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COMPETITION (METHODOLOGY) (PENALTIES AND RESTITUTION) REGULATIONS 2023

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Statutory Document No. 20XX/XXXX

C

Competition Act 2021

COMPETITION (METHODOLOGY) (PENALTIES AND RESTITUTION) REGULATIONS 2023

Laid before Tynwald:

Coming into Operation in accordance with regulation 2

The Isle of Man Office of Fair Trading makes the following Regulations under section 20(1) of the Competition Act 2021.

PART 1 – INTRODUCTION

1 Title

These Regulations are the Competition (Methodology) (Penalties and Restitution) Regulations 2023.

2 Commencement

These Regulations come into operation on the later of –

- (a) 1 April 2024; or
- (b) the date on which section 20(1) of the Act comes into operation.¹

3 Interpretation

In these Regulations –

“**the Act**” means the Competition Act 2021;

“**Penalty**” means a financial penalty imposed by the OFT under section 18 of the Act;

¹ Section 20(1) of the Act requires that these Regulations be subject to the negative Tynwald procedure in accordance with section 32 of the Legislation Act 2015 however, section 71 of the Interpretation Act 2015 allows a power in an Act to make a public document to be exercised notwithstanding that that enabling power has not yet commenced. By virtue of section 71(4) of the Interpretation Act 2015, any public document so made cannot commence before the enabling power is itself commenced.

“**relevant turnover**” is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking’s last business year, calculated in accordance with regulation 4; and

“**undertaking’s last business year**” is the financial year preceding the date when the infringement ended.

PART 2 – CALCULATION OF PENALTY

4 Method of calculation

The Board must calculate a financial penalty under section 18 of the Act as follows —

Step 1

- (1) Determine the Step 1 amount having due regard to —
 - (a) the seriousness of the infringement;
 - (b) the extent and likelihood of actual or potential harm to —
 - (i) competition;
 - (ii) consumers; and
 - (iii) third parties;
 - (c) the nature of the product including the nature and extent of demand for that product;
 - (d) the structure of the market including the market share of the undertaking involved in the infringement, market concentration and barriers to entry;
 - (e) the market coverage of the infringement;
 - (f) the need for general deterrence;
 - (g) the relevant turnover of the infringing undertaking;
 - (h) such other factors as it considers appropriate.
- (2) For the purposes of this regulation —
 - (a) the “relevant turnover” of an infringing undertaking is to be calculated after the deduction of sales rebates, value added tax and other taxes directly related to turnover;
 - (b) an infringing undertaking’s latest set of accounts must be used to determine the relevant turnover for that undertaking.
- (3) For the purposes of this regulation the “relevant turnover” of an infringing undertaking —
 - (a) is its turnover in the product and geographical market affected by the infringement for the financial year preceding the date of cessation of the infringement and —

- (b) is to be calculated after the deduction of sales rebates, value added tax and other taxes directly related to that turnover.
- (4) Despite the above, where the OFT consider it appropriate, it may use a different figure in the place of relevant turnover where it considers to do so would more properly reflect the true scale of an undertaking's activities in the relevant market.

Step 2

- (1) Determine the Step 2 amount by adjusting the Step 1 amount to take account of the duration of the infringement.
- (2) Where an infringement lasts more than one year the OFT may adjust the provisional amount by multiplying it by not more than the number of years of the infringement, and in doing so the OFT may round up a part year to a full year for the purposes of this calculation.
- (3) In exceptional circumstances, the financial penalty may be reduced by such amount as the OFT considers appropriate where the duration of the infringement is less than one year.

Step 3

- (1) Determine the Step 3 amount by, if appropriate, increasing the Step 2 amount to take account of any aggravating factors.
- (2) The Schedule sets out a non-exhaustive list of aggravating factors and has effect for that purpose.

Step 4

- (1) Determine the Step 4 amount by, if appropriate, adjusting the Step 3 amount to take account of any mitigating factors.
- (2) The Schedule sets out a non-exhaustive list of mitigating factors and has effect for that purpose.

Step 5

- (1) Determine the Step 5 amount by considering whether the Step 4 amount should be adjusted, and by what amount, in order to ensure that the penalty imposed is sufficient to act as a deterrent to infringing behaviour.
- (2) In making such a consideration, the OFT may have due regard to the infringing undertaking's market share, total worldwide turnover, financial position, and any other matters it considers relevant.
- (3) The matters referred to in paragraph (2) —
 - (a) must be assessed at the time the penalty is being imposed; but
 - (b) the OFT may assess total worldwide turnover by reference to the average of such turnover over a 3 year period.

Step 6

- (1) Determine the Step 6 amount by assessing whether the Step 5 amount is proportionate having due regard to all relevant circumstances including but not limited to —
 - (a) the nature of the infringement;
 - (b) the role of the undertaking in the infringement;
 - (c) the impact of the undertaking's infringing activity on competition;
 - (d) the undertaking's size and financial position;
 - (e) the seriousness of the infringement; and
 - (f) the need sufficiently to deter both the infringing undertaking and other undertakings from engaging in anticompetitive activity.

