

COMPETITION BILL 2020

Explanatory Memorandum

1. This Bill is promoted by Mr Martyn Perkins, MHK on behalf of the Isle of Man Office of Fair Trading.
2. *Clauses 1 and 2* deal, respectively, with the Short Title and Commencement of the resulting Act.
3. *Clause 3* defines key terms used in the Bill. This clause, along with the preceding two clauses, constitutes Part 1 of the Bill.
4. *Clause 4*, which commences Part 2 of the Bill, prohibits persons from entering into any arrangement that would have the effect of preventing competition within any market for goods or services. The prohibition is not limited to arrangements that would prevent competition only in the Island. Accordingly, any such arrangement would be within the scope of the clause, even if it is meant to be acted on outside the Island. The clause also specifies types of arrangements to which the prohibition particularly applies. Any arrangement that defies the prohibition is void to the extent of the defiance.
5. *Clause 5* prohibits conduct on the part of any person that amounts to abuse of a dominant position within any market in the Island for goods or services. It also sets out particular features of conduct any of which, if present, are certain to render the conduct an abuse of a dominant position. For the avoidance of doubt, the clause specifies what constitutes contravention of its subsection (1).
6. *Clause 6* defines the term “anti-competitive practice”. It also provides that an action taken pursuant to any enactment is eligible to constitute an “anti-competitive practice” unless the action’s authorising enactment specifically insulates the action from being so regarded. However, it is specifically provided that a breach of the relevant competition provisions applied to the Island by the Payment Services (Competition) Regulations 2015 constitutes an “anti-competitive practice”. Additionally, the clause empowers the Council of Ministers to amend by order the provision in respect of the aforementioned 2015 Regulations.
7. *Clause 7* expressly applies to public authorities the prohibition on engaging in an anti-competitive practice. This application is made subject to clause 8.
8. *Clause 8* empowers the Council of Ministers to, by regulations, grant exemptions from the prohibition of “anti-competitive practice” on the grounds of public policy. Any such regulations are subject to approval by Tynwald. The exemptions may be either absolute or subject to conditions, and may also be time limited. No such regulations may be made unless the Council of Ministers has consulted with and had regard to the views expressed to it by OFT and has

published written notice of its intention to do so. Changes in circumstances or failure of the exempted person to abide by the conditions of the exemption could lead to revocation or variation of the exemption, in either case done by the Council of Ministers. For this purpose, the Council of Ministers must keep under review the actions of the exempted party with a view to ensuring that the terms of the exemption are being complied with. Any proposed change to or revocation of the exemption must have been preceded by compliance with the rules of natural justice.

9. *Clause 9*, which is the first clause of Part 3 of the Bill, empowers OFT to carry out investigations. This investigative power is meant to be used to ascertain whether an anti-competitive practice is being carried out or the terms and conditions attached to an exemption issued under clause 8, or imposed under clause 25(5)(b) as a consequence of a merger, are being observed. It may also be used where OFT believes that the market is not functioning in the interests of consumers or the economy. OFT is required to make its own rules of procedure regarding the conduct of its investigations. The clause also empowers OFT to request and/or accept undertakings from people it has investigated or is investigating. The occasion for this would arise where OFT finds evidence of an anti-competitive practice but concludes that adherence to any alternative practice would redound to detriment of the Island's economy. The party being investigated may offer an undertaking to OFT and, should OFT accept the undertaking (which OFT is expressly authorised to do), thereby cause the investigation to be terminated.
10. *Clause 10* confers specific investigatory powers on OFT. OFT may by notice require a person to produce specified information, require a person to attend at a specified time and place for the purpose of being interviewed, or require a person to give any assistance relevant to the investigation that the person is in a position to provide. An officer authorised by OFT may obtain from a justice of the peace a warrant enabling the officer to search premises at which the officer has reasonable grounds to believe information relevant to the investigation is being stored. When executing any such warrant, the authorised officer must be accompanied by a constable and may be accompanied and assisted by any person whose expertise the authorised person considers pertinent. A person who, in the course of an investigation, is required to produce information is insulated from any obligation to supply that information if the person would have been entitled to refuse to produce it in the course of civil proceedings before the High Court. Any other default in compliance with a request may be the subject of an application to the High Court by the Attorney General, whereupon the High Court may make such order as it thinks fit to ensure that the default is made good. A person's failure to comply with a requirement imposed on the person under the clause is made an offence.
11. *Clause 11* empowers OFT to conduct joint investigations with any Department or Statutory Board that has regulatory powers, or with a competition authority in another jurisdiction (pursuant to a memorandum of understanding between OFT and that competition authority). The Council of Ministers is empowered to

by order extend the powers under the Bill to any Department or Statutory Board, with any modifications it considers necessary. Such an order is subject to Tynwald approval, and the extension made by such an order will result in the extended powers' being held concurrently with OFT. The concurrent holding of powers will, the clause stipulates, require OFT and the other holder to consult with each other before any of them takes action in exercise of the powers.

12. *Clause 12* empowers OFT to either suspend or abandon an investigation once it reveals that an offence under the resulting Act may have been committed. It also provides that such a revelation obliges OFT to hand over the attendant evidence to the police or any other person that has responsibility for enforcement with respect to the offence in question. If an OFT investigation has been suspended, OFT may resume its investigation only upon having been notified that the criminal investigation has been completed.
13. *Clause 13* empowers OFT to accept from any person an undertaking that it believes will correct an identified market malfunction or result in the discontinuance of an anti-competitive practice in which the person is engaging. OFT is required to signify its acceptance of the offered undertaking by notifying the offerer. The proposal to accept the offer of an undertaking must be published by OFT, as must the eventual acceptance of the undertaking. OFT must thereafter monitor whether the terms of the undertaking are being complied with. Variation of the undertaking is permitted if circumstances so warrant; also permitted is the release of the person from the undertaking if doing so is appropriate. Provision is also made for a new undertaking to supersede one that is no longer fit for purpose.
14. *Clause 14*, which commences Part 4 of the Bill, empowers OFT to make an order (for any of specified purposes) where an investigation conducted by it under clause 9 concludes that a market is not functioning in the interests of consumers or the economy. The overriding objective of the order is to rectify the identified deficiency. Before making any such order, however, OFT must have made a decision regarding any undertaking offered to it under clause 13.
15. *Clause 15* supplements clause 14 by delimiting the extra-territorial reach of an order under clause 14. For the order to have extra-territorial reach, it has to apply to someone with a British connection of one of the specified types ("a British person"). Once such a connection is present, the order will extend to a British person's relevant acts or omissions committed outside the Island.
16. *Clause 16* stipulates that, before an order under clause 14 is made, OFT must publish a written notice that complies with listed specifications.
17. *Clause 17* provides that failure to comply with an order under clause 14 is an offence triable on information. It specifically provides that this criminalisation does not limit the right to bring civil proceedings in respect of the said failure. It also empowers the Attorney General to make an application to the High Court in respect of the failure, in response to which the High Court may make an order requiring the default of compliance with the clause 14 order to be made good.

