ISLE OF MAN **OFFICE OF FAIR TRADING**

Isle of Man Office of Fair Trading

Summary of Responses to the Consultation on the Proposed Competition Bill 2020

Isle of Man Government

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July 2020

VERSION 1.0

CONTENTS

1. INTRODUCTION

The consultation document was produced to invite comment on proposals to revise the current competition framework by introducing new legislation to replace Part 2 of the Fair Trading Act 1996 (as amended). This is the second consultation - the first consultation was published in 2013. The 2018 consultation contained a range of targeted questions relating to a draft Competition Bill and included, for reference, the Summary of Consultation Responses to the 2013 consultation.

2. THE CONSULTATION EXERCISE

The public consultation exercise ran from 1st May to 15th June 2018.

The consultation document was issued directly to the following:

- Tynwald Members
- Attorney General
- Local Authorities
- Chief Officers of Government Departments, Boards and Offices
- Isle of Man Chamber of Commerce
- Isle of Man Law Society
- Isle of Man Trade Union Council

The document was also made available on the Consultation Hub of the Isle of Man Government website.

3. THE RESPONSES

A total of 40 responses were received. A list of respondents is attached at **Appendix 1** and a summary of those responses, together with the response of the OFT, is attached at **Appendix 2**.

4. OVERARCHING ISSUES

Whilst in general, the OFT has sought to follow the approach of responding to individual comments (see Appendix 2), there are recurrent themes within the responses which merit a combined response; and these are addressed in **Appendix 3**.

5. CONCLUSION

The OFT appreciates the responses received and has made amendments to its Bill accordingly. Some points have led to substantial changes in the drafting especially around the way in which mergers are dealt with in the Island. The OFT has answered the responses to those who wished their comments to be published below. It has also written an in-depth response to the overarching points which were made throughout the consultation in regard to the agricultural market on the Island.

Many of the key issues around the Bill were caught and amended through the first consultation response. The comments received this time have helped us to hone the scope of the Bill and we are now happy that it represents the needs and views of businesses and individuals on the Island, as well as remaining true to the requirements set out by the Council of Ministers.

Finally the OFT would like to thank all the respondents for their time. Given the extent of the responses and the breadth of comments, this has truly helped to shape the Bill, which we are now happy to progress through the branches of Tynwald.

Martyn Perkins MHK
Chairman

APPENDIX 1

ORGANISATIONAL RESPONDENTS

- Manx National Farmers Union
- The board of the Manx NFU
- Manx Independent Carriers Limited
- Isle of Man Creamery Ltd
- Isle of Man Agricultural Marketing Society Limited
- Isle of Man Communications Commission
- Department for Enterprise
- Sure (Isle of Man) Limited
- Isle of Man Fatstock Marketing Association
- Department of Infrastructure
- Appleby

INDIVIDUAL RESPONDENTS

- Dr Alex Allinson MHK
- Juan Kelly
- Michael Josem
- David Kelly
- Jonathon Kermode
- Raymond Craine
- Tim Johnston
- Derek Cain

Eighteen further responses were received which were marked 'anonymous' and which therefore have not been named in the above list. Their comments are included (marked anonymous).

Three further responses were received which were marked 'confidential' and therefore have not been named in the above list. Their responses have been taken into account but comments are not included.

RESPONSE SHEET REPLIES

QUESTION 1 – FROM THE PRACTICES MENTIONED BELOW DO YOU AGREE THAT ALL ARE ANTI-COMPETITIVE?

WE SAID:

The Draft Competition Bill 2018 defines 'anti-competitive practice' as that which either:

- restricts or prevents competition or
- constitutes an abuse of a dominant position

RESTRICTION OR PREVENTION OF COMPETITION

Directly or indirectly fixing prices or other trading conditions

Example: All major food suppliers agree between themselves that they will only sell bread at £5 per loaf, thus making substantial profits. In a competitive environment, suppliers would lower prices to undercut each other (to the benefit of the consumer); therefore such a situation is considered anti-competitive.

Limiting or controlling production, supply, markets, technical development or investment

Example: The Vehicle industry decide to impose a quota on the number of vehicles being imported, in an attempt to restrict supply and keep prices higher than would otherwise be the case. If there was no attempt to limit supply there would be a greater range of vehicles and a reduction in prices.

Sharing markets or sources of supply

Example: There are two main supermarket chains on the Island. The two chains agree to share the market; one will supply the south and the other will serve the north of the Island. If this agreement were not in place, the chains would have more incentive to compete with each other on price/quality as they would be operating in the same areas.

Making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which have no connection with the subject of the contracts

Example: Firm A is the supplier of a brand of baked beans which holds a large market share. They also produce soup but in this market there are many competitors and Firm A has a much lower market share. Firm A approaches the Island's main supermarket chain and agree to supply beans at a discounted price, provided that it also stocks only soup from

Firm A as well. Not only does the arrangement allow the supermarket to increase its margins, it limits consumer choice and reduces competition in the soup market.

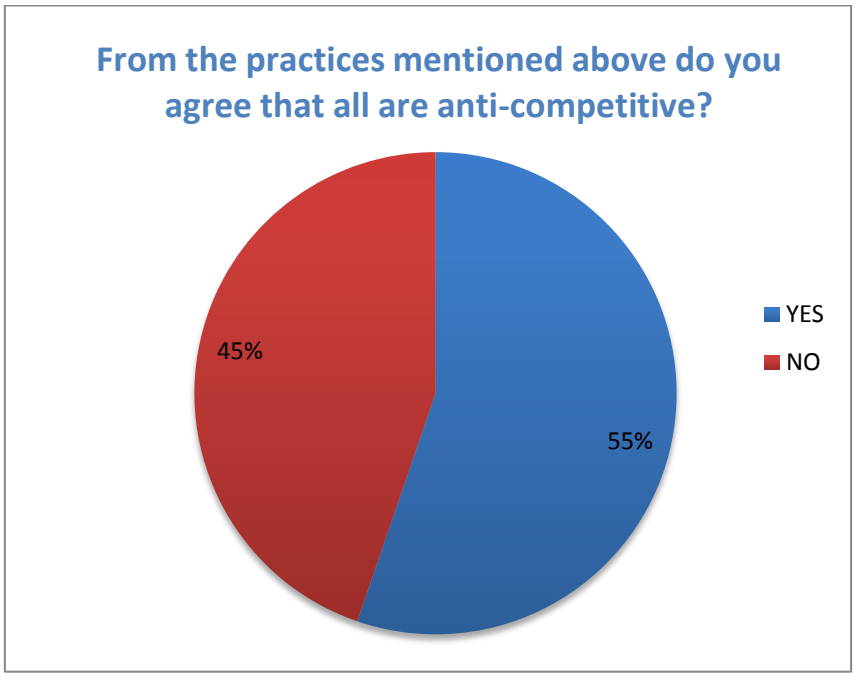
Distorting or restricting the market.

Example: Two airlines serve the Island, one of which is locally-owned and the other is part of a large international group; this airline is able to draw upon more financial support from its parent company, therefore charges less than it costs to operate for a sustained period of time. The local airline cannot sustain lowering its price for this long and therefore closes down, once it is out of business, the international airline now has a monopoly position and can charge much higher prices.

ABUSE OF A DOMINANT POSITION

Imposing unfair purchase or selling prices or other unfair trading conditions

Example: A cinema which has no other competitors places a condition that all purchasers of tickets must also buy popcorn for the screening.



COMMENTS TO QUESTION 1

YOU SAID:

Isle of Man Agricultural Society & One Anonymous Respondent (both supplied same answer)

Milk Prices Order:
A recently commissioned review of the functioning of the Milk Prices Order for DEFA included the following observations and overall recommendation:
Although the value and the impact of the Milk Prices Order 2015 would appear somewhat limited, there remains a risk that any disruption or perceived disruption caused by its removal would disadvantage one or more of producers, processors and consumers.
On the basis that imported milk is not subject to the Milk Prices Order 2015, and that the level of imports is sufficient to provide consumers with a choice over the type of milk, its packaging and its price, then it is unlikely that the Milk Prices Order is in itself limiting consumers to paying higher prices for fresh milk.

Neither Jersey nor Guernsey has left their dairy industries to the free market. Both of these Crown Dependencies have sanctioned the creation of monopoly-buyer status for their principal dairy processors. Whilst Jersey has never controlled the retail price of milk, it does have ministerial oversight of the wholesale price; Guernsey has recently revoked its Milk (Retail Prices) (Guernsey) Order 2014, although the Bailiwick retains complete ownership and control of Guernsey Dairy and therefore maintains control over the price at which milk is sold wholesale.
Recommendation: The dairy sector on the Isle of Man is an economically and socially valuable industry, integral to the Island's aims for food security, but it is inherently vulnerable because of its small scale relative to UK and European dairy counterparts. Given the perceived risks of disruption to the dairy industry that may be caused by the removal of the Milk Prices Order 2015, and given that it is unlikely that the Milk Prices Order 2015 is in itself limiting consumers to paying higher prices for fresh milk, it is recommended that the Milk Prices Order 2015 should be maintained.

Producer Retailer Contributions:
Isle of Man Milk Marketing Association Ltd (a cooperative of all Isle of Man milk producers), and subsidiaries, exist to ensure a viable Island industry, rather than allowing a handful of smaller enterprises to skim off the higher margins from the most profitable liquid milk. Isle of Man Milk Marketing Association Ltd is a collection of Isle of Man dairy farmers pooling their resources and sharing the risks.

The Isle of Man Agricultural Marketing Acts, and hence the Milk Marketing Scheme 2007, therefore include provisions for producer retailers to make additional contributions, without which producer retailers could be incentivised to threaten the whole Island dairy industry.

Exclusivity agreements:

It is sometimes necessary to have exclusivity agreements with customers and/or suppliers to make an investment in either capital, set-up costs, or resourcing by one of the parties worthwhile. Exclusivity agreements are generally recognised by the International Chamber of Commerce.

Communications Commission

The Communications Commission considers that, in theory, the practices included are all likely to be anti-competitive. However, whether or not the practice will be deemed to be so will be determined as a result of a competition investigation.

Sure (Isle of Man) Limited

Whilst we have answered Yes, this should be qualified to the extent that for some of the above practices, a fuller analysis would need to be undertaken. Many jurisdictions, including those within the European Union, have an outright prohibition on price fixing, regardless of the size of the firms involved, as it is considered to be such an undesirable practice. For the other practices mentioned, however, there will usually be a need for further analysis to determine whether the behaviour is actually harmful to the competitive process and consumers, or whether the behaviour is benign in its effect. To take the baked beans/soup example, whilst customer choice of soup may become limited in the island's main supermarket, the extent to which competing providers of soup will be adversely affected will depend on whether they still had sufficient other sales outlets for their products. More fundamentally, it is worth emphasising that before any analysis of the anti-competitive effects of the practices listed can be undertaken, it will first be necessary for the OFT to establish that the party accused of such practices does indeed hold a dominant position in the relevant market. The only possible exception to this requirement is where price-fixing is involved, which as noted above is usually subject to a blanket prohibition regardless of the market position of the firms involved.

Under EU competition law, which the draft Competition Bill seems to be based on, even a dominant firm could argue that its apparently anti-competitive behaviour had an objective justification and was proportionate. Indeed, this seems to be captured in the Competition Bill, in that it allows for circumstances where there may be countervailing benefits that would mean that some of the above practices may qualify for an exemption. However, the grounds for any such exemptions would need to be explicitly and carefully assessed before any such exemption is granted.

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 that need to be satisfied to qualify for an exemption.

Isle of Man Fatstock Marketing Association

In the past the Isle of Man held a Red Meat derogation which was based on health grounds to try to protect the Island's Livestock base. This as a consequence protected the island from the importation of cheap meat with limited confidence in its actual country of origin nor the actual health or welfare status of the livestock from which products being imported were derived. Indeed, whilst this ruling could have been seen as supporting a monopoly position the reality when the derogation was lost was that red meat was being imported into Southern Ireland and then distributed as "processed in Southern Ireland", exposing consumers to potential health hazards.

Anonymous Respondent

The Island has a limited population that is in decline. Encouraging free competition is a great wish, but given our scale and cost structure will not always be feasible.
A good starting point therefore is legislation that ensures supply on Island for the good of consumers and the economy.

Nothing in this proposed legislation covers online selling. Amazon for example is considered by many to be a monopolist, yet this proposed legislation does nothing to tackle anti-competitive behaviour by non IOM online retailers, and online sellers. None of whom contribute to the Island and it's economy in terms of rates, taxes or investment in infrastructure.

Equally, UK retailers operating here do not always factor in their true costs to operating here and thus there is often suspicion of "dumping" of goods here as the true cost of distribution is shared across a distribution centre where IOM based retailers reflect the true cost of doing business here.(as per airline example)

Anonymous Respondent

The example of fixing prices or trading conditions is juxtaposed with the example of distorting or restricting the market. If competition brings lower loaf prices which are good for the consumer, but is unsustainable and forces local millers/bakers out of business. Large international companies will always have economy of scale. Just like market distortion example. Producers need to be paid cost of production, plus investment for the future.

Four Anonymous Respondents Made Similar Points Which Have Been Collated

Example one is not anti-competitive because producers on the Isle of Man have much higher production costs such as importing equipment and higher electricity and fuel prices.
Without protection Manx producers would not be able to compete and go out of business. It is difficult and sometimes not possible for Manx farmers to compete with other countries.

OFT Response:

The Communications Commission correctly identifies that, whilst the practices are all potentially anti-competitive, any investigation would necessarily need to also consider the potential economic and social benefits. That principle underpins the whole Bill.

