

**3.2. Competition Bill 2020 –  
For Second Reading –  
Debate commenced**

Mr Perkins to move:

*That the Competition Bill 2020 be read a second time.*

2405 **The Speaker:** Next is the Competition Bill 2020, and I call on Mr Perkins to move.

**Mr Perkins:** Thank you, Mr Speaker.

Hon. Members, I am pleased to move the Second Reading of the Competition Bill 2020. I appreciate that it has taken some time to reach this stage, but it is important to get the detail  
2410 of the legislation correct.

The purpose of this Bill is to modernise our competition law by replacing Part 2 of the Fair Trading Act 1996 with provisions that are fit for purpose and appropriate for a small economy. The introduction of the Bill is as a consequence of a specific Programme for Government action, which is committing to being a 'Responsible Island'.

2415 The Bill's introduction will also meet an undertaking we have given to the United Kingdom government to update our competition legislation and to bring it into line with similar legislation in the UK and the Channel Islands. By doing so the UK government will, as part of ongoing negotiations on trade agreements, be able to assure prospective trade partners that such agreements can be extended to the Island, given our updated legislation. As such agreements  
2420 will provide new opportunities for investment and business, it will be important that we are able to demonstrate that the Isle of Man has competition standards equivalent to those of other jurisdictions with developed economies. Consequently, the Bill provides a framework which will facilitate businesses that wish to trade fairly whilst preventing, and if necessary punishing, anti-competitive abuses that may damage the interests of consumers, businesses and our local  
2425 economy.

The Bill will cover all forms of commercial activity that take place within the Isle of Man, and will enable the OFT to work in partnership with competition authorities in other jurisdictions and also undertake concurrent investigations with local regulators, such as the Communications Commission. The Bill will also fill in gaps which are currently missing such as imposing sanctions  
2430 and making provision for the protection of whistleblowers. The OFT will also have powers to deal with the substantial lessening of competition arising from a merger or acquisition.

Finally, the Bill empowers the OFT by order, and subject to Tynwald approval, to address market malfunctions through issuing directions and/or setting out a scheme for the purposes of remedying or preventing any adverse effects.

2435 Mr Speaker, the Bill strikes the right balance between ensuring that markets are competitive and securing the provision of essential goods and services in accordance with the 10 policy principles that underpin it. These principles include an appropriate balance between the respective and often conflicting benefits of competition and economies of scale.

2440 The Bill allows the Island to remain a place of enterprise and opportunity in which the free market can flourish; it ensures the Island has a modern competition framework protecting consumers, markets and businesses; and it enables the Island to achieve equivalence with UK and EU standards.

Mr Speaker, I beg to move that the Competition Bill 2020 be read for the second time.

2445 **The Speaker:** Mr Boot.

**Mr Boot:** I beg to second and reserve my remarks.

**The Speaker:** The Hon. Member for Douglas Central, Mr Thomas.

2450 **Mr Thomas:** Thank you, Mr Speaker. I would have been delighted to second such an important Bill.

2455 Firstly, I would like to thank officers from the Office of Fair Trading and from DEFA for their extensive meeting on Teams on 24th July. This was helpful for the development of climate change policy and also for the development of the Competition Bill, it seems, from what happened next in terms of changes; and also probably in terms of how the Post Office tackles this issue and how gas regulation develops. I also wanted to thank those officers and the politicians involved for immediately sharing the consultation responses that have been there for a couple of years but had not been published after that meeting. But I just want to say I regret slightly – or I regret a *lot*, and I hope officers regret slightly – that I have not been allowed to  
2460 continue discussion about some of these issues to do with competition and economic regulation since 24th July, and we have been having to work slightly siloed, which is never a good thing.

I hope that now we can work together to make this Bill, and the parallel regime for economic regulation in its context of climate change and its context of electricity generation, better.

2465 So with that, my most important call is for the Chair and the Department of Environment, Food and Agriculture behind the Chair to actually take the time to consider this Bill properly. I do not think it would be appropriate, given what I am going to say now, for this Bill to come back in two weeks, especially as there is Tynwald in between. I would hope that we can sit down together and work up some proper clauses and some proper draft regulations, if necessary, to actually put this situation on a really firm footing – as solid as it will need to be to establish that  
2470 international reputation that was referenced, Brexit. But most importantly to make sure that we have a market in the Isle of Man across the piece where trading is fair, where competition is there if at all possible, and that consumers are protected properly.