18. *Clause 18*, which commences Part 5 of the Bill, empowers OFT (or a Department or Statutory Board, either of which has powers concurrent with those of OFT) to impose disciplinary measures and/or penalties on a person who its investigation reveals – on a balance of probabilities – has engaged in an “anti-competitive practice”. These measures and penalties include the issuing of a public censure, the ordering of restitution and the imposition of financial penalties. Any such action taken may be appealed to the High Bailiff.
19. *Clause 19* empowers OFT (or a Department or Statutory Board with concurrent powers), with the consent of the Attorney General, to apply to the High Court for an injunction to restrain from engaging in an anti-competitive practice a person whom it believes (on reasonable grounds) is likely to so engage.
20. *Clause 20* empowers OFT to make regulations which set out the methodology to be applied in fixing penalties and restitution. Such regulations are required to provide a basis for penalties to be commuted for “whistle-blowers” (a term which the clause defines) and persons who admit their guilt at an early stage and thereafter co-operate with the investigation.
21. *Clause 21* empowers OFT, at its discretion, to submit to the Isle of Man Financial Services Authority (“the FSA”) a report detailing its belief that there is a need (in the interest of protecting consumers) for an individual to be disqualified as a director of a ‘person’ that is a body. This provision applies equally to bodies corporate and bodies unincorporate. On receipt of such a report, the FSA is empowered to take the necessary steps under the *Company Officers (Disqualification) Act 2009*. In proceedings pursuant to that last-mentioned Act, OFT is required to provide evidence in support of the FSA’s application for disqualification.
22. *Clause 22*, which commences Part 6 of the Bill, defines the concept of a “merger”. It also defines the concept of a “joint venture”.
23. *Clause 23* requires any two or more parties that propose a merger to notify OFT of the proposed merger before they take any action in furtherance of it. Such notification must be in the form and manner specified by OFT. Commencing a merger without complying with the notification requirement is an offence, triable summarily. However, liability in respect of such an offence may be discharged by paying a civil penalty. The amount and manner of payment of the civil penalty are to be prescribed in regulations made by the Council of Ministers and approved by Tynwald. Additionally, the Council of Ministers is empowered to take any steps it considers appropriate to mitigate the effects of a merger—
 - (a) that was completed without there having been prior notification to OFT; and
 - (b) in respect of which the Council of Ministers considers there to be exceptional reasons of public policy that demand such mitigation.
24. *Clause 24* sets out the procedure to be followed by OFT once it has been notified of a proposed merger. Specific actions that OFT is required to take are stipulated, depending on whether or not OFT believes the proposed merger

could lead to a substantial lessening of competition in the market. If OFT considers the merger unlikely to lead such lessening, it may authorise the parties to proceed with the merger without complying with any further procedural requirements. However, if OFT believes the merger likely to lead to such lessening, it must submit to the Council of Ministers a report of its findings. The report must set out the reasons for OFT's findings and details of any advice OFT has given to the parties to the proposed merger.

25. *Clause 25* sets out the powers of OFT on receipt of a merger report under clause 24. It confers on OFT the responsibility to conclusively determine whether or not the proposed merger is likely to lead to a substantial lessening of competition in the market. If the determination is that the proposed merger is not likely to do so, OFT must in writing notify the parties that they may proceed with the merger without further reference to OFT. However, if the determination is that the merger is likely to do so, then OFT must either authorise or forbid the merger. Before doing so, however, OFT may investigate the merger and (should it so investigate) must in writing inform the parties of its findings. That investigation may be carried out with the assistance of a third party or, alternatively, by a third party on behalf of OFT. The parties must be kept informed of all developments, including the identity of any third party engaged and the precise role the third party will play. Following the completion of this procedure, the merger that is determined to be unlikely to lead to the substantial lessening of competition in the market may be approved by OFT either unconditionally or subject to specified conditions. Written reasons for any decision taken must be given to the parties to the proposed merger. OFT must notify the Council of Ministers of any conditions subject to which it has approved the proposed merger, and is responsible for enforcing those conditions.
26. *Clause 26* authorises the Council of Ministers to overrule OFT's decision in respect of a merger or proposed merger. This can only be done for exceptional and compelling reasons of public policy, and must be preceded by consultation with OFT.
27. *Clause 27* stipulates that any report produced under Part 6 must be submitted to the Council of Ministers and must be laid before Tynwald. Such reports (which invariably will be produced by OFT) must also be published in such manner as OFT considers appropriate. In preparing reports, OFT is required to consider the extent to which it is necessary to include commercially sensitive information or information about the private affairs of an individual. If the inclusion of any such information is considered necessary, it may only be included in the version of the report submitted to Tynwald. That information must be redacted from the version of the report that is intended for general publication.
28. *Clause 28*, which commences Part 7 of the Bill, makes consequential amendments to the *Fair Trading Act 1996*.
29. *Clause 29* makes consequential amendments to the *Company Officers (Disqualification) Act 2009*.

Clause 30 provides for the saving of exclusion orders made under section 8(2) of the *Fair Trading Act 1996*.

30. The resulting Act is not expected to result in any additional expenditure being incurred or the need to acquire additional human resources. On the contrary, the resulting Act stands to accrue to the benefit of the general revenue of the Island *via* the imposition (in appropriate cases) of financial penalties for which the Bill provides.
31. In the opinion of the member moving the Bill, its provisions are compatible with the Convention rights within the meaning of the *Human Rights Act 2001*.