The OFT recognises that although competition is generally advantageous, there does need to be provision to allow behaviours that might otherwise be anti-competitive. This is particularly the case in a small economy like the Isle of Man. Clause 9 of the Bill seeks to provide the vehicle to achieve the correct balance.

FOLLOW UP TO QUESTION 1 – CAN YOU THINK OF ANY OTHER EXAMPLES OF ANTI-COMPETITIVE BEHAVIOUR?

YOU SAID:

Manx National Farmers Union

Importing products from the UK and selling them below the Manx cost of production for sustained periods. This forces Manx Producers out of business. Products imported to the island and sold even for just one day below the cost of production is an aggressive sales technique. More extreme examples of this include Tesco importing UK potatoes and selling them for less than the cost of importing them never mind the cost of producing them. 29p for 2.5kg of potatoes at selected times of the year in Tesco Douglas. You can't even send a postcard to the UK for 29p never mind grow 2.5kg of potatoes, package them, ship them to the Isle of Man on the steam packet, stock them in a supermarket and then sell them.

The Board of the NFU

Tesco Loss leading /dumping products leading up to the Christmas period. Short time only loss leader to attract custom.

- *Food being sold at below production costs. Allowable for a short period as per [NFU's firsts comment] predatory pricing to the local market.*
- *Food security of supply. Worry confirmed but market forces prevail.*
- *Imports not adding to the multiplier effect. As per [NFU's firsts comment].*
- *Imports, freight being subsidised by UK company head offices, and shipping deal with freight companies. Unable to influence company decision at a local producer level and suffering due to the economies of scale.*
- *Fragility of the local suppliers and retail operations can't compete profitably.*

David Kelly

It is possible that a dominant supplier who is also a major employer could leverage those granting permission to trade in order to supress competition. For example, one retail outlet could threaten to withdraw its services at the loss of employment of its staff in order to prevent a competitor setting up business.

Manx Independent Carriers

Services provided by Government departments and/or Statutory Boards provide services to the private sector. The IOM Post has a monopoly on mail (reserved business) which cannot be carried by the private sector. IOM Post compete with the private sector unfairly because they use resources funded and paid for by reserved business (e.g. wages, pensions, vehicles, buildings etc) to gain parcel traffic that should normally be carried by the private

sector. Often we find that prices quoted by IOM Post for un-reserved are unrealistic and we are unable to match them. All of Europe, UK and the Channel Islands have postal regulators e.g. OFCOM and it is expressly forbidden for Postal Services to use revenue derived from reserved business to subsidise un-reserved business. We do not fear competition provided costs are on a like for like basis but we find that our costs are such that we cannot compete. In the real world of business this does not happen and can only happen because IOM Post does not factor in the same costs as we have to. Regulators can and do impose substantial fines on Postal Services providers that transgress the rules. No such regulator exists in the IOM and our previous complaints to the OFT and indeed direct to elected MHK's are well known and available if required.

Jonathon Kermode

The Govt setting the price of milk

Isle of Man Creameries & Isle of Man Agricultural Marketing Society replied the same

Yes - Industries governed by the Isle of Man Agricultural Marketing Acts should not be regarded as 'anti-competitive' practices for the purposes of a Competition Act. Section 8 of the Competition Bill 2018 on exclusions from the scope of 'anti-competitive practices' does not merely relate to public authorities as indicated in the preamble to this question.

Tim Johnston

Supermarkets undercutting local producers by, for example, not reflecting the true cost of imports so that an item sold on island has the same transport cost as one delivered to a UK store.

Derek Cain

You have not used an example of supermarkets bringing perishable goods to the island at less than the cost of production and under cutting home produced goods such as milk vegetables and meat. The islands agricultural industry is small by UK standards and needs to be protected. The Agricultural Marketing acts have served the consumer and the farmer well and should not be put under threat by this legislation. The loss of the meat derogation has virtually bankrupted the red meat sector on the island and should be a lesson to politicians to take care.

Sure (Isle of Man) Limited

Yes and it is important that the OFT does not consider, or give the impression that, the above list is exhaustive. The OFT should make it clear that there may be other types of behaviour - whether conducted by a single dominant firm or as part of an agreement or arrangement between two firms - that could constitute anti-competitive behaviour or practices.

For example, we note that the Competition Bill includes discriminatory conduct (applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing

them at a competitive disadvantage) as a potential abuse of a dominant position (see section 4(2)(c) of the Bill). Within the telecommunications sector, this type of behaviour is sometimes manifested in the form of the vertically integrated incumbent network provider offering more favourable terms to its own retail arm than it offers to independent retail telecom providers. This discrimination can also be quite subtle, such as the incumbent giving greater or earlier visibility of its network plans to its own retail arm than it gives to competitors, placing those competitors at a disadvantage.

We note that the draft Competition Bill also recognises that discriminatory behaviour could occur in the context of an arrangement between two or more persons (see section 5(2)(d) of the Bill).

Other practices that could be anti-competitive could include an outright refusal to supply, or charging prices for wholesale services that are so excessive that they effectively amount to a refusal to supply.

The point is that it would be impossible to list every conceivable type of anti-competitive practice and as such the drafting of the Competition Bill should be such that it does not unduly limit itself in terms of the types of behaviour it could consider. Having said that, Sure (Isle of Man) Limited is reassured that the drafting of Sections 4 and 5 of the Competition Bill is very similar to that of Articles 102 and 101 respectively of the Treaty of the Functioning of the European Union (TFEU) and as such are consistent with best practice.

Isle of Man Fatstock Marketing Association

Allowing certain supermarkets to import fresh product in particular selling at UK prices in the IOM where the consumers within the regional distribution hub are subsidising the import costs so bringing product to the local market place at an unfair price with which local producers cannot fairly compete

Anonymous Response

Large building company's buying up any land for sale to stop small, local builders doing there own developments. With no competition they can sell homes of any standard and any price.

Anonymous Response

Petrol stations. There are only two suppliers are you confident that they are not fixing the prices?

Also, airlines.

Anonymous Response

Selling produce below cost of production and the cost of delivery to the Isle of Man

Anonymous Response

There are numerous practices that could be deemed to be anti-competitive for one reason or another and to simply use some obvious examples to suggest all such practices are un-competitive is rather disingenuous and is clearly guiding the survey response to a desired conclusion. Low prices in themselves do not always benefit the consumer as quality is usually lowered aswell. Uncontrolled market share dilution (improved competition/choice) often leads to unsustainable businesses, resultant bankruptcies, redundancies, poor materials/quality, etc. None of which benefit the consumer.

Anonymous Response

The cost of implementing an all Island supply infrastructure is disproportionately high - mainly because of monopolies under the direct control of IOM Government, (MUA & Steam Packet Company), neither of whom have been highlighted above, yet have the most inflationary impact on the cost of living and consuming on the IOM. These disproportionately high costs are also huge barriers to entry for new entrants in key area, like supermarkets, thus their activities are potentially more anti-competitve than those of any of the examples given above.

Equally, the financial support of agricultural produce on the Island creates potentially monopolistic supply in meat and dairy sectors - particularly where prices are set by law e.g. Milk.

Anonymous Response

The Milk Prices Order is NOT anti-competitive; the small scale of the Manx dairy is a drop in the ocean compared to the UK and Europe with their economy of scale. Production costs on a small island are significantly higher. Agriculture on the Isle of Man is unique and needs to be treated as such. Industries governed by IOM Agricultural Marketing Acts shouldn't be treated as anti-competitive practices. I believe these industries should be excluded under section 8 of the competition bill 2018.

Six Anonymous Respondents Made Similar Points Which Have Been Collated

As small scale dairy farmers they struggle to compete with UK suppliers; therefore they believe the Milk Pricing Order is NOT anti-competitive as it allows them to stay in the market.

OFT Response:

The wide variation of the consultation responses recognises the breadth of the economy of the Island. The Bill itself is drafted to implement a set of key principles, within which the economy can flourish and provide a measure of protection to businesses from anti-competitive behaviours.

It is important to recognise that competition law is one of the key provisions which allows an economy to trade with other economies; both inwards and outwards.

The substantial contribution on agricultural issues is dealt with in Appendix 3. This details the balance between the larger issues of the agricultural sector and the importation of produce. Clause 9 of the Bill would provide a framework for any exemptions which DEFA wished to propose to the Council of Ministers.

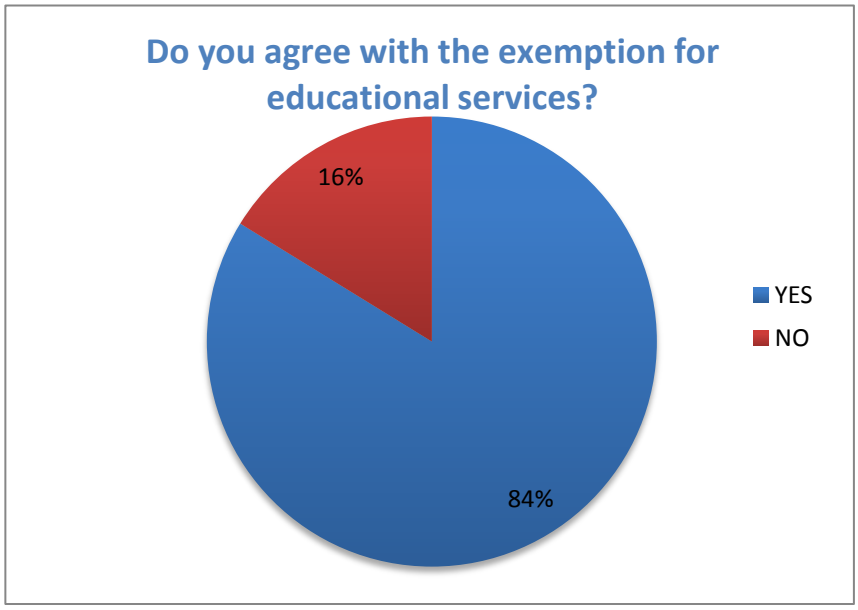
QUESTION 2 – EXEMPTIONS FOR CERTAIN PUBLIC AUTHORITIES

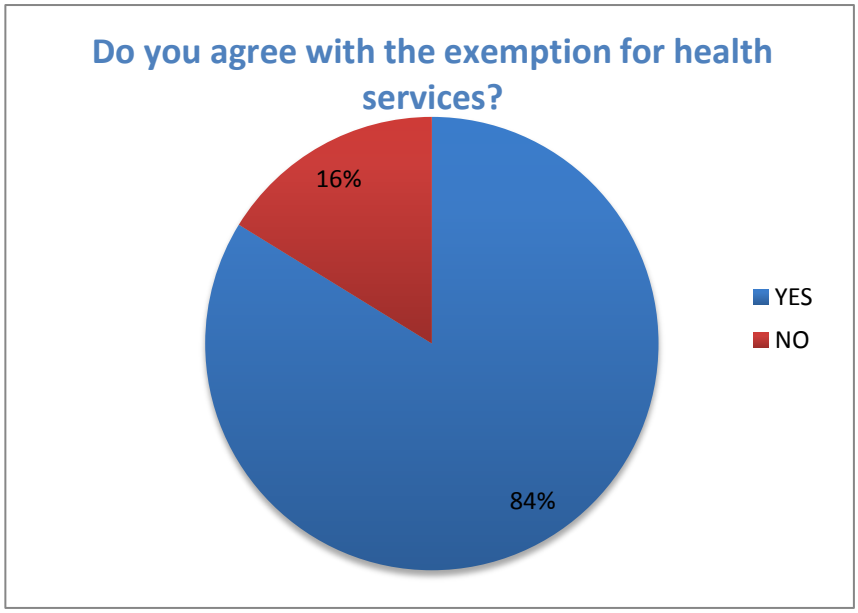
WE SAID:

The proposed legislation applies to public sector authorities as well as the private sector.
It is proposed that the following be excluded from the scope of 'anti-competitive practices':

- the provision of educational services by the Department of Education, Sport and Culture
- the provision of health services by the Department of Health and Social Care

This means that a private-sector school could not make a complaint that the provision of state education was anti-competitive due to it receiving Government funding and other preferential treatment (such as access to Government resources).
Similarly, a private hospital could not make a complaint that the NHS was engaging in anti-competitive practices in the provision of the state healthcare system.





COMMENTS TO QUESTION 2

YOU SAID:

Andrew Cooper – in response to both parts

As long as it doesn't impact on locally procured resources including locally produced food.

Juan Kelly – in response to both parts

There's is no logic to this. Why should education and healthcare be exempt? This just creates concentration risk and a disincentive to improvement.

Michael Josem – in response to both parts

Allowing parents/patients more choice and control is important. The greatest opportunity for the Isle of Man educational/health system is to be open and welcoming of competition, so that children and families/patients have more choice.

Communications Commission – in response to both parts

The Commission's view is 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. There should be clearly articulated conditions and guidelines around such exemptions. In the proposed exemption as is currently worded, it is not clear what services would be deemed "educational"/"health services" for example, and so this should be defined more clearly, to avoid inclusions which were not intended.

Sure (Isle of Man) Limited

We have answered yes but would qualify that to the extent that the exemption should only apply to the educational services themselves, and not to any underlying services used by the Department of Education, Sport and Culture - such as communication services - the provision of which should be subject to a normal competitive process, which could include a competitive tendering process.

Anonymous Respondent – in response to both parts

This exemption is essential, as private companies have the money to buy the best legal team to cause massive problems for the government.

Anonymous Respondent – in response to both parts

These should be:
1. Limited to not include stage run enterprise such as the IOM Steam Packet, the St John's Sawmill or the Post Office; and
2. Amendable by Order.

