong Kong competition regime, the Competition Commission is tasked with taking on complaints and conducting investigations before bringing cases to the Competition Tribunal. The Competition Ordinance makes it very clear that standalone actions cannot be made independently, though this was an option in an earlier version of the Competition Bill before it was passed into law.

As expected, the Court of First Instance confirms that it will not circumvent such design by the legislature, in particular by considering competition law claims “wrapped” within other legal

arguments. However, Loyal Profit is not left without a remedy, as it remains free to lodge a complaint with the Competition Commission for further action.

Faced with a claim whose cause of action was (at least in part) a contravention of a conduct rule, the Court of First Instance had no choice but decline the transfer request. By contrast, in the case of a competition breach being raised as a defence, the Court of First Instance would have to transfer the case to the Competition Tribunal for adjudication (at least in respect of the competition law aspect of the case). It is however interesting to note that the Court of First Instance did not merely approach the issue from a pure jurisdictional angle (directly declining the transfer) but went further, setting out how the plaintiff should have presented its case for the Court of First Instance to consider both the claim and the transfer request.

This raises the question of whether, had the plaintiff brought a base case on competition law grounds, the Court of First Instance would indeed have considered the argument substantively, or at least the transfer request. If the Court of First Instance meant to set out a clear test for the transfer of cases, in terms of substance and evidentiary burden, the brevity of the judgment on this issue does not allow the reader to draw clear conclusions on this important issue, which is regrettable.

This judgment comes at a time when both the legislature and the Competition Commission seem supportive of introducing a standalone right of action back into the Competition Ordinance, on the grounds that public enforcement alone is not sufficient to address competition concerns arising in Hong Kong.

Finally, it is worth noting that, as with the *TVB* case which was heard in the Court of First Instance in 2015 and 2016, the judgment relies heavily on UK and EU competition precedents. This shows that Hong Kong courts will continue to draw from a wide range of sources to address competition issues, which remain an uncharted territory in Hong Kong courts.

#### Related links:

The case, *Loyal Profit International Development Ltd v Travel Industry Council of Hong Kong* [2016] HCMP 256/2016, can be found [here](#)

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[1] *Television Broadcasts Ltd v Communications Authority* [2016] 2 HKLRD 41.

[2] *Ordem does Tecnicos Oficiais de Contas v Autoridade da Concorrenca* [2013] 4 CMLR 20.

[3] *Sainsbury's Supermarkets Ltd v MasterCard Inc* [2016] CAT 11.

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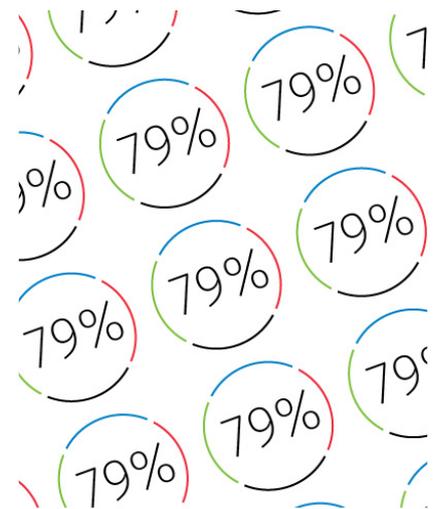
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