Isle of Man
Office of Fair Trading

Summary of Responses to the Consultation on the

Isle of Man's Competition Policy

December 2013

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Contents

1. Introduction

The consultation document was produced to invite comment on proposals to review the competition framework with a view to introducing new legislation to replace Part 2 of the Fair Trading Act 1996 (as amended).

2. The Consultation Exercise

The public consultation exercise ran from 27th July to 30th September 2013.

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 in the 'Consultations' section of the Isle of Man Government and Office of Fair Trading website.

3. The Responses

A total of 15 responses were received; a list of respondents is attached at **Appendix 1** and a summary of those responses is attached at **Appendix 2**.

4. Conclusion

Following the consultation exercise and further consideration, the Isle of Man Office of Fair Trading (OFT) agreed: -

- Given the general acceptance that the current provisions are unsatisfactory, the OFT will seek approval to the drafting of new legislation;
- The preparation of detailed drafting instructions, whilst led by the OFT, requires considerable input from other Government Departments and private sector organisations; and
- Great care will be required to ensure that a new competition framework genuinely meets the needs of the Island as a small economy.

Many of the key issues which will impact on the drafting were raised during the consultation and are discussed in detail in the OFT responses in **Appendix 2**. Those comments represent current OFT thinking but given the commitment to an inclusive approach clearly those thoughts and conclusions are open to be influenced.

Appendix 1

List of Respondents

- Patrick Parish Commissioners*
- Marown Parish Commissioners*
- Jurby Parish Commissioners*
- Ballaugh Parish Commissioners*
- Andreas Parish Commissioners*
- Chief Secretary's Office
- Department of Infrastructure
- Ramsey Town Commissioners
- Sure (Isle of Man) Limited
- Douglas Borough Council
- Communications Commission
- Manx Gas Limited

Three further responses were received but marked confidential and therefore have not been named in the above list, however, a summary of their comments are included below (unidentifiable).

**No comments made*

Appendix 2

Summary of Responses

General Comments Received

Chief Secretary's Office

The Chief Secretary's Office welcomes the broad and publicly focussed approach to the Competition Policy consultation that the OFT have undertaken and consider that others within the consumer market and business community are most appropriately placed to lead on and help refine this initiative.

OFT Response

The OFT is strongly supportive of the view expressed by the Chief Secretary's Office that the development of a new competition framework for the Island needs to be undertaken in an inclusive manner involving key Government Departments, especially the Department of Economic Development. It is however important that the OFT continues to ensure that the initiative is driven forward because as the body responsible for the enforcement of the existing competition framework under Part 2 of the Fair Trading Act 1996, it recognises the current deficiencies.

Department of Infrastructure

The Department of Infrastructure works closely with suppliers of priority services (especially in the travel industry such as airlines and sea travel providers and any type of competition regulation needs to ensure that the current position with regard to these two service areas is recognised). The nature of the Island means that there will be monopolies and any regulation should be very light touch and Government needs to avoid creating any bureaucratic obstacles to local businesses. What may appear to be a monopoly in local terms may not be, as it could be competing with UK businesses or internet business. The major monopoly operator on the Island is actually Government with the MEA and WSA.

OFT Response

The response from the Department of Infrastructure highlights the ultimate conundrum facing those tasked with developing a new competition framework – in a small economy it is important to balance the benefits of competition against the conflicting benefits which come from the economies of scale which can derive from monopoly or oligopoly in the provision of key services. There is no magic right or wrong answer, but the Department are absolutely right to point out that caution is required.

In its general comments the Department of Infrastructure refers to the need for any economic regulation to be light touch; a theme which resonates throughout subsequent responses from many contributors. It is important to understand what is meant by "light touch" because in reading the various comments it becomes clear that it means different things to different people.

From an OFT perspective "light touch" is about a philosophy of intervention being the option of last resort. The OFT believes that competition law should provide a robust framework of rules within which business can flourish on a fair and equitable basis. Where businesses choose to step outside that framework (for example price fixing cartels) in ways which disadvantage consumers and/or other market participants there should be meaningful penalties. Provided however, that the market participants stay within the defined boundaries

there should be minimal intervention unless it is clear that important markets are fundamentally failing the economy or the people.