Anonymous Respondent – in response to both parts

A free market is just that - a free market. You cannot have protected services/bodies simply because they are state owned. This gives free reign to state owned bodies operating the very practices this competition Bill seeks to abolish.

Anonymous Respondent – in response to both parts

As the landlord of a number of recent private health businesses we should not create a scenario where future rising demand for these is not stifled due to non-competitive practices of the DHSC, or creating a false value or entitlement to free services where services have a cost.

This is likely to be a huge area of our economy in the future and we must enable a quality, competitive environment.

The best example of customers being stifled by DHSC practices currently is in provision of Dentistry services - where only 40% of people can get an NHS dentist.

No exemptions should be put in place to protect this type of restrictive practice in the future.

We are also landlord to a fast growing education business on the IOM and they should not be constrained by legislation that does not apply to the monopolist provider - the DESC.

Anonymous Respondent – to Education services being exempt

Education is free at point of delivery for most of the population. All government resources should be available to benefit the greater good of the children. Parents wishing to send children to private schools understand the cost implications. These schools are free to set fees as they feel necessary.

Anonymous Respondent – to Education services being exempt

Industries governed by the IOM Agricultural Marketing Acts should not be regarded as anti comparative for the purposes of a Competition act. Reasons-size of market, Island production costs, creamery supports all dairy producers their staff and provides local employment at creamery.

OFT Response:

The logic of including an exemption for state education and the National Health Service is that both are fundamental statutory provisions which are operating in a market that does include competition. (For example state schools and fee paying schools). Any decision that a future Government might make in these areas would require primary legislation which; should it be decided to privatise, could amend the provisions in the Bill. Whilst in other areas there may be a case for granting exemptions, the circumstances in those markets may well change over time and Clause 9 of the Bill provides a mechanism for exemptions to be granted and then updated or removed as circumstances change.

Please also see appendix 3.

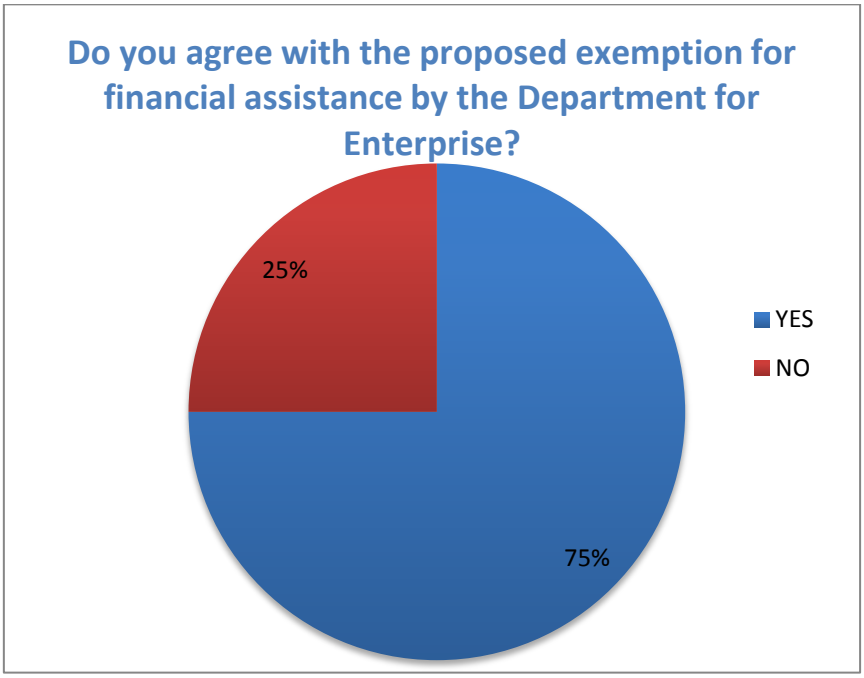
QUESTION 3 - DO YOU AGREE WITH THE PROPOSED EXEMPTION FOR FINANCIAL ASSISTANCE BY THE DEPARTMENT FOR ENTERPRISE?

WE SAID:

The Bill allows provision of financial assistance by the Department for Enterprise (DfE) and the receipt of such assistance is exempt from being considered as an anti-competitive practice.

All the schemes can be located on the DfE website.

The Bill however places upon the Department for Enterprise an obligation to consider the impact on competition of any financial assistance.



COMMENTS TO QUESTION 3

YOU SAID:

Juan Kelly

Financial assistance distorts the market and there is little evidence it obtains a satisfactory return on taxpayers' money.

Jonathon Kermode

If these grants are not applied to all businesses then automatically they would be unfair and give one business an advantage.

Communications Commission

The exemption for DfE providing financial assistance appears to be exempting all DfE financial aid from Competition Law. If this is to be the policy stance taken, the Commission's view is that exemptions should be provided on a case by case basis, rather than across the board for all DfE financial assistance.

Department for Enterprise

The Department agrees with the exemption in respect of the provision of financial assistance through established schemes.

Whilst the Department recognises the importance of not distorting the market within certain economic sectors, it is of the view that sufficient scrutiny and oversight of the operation of the various financial assistance schemes already exists.

The financial assistance schemes are provided via enabling powers within various pieces of primary legislation which, of course, will have received Tynwald approval prior to their enactment.

Furthermore, significant grants and other business assistance are ultimately approved by Treasury following recommendation by the Department and reported annually to Tynwald.

Care should be taken in creating potential additional bureaucracy around often crucial business development support to ensure that the Island remains competitive as a jurisdiction of choice for businesses to locate and grow.

The Department also notes that whilst the wording in the consultations states:

"The Bill however places upon the Department for Enterprise an obligation to consider the impact on competition of any financial assistance."

The wording in the draft bill states that the exclusion does not apply:

"….unless the Department for Enterprise, when evaluating an application for financial assistance, complies with the guidance provided by OFT…."

The Department view is that is a significantly different position than set out in the consultation, therefore, is not in a position at this stage to support this element of the proposed Bill without further details as to the proposed guidance.

The Department respectfully suggests that its own guidance relating to the operation and application of the financial assistance schemes is the best place to cover potential anti-competitive practice. The Department would welcome OFT input into relevant clauses where deemed necessary.

Sure (Isle of Man) Limited

Sure has answered "No" to this question as we do not think it is appropriate for there to be a blanket exemption for all financial assistance provided by the Department for Enterprise (DfE).

We have no difficulty with exemptions for assistance grants that are below the level (£100,000) that would require Treasury approval as these are unlikely to have a significant effect on competition. For more significant grants, however, there is likely to be a need for a more open and transparent process.

To some extent, this is captured by section 8 of the Bill, which requires the DfE to consider whether any applications for financial assistance are in line with guidelines produced by the OFT in terms of whether they could have an anti-competitive effect. However, we believe that there could be greater clarity over the types of projects that should be subject to this analysis. In addition, we believe that the OFT should take an active role in supporting the DfE in any such analysis, given that the OFT will have the necessary expertise in terms of what may or may not have an adverse effect on competition.

It may therefore be helpful for the OFT to specify some financial thresholds in its guidance to the DfE, which if reached, would require the DfE and OFT to work together to analyse whether there are any competition concerns associated with the financial assistance under consideration.

Sure is also unclear as to whether major projects – such as the national broadband plan – would fall within the remit of the DfE's financial assistance scheme. We believe that it would not be appropriate for any projects of national importance - such as the national broadband plan – to be administered through the DfE's scheme. Instead, a more open and transparent process – potentially involving a competitive tendering process – should be followed. The reasons for any decisions should be published and if particularly large financial sums are involved, should also be considered for public consultation before being confirmed.

We suggest therefore, that the Bill should make it clear that any projects of national interest – which could be defined in the same way as national interest is defined in the Bill for the purposes of merger control – would not be eligible for an exclusion under Section 8 of the Bill. Instead, they would need to be assessed for any potential anti-competitive effect by the OFT (possibly in conjunction with the DfE or other relevant Government departments such as the Communications Commission and Treasury.)

Three Anonymous Respondents answered in short

Those should be limited in scope and should be and should be amendable by Order.

This is a much more complex issue than can be determined in a few lines of explanation.

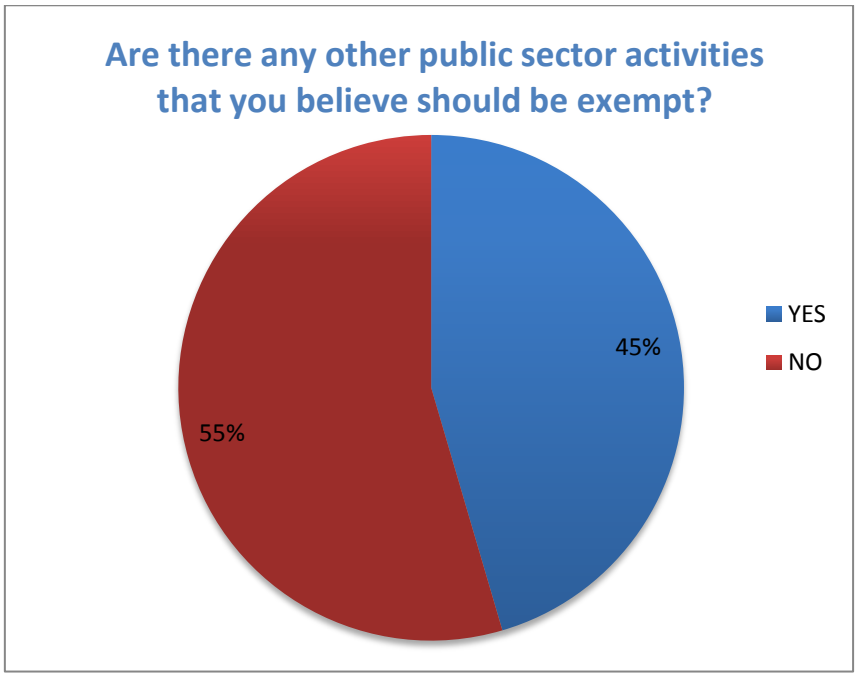
The current range of DfE schemes do not apply equally and tends to favour non IOM, inward investment, businesses more than those starting up or expanding here.

WE SAID:

OFT Response:

In the light of the feedback from the consultation exercise the OFT has reviewed its approach in this area and now proposes that financial assistance from the DfE should not in itself have the potential to be anti-competitive. The draft Bill will however place a statutory requirement for DfE to consider and document the implications on local competition of any financial assistance. The Bill will also enable scrutiny of this consideration by the OFT.

QUESTION 4 – ARE THERE OTHER PUBLIC SECTORS YOU BELIEVE SHOULD BE EXEMPT?



COMMENTS TO QUESTION 4

YOU SAID

Dr Alex Allinson

There are a whole range of Government policies designed to redistribute wealth and promote certain economic goals which could be seen by some as anti-competitive e.g. free bus travel being criticised by a taxi company.

Michael Josem

The provision of ferry services should be opened up to competition.

David Kelly

Properly nationalised industry, by which I mean those in which ALL profits are returned to the public purse and are properly controlled to prevent an overspend in excessive management charges. Such services should, in all cases, be run for the benefit of the population. Should a competitor be able to offer comparable services at a much reduced rate then it should be a matter of priority to investigate, understand and then address the pricing levied by those public services.

Raymond Craine

Public Transport

Isle of Man Creamery
Have not considered in any detail, but would be surprised on a small Island if there were not, e.g. water, gas, electricity, prison service?

Isle of Man Agricultural Marketing Society Limited & Isle of Man Fatstock Marketing Association answered the same
Manx Utilities, ie Water, Electricity, Sewerage.
Home affairs, ie emergency services, prison, police and probation

Anonymous Respondent
Yes but they would need to be considered on a case by case basis

Anonymous Respondent – plus one other mentioned Steam Packet
In fact the MUA and Steam Packet must be expressly included, for reasons given in 2 above. a good by product of this legislation would be to include all aspects of government activity in it, and thus drive improvements in customer and client understanding, service provision and satisfaction.

Anonymous Respondent
Why should the tax payers of the Isle of Man fund inefficient government services.

OFT Response:

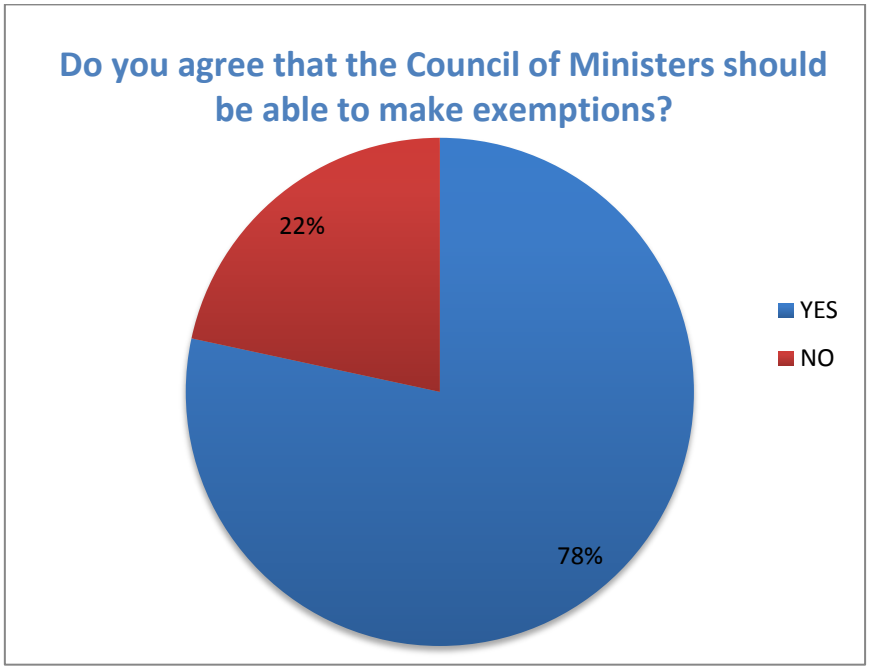
The OFT has reviewed the suggestions put forward; however, does not believe that any of these or any other areas of the economy merit exemption in statute. In these areas there may be an arguable case for Council of Ministers to grant exemptions through regulations under Clause 9 of the Bill. The suggestions generally relate to markets which could and probably will change over time and exemption by regulations represents a more flexible tool to deliver the desired economic outcome.

