



COMPETITION BILL 2020 EXPLANATORY NOTES

These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, Mr. M. J. Perkins, MHK.

INTRODUCTION

1. These explanatory notes relate to the Competition Bill 2020. They have been prepared by the Office of Fair Trading (OFT) in order to assist readers of the Bill. They do not form part of the Bill and have not been endorsed by the House of Keys.
2. The notes need to be read in conjunction with the Bill. They are not meant to be a comprehensive description of the Bill.
3. The Bill has been subject to a public consultation and has been updated to take account of comments raised. This Bill has also been reviewed by the UK Competition and Markets Authority and the Department for Business, Energy and Industrial Strategy and has been refined accordingly.
4. An Impact Assessment of the Bill has been prepared.

SUMMARY AND BACKGROUND

5. There have been major changes to competition legislation in most developed economies, including the UK and Europe. These modifications have been made to combat anti-competitive practises and abuses of dominate power from both the public and private sector and to ensure markets work effectively for the economy and consumers. This Bill will align the IOM with the UK and EU in terms of competition law, ensuring equivalence.
6. The Bill defines what constitutes anti-competitive practices and accordingly empowers OFT to investigate markets in relation to anti-competitive practices. If OFT believes there are reasonable grounds it may accept undertakings, apply orders (subject to Tynwald approval) as well as impose disciplinary measures and penalties so as to prevent or punish anti-competitive practices.
7. The Bill also enables OFT to investigate, and potentially prevent, mergers if such mergers could lead to a significant lessening of competition. Such a decision by OFT could be overruled by the Council of Ministers if there are exceptional and compelling reasons of public policy that make it desirable to do so.

STRUCTURE OF THE BILL

8. The Bill is divided into 7 parts as follows:

| Part | Summary |
|---|---|
| Part 1: Introductory | Introductory provisions relating to the short title, commencement and interpretation of key phrases. |
| Part 2: Anti-competitive practices | This section provides clarity on what anti-competitive practices are as well as abuse of market dominance and how this applies to both the private and public sector. It explains the exclusions as well as the process to make regulations for granting exemptions. |
| Part 3: Investigations | Sets out how OFT may undertake an investigation if the market is not functioning in the interests of consumers or the economy. Detail of the procedure of an investigation, including joint investigations is explained as well as the powers available to OFT. |
| Part 4: Orders Following an Investigation | If an investigation concludes that the market is not functioning in the interests of consumers or the economy, OFT will have the powers to make orders with a view to remedy those practices. The procedures and enforcement of those orders are described. |
| Part 5: Sanctions | After undertaking an investigation this section explains the types of actions OFT may undertake (e.g. censure, financial penalties, restitution, injunctions). It also provides for OFT to submit a request to the FSA for the disqualification of a company director. |
| Part 6: Mergers | This provides an explanation on the notification process of a proposed merger and the procedures OFT will follow. It grants powers to both OFT and Council of Ministers to approve or prevent a merger as well as the publication of the reports. |
| Part 7: Consequential amendments and saving | Amendments made to Part 2 of the Fair Trading Act 1996, along with amendment to the Company Officer (Disqualification) Act 2009 to accommodate the changes made by this Bill. Also provides savings provisions for orders made under section 8(2) of the Fair Trading Act 1996. |

EUROPEAN CONVENTION ON HUMAN RIGHTS

9. In the opinion of the member moving the Bill, the provisions of the Competition Bill 2020 are compatible with the Convention rights.

FINANCIAL EFFECTS OF THE BILL

10. In the view of the member moving the Bill, it is not expected to have any human or financial resource implications, although there would be receipts to the Isle of Man Government following imposition of any financial penalties imposed as a consequence of enforcing the provisions set out in this Bill.

NOTES ON CLAUSES

PART 1 – INTRODUCTORY

11. **Clause 1** gives the Bill its short title.
12. **Clause 2** provides that, aside from sections 1 to 3, the Bill will commence upon the making of an appointed day order by OFT subject to such consequential, incidental, supplemental or transitional provisions as appear necessary or expedient to OFT.
13. **Clause 3** provides the definition of key phrases contained within the Bill and requires that, unless specified otherwise, all notices published under the Bill must be published in a manner, and for a period, that is necessary to bring the notice to the attention of the affected persons.