Ramsey Town Commissioners

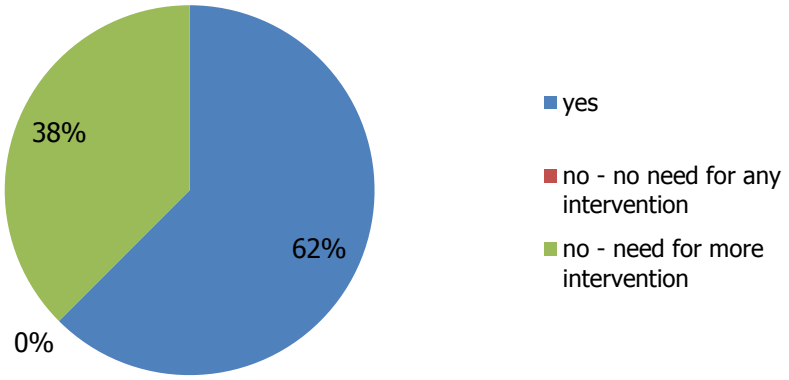
The Commissioners did not wish to respond to the specific questions however asked that their concerns that the proposals went beyond the needs of the Island in the context of its size be noted. The Commissioners were also concerned that the proposals appear to be silent in respect of Government involvement in monopolistic ventures, Government's operation of facilities, such as the cinema and Villa Marina, in direct competition with the private sector, and to instances of support for private commercial companies provided by Government to the disadvantage of competitors.

OFT Response

The OFT agrees with Ramsey Town Commissioners that the new framework needs to recognise the scale of the Island economy. The Commissioners are correct that the consultation is silent on the issue of Government involvement as market participants. That is a policy issue for others, notably the Council of Ministers and Tynwald. The role of a competition framework is to ensure that where there are mixed markets they operate fairly and within the legal boundaries.

Response Sheet Replies

Question 1
Do you agree with the light touch regulation approach of the OFT?



COMMENTS TO QUESTION 1

Confidential Respondent
Light touch regulation would appear to be right approach but I have concerns that the Council of Ministers under the provisions of Section 8 (2) and 9 could exert undue influence, particularly as in our own case where we have been competing for public sector work in competition with a Government funded operation providing similar services to ourselves. Whilst we are assured by various government departments that we compete on a level playing field there is no transparency in the tendering process. Ideally the OFT should be a 'Stand Alone' operation (rather like the F.S.C.) and be able to investigate without direction by Co.Min.

OFT Response
As currently structured the OFT Board has a minority political representation (a political Chair and Vice Chair and three lay members) and is genuinely at "arm's length" from Government. The Board has never felt that the Council of Ministers was trying to exert undue influence.

Sure (Isle of Man) Limited
A light touch regulation approach is absolutely not the right approach for the OFT. Since we started operating in the Isle of Man in 2007 we have experienced an incumbent that is prepared to engage in behaviour that in most other jurisdictions would be prohibited and therefore not be allowed to go unchecked. This demonstrates clearly that a light touch approach to regulation does not work. Sure cannot understand how the OFT can recommend a light touch approach to regulation at the same time as it recognises that regulation is "…even more important in a micro economy such as the Isle of Man, where issues of scale may result in natural monopolies and participants enjoying market dominance." How can a light touch approach even be contemplated in these circumstances?

We accept the principle that in small economies such as the Isle of Man that a proportionate approach to regulation and competition law should be adopted. But unless there is a clear prohibition on anti-competitive behaviour, accompanied by the will and resources on the part of the OFT to investigate substantiated claims of anti-competitive behaviour and impose sufficiently stringent financial penalties if those claims prove well-founded, then dominant

firms will have no incentive to change their behaviour. This will lead to competing firms questioning whether they should continue to invest in the Isle of Man, which will only further limit the extent to which consumers will be able to enjoy the full benefits of increased competition. We therefore urge the OFT not to miss this opportunity to reform the Isle of Man competition regime.

OFT Response

From an OFT perspective "light touch" is about a philosophy of intervention being the option of last resort. The OFT believes that competition law should provide a robust framework of rules within which business can flourish on a fair and equitable basis. Where businesses choose to step outside that framework (for example price fixing cartels) in ways which disadvantage consumers and/or other market participants there should be meaningful penalties. Provided, however, that the market participants stay within the defined boundaries there should be minimal intervention unless it is clear that important markets are fundamentally failing the economy or the people.