Ellan Vannin

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COMPETITION BILL 2020

1 **A BILL** to make provision about competition and the abuse of a dominant
2 position in the market; to empower the Isle of Man Office of Fair Trading to
3 collaborate with competition authorities in other jurisdictions to address issues
4 and behaviour in those other jurisdictions that affect the Island; to permit the
5 Isle of Man Office of Fair Trading to carry out with regulators concurrent
6 investigations into Isle of Man regulated markets; to repeal and replace Part 2 of
7 the Fair Trading Act 1996; to make provision for mergers; and for connected
8 purposes.

BE IT ENACTED by the Queen’s Most Excellent Majesty, by and with the advice and
consent of the Council and Keys in Tynwald assembled, and by the authority of the
same, as follows:—

9

PART 1 – INTRODUCTORY

10

1 Short title

11

The short title of this Act is the Competition Act 2020.

12

2 Commencement

13

(1) This Act (except sections 1 and 3 and this section) will come into
operation on such day or days as OFT may by order appoint.

14

15

(2) An order under subsection (1) may make such consequential, incidental,
supplemental and transitional provisions as appear to OFT to be
necessary or expedient for the purposes of the order.

16

17

18

3 Interpretation

19

(1) In this Act —

20

“**authorised officer**” means an officer appointed by OFT for the
purposes of this Act;

21

22

“**distortion**” means a state of affairs in which prices or supply are
different from what they would be in a competitive market;

23

24

“**enforcing authority**” has the meaning given in section 12(1)(b)(ii);

1 “FSA” means the Isle of Man Financial Services Authority¹;
 2 “information” includes a document and any other instructive material;
 3 “justice” means a justice of the peace;
 4 “market” means an economic activity related to the supply of goods or
 5 services within the Island provided by persons, irrespective of
 6 whether they are, or any of them is, present or based in the Island;
 7 “merger” has the meaning given in section 22;
 8 “OFT” means the Isle of Man Office of Fair Trading²;
 9 “police” means the Isle of Man Constabulary;
 10 “public authority” has the meaning given in section 6(1) of the *Freedom of*
 11 *Information Act 2015* and, for the purpose of that definition,
 12 “publicly-owned company” has the meaning given in section 6(2)
 13 of that Act;
 14 “restriction” means the presence of conditions that have the effect of
 15 limiting access to a given market.

- 16 (2) Wherever in this Act a notice is required to be published and no specific
 17 method of publication is stipulated, the person required to publish the
 18 notice must do so in such manner and for such duration as the person
 19 considers likely to bring the notice to the attention of affected persons.

20 PART 2 – ANTI-COMPETITIVE PRACTICE

21 4 Prohibition on preventing competition

- 22 (1) A person must not enter into any arrangement which—
 23 (a) may affect trade within the Island; and
 24 (b) has as its object or effect the prevention, restriction or distortion of
 25 competition within any market.

26 This subsection applies whether the arrangement is to be acted upon in
 27 the Island or elsewhere and is subject to the other provisions of this Part.

- 28 (2) Subsection (1) applies, in particular, to arrangements between persons
 29 which —
 30 (a) directly or indirectly fix purchase or selling prices or any other
 31 trading conditions;
 32 (b) limit or control production, supply, markets, technical
 33 development or investment;
 34 (c) share markets or sources of supply;

¹ A Statutory Board in accordance with Schedule 1 to the *Statutory Boards Act 1987*

² *Ibid.*

- 1 (d) apply dissimilar conditions to equivalent transactions with other
2 trading parties, thereby placing them at a competitive
3 disadvantage; or
- 4 (e) make the conclusion of contracts subject to the acceptance by the
5 other parties of supplementary obligations which, by their nature
6 or according to commercial usage, have no connection with the
7 subject of the contracts.
- 8 (3) An arrangement is void to the extent that it comprises or includes an
9 arrangement prohibited by subsection (1).
- 10 (4) For the purposes of this Act, a person is considered to be in
11 contravention of subsection (1) if the person is a party to an arrangement
12 which subsection (1) prohibits.

13 **5 Prohibition of abuse of a dominant position**

- 14 (1) Subject to the provisions of this Part, any conduct on the part of one or
15 more persons which constitutes the abuse of a dominant position within
16 any market is prohibited.
- 17 (2) Conduct may, in particular, constitute such an abuse if it consists of –
- 18 (a) directly or indirectly imposing unfair purchase or selling prices or
19 other unfair trading conditions;
- 20 (b) limiting production, supply, markets or technical development to
21 the prejudice of consumers or any class or description of
22 consumers;
- 23 (c) applying dissimilar conditions to equivalent transactions with
24 other trading parties, thereby placing them at a competitive
25 disadvantage; or
- 26 (d) making the conclusion of contracts subject to the acceptance by
27 the other parties of supplementary obligations which, by their
28 nature or according to commercial usage, have no connection
29 with the subject of the contracts.
- 30 (3) For the purposes of this Act, a person is considered to be in
31 contravention of subsection (1) if the person engages in conduct which
32 subsection (1) prohibits.

33 **6 Meaning of “anti-competitive practice”**

- 34 (1) In this Act, “**anti-competitive practice**” means either or both of the
35 following, as the context may require –
- 36 (a) conduct that tends to prevent, restrict or distort competition,
37 including but not limited to conduct specified in section 4;
- 38 (b) abuse of a dominant position, including but not limited to
39 conduct specified in section 5.

- 1 (2) Conduct engaged in pursuant to any enactment may constitute an anti-
 2 competitive practice unless the enactment disapplies or limits, in whole
 3 or in part, the provisions of this Act.
- 4 (3) A breach of the relevant competition provisions applied to the Island by
 5 the Payment Services (Competition) Regulations 2015³ constitutes an
 6 anti-competitive practice for the purposes of subsection (1).
- 7 (4) The Council of Ministers may by order amend subsection (3).
 8 Tynwald procedure – negative.