There are other areas of the economy where it may be appropriate for the Council of Ministers to use its powers under Clause 9 of the Bill. These would need to be considered on a case by case basis with appropriate supporting evidence. Given that circumstances will change over time, the section 9 procedure allows for regular review.

QUESTION 5 – DO YOU BELIEVE THE COUNCIL OF MINISTERS SHOULD BE ABLE TO MAKE EXEMPTIONS?

WE SAID:

The proposed legislation includes provision for the Council of Ministers to exempt certain activities on the grounds of public policy. Such an exemption would need to be approved by Tynwald before it could take effect.



WHY OR WHY NOT?

YOU SAID:

Manx National Farmers Union

Potentially if it was in the best interest of the island and again only if it was approved by Tynwald.

Dr Alex Allinson

However the reason for any move under 10(4) to restrict OFT investigation should be justified with a public explanation to preserve transparency and protect the integrity of the OFT.

Juan Kelly

It is a fundamental feature of democracy that the judiciary and political arms be separate. Any exemptions should be captured in the law and not left to individuals to decide.

Michael Josem
Manx people should be able to have more choice in where they shop, work and travel.

David Kelly
Any exemptions should be subject to public consultation.

Jonathon Kermode
These should go through on with the consent of the House of Keys

Isle of Man Creamery
A fully open market may not necessarily be an appropriate solution for a small Island situation.

David Kelly
Any exemptions should be subject to public consultation.

Tim Johnston
Where there is existing long proven legislation it should be protected, especially for fragile industries, for example, the existing marketing legislation for all sectors of agriculture.

Isle of Man Agricultural Society Limited
A fully open market may not necessarily be an appropriate solution for a small Island situation.

The reasons are the same as those given in the answer above for practices that should not be regarded as 'anti-competitive' relating to Section 8 of the Competition Bill.

Industries governed by the Isle of Man Agricultural Marketing Acts should not be regarded as 'anti-competitive' practices for the purposes of a Competition Act, and hence should be excluded under Section 8. However, if there is to be an exemption under Section 9, then it would need to be in force from the outset of the Competition Act.

Derek Cain
Situations that are in the national interest such as food security.

Communications Commission
The Communications Commission considers that there may be times where it may be necessary to make exemptions, however we feel it is important that a thorough review be carried out prior to any exemption being granted, to consider the implications on the market and competition. It is also important to consult with the regulators of any industry, or part thereof, for which an exemption is being considered, as the regulator will have the expertise in that particular market.

Department for Enterprise
The Department agrees that Council, subject to Tynwald approval, should be able to propose further exemptions when there is an overriding national or public interest.

Sure (Isle of Man) Limited
Yes, but only in limited circumstances where a full and transparent analysis of the net benefits of making an exemption has been undertaken and also consulted on.

Isle of Man Fatstock Marketing Association
There are situations in an Island economy where for good reason it may be deemed necessary to support specific practices that might otherwise undermine elements of the Island's economy and infrastructure. As a small Island our economic balance is more fragile and exposed to challenges that would have a much lesser impact on larger economies.

Anonymous Respondent
If it can be shown to be in the national interest.
For example, Gas supply. Competition might not be sustainable, and result in damage to key infrastructure.
However, a regulatory framework should also be put in place.

Anonymous Respondent
Conflict of interest

Anonymous Respondent
The Island is so small that achieving critical mass to buy well to stay in business and be efficient inevitably means a degree of monopoly power.

Anonymous Respondent
Subject to Tynwald approval and consultation.

Anonymous Respondent
For the reasons already explained - what is the point of a competition bill that can be over - ridden by politicians when it suits them. A Competition Bill is just that, A competition Bill.

Anonymous Respondent
there should be a set of clear and ambiguous rules that apply to all , and should be factored in to future decisions of CoMin and Tynwald e.g. if they were to buy the Steam Packet Company after such legislation was in place.

Anonymous Respondent
Answer given with caution- probably better than nothing but have reservations on this one.

Anonymous Respondent

For the reasons already explained - what is the point of a competition bill that can be over - ridden by politicians when it suits them. A Competition Bill is just that, A competition Bill.

OFT Comment:

The ability for the Council of Ministers to make exemptions (Clause 9) is a powerful tool but the requirement for approval by Tynwald Court provides appropriate scrutiny and accountability.

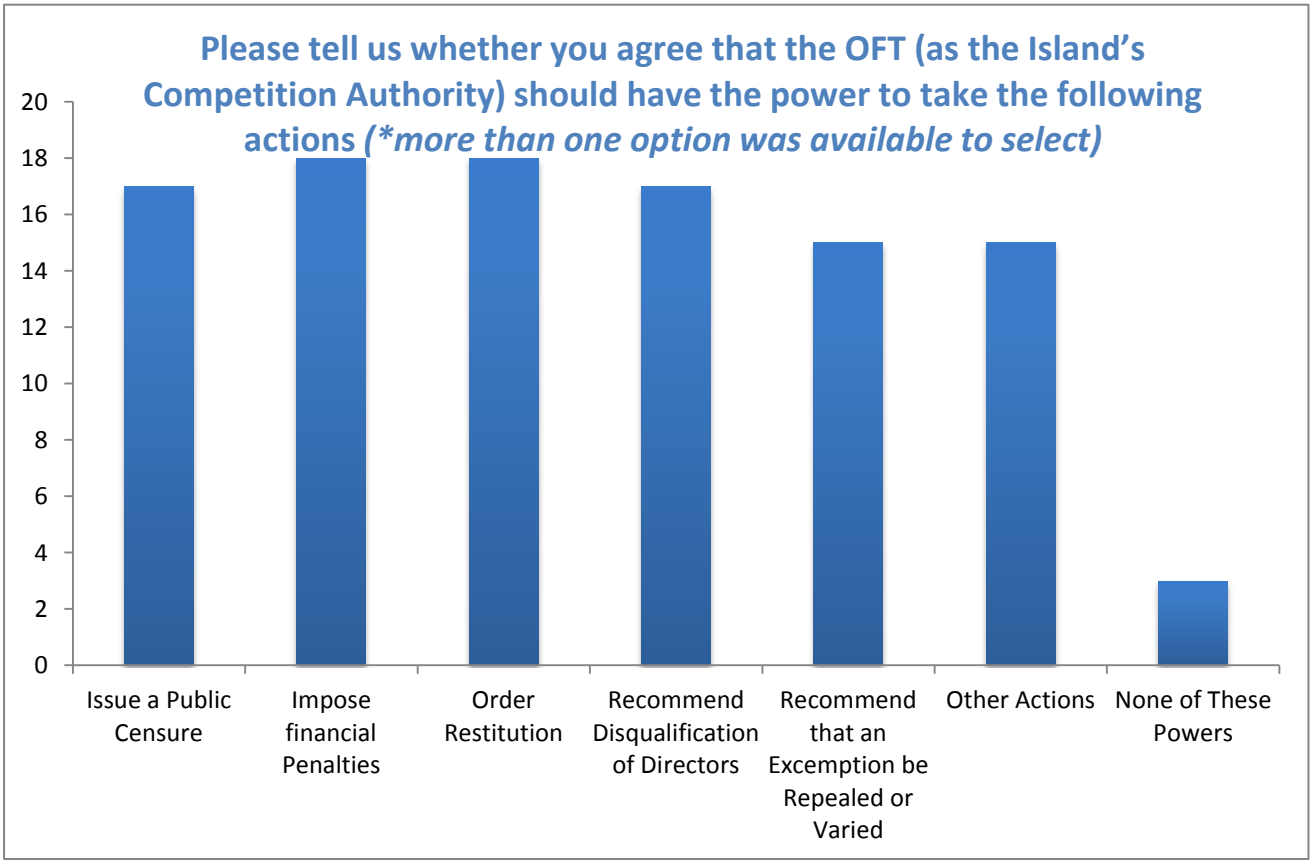
QUESTION 6 – PENALTIES AND SANCTIONS

WE SAID:

While the Fair Trading Act 1996 provides rules on competition, it does not provide the OFT with the ability to impose penalties on those who break the rules.

The proposed legislation allows the OFT to take the following actions in the event that it finds someone has engaged in an anti-competitive practice:

- Issue a public censure – this could take the form of a publication detailing the offending practice
- Impose financial penalties – the OFT will subsequently determine and prescribe them by regulations. They are likely to be presented as a % of turnover (e.g. 10% of a companies' turnover for the time the offending action was taking place)
- Order restitution – if an anti-competitive practice has harmed another person (whether a business or otherwise), then the OFT would have the power to compel the offending person to compensate the harmed person
- Recommend to the Financial Supervision Authority that it consider disqualifying the directors of the offending company
- If the anti-competitive practice is a breach of an exemption granted by the Council of Ministers, recommend that the exemption be repealed or varied



COMMENTS ON OTHER ACTIONS

YOU SAID:

Manx National Farmers Union

I believe the OFT needs wide and far reaching powers to combat the aggressive and anti-competitive sales tactics of the multinational corporations that operate on the island. Large multi nationals are continuously opening on island and undercutting the local supply chain. from motor vehicles, food retailers, electronics retailers etc. I believe we need fairly priced choice but not at the expense of well-run local business.

David Kelly

The OFT should have the power to order divestment of parts of a business to deal with structural issues

Michael Josem

Offenders should be prosecuted like any other crime in a court with a jury. The OFT should not be investigator, prosecutor, judge and jury.

Jonathon Kermode

Legal action should be the remit of the police the FSA and the courts.

Isle of Man Creamery

No objection in principle to the OFT having powers. However, the OFT must be completely independent if it is to have such powers. Whilst the OFT remains part of the Department of Environment, Food and Agriculture ("DEFA"), it cannot be regarded as completely independent.

The OFT is conflicted if it needs to investigate matters relating to DEFA, even if internal barriers are in place. The Director of the OFT for example, should not continue holding a concurrent senior post within DEFA, nor report to the DEFA Chief Executive in any capacity.

Tim Johnston

The OFT needs to be completely free and impartial, it cannot be this whilst it sits within DEFA. It is wrong that the Director of the OFT reports to the Chief Executive of DEFA.

Isle of Man Agricultural Marketing Society

We have no objection in principle to the OFT having powers, however, the OFT must be completely independent.

Department for Enterprise

The Department does not wish to express a view on specific sanctions or penalties that the OFT may be able to call upon. However, it is of the view that if legislation exists to control or prevent anti-competitive practices, there should be sufficient powers in place to enable the relevant authority to take the necessary action in proven cases.

Sure (Isle of Man) Limited

The OFT should also have the power to direct the party or parties that have been found to have breached the rules to stop the offending behaviour. This may sound obvious but the OFT's powers to do this need to be made explicit. As currently drafted, Section 20 of the Competition Bill does not seem to do this.

Isle of Man Fatstock Marketing Association

We support the principle of the OFT having powers but it must be completely independent. As long as it sits within a Government Department, should matters in that department need investigating then impartiality is invariably challenged.

An obvious solution is to have a single member mini Department answerable directly to COMIN.

Anonymous Respondent

If they require a license to operate, then consideration should be given to revoking that license.

Anonymous Respondent

Care should be taken that draconian penalties should not be taken if a situation has arisen which is not intentional

A supervising body should have the right to investigate openly and warn of the dangers of a situation arising before a problem arises

Anonymous Respondent

Not sure who the Financial Supervision Authority is....

The reporting of unfit behaviour and the ability to transfer information, documents and records for use evidentially would suffice.

A 'recommendation' (as described above) that the Authority act would be inappropriate under the FSA's constitution.

Anonymous Respondent

The OFT, as the island's Competition Authority, is chaired by a politician. The politicians can exempt public services from the requirements of the Competition Bill. The proposed powers clearly name 'directors' & 'companies'. There is no mention of 'civil servants', 'politicians' or 'department's or 'statutory Boards'.

This Bill is clearly aimed at the private sector, with state controlled protection for state controlled abuses of competition law and monopolies.

Anonymous Respondent

Whatever enforcement penalties are appropriate they should be used and enforced. there is too much "L'aissez faire" around enforcement activity currently e.g. planning and thus there often seems little point in having any rules in this area.

Five Anonymous Respondents Made Similar Points Which Have Been Collated

There is a potential for the OFT to be in conflict if it ever needs to investigate DEFA as the director reports to and holds a senior position in that department.

Anonymous Respondent

Rather small group of individuals dealing within a small circle

OFT Response:

The range of powers provided by the Bill is intended to dissuade businesses from engaging in anti-competitive behaviours. Given that almost all anti-competitive practices have to be investigated after the event (when the damage has already occurred) it is important to provide effective deterrents. It should be noted that under the Competition Bill Part 5 (SANCTIONS), every sanction made by the OFT has the right to be appealed to the Courts.

There is no issue regarding the independence of the OFT. Whilst it is located within the DEFA regulatory hub it is a legally separate body established under the Statutory Boards Act 1987 with an independent Board. If the OFT ever needed to investigate DEFA it would do so without fear or favour.