Abuse of market power is, from an OFT perspective, stepping outside the framework of rules. We agree with Sure that it should be addressed and there should be meaningful penalties. The real risk of lack of those boundaries jeopardising investment in the economy is recognised by the OFT; and that is why the OFT is driving this initiative – the current rules are not fit for purpose; a view that Sure has previously expressed in a different context.

Communications Commission

The Communications Commission appreciates that this consultation from the OFT is setting out to explore in broad terms a new approach to competition law and that the finer details of policy will be explored in further consultations. However we have taken this opportunity to draw attention to those areas where we feel there are areas of concern in the current and proposed regime hoping that it might be helpful in drawing up further consultation documents.

The Communications Commission considers that, while a light-touch system is possible in principle, there needs to be considerable development of the regulatory system itself in the Isle of Man before any discussion of its appropriateness can realistically take place. The current process for investigation of possible anticompetitive practices, requiring as it does a direction from the Council of Ministers, is unwieldy and is outside the control of the OFT.

In addition, there are currently few or no legal or stated provisions dealing with market definition, what actually constitutes an anticompetitive practice (i.e. in terms of the specific, measurable effects it must have to be defined as such) and what must be demonstrated to show anticompetitive effects.

This consultation recognises that the Isle of Man, while not part of either the UK or EU, should consider what happens in those markets and the outcomes of their competition policies, and that it can in fact benefit from the outcomes of competition enforcement at both UK and EU levels. There is therefore a clear benefit to be had from setting out a framework for looking at competition, informed by those used in the UK, EU and elsewhere.

It is perhaps worth noting that the competition laws in Guernsey and Jersey are modelled on the competition provisions in the Treaty on the Functioning of the EU. The Channel Islands' legislation places certain obligations on the Regulator (CICRA) and the Royal Court in each island when applying the competition laws:

CICRA must endeavour to ensure that, as far as possible, competition matters arising in the Channel Islands are dealt with in a manner consistent with – or, at least, that takes account of – the treatment of corresponding questions under EU competition law. Relevant sources include judgments of the European Court of Justice or General Court, decisions taken and guidance published by the European Commission, and interpretations of EU competition law by courts and competition authorities in the EU Member States. The legislation, however, does not prevent CICRA from departing from EU precedents where this is appropriate in light of the particular circumstances of the Channel Islands.

But there appears to be no such equivalent framework currently in place in the Isle of Man, unless it is implicit in the wording of Section 8 of the Fair Trading Act 1996 (as this appears to be based on some parts of the UK and EU legislation) that the method for assessing anti-competitive practices would be the same as used in those jurisdictions. However, there doesn't appear to be a clear demonstration that this is the case. The consultation lists a set of practices that may be anticompetitive. Further documentation would need to define these in terms of what has to be shown to demonstrate that this is the case. The Commission, while acknowledging that this is OFT's first consultation on competition policy, is of the view that an undefined list of anti-competitive behaviours is not sufficient either as a foundation for competition policy or to give firms and other stakeholders certainty of what they can and cannot do.

The Commission suggests that the OFT needs to set out, and consult upon, what it proposes to put in place as a 'light-touch' competition regulatory regime, including modifications to current arrangements and the legislative framework. This should include: how markets will be defined; how market power will be determined; what will constitute different types of or anti-competitive behaviour (including abuse of a dominant position); what levels of concentration will trigger a merger inquiry, what levels of sanctions or undertakings will be available, and so on.

In summary, while the Communications Commission agrees that a regulatory regime should be appropriate and proportionate for the Isle of Man's markets and circumstances, it would emphasise that there needs to be considerable work done on the foundations, definitions and proof requirements of competition policy on the Island before any consideration of 'lightness of touch' can be undertaken.

OFT Response
Thank you for the most helpful comments which will be taken into account as the policy and legislation are developed.

Confidential Respondent
One of the island's largest monopoly suppliers is government itself. What powers does the OFT have to investigate government departments and order change?

OFT Response
The OFT has demonstrated its willingness to deal robustly with anti-competitive practices by Government agencies in mixed markets. The recent investigation into the procurement of Government printing services etc.[1] illustrates the OFT approach. Whilst under current legislation there are no powers to order change, that change has happened.