9 7 **Anti-competitive practice by public authorities**

10 The prohibition imposed by this Act on engaging in an anti-competitive
 11 practice applies to public authorities.

12 8 **Regulations in respect of exemptions from “anti-competitive practice”**

- 13 (1) The Council of Ministers may make regulations which provide for
 14 exemptions, on the grounds of public policy specified in subsection (4),
 15 from the prohibition of anti-competitive practice imposed by this Act.
 16 Tynwald procedure – approval required.
- 17 (2) Without limiting subsection (1), regulations under this section may
 18 exempt any one or more of the following –
 19 (a) a sector of the economy;
 20 (b) a specific person;
 21 (c) specific practices in general;
 22 (d) specific practices by a specific person.
- 23 (3) Regulations under this section may do either or both of the following –
 24 (a) provide for an exemption to be absolute or subject to conditions;
 25 (b) be time limited.
- 26 (4) In order to make regulations under this section, the Council of Ministers
 27 must be satisfied on reasonable grounds that the exemption contained in
 28 the regulations –
 29 (a) is likely to produce a better outcome for consumers or the
 30 economy of the Island;
 31 (b) is necessary for exceptional and compelling reasons of public
 32 policy; or
 33 (c) satisfies paragraphs (a) and (b).
- 34 (5) The Council of Ministers must seek and have regard to the views of OFT
 35 prior to making regulations under this section.

³ S.D. 2015/0205

- 1 (6) The Council of Ministers may not repeal or vary an exemption unless it
2 has published written notice of its intention to do so. Such publication
3 must be —
- 4 (a) for a period of not less than 3 months before the date of the
5 intended repeal or variation; and
- 6 (b) in such a manner as to ensure that it comes to the attention of
7 persons likely to be affected by the repeal or variation.
- 8 (7) Where a person exempted under this section contravenes any condition
9 that, in accordance with a provision inserted in regulations by virtue of
10 subsection (3)(a), is attached to the exemption, the Council of Ministers
11 may repeal or vary the exemption either of its own accord or at the
12 behest of OFT.
- 13 This is subject to subsection (8).
- 14 (8) Where the Council of Ministers proposes to repeal or vary an exemption
15 under subsection (7), either of its own accord or at the behest of OFT, it
16 must, before doing so, —
- 17 (a) forthwith furnish the exempted person with, and publish, a
18 written notice —
- 19 (i) stating its intention to repeal or vary the exemption;
- 20 (ii) stating the reasons for that intention; and
- 21 (iii) advising of the time within which and the method by
22 which the exempted person may make representations to
23 the Council of Ministers before the repeal or variation takes
24 effect;
- 25 (b) afford the exempted person the opportunity to make
26 representations in the manner and within the time set out in the
27 notice; and
- 28 (c) take into account any representations made.
- 29 (9) Where, following its determination under subsection (8), the Council of
30 Ministers decides to repeal or vary an exemption, it must —
- 31 (a) in writing notify the exempted person of the decision and, where
32 applicable, the extent of the variation; and
- 33 (b) publish a written notice specifying the details referred to in
34 paragraph (a).

35

PART 3 – INVESTIGATIONS

36

9 Investigations

37

- (1) OFT may investigate any matter where it has reasonable grounds to
38 suspect that a person —

- 1 (a) has been engaging, or intends to engage, in an anti-competitive
2 practice;
- 3 (b) has been breaching, or intends to breach, any condition –
4 (i) attached to an exemption; or
5 (ii) that OFT has imposed, under section 25(5)(b), as a
6 consequence of a merger; or
7 (c) satisfies paragraphs (a) and (b),
8 and must produce a written report of its findings during the
9 investigation.

10 (2) OFT may investigate any market where it believes, on reasonable
11 grounds, that the market is not functioning in the interests of consumers
12 or the economy. Such an investigation may be either of OFT's own
13 volition or in accordance with subsection (3).

14 (3) The Council of Ministers may request that OFT undertake an
15 investigation under subsection (2).

16 (4) OFT must make rules of procedure in respect of the carrying out of
17 investigations under this section.

18 Tynwald procedure – laying only.

19 (5) If the outcome of an investigation indicates that –

20 (a) an anti-competitive practice has been (or is likely to be) engaged
21 in; but

22 (b) forbearing to engage in the practice would provide a worse
23 outcome for consumers or the economy of the Island,

24 OFT may recommend to the Council of Ministers that an exemption be
25 granted.

26 (6) If, at any point during the course of an investigation, the person being
27 investigated offers to OFT an undertaking under section 13, OFT may
28 accept this undertaking and terminate the investigation.

29 (7) In this section, any power to investigate that is conferred on OFT may be
30 exercised –

31 (a) by OFT directly and exclusively;

32 (b) exclusively by a third party engaged by OFT; or

33 (c) jointly by OFT and a third party engaged by OFT,

34 but, for the avoidance of doubt, neither the power under subsection (4)
35 nor the power under subsection (5) may be exercised by anyone other
36 than OFT.

37 10 Investigatory powers

38 (1) OFT may, by notice in writing, require –

- 1 (a) a body corporate to furnish an authorised officer with any
2 information required for the purposes of an investigation, within
3 such timescale as may be specified; or
- 4 (b) an individual (whether identified by name or by position) to
5 attend at a specified place and time to be interviewed and answer
6 questions.
- 7 (2) An authorised officer may apply to a justice for a warrant to enter and
8 search, in the course of an investigation under this Part, any premises in
9 which the authorised officer has reasonable grounds to believe
10 information pertinent to the investigation is being stored, and such
11 application must set out the grounds on which it is based.
- 12 (3) The justice to whom an application under subsection (2) is made must
13 issue the warrant if the justice is satisfied that there are sufficient
14 grounds to do so.
- 15 (4) An authorised officer, acting pursuant to a warrant issued by a justice
16 under subsection (3), —
- 17 (a) may enter any premises specified in the warrant;
- 18 (b) may inspect or seize any information found on the premises,
19 provided the information appears to be relevant to the
20 investigation;
- 21 (c) may, with or without the help of any individual on the premises,
22 access any information stored electronically (whether or not with
23 the use of cloud technology);
- 24 (d) may require any individual on the premises to provide an
25 explanation of any information or state where it may be found;
- 26 (e) must be accompanied by a constable; and
- 27 (f) may be accompanied by such other person who, by reason of the
28 person's expertise, is reasonably necessary to assist the authorised
29 officer.
- 30 (5) Nothing in this section compels a person to supply any information
31 which the person would be entitled to refuse to produce or give in civil
32 proceedings before the High Court.
- 33 (6) If a person makes default in complying with a notice under subsection
34 (1), the High Court may, on the application of the Attorney General,
35 make such order as the court thinks fit for requiring the default to be
36 made good, and any such order may provide that all the costs or
37 expenses of and incidental to the application will be borne by the person
38 in default or by any officers of a company or other body who are
39 responsible for its default.
- 40 (7) Subject to subsections (5) and (6), a body corporate —
- 41 (a) commits an offence if it fails to comply with a requirement
42 imposed under subsection (1)(a); and