PART 2 – ANTI-COMPETITIVE PRACTICES

14. **Clause 4** prohibits the entering into of specified arrangements that have the effect of preventing competition in the Isle of Man, or elsewhere.
15. **Clause 5** prohibits the abuse of a dominant market position and is in breach of the provisions. Accordingly, the clause identifies examples of conduct that are considered to be an abuse of a dominant market position.
16. **Clause 6** defines anti-competitive practices, with respect to the conduct prohibited in clauses 4 and 5, and specifies that a breach of the Payment Services Regulations 2015 [*SD 2015/0205*] also constitutes an anti-competitive practice.
17. **Clause 7** ensures a level playing field by stipulating the prohibition on anti-competitive practices applies to public authorities as defined in section 6(1) and 2 of the Freedom of Information Act 2015 (e.g. Government Departments, Statutory Boards, local authorities and publically owned companies).
18. **Clause 8** provides clarity on how anti-competitive practices on the grounds of public policy may be exempted by regulations made by the Council of Ministers, subject to Tynwald approval. Before making such regulations the Council of Ministers must be satisfied, after consultation with OFT, that there are positive outcomes for consumers or the economy.

This clause also enables the Council of Ministers to repeal or even vary the exemption.

PART 3 - INVESTIGATIONS

19. **Clause 9** provides the grounds under which OFT may undertake an investigation and must produce a written report of its findings. The grounds for investigation include circumstances where OFT reasonably suspects that there are anti-competitive practices and when the market is not working effectively for the consumers or the economy. The Council of Ministers may also request that OFT undertake such an investigation.

OFT has the option of ceasing such an investigation, in the event the person being investigated offers an undertaking, which will remedy the anti-competitive practice.

The procedures to be followed by OFT when undertaking such investigations are to be specified in Rules laid before Tynwald.

20. **Clause 10** sets out the investigatory powers granted to OFT when undertaking an investigation. These include the ability to require the production of information or persons for interview. In addition, subject to a warrant being issued by a justice, authorised officers of OFT, accompanied by a constable and such other person who by reason of expertise is required to assist the authorised officer, may enter premises and inspect and seize information relevant to the investigation.

This clause also provides details of the offences and associated fines and custodial sentences that may be incurred by not providing information; by providing false information; by obstructing officers or by destroying information, in relation to an investigation.

21. **Clause 11** empowers OFT to undertake a joint investigation with other Government bodies or competition authorities abroad. It also enables the Council of Ministers, by an order approved by Tynwald, to extend the powers of this Act (subject to modifications) to any Department or Statutory Board to be held concurrently with OFT.

22. **Clause 12** requires OFT to suspend or abandon an investigation, if over the course of the investigation; evidence is found of other offences where the police (or any other enforcing authority) will need to be involved. OFT investigation cannot be resumed until it has received written notification that the criminal investigation has been completed.

23. **Clause 13** enables OFT, where there are reasonable grounds for OFT to believe that evidence of anti-competitive practices taking place, or where it appears to OFT the market is not functioning in the interests of the economy, to accept an undertaking from the individual. The undertaking must remove the anti-competitive effects of the activity for the benefit of consumers and the economy, by sufficiently modifying its behaviour or accepting a remedy issued by OFT. A public notice must be arranged, along with any representations. OFT is required to publish details of the undertaking with reviews taking place to ensure the desired behaviour is being carried out.

PART 4 – ORDERS FOLLOWING AN INVESTIGATION

24. **Clause 14** provides powers to OFT to make orders that, subject to Tynwald approval, are intended to remedy the adverse effects explained in the investigation report, if the market is not functioning in the interest of the consumer or the economy.
25. **Clause 15** provides clarification on how an order made further to clause 14 applies to persons carrying on business in the Island, as well the conduct of British citizens and bodies incorporated under the law of the Island operating outside the Island.
26. **Clause 16** explains that any order made must be published with the appropriate details of the provisions contained within the order, taking into account the interests of the individuals effected and considering the representations they have made.
27. **Clause 17** makes it an offence, punishable on conviction on information to a fine, to fail to comply with an order made further to clause 14. It also enables the High Court, on application by the Attorney General, to make an order requiring any person to make good a failure to follow the requirements of such an order.