[1] http://www.gov.im/oft/info/investigations.xml

Confidential Respondent
I don't believe there is any evidence to suggest to the contrary that heavy handed treatment of regulation will have the desired effect and therefore conclude the light touch approach is more suitable.

The light touch approach allows businesses to develop and natural growth in a competitive market. It is likely in a small economy that monopolies will exist and these will be small businesses and they mostly succeed where they are in the best interests of the consumer.

OFT Response
Please see earlier comments regarding monopoly and oligopoly.

Manx Gas Limited
Manx Gas competes with both oil and electricity as alternative forms of energy supply, but it is the only source of gas on the Isle of Man. As a monopoly supplier of an essential service Manx Gas expects to be subject to an appropriate degree of regulation, including oversight of the prices that it charges for gas supply.

In this context, Manx Gas supports the principle of "light touch regulation" and is working with the OFT and Treasury to develop a light touch regulatory framework for gas distribution that is appropriate for the scale and scope of the Isle of Man gas sector. The intention is to supplement the already established ROCE framework with more qualitative standards and benchmarks that Manx Gas must meet.

From the perspective of developing a regulatory framework for Manx Gas it is important that the consultation on competition policy should clearly distinguish between the function of competition regulation and the economic regulation of utility prices.

Competition regulation is about protecting consumers from unfair, anti-competitive trading practices and to ensure that competitive markets are functioning properly. The OFT has powers under the Fair Trading Act to identify these practices and then take corrective or even punitive actions.

Economic regulation of prices is about establishing a framework or set of rules, which will result in the setting of fair and reasonable prices, and then monitoring the application of those rules.

In the absence of a clear set of rules that are enforced in a predictably consistent manner, uncertainty will arise, for all stakeholders, including consumers, regulators, essential service providers and investors.

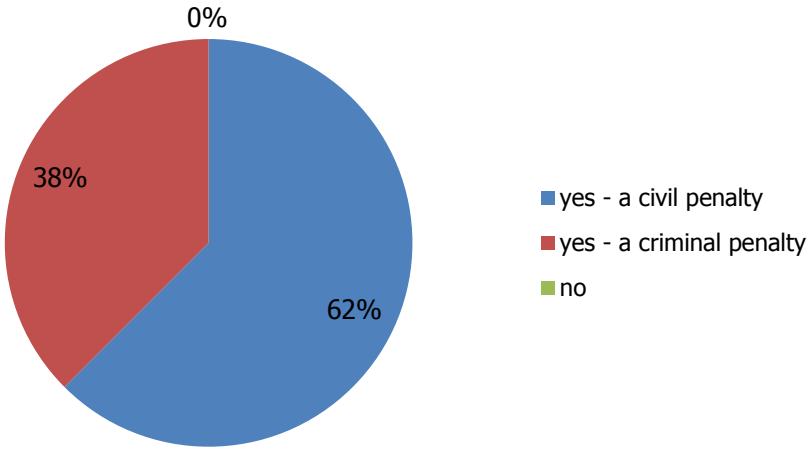
Additional or different powers to enforce competition regulation cannot substitute for an economic regulatory framework and will not reduce uncertainty.

It is for this reason that we, together with the OFT and the Treasury, are working towards the development of an appropriate, fit-for-purpose, economic regulatory framework for Manx Gas to supplement the in-place ROCE methodology. The further development of competition policy, which is the subject of this consultation, is of lesser relevance to Manx Gas. The market for gas supply on the island, like in most jurisdictions, is a natural monopoly and therefore Manx Gas expects to be economically regulated. We are therefore keen to enhance the framework for regulation that will meet the needs of all stakeholders.

OFT Response
The OFT recognises the difference between the regulation of competition and economic regulation.

Question 2

Do you believe that perpetrators of anti-competitive practices should be subject to a financial sanction?



COMMENTS TO QUESTION 2

Confidential Respondent
A civil penalty - in any event.

A criminal penalty – preferably.

Sure (Isle of Man) Limited
There is absolutely no point in having a competition regime in place – even one that explicitly prohibits anti-competitive behaviour – if any company that is found to have acted anti-competitively faces no penalty for doing so. The threat of financial sanctions is the most effective deterrent against anti-competitive practices as this will have a direct impact on the perpetrator and, in the case of a perpetrator that is a limited company, its shareholders.