- 1 (b) is liable on conviction to a fine.
- 2 (8) Subject to subsections (5) and (6), an individual commits an offence if the
3 individual —
- 4 (a) in defiance of a requirement under this section imposed on the
5 individual by an authorised officer —
- 6 (i) fails to provide any information, or an explanation of any
7 information;
- 8 (ii) provides any information, or an explanation of any
9 information, that the individual knows or reasonably
10 suspects to be false or misleading in a material respect; or
- 11 (iii) obstructs an authorised officer in the course of an
12 investigation; or
- 13 (b) destroys, conceals, alters, or removes from the Island, any
14 information that the individual knows, or ought reasonably to
15 suspect, is likely to be required in relation to an investigation or
16 possible investigation.
- 17 (9) An individual who commits an offence under subsection (8) is liable —
- 18 (a) on summary conviction, to a fine not exceeding level 5 on the
19 standard scale; or
- 20 (b) on conviction on information, to a fine or to custody for a term not
21 exceeding 2 years.
- 22 (10) In this section, “premises” includes both domestic premises and business
23 premises.

24 **11 Joint investigations**

- 25 (1) OFT may conduct joint investigations with —
- 26 (a) any Department or Statutory Board which has regulatory powers;
27 or
- 28 (b) pursuant to a memorandum of understanding between it and
29 OFT —
- 30 (i) a competition authority; or
- 31 (ii) an authority which has regulatory powers,
32 in another jurisdiction.
- 33 (2) Joint investigations may be carried out equally or with a single party
34 leading and the other supporting, and the decision on which of those
35 methods to use must be made on a case by case basis by OFT and the
36 Department or Statutory Board concerned.
- 37 (3) The Council of Ministers may by order extend powers under this Act to
38 any Department or Statutory Board, and such extension may be subject
39 to such modifications as the Council of Ministers deems necessary.

- 1 This is subject to subsection (4).
2 Tynwald procedure – approval required.
3 (4) Where an extension under subsection (3) is granted –
4 (a) it may be limited in scope; and
5 (b) the Department or Statutory Board will hold concurrently with
6 OFT the powers so extended.
7 (5) OFT and any Department or Statutory Board holding concurrent powers
8 under subsection (4) must consult each other before taking any action in
9 relation to matters covered by those concurrent powers.

10 **12 Procedure where offence detected on investigation**

- 11 (1) Where an investigation under this Part reveals evidence that an offence
12 under any enactment may have been committed, OFT –
13 (a) may either suspend or abandon the investigation; and
14 (b) must, upon acting in accordance with paragraph (a), hand over
15 the evidence to –
16 (i) the police; or
17 (ii) if another person is by law responsible for enforcing the
18 provisions breach of which constitutes the offence (“the
19 enforcing authority”), the enforcing authority.
20 (2) After having acted in accordance with subsection (1), OFT may not
21 resume its investigation unless –
22 (a) any investigation commenced by the police or the enforcing
23 authority (“the criminal investigation”) has been completed; and
24 (b) OFT has received from the police or the enforcing authority, as the
25 case may be, written notification that the criminal investigation
26 has been completed.

27 **13 Undertakings relating to anti-competitive practices and failing markets**

- 28 (1) Where it appears to OFT that –
29 (a) there are reasonable grounds for believing that any person is
30 engaging, or has engaged, in a course of conduct which
31 constitutes an anti-competitive practice; or
32 (b) a market is not functioning in the interests of consumers or the
33 economy,
34 OFT may accept an undertaking offered by any person that OFT is
35 satisfied is sufficiently connected with the course of conduct or market
36 malfunction in question. OFT must signify its acceptance of the
37 undertaking by giving written notice to the person by whom it is offered.

- 1 This is subject to subsection (2).
- 2 (2) OFT must not accept an undertaking offered under subsection (1) unless
- 3 —
- 4 (a) it is satisfied that the honouring of the undertaking would, as the
- 5 case may be, —
- 6 (i) sufficiently modify the course of conduct in question so as
- 7 to remove its anti-competitive effects; or
- 8 (ii) remedy or prevent effects adverse to the interests of
- 9 consumers or the economy; and
- 10 (b) it has —
- 11 (i) arranged for the publication of a written notice complying
- 12 with subsection (3); and
- 13 (ii) considered any representations made to it in accordance
- 14 with the written notice.
- 15 (3) A written notice under subsection (2)(b)(i) must —
- 16 (a) state that OFT is proposing to exercise its power under subsection
- 17 (1);
- 18 (b) identify the course of conduct or market failure which prompts
- 19 the exercise of that power;
- 20 (c) identify the person who OFT believes is engaging, or has
- 21 engaged, in that course of conduct;
- 22 (d) in respect of a course of conduct, identify the goods or services in
- 23 relation to which OFT believes the person is engaging, or has
- 24 engaged, in that course of conduct;
- 25 (e) in respect of a course of conduct, specify the effects (identified by
- 26 OFT as adverse to consumers or the economy) which that course
- 27 of conduct may now or in future have;
- 28 (f) in respect of market failure, set out the reasons why OFT believes
- 29 that the market is not functioning in the interests of consumers or
- 30 the economy;
- 31 (g) set out the terms of the undertaking which OFT is proposing to
- 32 accept;
- 33 (h) identify the person who is offering to give the undertaking; and
- 34 (i) specify the deadline by which representations about the proposed
- 35 undertaking must be made to OFT.
- 36 (4) Once OFT has considered any representation made to it in accordance
- 37 with a written notice under subsection (2)(b)(i), that subsection does not
- 38 apply to the acceptance of a modified version of the undertaking.
- 39 (5) OFT must —