QUESTION 7 – WHISTLE BLOWERS

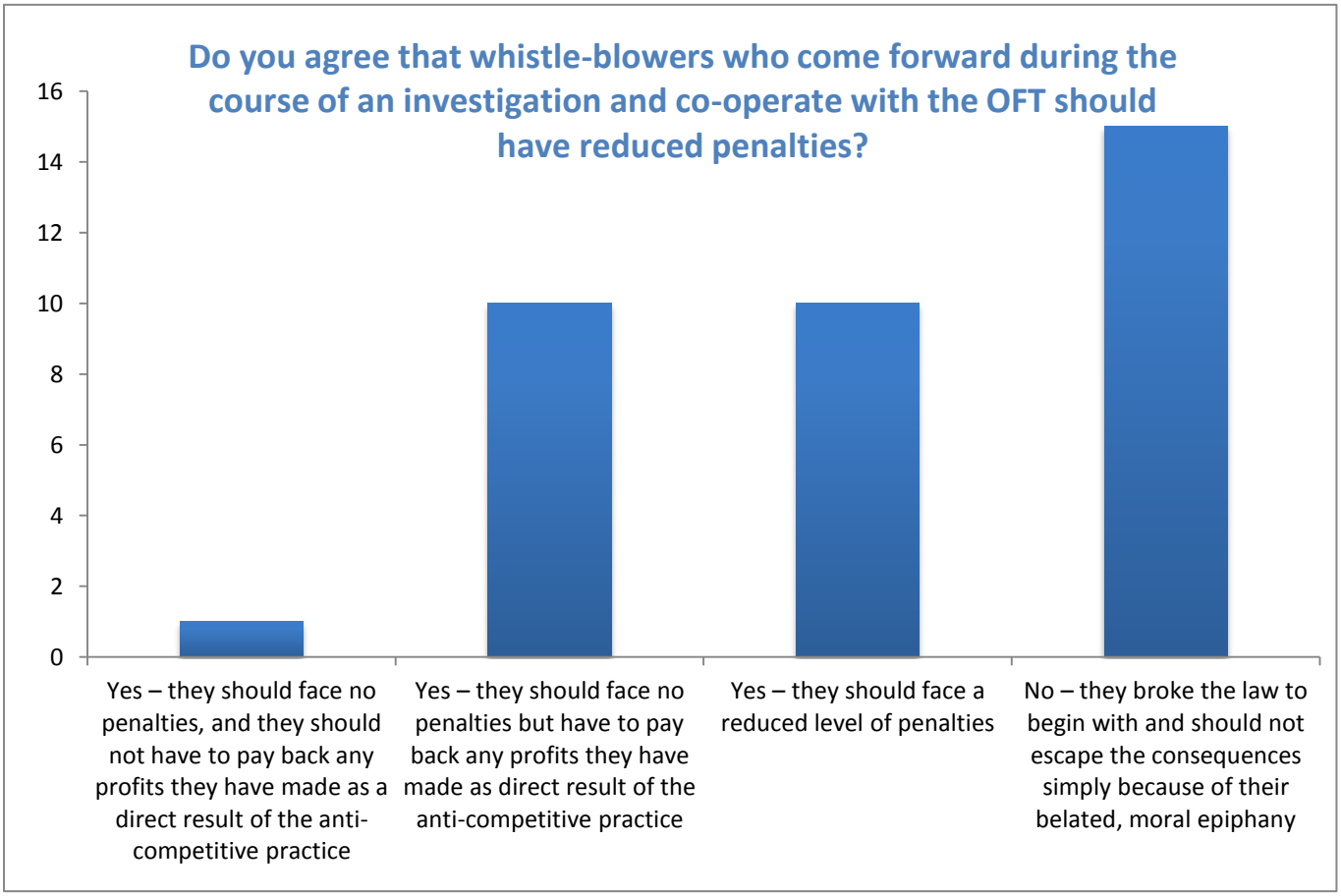
WE SAID:

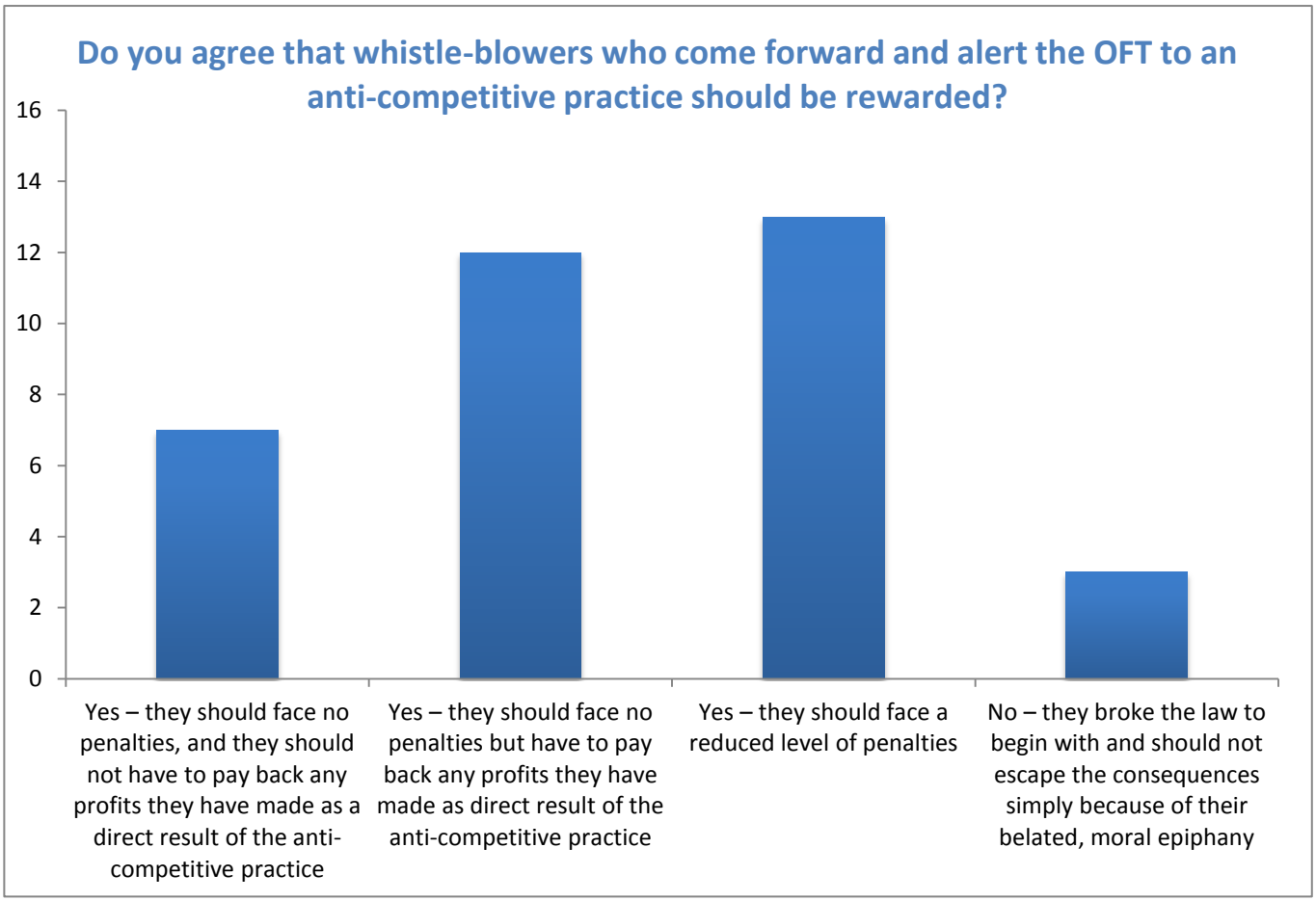
The detection of some anti-competitive practices can be very difficult without having information from the parties involved. The most notable example is cartel activities, where persons collude to set prices at a certain level.

In a recent international example, airline companies agreed amongst themselves to keep prices for transatlantic flights at a certain level. Only when one of the parties to the cartel came forward to the competition authority was the anti-competitive practice detected. In recognition that these activities are very difficult to detect, the legislation allows for a reduction in penalties for 'whistle-blowers' who alert the authority to anti-competitive practices that they themselves are involved.

Similarly, the legislation allows for reduced penalties for those who admit guilt and co-operate at an early stage of the investigation.

In both of these cases, the level of penalty would still be set so that a whistle-blowing person did not profit from an anti-competitive practice (ie any penalty could be set to recover the additional profit they made, but not any more than that).





COMMENTS TO QUESTION 7

YOU SAID:

Manx National Farmers Union

It depends on the scandal and the level of profits involved, length of time it was going on for, if an earlier opportunity had been available for them to come forward, the impact the issues had as a whole, each case should be taken on face value and addressed appropriately and with discretion. But without the power to waive prosecution no one will come forward in the first place so you need the ability then apply it where appropriate.

Juan Kelly

Whistle blowers need much more protection in law particularly in a small place like the IOM where finding another job can be difficult

Isle of Man Creamery & Isle of Man Agriculture Marketing Society

The above questions assume that the whistle-blower is the wrong-doer, which may not be the case. Whistle-blowing legislation should ensure that whistle-blowers are not penalised.

Communication Commission

The Commission considers it important to provide a sufficient incentive for whistle-blowers to come forward, or else cartel activity will likely remain undetected as it is only known to

the agents engaged in that anti-competitive activity. One of our Board Members personal view was that this should go further and profits earned as a result of anti-competitive activity should be repaid. However, this needs careful consideration against how this could be calculated, and also the reduced incentive to come forward.

Department for Enterprise

The Department does not feel it is in a position to comment specifically on these points in the way they have been posed in the consultation.

However, it does recognise the potential involvement of 'whistle-blowers' in exposing anti-competitive practices and acknowledges that OFT will need to provide for this in relevant legislation.

The Department would recommend that the OFT explore areas of international practice or policy in regards to the treatment of whistleblowing in similar cases.

Sure (Isle of Man) Limited

For both of the scenarios shown under question 9, it is only possible to tick one of the four answers. There may be circumstances, however, where more than one of the answers could be appropriate. Whilst Sure (Isle of Man) Limited would find it hard to support the first answer - and our response submitted to the 2013 consultation on the Competition Bill set out our views that this would be particularly inappropriate in the case of unilateral abuses by a single dominant firm - we can see there may be cases where any one of the remaining answers could be appropriate.

As an overall principle, however, we would find it unpalatable for any firm that has knowingly and deliberately acted in an anti-competitive manner to be allowed to retain any profits they may have made as a result of those actions. In some serious cases, it may also be appropriate for penalties to be applied, albeit at a reduced level compared to if the firm concerned had not acted as a whistle-blower. Otherwise, there could always be an incentive to engage in anti-competitive behaviour for as long as the firm thought it could get away with it, knowing that if it did decide that the risks of continuing with that behaviour were becoming too high and so it should become a whistle-blower, it would face no additional penalty than having to repay any additional profits it had made as a result of its actions.

Given that the OFT is likely to find it difficult to determine the exact amount of those "ill-gotten" gains - which in itself could lead to protracted legal disputes and costs for the OFT and other parties involved – this may prove to be an attractive strategy for an unscrupulous firm.

Isle of Man Fatstock Marketing Association

This assumes that the whistle blower is in the wrong. There must be support for whistle blowers where they are not in the wrong to ensure they are protected and not disadvantaged.

Anonymous Respondent

The main beneficiaries of anti-competitive practices, subsidy and monopoly supply are state controlled enterprises.

Anonymous respondent

I think you need to be careful you are not introducing a "sledgehammer to crack a walnut"

OFT Response:

Some forms of anti-competitive behaviours, especially cartel activities, are very difficult to detect. Often a "whistleblower" is the only viable method. The Bill as drafted strikes an appropriate balance between encouraging whistleblowing and not rewarding the original activities.

QUESTION 8 – MERGERS

WE SAID:

The proposed legislation allows the OFT to investigate a merger between persons if the merger is considered to be in the national interest.

For example, if there were only two major retail grocery suppliers in the Island, and they were intending to merge into one company, there could be a significant reduction in competition in that sector.

Following an investigation, the Council of Ministers would have the power to:

- block the merger
- impose conditions on the merger, or
- allow the merger to go ahead with no conditions

DO YOU HAVE ANY COMMENTS ON THE PROPOSED POWERS TO INVESTIGATE AND POTENTIALLY BLOCK, OR PLACE CONDITIONS ON MERGERS CONSIDERED TO BE AGAINST THE NATIONAL INTEREST?

YOU SAID:

Manx National Farmers Union

I think it is a fair power to give Co-Min although I would like to see it also needing Tynwald approval.

Juan Kelly

An essential power. Should be brought in to line with the UK CMA

Michael Josem

The national interest should be tightly defined to only refer to customer benefit.

Jonathon Kermode

The govt have no role in interfering with business.

Raymond Craine

Council of Ministers should have the right to block or impose conditions.

Isle of Man Creamery

OFT should have the flexibility to investigate potential mergers. However, in making such decisions it is important to recognise that large companies in an Isle of Man context can be very small in a global context, and some companies may need to be in both markets.

Tim Johnston

It is right that the OFT has the powers to investigate, however, it must be mindful that completely open competition is not always possible on a small island and a large company on island may be tiny in a global context.

Isle of Man Agriculture Marketing Society

OFT should have the flexibility to investigate potential mergers. However, in making such decisions it is important to recognise that large companies in an Isle of Man context can be very small in a global context, and some companies may need to be in both markets.

Derek Cain

OFT should have the power to investigate but they would have to consider the size of the merging companies. What may seem large in the Isle of Man maybe small compared to the UK and they may need to merge to get the best prices for the Island customers.

Communications Commission

The Commission considers it important that the OFT has the ability to fully investigate any mergers. The opportunity for economies of scale in the Island mean that natural monopolies can occur and a higher level of market share may be required as a result, in order to make an enterprise viable.