5 Maximum penalty

- (1) The final amount of the penalty calculated according to these Regulations may not in any event exceed 10% of the worldwide turnover of the undertaking in its last complete annual business year.
- (2) Where any infringement by an association of undertakings relates to the activities of its members, the penalty shall not exceed 10% of the sum of the worldwide turnover of each member of the association of undertakings active on the market affected by the infringement.
- (3) Where there are 2 or more infringing undertakings, unless the Board deems otherwise, the penalty is to be the same for each of them.

PART 3 – REDUCTION ADJUSTMENT

6 Participation reduction

Where an undertaking —

- (a) acknowledges its participation in an infringement; and
- (b) makes what the OFT considers to be appropriate redress for that infringement,

the OFT may reduce the penalty.

7 Financial hardship reduction

- (1) Where, in exceptional circumstances, an undertaking is unable to pay the penalty due to the financial position of the undertaking, the financial penalty may be reduced.
- (2) Where an undertaking asserts, under paragraph (1), it is unable to pay the penalty, the undertaking must provide evidence of its financial health, including evidence of the cash flow of the undertaking.

- (3) When determining whether to grant a reduction under this regulation the OFT will have regard to the undertaking's financial position (including cash flow and ability to borrow), evidence of dividends and other forms of value extracted from the undertaking, and submissions about the specific social and economic context in which the undertaking operates.
- (4) The OFT will not grant a reduction on the basis of an undertaking's adverse or loss-making financial situation.

PART 4 – IMMUNITY AGAINST PENALTIES AND WHISTLEBLOWING AGAINST CARTELS

8 Requests for immunity

- (1) An undertaking may seek immunity in respect of the imposition of a penalty, where the undertaking does so, it must contact the OFT as soon as reasonably practicable.
- (2) Prospective applications for immunity may be discussed with the OFT without disclosing the identity of the undertaking but the prospective applicant's name must be supplied to the OFT.
- (3) The OFT must not disclose the identity of the prospective applicant unless the prospective applicant has consented to a disclosure.
- (4) The prospective applicant may be accompanied by a legal adviser.
- (5) In this regulation "prospective applicant" means a person, undertaking or other such entity seeking immunity under this Part.

9 Immunity prior to an investigation

- (1) Where an undertaking provides to the OFT evidence of cartel activity in a market before the OFT has commenced an investigation, the OFT will grant that undertaking and its directors and officers immunity from any penalty under these Regulations.
- (2) Before an undertaking is granted immunity under paragraph (1), that undertaking must –
 - (a) acknowledge that it participated in cartel activity;
 - (b) provide the OFT with all the information, documents and evidence available to it regarding the cartel activity;
 - (c) maintain complete cooperation throughout the investigation and until the conclusion of any proceedings in respect of it; and
 - (d) refrain from further participation in the cartel activity.

10 Immunity after an investigation

- (1) If the undertaking is the first to provide the OFT with evidence of cartel activity in a market before the OFT has issued a statement of objections, it may –
 - (a) be granted immunity;
 - (b) receive a reduction in the level of the financial penalty of up to 100%;
 - (c) receive protection for its employees and directors.
- (2) Where the OFT provisionally decides to impose a penalty, the undertaking may make written representations to the OFT prior to any final decision being taken.

PART 5 – RESTITUTION

11 Restitution following anti-competitive behaviour or competition infringement

- (1) The OFT may, in addition to issuing a financial penalty, also order restitution to any third-party victim who has suffered losses due to the anti-competitive behaviour or competition infringement.
- (2) Victims of competition infringement, who have suffered damage caused by an infringement, are entitled to claim –
 - (a) actual loss;
 - (b) loss of profit; and
 - (c) payment of interest, resulting from (a) and (b), from the time the infringement took place for that harm.
- (3) Where a victim seeks restitution under paragraph (2), the victim must submit to the OFT, evidence of the damage and loss and any other relevant information.
- (4) Before issuing an order for restitution under paragraph (1), the OFT must calculate a figure based upon any evidence submitted under paragraph (3), which seeks to restore to the victim their financial position as if the infringement had never taken place and reflects any of the consequences listed in paragraph 2 (a)-(c).

MADE

JOHN WANNENBURGH
Chair of the Office of Fair Trading

SCHEDULE

[Regulation 4]

AGGRAVATING AND MITIGATING FACTORS

1 Aggravating Factors

The OFT may use any of the following as aggravating factors to increase the financial penalty. Aggravating factors include the following –

- (a) persistent and repeated unreasonable behaviour that delays the OFT's enforcement action;
- (b) role of the undertaking as a leader in, or an instigator of, the infringement;
- (c) involvement of directors or senior management;
- (d) retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- (e) continuing the infringement after the start of the investigation;
- (f) repeated infringements by the same undertaking or other undertakings in the same group (recidivism);
- (g) infringements which are committed intentionally rather than negligently;
- (h) retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.

2 Mitigating Factors

The OFT may use any of the following as mitigating factors under Part 2 to decrease the financial penalty. Mitigating factors include the following –

- (a) role of the undertaking, for example, where the undertaking is acting under severe duress or pressure;
- (b) termination of the infringement as soon as the OFT intervenes; and
- (c) cooperation which enables the enforcement process to be concluded more effectively and/or speedily.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations set out the methodology by which the Office of Fair Trading will determine any financial penalty or restitution imposed by virtue of section 18 of the Competition Act 2021.