- 1 (a) once it has accepted an undertaking under this section, arrange
2 for the undertaking to be published in such manner as appears to
3 it to be appropriate;
- 4 (b) keep under review the carrying out of any such undertaking and
5 from time to time consider whether —
- 6 (i) by reason of any change of circumstances, the undertaking
7 is no longer appropriate; and
- 8 (ii) either —
- 9 (A) the person concerned can be released from the
10 undertaking; or
- 11 (B) the undertaking needs to be varied or superseded
12 by a new undertaking; and
- 13 (c) if it appears to OFT that the person by whom an undertaking was
14 given has failed to carry it out, give that person written notice of
15 that fact.
- 16 (6) If at any time OFT concludes under subsection (5)(b) —
- 17 (a) that any person can be released from an undertaking; or
- 18 (b) that an undertaking needs to be varied or superseded by a new
19 undertaking,
- 20 it must give written notice to that person stating that the person is so
21 released, or specifying the variation or, as the case may be, the new
22 undertaking which in its opinion is required.
- 23 OFT must publish any written notice it gives under this subsection.
- 24 (7) Where a written notice is given under subsection (6) specifying a
25 variation or new undertaking, the notice must state the change of
26 circumstances by virtue of which the written notice is given.
- 27 (8) OFT may at any time, by written notice given to the person concerned (a
28 “subsection (8) notice”) —
- 29 (a) agree to the continuation of an undertaking in relation to which it
30 has given written notice under subsection (6) (a “subsection (6)
31 notice”) specifying a variation or new undertaking; or
- 32 (b) accept a new or varied undertaking which is offered by that
33 person as a result of a subsection (6) notice.
- 34 (9) OFT must publish a subsection (8) notice.

35 PART 4 – ORDERS FOLLOWING AN INVESTIGATION

36 14 Orders following report on an investigation

- 37 (1) In any case where an investigation under section 9 concludes that a
38 market is not functioning in the interests of consumers or the economy,

OFT may, if it thinks fit, make an order under this section. Such an order must contain directions to a specified person or persons.

Tynwald procedure – approval required.

- (2) An order under this section may set out a scheme for the purposes of remedying or preventing any adverse effects which are specified in the report required by section 9(1).

This is subject to subsection (3).

- (3) No order may be made by virtue of subsection (1) until OFT has made a decision in relation to any undertaking offered pursuant to section 13.

15 Orders under section 14 – supplemental

- (1) Nothing in an order under section 14 has effect so as to apply to any person in relation to the person's conduct outside the Island unless that person is –

- (a) a British citizen, a British Overseas Territories citizen, a British Overseas citizen or a British National (Overseas);
- (b) a body corporate incorporated under the law of the Island; or
- (c) a person carrying on business in the Island, either alone or in partnership with one or more other persons.

- (2) An order under section 14 may extend so as to prohibit the carrying out of arrangements already in existence on the date on which the order is made.

- (3) Directions in an order under section 14 may mandate a specified person or the holder for the time being of a specified office in any company or association –

- (a) to take such steps within the person's functions (as may be specified or described in the directions) for the purpose of carrying out, or securing compliance with, the order; or
- (b) to do or refrain from doing anything so specified or described which the person might be required by the order to do or refrain from doing,

and may authorise OFT to vary or revoke any directions so given.

16 Procedure for orders under section 14

- (1) Before making an order under section 14, OFT must publish a written notice –

- (a) stating its intention to make the order;
- (b) indicating the nature of the provisions to be embodied in the order; and
- (c) stating that

- 1 (i) any person whose interests are likely to be affected by the
2 order, and who is desirous of making representations in
3 respect of it, should make those representations in writing
4 (ii) those representations must specify the person's interest
5 and the grounds on which the person wishes to make
6 representations; and
7 (iii) the representations must be made before a date specified in
8 the notice (that date being not earlier than the end of the
9 period of 30 days beginning with the day on which the
10 notice is published).
- 11 (2) OFT —
- 12 (a) must not make an order under section 14 before the date specified
13 in the notice in accordance with subsection (1)(c)(iii); and
14 (b) must consider any representations duly made to it in accordance
15 with the notice before that date.

16 **17 Enforcement of orders under section 14**

- 17 (1) A person who fails to comply with an order under section 14 commits an
18 offence and is liable on conviction on information to a fine.
- 19 (2) Nothing in subsection (1) —
- 20 (a) limits any right of any person to bring civil proceedings in respect
21 of any contravention or apparent contravention of any such order,
22 and (without prejudice to the generality of the preceding words)
23 compliance with any such order is enforceable by civil
24 proceedings at the suit of the Attorney General for an injunction
25 or for any other appropriate relief; or
- 26 (b) prevents OFT (or any Department or Statutory Board with
27 concurrent powers) from taking any of the actions specified in
28 section 18(2).
- 29 (3) If any person makes default in complying with any direction contained
30 in an order made under section 14, the High Court may, on the
31 application of the Attorney General, make an order requiring that person
32 to make good the default within a time specified in the order, or, if the
33 direction related to anything to be done in the management or
34 administration of a company or association, requiring the company or
35 association or any officer of it to do so.
- 36 (4) Any order of the Court under subsection (3) may provide that all the
37 costs or expenses of or incidental to the application for the order must be
38 borne by any person in default or by any officers of a company or
39 association who are responsible for its default.

PART 5 – SANCTIONS

18 Disciplinary measures and penalties

- (1) Where, following an investigation, OFT (or a Department or Statutory Board with concurrent powers) is satisfied, on a balance of probabilities, that a person has done something which constitutes an anti-competitive practice, it may take any of the actions specified in subsection (2).

This section does not limit the possibility of criminal proceedings under section 17(1).

- (2) The actions referred to in subsection (1) are –

- (a) issue a public censure;
- (b) impose financial penalties;
- (c) order restitution;
- (d) provide a recommendation to the FSA that it consider disqualifying the directors or other officers, or any of them; or
- (e) in the case of an anti-competitive practice which is a breach of an exemption granted by the Council of Ministers, recommend to the Council of Ministers that such exemption be repealed or varied.

- (3) Any action taken under subsection (1) may be appealed to the High Bailiff, who may hear the appeal *in camera*.

19 Injunctions

- (1) OFT (or a Department or Statutory Board with concurrent powers) may, if satisfied on reasonable grounds that a person is likely to engage in acts which are anti-competitive, apply to the High Court for an injunction.

This power is subject to subsection (2).

- (2) The power under subsection (1) may not be exercised without the consent of the Attorney General.

20 Regulations on penalties and restitution

- (1) OFT may make regulations which set out the methodology to be applied in fixing penalties and restitution.

Tynwald procedure – negative.

- (2) Regulations under this section must provide a basis for penalties to be commuted for –

- (a) whistle-blowers; and
- (b) those who, at an early stage in an investigation, admit guilt and co-operate with the investigation.