Firstly, it is important that any relevant regulator be consulted prior to investigating a merger as a degree of expertise and sectorial knowledge will likely lie with the regulator for that particular industry, as mentioned in the Communications Commission response to the initial consultation.

Clause 27(8) of the proposed Bill places an emphasis on reduction of market share. The Commission considers it more appropriate if this section was centred around a competition assessment and considering what actions could be taken to reduce market power, of which market share is one factor. Barriers to entry and market structure for example, are also important considerations, since if barriers to entry are able to be lowered; competition may enter that market and compete away high market share.

Clause 27(1) provides for the ability for Council of Ministers to serve notice upon a merger up to 6 months after the date of completion. From a practicality point of view, the Commission would consider it more appropriate if notice was served on a merger before its completion. Should competition concerns arise after the event of a merger, these should be dealt with under the existing competition law provisions, if an abuse of market power has been, or is, occurring.

Other Competition Authorities more clearly define the requirements for when a merger may be investigated, for example, the Competition (Mergers and Acquisitions)(Jersey) Order 2010. The Commission notes that Clause 26(4) is permissive in that Regulations may (not must) be made. The Commission would therefore question whether it would be more appropriate to require the Regulations to be made and to define the criteria, for example, through a market share or turnover threshold appropriate for the size of the Isle of Man.

Department for Enterprise

The Department agrees with the proposed powers in respect of mergers.

Sure (Isle of Man) Limited

Sure agrees that the OFT should have the ability to investigate and potentially block a merger or make it subject to conditions, but that this power needs to be applied proportionately and reasonably, and only to the extent that a merger may raise issues as to whether it is in the "national interest". The Bill defines the national interest for the purposes of merger control as including cases where the merger is of importance to the economy of the Island, or involves a product or service that is essential to consumers.

It appears that this definition of national interest could be open to quite wide interpretation and that this could result in the OFT having to devote its limited resources to considering mergers that are actually not that significant in effect. We wonder, therefore, whether it would be sensible to also introduce some financial thresholds – for example based on the combined turnover of the merging parties – as another filter to assess the significance of a potential merger? In our response to the 2013 consultation we had referred to the thresholds used in Guernsey, whereby a merger would only be subject to the merger regulations if the combined turnover of the parties within the Channel Islands was over £5m, and two or more of the undertakings involved in the merger or acquisition each had applicable turnovers arising in Guernsey in excess of £2million. It may be appropriate for similar thresholds to be considered for the Isle of Man. Alternatively, a combined market share test could ensure that only significant mergers are captured under the definition of "national Interest".

Sure notes that parties to a potential merger would be able to approach the OFT for advice before completing a merger but it is not clear whether doing so means that the parties can still proceed with completing the merger pending the outcome of the OFT's advice to the Council of Ministers. We also note that once a merger has been completed it can become subject to an investigation at any time within 6 months of completion. This could create uncertainty for businesses, which the introduction of some form of qualifying thresholds – whether that is in terms of a financial criteria or a market share test – may go some way towards alleviating.

Isle of Man Fatstock Marketing Association

OFT should have powers to investigate potential mergers recognising the contrast between scale of operation on the Island and across. Some consolidation may be required locally to share fixed costs to provide a meaningful provision or service to local consumers/ population.

Anonymous Respondent

We may be heading for a situation where one motor car retailer will come to dominate the market. Powers to block or otherwise restrict mergers and takeovers might be invaluable. Good luck with this one, as Legislation might only be effective with Isle of Man companies.

Anonymous Respondent
In a small market mergers if done correctly can save consumers money by reducing duplicate over heads

Anonymous Respondent
We should have a free market. However one single retail outlet would cause high prices. Conditions should be imposed or the merger stopped. Prices should mirror England and Ireland with discretion to the cost of transport to the island. Local produce should be a priority when imposing conditions. Prices should reflect farmers costs and be fair.

Anonymous Respondent
We may be heading for a situation where one motor car retailer will come to dominate the market. Powers to block or otherwise restrict mergers and takeovers might be invaluable. Good luck with this one, as Legislation might only be effective with Isle of Man companies.

Anonymous Respondent
All mergers should be blocked if it against national interest.

Anonymous Respondent
You have to take each case on its own merits. Sometimes the merger will be in the best interests for all concerned and provide more benefits/better service to consumers as a result.

Anonymous Respondent
Paying more for a tin of baked beans is not a 'National Interest' issue.

What is the definition of 'National interest'? Who provides the definition?

The government have just decided to buy the IOM Steampacket Company in the 'National Interest'. There was no consultation, no open market bidding competition and nothing within these proposals to stop the same process being applied to whatever the government deemed to be in the 'National Interest'.

Anonymous Respondent
This is a very poor question in the current retail climate - if you look at the UK currently the only way for most major grocery retailers to survive is to merge, especially in the face of online competition. (see Sainsbury and Asda, Tesco and Booker).
If you over regulate in this area, you could end up with no supermarkets, as the cost of doing business on IOM is so high die to freight and utilities providers - that is the reason the Discounters are not coming…

OFT Response:

At the present time there are no powers for Council of Ministers to address mergers. Part 6 of the Bill provides a mechanism to address mergers which may be "of national interest" a term which is defined in clause 26(3). It is believed that it is appropriate for Council to have these powers, noting that any decision to block a merger would require approval by Tynwald Court.

The OFT believes that these powers are likely to be used very rarely given the definition of national interest.

However the OFT has taken note of the feedback regarding the mechanisms to deal with mergers and Clauses 25-27 will be re-drafted to better achieve the desired outcome.

QUESTION 9 – FURTHER COMMENTS

DO YOU HAVE ANY FURTHER COMMENTS ON THE PROPOSED COMPETITION LEGISLATION?

YOU SAID:

Manx National Farmers Union

It should be illegal for any company to import products and sell them below the cost of production + Shipping. Shipping costs should be clearly labelled on all imported products be it a car, shoe, food etc.. Any item sold on a "special offer" price should be clearly labeled as this product is being sold below the cost pf production because - short shelf life/short promotion/overstocking etc. Sensible legislation should accompany this. Selling any item permanently or for an extended period of more than one week should be banned, special attention should be paid to cut price bottles of alcohol and staple food items including bread/milk/vegetables and meat in supermarkets that are used as loss leaders to get people into the supermarket. it is detrimental to health and also detrimental to local producers.

The Board of the Manx NFU

Tesco Loss leading/dumping products leading up to the Christmas period. Short time only loss leader to attract custom.

- *Food being sold at below production costs. Allowable for a short period as per above predatory pricing to the local market.*
- *Food security of supply. Worry confirmed but market forces prevail.*
- *Imports not adding to the multiplier effect. As per above.*
- *Imports, freight being subsidised by UK company head offices, and shipping deal with freight companies. Unable to influence company decision at a local producer level and suffering due to the economies of scale.*
- *Fragility of the local suppliers and retail operations can't compete profitably.*
- *Sector wage stagnation for the IOM workers. Many sectors have had minimal pay rises during the last 5 years due to off island competition that uses predatory pricing as a mechanic to stymie the local offer e.g. meat supply on island.*

Manx Independent Carriers

OFT Must be given the power to impose order or penalties otherwise it is a "toothless" organisation that is unfit for purpose.

Raymond Craine

Supermarkets should not be allowed to sell food at below the cost of production if they force the producer they are buying from to stand the cost.
Supermarkets should not be allowed to increase orders from local suppliers if the boat cannot sail but then cancel their order when the boat can sail because they have a container full of perishable goods to sell. Which leaves the Local supplier with a load of produce ready to sell but no buyer.

Isle of Man Creamery & Isle of Man Agriculture Marketing Society

Proper Impact Assessment:

We would have expected there to have been a proper Impact Assessment of the Competition Bill implications prior to it being issued, but there does not seem to have been one?

Such an Impact Assessment should have identified Isle of Man Creamery as being an affected party, and as such we would have expected to be formally included within, or at the very least formally notified of, the consultation process. This does not appear to have happened?

Wider impact on Isle of Man:

Losing the Isle of Man dairy sector would have devastating widespread consequences beyond the dairy industry, with implications for cultural, environmental, landscape, tourism, employment, economic, and food supply factors.

Impact on wider Isle of Man economy:

It has been accepted for some time that there is a 'Multiplier effect' of buying local; being quoted within DEFA's 'Food Matters' as meaning that £1 spent with a local business is worth £1.83 to the local economy versus 58p with a non-local business [New Economics Foundation 2008]. DEFA are currently running a local media campaign on the multiplier effect.

The dairy industry on the Isle of Man, provides food security for one of the main food staples, directly employs over 200 people, exports around £5m of product every year (excluding direct farm exports e.g. stock), and sells around £8m on Island, thus preventing higher imports.

Food safety:

Government needs to be mindful that the OFT also has responsibility for providing an effective and appropriate legislative and regulatory framework for consumer protection (OFT Business Plan 2018/2019), for which the OFT needs to be completely independent of DEFA. Food safety should not therefore be compromised at the expense of allowing increased competition.

Other agricultural sectors:

The Competition Act needs to be drafted in such a way that it would not need to be redrafted should changes be required to the Isle of Man Agricultural Marketing Acts due to structural changes in other agricultural sectors, such as the meat sector.

Existing consumer safeguards:

The Isle of Man Agricultural Marketing Acts already include consumer protection safeguards, such as contained within the Agricultural Marketing (No.2) Act 1948, an Act authorising control over agricultural prices, whereby a Marketing Committee including consumer representatives can make recommendations.

Dairy farm set-up costs:

Farm dairy unit set-up costs are capital intensive, making it difficult for new entrants.

Once farm milk production has ceased, it is difficult to re-commence, usually making the loss from that unit irrevocable.
DEFA's Food Matters strategy:

According to DEFA's online Food Matters Brochure 2015-2025, the dairy sector is worth more than any other food or drink sector on the Island. The Creamery purchases from local dairy farms, collecting and processing their milk in a safe, hygienic environment to produce high quality products conforming to legal specifications for both local and export markets.

The DEFA Business Plan 2015-18 claims that they have a significant role in supporting three of the eight key themes identified in Isle of Man Government's Vision 2020, being "Destination Island (Tourism)", "Distinctive local food and drink (Retail and Produce)" and "Offshore energy hub (Harnessing the future waves of power)". Part of DEFA's plan is "to develop a realistic strategy for food security and safety in the Isle of Man by balancing the varying challenges of both short and long term food security for the Manx Nation, facilitating the retention and development of appropriate infrastructure to meet those needs, and balancing a sustainable industry with affordable food."

In 2014, DEFA introduced Food Matters, a food business development strategy for 2015 to 2025 which works in tandem with Vision 2020's strategic goals to invest in local producers. This initiative plans to increase the value of local food and drink production by £50 million over the next 10 years. The Executive Summary of DEFA's Food Matters strategy 2015-2025 (Food Matters, A Food Business Development Strategy for the Isle of Man 2015-2025, October 2014, Tynwald Paper – November 2014, GD 2014/0076) concludes with the following:

"Food matters to our economy

The local food industry is currently worth over £75 million and provides employment for 1300 people. Local primary production and local sales provide a 'multiplier effect' for the economy that is not replicated when imported products are purchased.

The potential for growth of the industry is enormous with a potentially limitless global export market and the local retail sector worth around £170 million and the food service sector another £90 million. Growing a sustainable, competitive and profitable food industry will form a vital cornerstone of our future expanding and diversified economy.

Food matters to our people

'Food security' - access to a safe, nutritious and affordable diet is a basic quality of life issue that we take for granted in the Isle of Man. The ability to produce food in the Isle of Man will become of increasing importance as world demand for food increases and climate change results in more extreme weather events, impacting on global food production.

On another level, food is an increasingly important part of the lifestyle and culture of an affluent society. People actively seek out quality and artisanal produce with assured provenance credentials. Providing quality local produce adds to the quality of life of the resident population and is an important part of the visitor experience which can, in turn, promote the Island as a visitor destination, as well as encouraging prospective residents and businesses to relocate.

Food matters for the environment

Local food is better for the environment. Fewer food miles, less packaging and longer shelf life ensures less food waste, a smaller carbon footprint and a better quality of life for us all.

The Island's distinctive landscape and coastal towns have been shaped by centuries of fishing and farming activities and food production activities have an important role to play in the Island's culture and communities. Maintaining these key primary industries will ensure that the custodians of this landscape continue to manage the landscape in a sustainable way and the vibrant coastal towns and villages retain their strong sense of community and maritime heritage through local jobs, local food and local spend."

Precedence of legislation:

We note that no amendments are proposed to the Isle of Man Agricultural Marketing Acts as part of the Competition Bill, and hence expect that Isle of Man Agricultural Marketing Acts will take precedence over the Competition Act?

However, for the avoidance of doubt, we expect that industries governed by the Isle of Man Agricultural Marketing Acts will be included under Section 8 as being excluded from the scope of 'anti-competitive practices' for the purposes of competition legislation?

Further consultation:

Isle of Man Creamery Ltd would be happy to take part in further consultation.

Communications Commission

The Commission's main interest is the ability to carry out concurrent investigations between the OFT and the Communications Commission. The Commission welcomes the provision which allows for concurrent investigations to be carried out with other regulatory bodies. However, it feels that additional clarification is required to ensure there is no ambiguity that regulatory bodies can carry out their own competition investigations without OFT involvement, should they have the necessary legal powers and responsibilities in their own legislation. Regulatory bodies should also be consulted as a matter of course prior to any OFT investigation. Additionally, there should only be a single penalty imposed as a result of any joint investigation to avoid double penalty.