Sure therefore believes that the OFT should introduce the ability to levy financial penalties in the event that it proves that a company or person has engaged in anti-competitive behaviour. The level of the potential penalty needs to be sufficiently high to act as a deterrent and we are aware that it has become best practice amongst competition authorities to have the ability to impose financial penalties equivalent to up to 10% of relevant turnover. The actual penalty that is imposed for any particular offence could be determined by a range of factors that could include the seriousness of the behaviour in terms of the effect on competition; the duration of the offence; the amount by which the perpetrator of the offence benefitted financially from the behaviour, etc.

If the OFT does indeed decide to include the ability to impose financial penalties – and we believe it must if it is serious about making real changes to the competition regime – then it is important that it provides clear guidelines on the principles it would use to determine the level of the financial penalty.

Of fundamental importance to the above, is for the OFT to include an express prohibition on anticompetitive behaviour. Currently the Fair Trading Act 1996 (as amended) ("the FTA") merely defines what an anti-competitive practice is; it does not say that anti-competitive

practices are prohibited. This must be addressed otherwise perpetrators of behaviour that would be regarded as anti-competitive in almost every other jurisdiction can continue to say that they are not doing anything that is against Isle of Man law.

Douglas Borough Council
Action should take the form of proceedings in the criminal court and not rely on the affected party pursuing civil proceedings.

Communications Commission
The Communications Commission takes the view that criminal penalties may be appropriate for more serious anti-competitive practices, such as cartels and bid rigging. However, civil penalties can be a quicker way of rectifying anti-competitive behaviour in less serious cases.

Confidential Respondent
There should be a box for not sure!

In being forced to tick a box above I would choose yes - civil penalty as there should be a deterrent for perpetrators of anti-competitive practices and there should be a financial sanction.

The OFT should issue a Whistle Blowing policy, I am not aware if this type of policy currently exists.

I appreciate that the 'whistleblower' gets some form of exemption or reduction in the level of penalty but I don't think that should be 100% exemption. If the anti-competitive practice has been carrying on for a number of years the 'whistleblower' will have benefitted financially over that period until they came clean.

However if the anti-competitive practice is very severe (pushing other small businesses out of the market) then one may consider criminal penalties for those concerned.

Manx Gas Limited
This section on anti-competitive practices is of little relevance to Manx Gas.

OFT Overall Response
This question has produced a diverse response and reading them it is suspected that many may have chosen the last Confidential Respondent's suggested box for "Not Sure" had it been available.

At the outset the OFT would point out that by a civil penalty it is not suggesting that a person disadvantaged by anti-competitive behaviour should be left to pursue the perpetrator in Court (although once the case is proven by the competition authority, civil damages claims can often ensue). Within a civil penalty regime the competition authority having found the abuse proven imposes a penalty on the perpetrator(s), such penalty being determined in accordance with a published set of approved rules. There is a right of appeal to an independent body. This is the system which is in place at both UK national and European Union levels. Many of these competition cases, especially those around abuse of market power, hinge on the expert testimony of economists and the sort of issues raised by the Communications Commission in response to Q1 (such as market definition) become points of contention. It is difficult to see how many of these cases could be proven to the criminal standard of "beyond reasonable doubt" and they are far more appropriate to the standards of proof required under civil law. Equally the wholesale criminalisation of

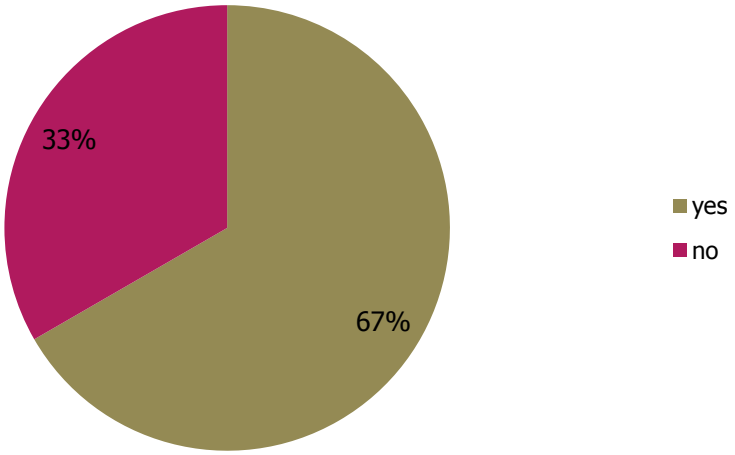
competition law breaches would require a level of enforcement resources way beyond those currently available to the OFT. Finally, of course, with the creation of a criminal offence comes the prospect of both firms and directors/managers acquiring a criminal record which the OFT believes is out of proportion to most competition law breaches. For all of these reasons that OFT believes that most breaches of competition law should be dealt with by way of civil penalties.