- 1 (3) In this section, “whistle-blower” means a person who informs on an anti-
2 competitive practice.

3 **21 Disqualification of directors**

- 4 (1) OFT may, when it deems it appropriate based on its findings following
5 an investigation, prepare and submit to the FSA a report detailing the
6 need, in the interest of protecting consumers, for an individual to be
7 disqualified as a director or other officer of a person that is a body
8 (whether corporate or unincorporate).
- 9 (2) Upon receipt of a report under subsection (1), the FSA may, at its
10 discretion, take the necessary steps in accordance with section 3 of the
11 *Company Officers Disqualification Act 2009* to have the individual
12 disqualified as a director or other officer.
13 This is subject to subsection (3).
- 14 (3) In proceedings occasioned by the FSA’s taking the steps referred to in
15 subsection (2), OFT must provide evidence in support of the FSA’s
16 application for disqualification.

17 **PART 6 – MERGERS**

18 **22 Meaning of “merger”**

- 19 (1) A “merger” occurs for the purposes of this Act when a person, or an
20 individual who controls a person, directly or indirectly acquires or
21 establishes control of another person or the business of another person.
- 22 (2) Control of a business or person may be direct or indirect and exists if
23 decisive influence is capable of being exercised in respect of it.
- 24 (3) In determining whether decisive influence exists, all relevant facts and
25 circumstances of the case must be taken into account.
26 This is in addition to the requirement to take into account the ostensible
27 effect in law of any document, transfer, assignment or other instrument,
28 act or arrangement.
- 29 (4) A merger also occurs for the purposes of this Act —
30 (a) if —
31 (i) a person acquires the whole or a substantial part of the
32 assets of another person; and
33 (ii) the result of the acquisition is to place the acquiring person
34 in a position to replace or substantially replace the other
35 person in the business in which it was engaged
36 immediately before the acquisition; or
37 (b) if a joint venture is created.

- 1 (5) A joint venture is created when a business previously carried out
 2 independently by two or more persons, or a new business, is carried on
 3 jointly by those two or more persons, whether or not in partnership or by
 4 means of their joint control of, or ownership of shares in the capital of, a
 5 body corporate.
- 6 (6) Without prejudice to the generality of the foregoing, a merger may –
 7 (a) be achieved in any manner, including –
 8 (i) by purchase, lease, acquisition of shares or assets, or by
 9 some other disposition or arrangement or by operation of
 10 law; or
 11 (ii) by amalgamation of or other combination between persons
 12 or their businesses,
 13 and whether or not the parties to the merger, or their business or
 14 assets, thereafter maintain identities which are distinct;
 15 (b) be effected by a single transaction or by a series of two or more
 16 transactions; and
 17 (c) take place whether or not any property is transferred.
- 18 (7) References in this section to a person or business are references to the
 19 whole or any part of the person or business.

20 **23 Notification of proposed merger**

- 21 (1) Whenever –
 22 (a) any two or more parties propose to merge; and
 23 (b) a financial threshold, prescribed by OFT by means of an order
 24 that also specifies the relevant value to which the threshold
 25 relates, is likely to be met by the proposed merger,
 26 the parties must notify OFT of the proposed merger before they take any
 27 action in furtherance of it. Notification must be in the form and manner
 28 specified by OFT.
 29 Tynwald procedure – affirmative.
- 30 (2) If a merger is commenced (regardless of whether it is completed or not)
 31 without the parties’ to it having notified OFT in accordance with
 32 subsection (1), each of the parties to the merger commits an offence and
 33 is liable on summary conviction to a fine not exceeding level 5 on the
 34 standard scale.
- 35 (3) Each party who commits an offence under subsection (2) may discharge
 36 its liability by paying a civil penalty in the amount and manner
 37 prescribed in regulations made by OFT; provided that the maximum
 38 amount of any civil penalty that may be prescribed is equivalent to level
 39 2 on the standard scale.
 40 Tynwald procedure – approval required

- 1 (4) The Council of Ministers may take any steps it considers appropriate to
2 mitigate the effects of a merger that has been completed without OFT's
3 having been notified before the merger was commenced.
4 This is subject to subsection (5) being satisfied.
- 5 (5) A prerequisite for the Council of Ministers to act pursuant to subsection
6 (4) is that it consider there to be exceptional reasons of public policy that
7 make doing so desirable.

8 **24 OFT procedure following merger notification**

- 9 (1) Upon receipt of a notification of a proposed merger under section 23,
10 OFT must make an initial assessment of whether the proposed merger
11 could lead to a substantial lessening of competition in the market.
- 12 (2) If OFT assesses that the proposed merger is not likely to lead to a
13 substantial lessening of competition in the market, it must so advise the
14 parties in writing. The parties will thereafter be free to merge without
15 further reference to OFT.
- 16 (3) If OFT assesses that the proposed merger could lead to a substantial
17 lessening of competition in the market, it must —
- 18 (a) so advise the parties in writing; and
- 19 (b) require the parties to produce evidence that OFT considers
20 relevant to the process of determining whether the proposed
21 merger is likely to do so.
- 22 (4) If, following production by the parties of the evidence requested under
23 subsection (3), OFT determines that the merger is unlikely to lead to a
24 substantial lessening of competition in the market, OFT —
- 25 (a) must, following discussions with the parties, in writing notify
26 them that it has no objection to the proposed merger; and
- 27 (b) must submit to the Council of Ministers a report on the proposed
28 merger, setting out —
- 29 (i) why OFT considers the proposed merger unlikely to lead
30 to a substantial lessening of competition in the market; and
31 (ii) in detail, any advice that OFT has given to the parties.

32 **25 Power of OFT to approve or forbid merger**

- 33 (1) If, following production by the parties of the evidence requested under
34 section 24(3), OFT determines that the proposed merger is likely to lead
35 to a substantial lessening of competition in the market, it must —
- 36 (a) either approve or forbid the proposed merger;
- 37 (b) in writing notify the parties of its decision in this regard; and
- 38 (c) lay this notification before Tynwald.