I just wanted to say that it is very important that the right Bill goes through this House and upstairs but it cannot be urgent, in the sense that this Bill has been kicking around since 2012  
2475 and the consultation on the principle was started in 2013. So I hope that we can take the time to actually properly work together on that basis.

Just some thoughts, then, about some of the ideas that I would like to work on. The first one starts in the long title of the Bill itself. So ‘dominant position’ is used in this long title, whereas the Communications Bill that was before us for a number of years in the past, talks about  
2480 ‘significant market power’, which amounts to or is equivalent to dominance of the market. The Communications Commission is a very sophisticated regulator in this area, so there must be some reason why they talk about significant market power in terms of that, and I would like to explore that further.

I would also like to understand why, in the long title, the Office of Fair Trading is empowered:

... to collaborate with competition authorities in other jurisdictions to address issues and behaviour ...

2485 – and also empowered to work with regulators.

I am interested to know why ‘jurisdictions’ is used, because the Competition and Markets Authority across is responsible for *several* jurisdictions. Would it not just be better to empower the Office of Fair Trading, as the competition regulator, to work with regulators and competition  
2490 authorities rather than limit it to only being able to work with them in specific jurisdictions? To me, it could end up being quite an important point down the track.

Also this long title talks about ‘regulated markets’, but I am not sure that regulated markets is a term that has been commonly used in the Isle of Man. I am not sure if we know what the regulated markets are. We need to ask ourselves whether the fact that we have excluded sea services and milk from the Fair Trading competition regime, whether that makes them regulated  
2495 markets, and how we are going to handle the utilities and gas in the future.

2500 Then, most importantly, in terms of the long title, I would like to explore in the next few weeks whether or not we could perhaps usefully re-establish the Office of Fair Trading inside this Bill, so it really is a modern regulator. Because at the moment the Office of Fair Trading is established in the 1981 Board of Consumer Affairs Act which commenced back in October 1981, and the long title of that clearly describes the office as ‘the Board of Consumer Affairs’.

2505 So, wouldn't it be great to learn from the most recent decades, of the Office of Fair Trading becoming better and better at what it does, to actually put a clean start to this process – just as was proposed inside the regulatory review, which is the parallel action that this Government has been working on for four years – to establish an office of consumer protection and competition regulation? Wouldn't that be grand?

2510 Wouldn't it be great if somebody had been thinking about that for four years and written it all down in the regulatory review report ...? Wouldn't it be great if we could separate out regulators in terms of their functions, just like Mr Shimmins mentioned in another place last week? The Communications Commission was re-established in the Communications Bill that was just before us today, and that to me seems a very useful precedent that we need to establish now.

2515 Clause 3, definition of ‘public authority’: I have already mentioned that in the previous Bill debate, but basically the public authority is defined as its meaning in the Freedom of Information Act, which seems to make me uncomfortable and I would like to think that through further. I can imagine whereby a public company should be excluded from the Freedom of Information Act because it has commercial competitors, but why would that mean that it became excluded from competition regulation any more than from climate change responsibilities?

2520 Clause 7: why do we need clause 7 now? Originally, clause 7 was part of a duo of clause 7 and clause 8, and somebody was being clever trying to exclude Education Services and Health Services and anything that got a grant from the Department for Enterprise, *from* the competition regime. Over the summer that has been taken out because that is blatantly and patently unsustainable, and we are left with a simple clause that says ‘this applies to public authorities’. But it does not only apply to public authorities, it applies to private bodies as well; and it does not only apply to public authorities as defined in the Freedom of Information Act, I suggest, it applies to any body, however they are formed.

2530 So if Culture Vannin had an anti-competitive practice going on in the Manx language, I would like to think that we were covered. But we are not covered by the Freedom of Information Act because we are a statutory public body, we are a statutory charity, so we are not covered by the Freedom of Information Act. But I would like to think if we were trying to corner the market in language that somebody could take an action against us under the competition legislation, it is only right .