Additional points the Commission has to make, which are not as closely linked to its regulatory responsibility, are noted below:

1. Section 5(1) (b) states

A person must not enter into any arrangement which has the object or effect of preventing competition within any market for goods or services
(a) in the Island (including markets for travel to and from the Island); or
(b) outside the Island.
This subsection applies whether the arrangements are to be acted upon in the Island or elsewhere and is subject to the other provisions of this Part.

Having clarified the scope of this Clause with the OFT, the Commission now understands that the intention is that it applies to anti-competitive practices:

- *Undertaken in the Isle of Man where they affect Isle of Man markets*
- *Undertaken elsewhere where they affect Isle of Man markets*
- *Undertaken in the Isle of Man where they affect markets outside the Island*

This stance does appear to have deviated from the original Competition Bill consultation which focused on regulation within local markets. It is possible that the OFT could be left attempting to investigate non Isle of Man companies, particularly if the relevant competition authority turns down the request for a joint investigation. It is also unclear what remedies the OFT could realistically impose on any non-Isle of Man company as a result of a competition investigation.

2. Clause 10(4) provides Council of Ministers the ability to direct the OFT not to undertake an investigation, for compelling reasons of public policy. The Commission's view is that any decisions on whether to investigate should be carried out by the OFT as an independent body. Clause 10(5) should also require OFT to set out guidance regarding when it may decide not to carry out an investigation, which could include for example, a compelling reason of public policy, lack of value for money, or prioritisation of other cases. The procedures made by OFT under Clause 10(5) should include provisions on how to deal with market definition.

3. We would like to ask for clarification on Clause 10(9), which states:

In this section, "market" means an economic activity for the supply of a good or service within the Island provided by operators without restriction with respect to whether the operators are, or any of them is, present or based in the Island.

Could the OFT confirm whether activities carried out by Government owned entities would be included within this definition? The Commission's view is that they should, as Government can have the ability to influence and/or distort markets.

Sure (Isle of Man) Limited

Sure is pleased that the proposed Competition Bill is addressing the key deficiencies of the current regime, especially in terms of the current constraints on the OFT to investigate potential instances of anti- competitive behaviour. In particular, the removal of the convoluted process whereby the OFT could only proceed with an investigation following the approval of the Council of Ministers is welcomed, along with the introduction of the ability to apply penalties for any instances of proven anti-competitive behaviour.

We do note that the Council of Ministers would still have the ability to give direction to the OFT not to investigate a particular case. In order for this not to undermine the aims of the Competition Bill and the ability of the OFT to enforce its provisions, such powers need to be limited to exceptional circumstances and, in general, the Council of Ministers should be required to be transparent about the reasons for exercising those powers.

We notice that there is reference to there being a prohibition on persons engaging in anti-competitive arrangements that have the object or effect of preventing competition within a market, that could be outside the Island (See section 5 of the Bill). We are unclear as to how the OFT would have the jurisdiction to be able to prevent any such behaviour that occurs outside the Isle of Man so suggest that this may need to be clarified.

Finally, it would be useful to have some information on the timing of the introduction of this Bill, given that the last consultation that was held on it was conducted some five years ago in 2013.

Isle of Man Fatstock Marketing Association

As part of the IOM Agricultural Marketing Association we would ask what Impact Assessments have been done with regard to the potential implications of the Competition Bill?

Anonymous Respondent

Is it overkill? Isn't the threat of an investigation and bad publicity enough?
Will it only be used against local companies which are in fact minute in real terms?
Will it stop predatory pricing and selling certain goods below cost whilst overcharging on others?

Anonymous Respondent

On the basis of the proposal it is ill conceived, ill thought out and wholly protectionist in respect of public sector services.

Include public sector services, statutory boards, politicians and civil servants and it might make sense.

Anonymous Respondent

Based on these questions there seems to be the wrong focus.
The Island and most smaller economies are under threat from globalization, homogenization and online shopping and service provision.
Over regulating competition in declining consumer markets (reputedly DfE has a report into the domestic economy that shows locally owned and operated businesses are operating 20% below 2008 levels currently) is the last think consumer supplying businesses need on the IOM at present..
The Island needs to fix the cost issues with MUA and Steam Packet and create an environment to home grow entrepreneurs, and that will deliver lower prices and greater investment overnight.
Focusing on the minutiae in this questionnaire is more likely to hasten the demise of many local businesses, and this should be viewed very seriously before considering going forward with this legislation.
None of us believe that the Island should be full of monopolies or anti-competitive practices, however there needs to be factored in an understanding of scale, market potential and external online threats, before proceeding with this additional layer of bureaucracy for very little gain.

Four Anonymous Respondents Made Similar Points Which Have Been Collated

Consumer safeguards within IoM Agricultural Marketing Acts are already in place.
Losing dairy sector would be devastating, there is a multiplier effect of buying local; DEFA has stated that for £1 spent with a local business it is worth £1.83 to the economy. DEFA's Food Matters Strategy highlights the importance of local food industry, stressing the point of being able to produce food on the Isle of Man. People want to buy local and have as little 'food miles' as possible. Losing the dairy sector would have a devastating effect on our economy. People would lose jobs etc

Two Anonymous Respondents Made Similar Points Which Have Been Collated

If this legislation happens the dairy industry on the Island would cease to exist as overheads on the Island are so much higher than the UK. This would mean the loss of many jobs. Local produce is best and people want to buy local, every pound spent locally is worth so much more to the economy and benefits the Island as a whole. The Island should not be reliant on dairy imports due to the boat not sailing in bad weather.

OFT Response:

Much of the contents of the general responses have already been picked up elsewhere. The comments specifically relating to agriculture are set out in Appendix 3.

Some specific responses:-

(a) The Bill covers Government activities (and those of other public authorities).

(b) The Bill is consistent with international standards of competition law and this compliance is likely to be a pre-condition of the ability to trade post-Brexit when the Island becomes subject to potential scrutiny by the World Trade Organisation. International trade is based around the principle of open markets.

(c) The Bill is not intended to protect local companies from fair competition.

(d) Online purchasing and economies of scale are facts of life. If local businesses wish to protect market share they can only do so by persuading consumers to buy local through quality service, competitive pricing or other means. Ultimately the OFT (nor indeed Isle of Man Government) cannot control customer behaviour.

(e) The Bill has a full impact assessment.

ADDITIONAL COMMENTS

Isle of Man Government
Reiltys Ellan Vannin

infrastructure
bun-troggalys

Office of the Minister
and Chief Executive

Contact: Erica Radcliffe
Telephone: (01624) 686603
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Date: 15th June 2018

Mr Z Miah
Economist – Competition and Markets
Office of Fair Trading
Thie Slieau Whallian
Foxdale Road, St Johns
IM4 3AS

Dear Mr Miah

Consultation on Competition Bill

Thank you for giving the Department opportunity to comment on the Competition Bill 2018. The Departments' comments are as follows:

There is an argument for extending the exemptions beyond Health and Education to parts of DOI. The Isle of Man is not a fully functioning market in all respects, particularly in sectors where high capital investment requirements and the small potential market restrict both entry to the market and viability of competitive trading. Perhaps the best known example is the period of competition in ferry services but a wide range of infrastructure services could be similarly viewed. There is of course no bar to monopoly provision, though it is accepted that market power should not be abused. To an extent, it could be argued that monopoly provision by the public sector is more likely to operate to support the wider economic and social wellbeing of the Island, given that there is no likelihood of either excessive profitability or of any profits leaving the Island. Of course, the extent to which the public sector should operate in the market and, if so, under what, if any, restrictions, is a matter of policy.

This Department currently operates a number of public services that would be able to trade in the market and indeed some that do so in a limited way, but with controls in place to limit any impact. Again, it is matter of policy, with the same provision being capable of being regarded by one person as competition using taxpayer funded assets and by another as a prudent attempt to better utilise expensive capital assets. You will know that the current policy of Tynwald Court in respect of procurement favours the use of internal resources for internal services but the wider question of supply into the wider market has not been as clearly answered.

In the sphere of transport, the recent consultants' report highlights that, under either the present system or a Government owned company, there should continue to be a single provider of bus services on the Island. At the moment, profitable routes like those between Douglas and the South and to a lesser extent those between Douglas and Peel and Douglas and Ramsey are cross-subsidising socially necessary services. Competition on the profitable routes would significantly increase the level of subsidy required to provide unprofitable but socially necessary services. Therefore, monopoly provision is likely to be the best option for bus services. The Office may wish to refer to the specialist reviews published as part of the SAVE report by Treasury to June Tynwald 2018. The Department does provide private hire buses but does not operate coaches. It is unlikely to do so unless it is called to do so following any failure of the market and consequential unaddressed need. The Department operates 4 heritage railways but does not have a monopoly in this sector. It is certainly not requesting one.

A similar argument applies for the provision of life-line ferry services to the Isle of Man. Oxera LLP identified in its 2016 Economic Appraisal of sea links at the Isle of Man that in common with other Island community ferry services, commercially unviable passenger traffic is subsidised by the more regular and profitable freight service. That report also identified that whilst the passenger vehicle market is a natural monopoly, the Ro-Ro freight segment is contestable and prices are suppressed due to the threat of entry, albeit that a new entrant will either need to construct a new linkspan or use an alternative technology. The introduction of competition into the market for the provision of freight services would therefore undoubtedly impact upon the subsidisation of ferry passenger traffic and could reasonably be expected to increase costs to consumers. This need to ensure better outcomes for consumers of passenger sea services is enhanced still further by Treasury's recent acquisition of majority shareholding in the Isle of Man Steam Packet Company Ltd.

The Department requests exemption for both ferry and bus services under Section 9 (4) of the draft Bill, to be progressed in conjunction with the primary legislation. The Department has not sought an exemption for commercial airport operations as the barriers to entry into airport operation market are very high and as the Department owns the 2 most suitable sites on the Island. Similarly, the Department owns and operates the Island's harbours and considers it highly unlikely that there will be a competitive entry into the commercial harbour sector. If the Office would wish to treat all key transport modes equally, the Department would be pleased to support inclusion of airport and harbour operations in the requested exemption.

I trust that these comments prove useful. Should you require any further information, please do not hesitate to contact me.

Yours sincerely

N J Black
Chief Executive

Copy to:- F Williams, OFT

OFT Response:

Clause 9 of the Bill provides the mechanism to enable the Council of Ministers to grant exemptions. If the Department wishes (in parallel with the passage of the Bill through the Branches) it could seek Council approval to the grant of exemption in anticipation that clause 9 becomes law in its current form. Alternatively the Department could ask Council of Ministers to grant an exemption under Section 8 (2) of the Fair Trading Act 1996, which would be preserved by clause 33 of the final Bill.

It is the view of the OFT that clause 9 is the correct vehicle to provide any necessary exemptions for transport services because it would appear that there is potential for future changes in the market (e.g. a future Government might decide to privatise Bus Vannin).

Appleby

Competition Bill: Consultation

We note that the origins of the Bill are the Competition Act 1980 (CA 1980), the Competition Act 1998 (CA 1998) and for mergers, the Enterprise Act 2002 (EA 2002). There is a wealth of domestic and EU law which relates to competition as well as WTO policy. To provide a comprehensive analysis informed by this body of regulation and policy would be a mammoth task, so we have restricted our comments to observations based on the local economy an concepts of fairness and the practitioner's daily lot.

Drafting:

We have the following observations-

1. *The long title is puzzling 'A BILL to make provision for all forms of commercial activity that take place in the Island..'*

   Compare:

   CA 1980: [An Act to abolish..] and to make provision for the control of anti-competitive practices in the supply and acquisition of goods and the supply and securing of services;

   CA 1998: An Act to make provision about competition and the abuse of a dominant position in the market;

   A long title describes the parameters of a Bill and by convention; amendments cannot be made which are outside the long title (see Thornton on Legislative Drafting). The long title as stated invites wide and irrelevant amendments. There may be words missing which should reflect the subject matter of the first part of the Bill.

OFT Response:

Agreed – the long title will be amended

2. *Tynwald Procedure: clause 9(1); clause 10(5), clause 13(3) clause 26 (4): all bar clause 10(5) require approval; clause 10(5) (OFT must make rules of procedure in respect of the carrying out of it of investigation) should warrant approval rather than just laying. Also, clause 13(6) refers to the Legislation Act 2015 in respect of the meaning of approval, laying etc; but only in this section in respect of clause 13(3), though in fact the observation applies to all the chosen procedures.*

OFT Response:

The matters covered by the instruments quoted are matters of overall public policy which rightly require overt scrutiny in Tynwald. Clause 10 (5) relates to rules about the conduct of an investigation which is a matter of detail not public policy so the laying procedure is appropriate.

On reflection the OFT believes that, in any case, the power in clause 10(5) should be permissive (may) rather than prescriptive (must) and this will be changed in the final Bill.

3. *Definition of person: "means a person carrying on a business and includes an association, whether or not incorporated, which consists of or includes such persons". It would be useful if it was made clear that the person does not have to be resident, incorporated or having an establishment in the IOM. Compare 'person' in the Interpretation Act 2015, which does not of course, require the business connection:*

35 References to "person" generally

1) An expression used to denote persons generally includes a reference to a body (whether corporate or not) as well as to an individual.

Example:

"Person", "anyone else", "party", "someone else", "no-one", "another", "whoever" and "employer" are references to a person generally.

2) Subsection (1) is not displaced only because there is an express reference to an individual or corporation elsewhere in the Manx legislation.

Examples:

a) "Body corporate" and "company" are express references to a corporation.

b) "Adult", "child", "spouse" and "driver" are express references to an individual.