PART 5 - SANCTIONS

28. **Clause 18** explains what action can be undertaken by OFT after an investigation has been concluded. Such actions may include public censure, the imposition of financial penalties, the ordering of restitution and recommending the disqualification of directors or officers of a company to the FSA (further to clause 21). Any action taken may be appealed to the High Bailiff.
29. **Clause 19** provides OFT with the ability to apply to the High Court, with the consent of the Attorney General, for an injunction to restrain companies it reasonably believes are engaging in anti-competitive activities.
30. **Clause 20** permits OFT to make regulations setting out a methodology of fixing penalties and restitution, taking into account whistle-blowers and those cooperating in the investigation. Such regulations are made subject to Tynwald approval.
31. **Clause 21** provides that OFT officers are able to submit a report to the FSA to request the disqualification of directors in order to protect consumers and the economy. On receipt of such a report the FSA may, at its discretion, take the necessary steps to have the individual disqualified as a director or other officer further to the Company Officers (Disqualification) Act 2009.

PART 6 - MERGERS

32. **Clause 22** provides a definition of a 'merger' for the purposes of the Bill. A merger may generally be considered to occur when the control of a business or person is acquired; when a person acquires the whole or substantial part of another person's assets; or when a joint venture is created.
33. **Clause 23** specifies that when a merger is being proposed, the parties in question must notify OFT (in the form specified in an order/regulations approved by

Tynwald), with the potential of, upon summary conviction, a fine at level 5 on the standard scale being imposed should this not occur. Each party may also discharge its liability by paying a civil penalty equivalent to level 2 on the standard scale. The clause also enables Council of Ministers, if there are exceptional reasons of public policy, to take steps to mitigate the effects of the merger.

34. **Clause 24** explains the procedure for OFT after receiving a merger notification. Officers must determine if there is a substantial lessening of competition in the market and keep both the noticed parties and the Council of Ministers informed of the situation.
35. **Clause 25** provides clarity on the ability for OFT to approve or prohibit a merger. Once in receipt of the merger notification, this must be laid before Tynwald and the OFT will assess whether the proposed merger will lead to a substantial lessening of competition within 3 months of having received the notification and keep all the parties and the Council of Ministers informed of its determination. After examining the evidence produced by the parties involved, with the assistance of a third party if necessary, the OFT may approve or forbid a merger. If the merger is approved, there may or may not be conditions attached. Failure to notify OFT is considered an offence under clause 17 and the merger will be deemed not to have taken place.
36. **Clause 26** permits the Council of Ministers to overrule OFT's decision on a merger. However this action must only be undertaken for exceptional and compelling reasons of public policy. Both OFT's advice to the Council of Ministers regarding the merger and the Council decision to overrule OFT, must be published in the interests of transparency.
37. **Clause 27** provides an explanation of the process for publication of reports. Initially the full report is submitted to the Council of Ministers and Tynwald. However a shorter report may be published which excludes commercially sensitive information, or information about the private affairs of an individual.

PART 7 – CONSEQUENTIAL AMENDMENTS AND SAVING

38. **Clause 28** provides details of amendments made to the Fair Trading Act 1996. These amendments remove the previous legislative controls specified in Part 2 (anti-competitive practices and prices of that Act), which are replaced by the controls set out in this Bill, and make consequential amendments to refer to the provisions of this Bill.
39. **Clause 29** amends the Company Officers (Disqualification) Act 2009 to insert reference to clauses 4 and 5 of the Bill into paragraph 4 of Schedule 1 (matters for determining unfitness of officers) to that Act.
40. **Clause 30** provides a saving provision to ensure the continued operation of orders made under section 8(2) of the Fair Trading Act 1996 as if there were regulations made under section 9 of the Bill, upon commencement of the Bill.