2535 Clause 8, the former clause 9, is the one that is most problematic. There is a lot of evidence from lots of people who submitted that this is problematic in the consultation responses that were very helpfully published after my meeting on 24th July, to help us understand this a bit better; but Sure and the Communications Commission, and lots and lots of anonymous correspondents all submitted that clause 9, then, clause 8 now, is problematic. Because, essentially, this is the connection with economic regulation.

2540 There are all sorts of decisions that the Council of Ministers can make, and regulations that it may make, the basis for which are not fully developed as yet. Sure responded:

We note that Section 9 of the Competition Bill refers to the Council of Ministers producing regulations that would set out the conditions that would need to be satisfied in order for a potentially anti-competitive practice or agreement to qualify for an exemption. It will be important for any such regulations to be subject to a transparent consultation so that all stakeholders – including the OFT – can input to those regulations and ensure that they reflect best practice for in terms of the conditions ...

I did note the very powerful statement by the Chair, and I thank him for it, about we have to balance here the competition aspects and the economies of scale aspects. That is *absolutely* the case. We do not need UK regulators; we do not need UK-style regulation. What we need is regulation that is appropriate for the Isle of Man, but we need to make sure that we get it.

2545 With my Post Office hat on, I could not help but notice that Manx Independent Carriers submitted evidence back in 2018, worrying about the Post Office and competition. That is something that Mr Robertshaw has asked us to consider, because we have got to work out where we are in terms of the exclusive privilege and all sorts of aspects, and that has been before us.

2550 The Communications Commission submitted evidence back in 2018 that:

... if blanket exemptions are to be provided at the outset, this could result in the exemptions not following the procedure as set out in Clause 9 of the Competition Bill.

– and it had worries about it, which it had expressed very clearly. So, basically, the Communication Commission recorded that it was important that:

... a thorough review be carried out prior to any exemption being granted ...

2555 Since then we have granted two exemptions and we have got a third before us on the Order Paper next week for the Isle of Man Post Office – at least *that* is what the Council of Ministers has asked the place upstairs to approve.

2560 There are some more specific issues. Firstly, CoMin only *may* make regulations for exemptions, and in my view I would be trying to convince the House that they *should* make regulations, because this is such an important matter. The grounds of public policy will need to be fleshed out. How come exemptions for Bus Vannin were not made in 2019, any more than the ones for the Post Office have not been made since 1996, since when the Isle of Man Post Office has had a statutory exclusive privilege in respect of the logistics business for letters?

2565 How does the Council of Ministers satisfy itself of the reasonableness of the grounds as specified in subclause (4)? How will it examine and conclude in respect of whether exemptions provided under regulations are likely to produce a better outcome for consumers, or for the economy of the Island, and are necessary for exceptional and compelling reasons of public policy?

2570 Why does the Council of Ministers only need to seek and have regard to the views of the OFT, and not others, prior to making regulations? What reports need to be compiled, published and then made in front of this House upstairs for the general public? Why are joint investigations only allowed between the OFT and Departments and Statutory Boards? There are actually now regulators in the Isle of Man who have a different legal status from Departments and Statutory Boards. And that is another issue.

2575 There is also some tidying up to do. So, for instance, clause 28 refers to a non-existent clause 31, and there are various other places around the Bill that need tidying up. I am very pleased to work with the drafters to actually refine it.

2580 The most important thing is that this is a massively important piece of legislation. It is too long coming. The action in the Government Programme was to have this Competition Bill alongside a new approach to the regulation of natural monopolies to make sure we deal with the economies of scale issues in a small Island, but also to make sure we are fair to consumers and we are fair to other competitors.

2585 So with that I fully support this Bill being here today. I am delighted that it is here today and I would hope that the Chair can give us time to work together properly now to deal with these difficult issues in their widest context – **(Two Members: Hear, hear.)** especially as the heads of terms for the Gas Agreement refers to the agreement as being invalid and null and void, if new legislation comes in which makes it null and void. *This* clearly would be new legislation that we

already know about that is likely to come in and so we need to be very careful immediately, but also thereafter.

Thank you very much, Mr Speaker.

2590 **The Speaker:** Hon. Member for Middle, Mr Shimmins.

**Mr Shimmins:** Thank you, Mr Speaker.

I have a few queries for the mover. Firstly, clause 4 on preventing competition, states:

This subsection applies whether the arrangement is to be acted upon in the Island or elsewhere ...