The two uses give rise to confusion as the Bill has references to 'person' which may or may not be intended to be interpreted by applying the Bill definition eg clause 12(4)(e) (OFT may be accompanied by such other 'person who by reason of the person's expertise'); clause 18 (Procedure for orders under s 16) allows a 'person' to make representations if their interests are affected by an order. Is this the narrower definition of 'person' provided in the Bill or do all 'persons' (Interpretation Act) have standing?

OFT Response:

The definition in the Interpretation Act 2015 provides the backdrop and is not completely superseded by the more specific definition in the Bill. "An expression used to denote persons generally …" will still do so when used in the Bill. However, based on the definition in the Bill there will be an additional qualification, i.e. "carrying on a business".

The phrase "carrying on a business" creates more problems than it solves. Given that if it is removed, the definition will have nothing to distinguish it from section 35 of the Interpretation Act 2015, so the definition will be removed from the Bill.

4. *Clause 6(1) (a) and (b) should be reversed in order.*

OFT Response:

Agreed – this will be amended in the final Bill

5. *The term 'operators' is not defined in clause 10(9); I think it should be 'persons'.*

OFT Response:

Agreed – this will be amended in the final Bill

6. *Clause 11, the word 'this' is missing before 'Part'*

OFT Response:

Agreed – this will be amended in the final Bill

7. *Clause 23 (Disqualification of directors) refers to section 2(1) of CODA. That is the undertaking section of CODA. I think the reference should be to section 3 of CODA (application for disqualification order)*

OFT Response:

Agreed – this will be amended in the final Bill

Substance:

Preliminary: this is a major accretion to the responsibilities of the OFT and we have concerns that there may not be the necessary capacity to regulate in accordance with the Bill.

OFT Response:

The OFT already has responsibility for competition law under Part 2 of the Fair Trading Act 1996. The Bill makes the role of the OFT clearer but does not substantially increase it. The new area which the OFT will be required to be involved in is the question of mergers of national interest which OFT feels will be a rare occurrence.

In terms of major investigations given the small scale of the Competition and Markets team the option will, as at present, be to bring in specialist external economic or sector specialist resources.

Part 2 Anti-competitive Practices

Clause 4 (abuse of dominant position) reflects substantially CA 1998, section 18, so there should be sufficient case law available on its interpretation

OFT Response:

Agreed

Clause 5 (prohibition on preventing competition) also reflects large parts of section 2. Clause 5(1)(b) has extraterritorial reach unlike the UK version (see clause 13 comment below) which is limited to preventing etc. competition in the UK. Clause 5 (4) avoids an agreement 'to the extent that it comprises or includes an agreement prohibited by clause 5(1)' which is better than the UK version: section 2(4) 'Any agreement or decision which is prohibited by subsection (1) is void'. The IOM sub clause suggests severability of the offending part of an agreement rather than that the whole agreement is void.

OFT Response:

It should be remembered that until the UK leaves the European Union, UK competition law sits beneath EU competition law as provided by Articles 101 and 102 of the Treaty on the Functioning of the European Union. The Isle of Man is not a Member of the European Union and therefore its competition law needs to operate independently but remain consistent with international standards.

Clause 9(1) (regulations in respect of exemptions from anti-competitive practices) allows for exemptions on public policy grounds. In this regard, the public policy consideration will be predominantly insular and there is unlikely to be much in the way of UK public policy to assist the executive. Subsection (2) expands upon this: exemption by sector, person, practices, and specific practices by a specific person. Historically the arguments have turned on transport, transport links and utilities- the commanding heights of the IOM economy. To determine an exemption will be a politically difficult task. Previous history demonstrates that any decision is likely to be the subject of judicial review. COMIN may 'repeal' ('rescind' or 'cancel' would be better language, it is not primary legislation) or vary an exemption by 3 months' notice where economic circumstances change and may 'immediately' repeal or vary an exemption when any conditions are not met (clause 9(7)). In spite of the immediate repeal/variation, there is a procedure which must first be followed, providing for rights to make representations- very much like an appeal which COMIN will consider before proceeding to repeal/vary. So it is not immediate.

OFT Response:

It is rightly the Council of Ministers role to determine public policy. The word "immediately" will be removed from clause 9(7)

Part 3 Investigations

Clause 10 (investigations) in addition to the OFT powers to investigate into anti-competitive practices/breach of exemption conditions, COMIN may also request an investigation by OFT where it considers a market is not functioning or direct OFT not to undertake an investigation 'for compelling reasons of public policy'. This begs the question as to how 'compelling reasons' is determined and whether that determination is unchallengeable. There is some transparency- OFT has to publish reports of its investigation to Tynwald (clause 10(6) (Report to Tynwald), but note there is no redaction built in to this requirement). OFT devises its own investigation procedure (laid before Tynwald, not approved) (clause 10 (5). Investigation can result in undertakings/exemptions- without a necessarily punitive result (clause 10(7). The investigation into market operation applies whether or not the 'operator(s)' are or are not present or based in the Island (clause 10(9). Seems reasonable, but if the operator is not here, how can the investigatory powers (inspection and seizure of information, access to premises) (clause 12) be effectively exercised? Presumably, an MOU is intended to deal with that since it will require foreign assistance (clause 13 (1)(b)). The MOUs with other competition authorities will have to deal with a broad range of cross-border matters, but it rather assumes the investigation will include common interests and justify a joint investigation. The term 'operators' is not defined in clause 10(9); it should be 'persons'.

OFT Response:

The intention of the Bill is that the OFT would co-operate with the relevant competition authority; and the MOU would be investigation specific.

Clause 11 (standard of proof), the word 'this' is missing before 'Part'

OFT Response:

Agreed – this will be amended in the final Bill

Clause 12 (5) (investigatory powers) provides that it is an offence for an individual to act in defiance of requirements put on him by the OFT in the exercise of its investigatory powers; we would have expected this to be "person" in the Interpretation Act sense so it could also include corporates. Otherwise employees are hung out to dry. There is no provision for corporate offences in the Bill, which is unusual as it would be conventional.

OFT Response:

Agreed – this will be amended in the final Bill

Clause 13 (joint investigations) OFT may conduct an investigation with a Department or Board jointly (clause 13(1)(a)). Fine. Or, clause 13(1)(b), jointly with a foreign competition authority under a MOU. Clause 13(2) allows for a single party to lead and the other to support. This should not be the case where the investigation is with the foreign competition authority; in other words OFT should always lead where there is a foreign authority. To provide a foreign authority with leadership powers in the IOM necessarily undermines local accountability. How can Tynwald control the foreign joint investigator? There are no penalties in here for abuses by the investigators or restrictions on onward disclosures. Presumably to be the subject of the MOU, which will not be a public document or receive legislative scrutiny. Cf Schedule 5 FSA 2008 (Disclosure of information; creating offences for recipients' disclosures); sections 104F-104I of ITA 1970 (information: restrictions on disclosure and use; offences).

OFT Response:

The question asked is "How can Tynwald control a foreign joint investigator?" By the same token, one should ask "How can a foreign Parliament control a Manx joint investigator?" The point is that the investigators would only be collaborating because the matter is a question of mutual interest. The terms of the collaboration, then, are properly the subject of negotiation between the investigators and are properly to be set out in an MOU.

This is not a matter for Parliamentary control, whether by Tynwald or any other Parliament. The idea is that investigators are to operate independently of external influence, whether by a Parliament or anyone else.

It would be a matter for the OFT in concluding an MOU to determine the circumstances in which it would not have a lead role. An MOU would needs to cover data sharing and disclosure to ensure GDPR compliance.

Clause 14 (procedure where offence detected): it should be noted that in addition to reporting offences under the Bill, the OFT must hand over any evidence in respect of any offences under any enactment. An investigation could therefore trigger other police investigations.

OFT Response:

The issue regarding an investigation triggering other police investigations is surmountable. It is to be surmounted on the basis that the extent to which the right to privacy (Article 8, ECHR) is infringed is justifiable on the ground that it is "in accordance with law and is necessary in a democratic society … for the prevention of disorder or crime".

Clause 15 (undertakings) undertakings can be accepted where anti-competitive practices are found. The OFT must publicise this and receive representations concerning the published notice. Clause 15(4) suggests that as a result of the representations, OFT may modify a proposed undertaking, which then does not have to follow the initial publication and representation procedure. There are procedures for release and variation of undertakings, but nothing regarding how representations are to be dealt with or appeals or provision for regulations to govern those matters.

OFT Response:

Any representations from the original notice will identify the concerns of a party which the OFT will have regard to in the event that it needs to consider a modified undertaking.

The reference clause 15(4) should be to subsection 2(a) and 2(b) and this will be reflected in the final Bill.

Part 6 (Mergers)

Part 3 of EA 2002, omitting the EU law, would be a much better approach than in the Bill ; not all mergers fall within the purview of the Act. See section 23 of the EA 2002 (relevant merger situations) and the turnover test in section 28.

Clause 24 defines the term 'merger'. This appears detailed and comprehensive. Again an avoidance of doubt provision that this definition applies whether or not one or both parties are established in the IOM, would be useful- see drafting note 3 above. The real issue for practitioners would seem to be clause 25 (advice prior to a merger). Parties may seek advice from OFT prior to a merger. OFT must determine whether there is a national interest aspect and submit a report to COMIN on its determination (clause 25(3)- it does not say that if OFT finds no national interest, it is not required to submit a report to COMIN. COMIN makes the final determination and will or will not investigate as a result of that determination. Parties to the merger may ask COMIN to investigate the merger if it has given a conditional notice that though having national interest, it will not investigate the merger, or an notice [conditional or unconditional not indicated by the text] that there is national interest and it will proceed to investigate. The 'condition' is not explained. COMIN notices attract Tynwald procedure (clause 25(7)).

There is a judgment call here for practitioners when advising; would it be overcautious to seek advice in respect of mergers which are advised upon from day to day? If advice from OFT should be obtained, how speedy will the process be? What costs will be involved? What degree of understanding must the adviser/OFT have/COMIN, which could delay a transaction? That is a question which requires careful thought and understanding of the actual businesses undertaken by the merging parties (see national interest definition in clause 26(3)). As currently drafted the process will necessarily be protracted; it would be better if the level of comfort from COMIN were to be generally unnecessary and the preliminary national interest assessment should be summary carried out by the OFT (cf OFT on moneylenders). In the worst case scenario, a cautious OFT will otherwise refer all mergers having a potential (but not actual) national interest aspect to COMIN

and the procedure will become protracted (no doubt further and better particulars will be required at all stages) until either a no national interest determination or a further investigation(clause 25(4)).

OFT Response:

The OFT agrees in general and has worked to streamline and remove ambiguity from this process. In doing this it has also ensured there is not the chance for them inadvertently ending up reviewing/investigating the merger in some cases up to three times. The need for CoMin to add conditions is to ensure that a perceived problem does not go ahead.

OVERARCHING ISSUE

AGRICULTURAL MARKETING

There would appear to be a perception with the consultation responses that the proposed Competition Bill represents either a threat to agricultural marketing or an opportunity to provide protection against imported goods. The reality, from an OFT perspective, is that the Bill is neither. In fact it seeks to broadly maintain the status quo. There is a particular theme around the protection of the dairy sector through price fixing.

The ability for the Department of Environment, Food and Agriculture (DEFA) to fix the price of locally produced milk derives from the Agricultural Marketing Acts.

Current Situation

The term anti-competitive practice is defined by section 8 of the Fair Trading Act 1996 which states

For the purposes of this Part a person engages in an anti-competitive practice if, in the course of business, he pursues a course of conduct which, of itself or when taken together with a course of conduct pursued by another person or other persons, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the Island or the supply or securing of services in the Island. This is subject to subsections (2) and (4A).

It is self-evident from the wording highlighted in red that any form of price fixing has the inherent potential of being an anti-competitive practice.

Under the 1996 Act the restriction is not absolute and in the event of an investigation it is open to the persons operating the practice to argue that the practice is necessary or beneficial in terms of consumers or the economy or both. Interestingly responders have actually articulated some of the perceived long term advantages of the system; and those would presumably form the basis of any case in the event of an investigation.

It is a matter of fact that the OFT has never sought to use its powers of investigation in relation to agricultural marketing. Even if it had chosen to do so; and had ruled the fixing of milk prices to be anti-competitive there is still the potential for the practice to be exempted by the Council of Ministers under section 8(2) of the 1996 Act.

Competition Bill Proposals

If we then consider the legislative position were the Competition Bill to become law in the consultation format

Firstly clause 5(2) of the Bill is explicit in terms of price fixing providing

Subsection (1) applies, in particular, to arrangements between persons which —

(a) directly or indirectly fix purchase or selling prices or any other trading conditions.

Although the Bill is more explicit it has not changed the meaning in relation whether or not price fixing can be anti-competitive. Equally the Bill still leaves it open to the persons operating the practice to argue that the practice is necessary or beneficial in terms of consumers or the economy or both.

Finally the Clause 9 of the Bill replicates the exemption provision (albeit in different terminology) and allows the Council of Ministers to exempt things that might otherwise be anti-competitive on the grounds of public policy.

In summary the migration from Part 2 of the Fair Trading Act 1996 to the Competition Bill (as consulted on) would be neutral in relation to market interventions by DEFA under the Agricultural Marketing Acts.

Clearly the Agricultural Marketing Acts and the making of secondary legislation thereunder, are primarily a matter for DEFA; and in exercising its statutory functions DEFA must have regard to other legislation; be that Part 2 of the Fair Trading Act 1996 or the Competition Bill should it become law.

It is important to note that neither the existing law nor the proposed Bill are unduly restrictive in relation to legitimate measures to manage markets. If otherwise anti-competitive behaviours are to continue they simply need to be justified in the long term interests of consumers, the economy or a combination of the two. The Bill as drafted does not seek to change that position.