- 1 This is subject to subsections (2) to (8).
- 2 (2) Before approving or forbidding the proposed merger in accordance with
3 subsection (1), OFT may investigate the proposed merger, but must not
4 commence its investigation unless it has notified the parties of its
5 intention to investigate.
- 6 (3) OFT may engage the services of a third party, whom it may request to
7 either assist it in the investigation or carry out the investigation on its
8 behalf.
- 9 (4) Where it does investigate the proposed merger, OFT must, –
- 10 (a) in writing, advise the parties beforehand of the identity of the
11 investigator; and
- 12 (b) in due course, advise the parties of the outcome of the
13 investigation.
- 14 (5) If, following completion of an investigation under subsection (2), OFT
15 decides to approve the proposed merger, it has the following two
16 options –
- 17 (a) to approve the merger unconditionally; or
- 18 (b) to approve it subject to conditions.
- 19 (6) OFT must, in writing, advise the parties which of the options in
20 subsection (5) it decides to exercise and of the reasons for its decision.
- 21 (7) Where OFT approves a proposed merger subject to conditions, it must
22 advise the Council of Ministers of those conditions.
- 23 (8) OFT is responsible, in accordance with section 9(1)(b)(ii), for enforcing
24 the conditions which it has imposed under subsection (5)(b).
- 25 (9) In any event, OFT must make a decision under subsection (1) within 3
26 months of having received a notification of proposed merger in
27 accordance with section 23.
- 28 (10) Subject to this section and section 24, OFT must make rules of procedure
29 in respect of the carrying out of investigations under this Part.
30 Tynwald procedure – laying only.
- 31 (11) Written notification that OFT forbids a proposed merger is to be deemed
32 to be an order under section 14 and, if the parties merge in defiance of
33 OFT's prohibition against doing so, –
- 34 (a) the parties commit an offence under section 17; and
- 35 (b) the purported merger, for all purposes in law, has no effect and is
36 to be deemed to never have occurred.

- 1 **26 Power of Council of Ministers to overrule OFT's decision on merger**
- 2 (1) The Council of Ministers may, after having consulted OFT, overrule
- 3 OFT's decision in respect of a merger or a proposed merger.
- 4 (2) The Council of Ministers may only exercise the power under subsection
- 5 (1) if it considers there to be exceptional and compelling reasons of
- 6 public policy that make it desirable to do so.
- 7 (3) Where, in accordance with subsection (1), the Council of Ministers
- 8 consults OFT in respect of a merger or proposed merger, –
- 9 (a) OFT must publish the advice it gives to the Council of Ministers;
- 10 and
- 11 (b) the Council of Ministers must publish its reasons for overruling or
- 12 forbearing to overrule OFT's decision.

13 **27 Publication of reports**

- 14 (1) Any report produced by OFT under this Part must be submitted to the
- 15 Council of Ministers and must be laid before Tynwald as soon as
- 16 practicable after the report is completed.
- 17 (2) Any such report must be published in such manner as OFT considers
- 18 appropriate.
- 19 (3) When preparing a report, OFT must consider the extent to which it is
- 20 necessary to include information which –
- 21 (a) is commercially sensitive; or
- 22 (b) reveals information about the private affairs of an individual.
- 23 (4) Where OFT decides that it is necessary to include information falling
- 24 within subsection (3) –
- 25 (a) it may do so only in the report it submits to the Council of
- 26 Ministers and to members of Tynwald individually; and
- 27 (b) must redact such information from version of the report it lays
- 28 before Tynwald.
- 29 (5) In reaching a decision on the publication of information covered by
- 30 subsection (3), OFT must have regard to the extent to which the
- 31 information is material to the understanding of the report.

32 **PART 7 – CONSEQUENTIAL AMENDMENTS AND SAVING**

33 **28 Amendment to the Fair Trading Act 1996**

- 34 (1) The *Fair Trading Act 1996* is amended as follows.
- 35 (2) Part 2 is repealed, subject to section 31 of this Act.

- 1 (3) Section 20 is amended by omitting from subsection (2) “(as defined by
2 section 8)” and substituting “(as defined by section 6 of the *Competition*
3 *Act 2020*)”.
- 4 (4) Section 21 is amended in subsection (3)(a) by substituting —
5 (a) “level 5 on the standard scale” for “£5,000”; and
6 (b) “or” for the “and” that appears immediately after the semicolon.
- 7 (5) Section 24 is repealed.
- 8 (6) Section 25 is amended —
9 (a) in subsection (4), by inserting “or the *Competition Act 2020*”
10 immediately after “this Act”; and
11 (b) in subsection (5) —
12 (i) by substituting “level 5 on the standard scale” for “£5,000”;
13 and
14 (ii) by inserting “or” immediately after the semicolon at the
15 end of paragraph (a).
- 16 (7) Section 26 is amended by substituting the following for the definition of
17 “**anti-competitive practice**” —
18 | “**anti-competitive practice**” has the meaning given in section 6 of the
19 | *Competition Act 2020*.”
- 20 (8) Schedules 2 and 3 are repealed.

21 **29 Amendment to the Company Officers (Disqualification) Act 2009**

- 22 (1) The *Company Officers (Disqualification) Act 2009* is amended as follows.
- 23 (2) In paragraph 4 of Schedule 1 —
24 (a) omit “and” from immediately after the semicolon at the end of
25 subparagraph (e);
26 (b) omit the full stop at the end of subparagraph (f) and substitute “;
27 and”; and
28 (c) insert the following immediately after subparagraph (f) —
29 | “(g) sections 4 and 5 of the *Competition Act 2020*.”.

30 **30 Saving of exclusion orders made under the Fair Trading Act 1996**

31 As of the date on which section 29(2) of this Act comes into operation, all orders
32 already made under section 8(2) of the *Fair Trading Act 1996* are saved and
33 continue in operation as if they were regulations made under section 9 of this
34 Act.

IN THE KEYS

COMPETITION BILL 2020

A **BILL** to make provision about competition and the abuse of a dominant position in the market; to empower the Isle of Man Office of Fair Trading to collaborate with competition authorities in other jurisdictions to address issues and behaviour in those other jurisdictions that affect the Island; to permit the Isle of Man Office of Fair Trading to carry out with regulators concurrent investigations into Isle of Man regulated markets; to repeal and replace Part 2 of the Fair Trading Act 1996; to make provision for mergers; and for connected purposes.

Leave to introduce given by the Council of Ministers on 15 October 2020.

MR PERKINS

3 NOVEMBER 2020

Published by Authority