This wording could mean that this Bill will regulate international business rather than only domestic Island business, so I would welcome the mover's views on that point.

2595 Turning to clause 8 and the exemptions from 'anti-competitive practice', I am probably just building on the remarks that my hon. friend Mr Thomas has made. We are aware that there are already a couple of exemptions in place in respect of the ferry service and the milk price, but will the mover confirm the details of any other exemptions that are currently in existence?

2600 Clearly, there are some potential anti-competitive practices in the public sector – so Bus Vannin, the MUA, the Post Office, the Vehicle Testing Centre, etc., and there are actually a fair few more – but you get the drift. What I am interested in is how will the Council of Ministers decide whether or not to exempt their own Departments from anti-competitive practices? How will they also assess whether private companies will be exempt, because there are some private companies that would potentially fall into this category? Will the Office of Fair Trading maintain  
2605 an up-to-date public list of exemptions that have been agreed from this anti-competitive practice?

Moving on to 'Investigations' and clause 9: I am concerned it is a very low bar to launch an investigation. If you read the wording, it is proposed that the Office of Fair Trading can investigate when it suspects a body has been engaged in, or *intends* to engage in, an anti-competitive practice. I think actually suspecting that someone may *intend* to do something is  
2610 actually quite a low level, and I would prefer to see a higher bar prior to the Office of Fair Trading launching an investigation. Investigations are a very serious matter that can cause massive disruption to businesses and other organisations, so we need to be very careful before we launch investigations I would suggest, Hon. Members. So I would like to see a higher bar.

2615 I am also concerned that the Office of Fair Trading may investigate any market under its 'own volition'. Where are the checks and balances, Hon. Members? It is proposed that the rules of procedures for investigations would be 'laid before' Tynwald, but it would perhaps be better if these rules were subject to Tynwald *approval* so that we can understand what the procedures for investigations are – which, as I say, can be devastating – prior to them being finalised.

2620 There are a number of clauses in Part 6 covering mergers, and it is difficult to assess the impacts without knowing what the *de minimis* levels are going to be. So clause 23 states a financial threshold will be set by order – that is the amount that would be the arbiter of whether actually the mergers provisions would come into force. What is this likely to be? Perhaps the mover can tell us: is that a million pounds, £10 million, or £100 million? It would be helpful to  
2625 understand the quantum, because clearly if it is in the higher range there will be less need and fewer interventions by the Office of Fair Trading. Although when I look at the proposed fines which are also contained in this section, it is possible that the penalty fine for failure to notify may be relatively low in respect to a very high-value merger. But it is very difficult to gauge without any indication in terms of the amount. It might also be better to have another measure  
2630 in terms of percentage, in terms of a combined market share, which would be an interesting thing to consider.

Moving on, the Bill proposes that the Office of Fair Trading will assess each merger situation, and they will write to the parties involved and then also send a report to the Council of Ministers. That raises a few little alarm bells in my head because this is new work for the Office  
2635 of Fair Trading, and I imagine that the Office is very much looking forward to making these determinations and writing these reports, and then sending them on to the Council of Ministers. But I would just challenge: *why* would the Office of Fair Trading send reports about run-of-the-mill transactions to the Council of Ministers? Why would these mergers with which they are comfortable or are pretty straightforward not just proceed without delay? Would it not be

2640 better only to send reports to the Council of Ministers when there is an identified problem to be considered?

This is especially of interest to me because clause 26 proposes that the Council of Ministers can *overrule* the Office of Fair Trading's decisions on mergers. So effectively this means that the Council will arbitrate on all mergers above a certain level, of which we do not know, here on the Island. Is this what the Council wants? I am not sure. Perhaps the Minister for Enterprise can advise whether he feels this will encourage investment and innovation in our economy. I would be interested in his views.

2650 There are no timescales contained in clause 26, so how is this going to work in practice if the Office of Fair Trading has advised the merging entities that they have no objections to the proposed merger, then subsequently perhaps a few weeks down the line, the Council of Ministers reads the written report from the Office of Fair Trading and decides to object? But the deal has already been done. What a mess that could be, Hon. Members.

2655 Who is going to pay for all of these investigations and reports? That is a question that is a bit unclear at this stage, I think. This will be a new line of business for the Office of Fair Trading and the expansion of their operations perhaps.

2660 I am aware that until recently the Channel Islands operated a combined competition and regulatory authority. They are very similar places in many respects, particularly in business, our fellow Crown Dependencies. They had decided to have a joint regulator largely on the grounds of efficiency, given the scale issue, and to minimise costs. But earlier this year they had some differences in political priorities between Jersey and Guernsey and they decided to split on this particular aspect of regulation and set up their own authorities, and that is currently what they are doing. The States of Jersey have just recently advised that they need four additional officers to undertake this function in Jersey.

2665 So perhaps the mover could confirm that no additional budget has been requested by the Office of Fair Trading in respect of this Bill, or indeed will be required going forward as a result of the Bill. I think it is important we understand the impact of any legislation that is being brought forward, in practical and financial terms.

2670 That is a number of queries from me, and I would support Mr Thomas's comments that it would seem sensible perhaps to take additional time between Second Reading and clauses just so that we can all understand the provisions in this Bill in a bit more detail.

Thank you, Mr Speaker.

**The Speaker:** Hon. Members, that concludes the morning session. The House will be suspended until 2.30 p.m. when Mr Hooper will be next to speak.

*The House adjourned at 1 p.m.  
and resumed its sitting at 2.30 p.m.*

**Competition Bill 2020 –  
Debate concluded –  
Second Reading approved**

2675 **The Speaker:** Fastyr mie, good afternoon, Hon. Members.

**Members:** Fastyr mie, Mr Speaker.

2680 **The Speaker:** We continue consideration of the Competition Bill 2020.  
Mr Hooper.

**Mr Hooper:** Thank you very much, Mr Speaker.

My contribution will hopefully be short. I do not intend to repeat any of the points that have already been made. I just want to mention very briefly about an appeal process.

2685 Going through the Bill there are quite a few different elements in here where the OFT can take action: it can issue orders, it can make determinations, but actually there does not appear to be any process by which a person can appeal against any of those decisions. So I am just a bit nervous about talking about a Bill that actually does have quite broad powers given to the OFT, but does not actually make very specific reference to actually if you disagree with an enforcement action, if you disagree with an order that is made, if you disagree with a notice from the Council of Ministers saying, 'You cannot merge', where is the appeal process? What does that look like?

2690 In terms of the power of the Council of Ministers to overrule the OFT, earlier on in the merger section it does talk a little bit about there being a financial threshold for when the OFT should be notified, but I do not see then that notification threshold actually mirroring further down. So the clause in respect of the Council of Ministers just makes a reference that:

The Council of Ministers may ... overrule OFT's decision in respect of a merger or a proposed merger.

There does not appear to be a reference back to actually it has got to be of that significant size, and it cannot interfere in some of the smaller ones.

2700 So, really, those are the two questions. It is more about the appeal provisions for *all* the enforcement action and all the notification and all the orders throughout the Bill; and also then very specifically in respect of the Council of Ministers' interaction with some of those earlier clauses.

Thank you.

2705 **The Speaker:** I call on the mover to reply, Mr Perkins.

**Mr Perkins:** Thank you, Mr Speaker.

2710 I thank all three Members for their contributions to the debate. Firstly, I come to Mr Thomas and his regrets – '*Je ne regrette rien*', as Edith Piaf said. (*Laughter*) I hope we can do something towards that. I am very willing to work with you and I am sure the officers are, to alleviate some of your concerns, because I know you have lived and breathed this for *many* years and certainly the broad context of the Bill.

2715 I note your concerns on clause 8, which is the one you really raised, the Council of Ministers, and picking up on Mr Hooper's comment, the bar will be set according to the actual inquiry that is going to be raised. But I will come on to Mr Hooper later.

2720 Mr Shimmins for Middle: apart from the Steam Packet and the Milk Price Order, there are no other exemptions. The Milk Price Order is a classic example of why we need this legislation. It is in place and it will follow through from what we have got. But to give an example: the Milk Price Order, Government has to decide whether we need a milk industry or whether we just throw them to the wolves and allow competition to come in from the UK. I think this is a really good example. We have got the best of both worlds, our farmers are secure on the price of what they are going to get, and indeed if consumers wish to buy milk from elsewhere we have not banned that coming in. If we *did* ban that coming in they would ban our dairy products going the other way. So this is a *very* fine line, and that is a good example.

2725 We are aware of one other Post exemption that has been put forward, and actually it has just been put forward this last week. I think Mr Thomas may have had something to do with that, with the Post Office, but say no more. Right.

2730 The process for the Council is set out and would be in the Act. I am not sure exactly how good the advice would be, but they could determine which advice they want to go to – they could go back to the OFT, they could actually get independent advice or they could look wherever they

felt advice was best. I think it is important to have that diversification, that separation of the Council of Ministers.

Will they keep a list? Well, knowing the memory of some of the Council of Ministers, I think they probably *would* keep a list of who is on the exemptions.

2735 The OFT will always act reasonably and proportionately in any of these things. We are a very reasonable organisation and the way we tend to operate now is that if we see something coming up, we will have a quiet word in their ear, and invariably that has the right action going down the line. I am sure this will not change with the new legislation. It is much easier to say quietly to somebody, 'Just get your labelling right on that meat', and it is all resolved in half an hour or a  
2740 couple of hours after a phone call. That is how we operate now. Unfortunately, people think the OFT has got no teeth, but I can assure you that it does work. So rather than going off at the deep end and launching a massive investigation, we operate behind the scenes in that manner.

The *de minimis*, the level of the bar: again picking up Mr Thomas's and Mr Hooper's points, it would be sufficiently high to exclude the majority of small trading companies. On the other hand  
2745 it would capture larger companies and potentially companies off Island; because do not forget, we are vulnerable to other jurisdictions having companies that could be predatory on companies in the Isle of Man. CoMin can always overrule if they think there are exceptional or compelling reasons of public policy, and if it is desirable to do so. That is based on the UK legislation and if they suddenly feel there is a need for it, the Government can actually interfere.

2750 There will be no additional staff, we will operate with the staff that we have got at the moment. You may be surprised at that, because the OFT takes on a lot of stuff – weights and measures, measures in pubs and all the rest of it that goes with all this. We make the best use of our staff possible. However, I would point out that, as at present, if we now decide to undertake a big undertaking in a prosecution we may well have to ask for extra resources. That is exactly  
2755 the same as it is now. We have not had to do that over the years but there is always that option to do so. Indeed, on some prosecutions we do approach the Attorney General and if it is not in the public interest and it is going to cost an arm and a leg, then we do not undertake that investigation. So the costs are constrained and we have to have sense about this.

Otherwise, apart from that, I think that is it.

2760 Oh, mergers, yes. Again, mergers would be looked at and if it was in the public interest then the Council of Ministers could overrule it if they decided to. On the other hand, they could advise us that there is likely to be a merger between X, Y and Z Company, and would we look into it? So there are lots of avenues that *are* covered in this new Bill.

2765 Coming on to Mr Hooper, he is concerned about the appeal of an OFT decision. Essentially the OFT *can* decide to impose sanctions and that could be appealed. The way of appeal would be through the High Bailiff, and that seems to be the method of appeal that has been decided in all this.

2770 **Mr Hooper:** Apologies, Mr Perkins, would you give way momentarily?

**Mr Perkins:** Yes, of course.

2775 **Mr Hooper:** Just to clarify, sorry. In respect of the sanctions, the Hon. Member is correct, the Bill says if they have been issued with a penalty notice there is an appeal process. But under this the OFT can issue notices, directions and orders actually instructing businesses to do things and to take certain action. Failure to follow that order would then be an offence which they could get a sanction for. But there does not appear to be a way of appealing that original order. So if the OFT decided to instruct the business, 'Thou shalt paint your buildings blue', there is no appeal against that decision.

2780 That is the query I was raising. In connection with all the various powers the OFT is given in the Bill, the only thing you can appeal against is the financial sanction at the end of the process.

Thank you. **Mr Perkins:** I thank the Hon. Member for pointing that out, and I think that would be one of the things that we will have to look at. I must admit that slipped through the net, so we will investigate that going forward.

2785

I think that is about it, actually, Mr Speaker; and with that, I move the Bill.

**The Speaker:** The question is that the Competition Bill 2020 be read for a second time. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.