However, there is a view expressed that some offences such as cartel activity and bid rigging are so serious as to merit criminal sanction. The OFT supports that view and intends to include the provision. In so doing the OFT is anticipating a healthy debate around the exact offences which should be criminalised when it consults on draft legislation.

The issue regarding "whistleblowers" which is raised here is dealt with under Q3.

Question 3

Do you agree with the principle of reduced penalties for 'whistleblowers'?



COMMENTS TO QUESTION 3

Confidential Respondent

Not sure.

Sure (Isle of Man) Limited

Sure believes that the principle of reduced penalties for whistleblowers for cartels can be an effective means of discouraging the formation or persistence of cartels. A system, such as that in the UK, whereby the first member of a cartel to blow the whistle is granted complete immunity from fines, would seem to be the most effective way of encouraging members of a cartel to stop such behaviour quickly. Sure is not convinced, however, that introducing immunity for whistleblowers of other types of anti-competitive behaviour is appropriate, especially if the OFT is intending that instances of abuses of a market position by a single dominant firm could be subject to immunity from fines if the firm in question blows the whistle on itself. This could result in situations where a firm could engage in anti-competitive behaviour for a long period of time – and in doing so, reap the benefits of such behaviour by for example, foreclosing a competitor from a market such that it does not face price competition – and then escape punishment for that behaviour by effectively just saying sorry.

If there is no financial penalty involved for engaging in anti-competitive behaviour then this would not give firm any incentive to refrain from such behaviour and would render any attempts by the OFT to improve the competition regime completely meaningless.

Douglas Borough Council

Reduced penalties for whistleblowers might encourage more individuals to bring matters to light for investigation; however a guarantee of reduced penalties provides a means for an individual who has been involved in anti-competitive practices to escape proper punishment simply by reporting it themselves. Any decision on a reduced penalty should be a matter for the Office of Fair Trading, rather than the criminal court (in order to retain some anonymity), and it should be made clear that there would be no automatic right to a reduced penalty for whistleblowers, with each case being dealt with individually.

Communications Commission
As information on anti-competitive activity can often be known only to a few agents in an anti-competitive activity, it is important that those agents be encouraged to declare that activity to the authorities.

Confidential Respondent
I agree with reduced penalties for 'whistleblowers' as they have called a halt to the anti-competitive behaviour. The firm will be under investigation and preventative measures will be enforced to control the firm and natural competition will evolve again which is in the best interests of the consumer.

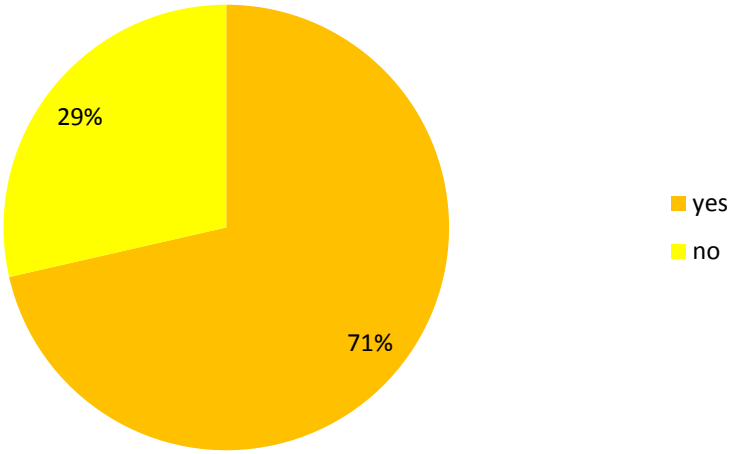
In relation to the reduced penalty it depends on the seriousness and length of crime. If the whistleblower has been a participant to the crime for a number of years and enjoyed profits from a company acting anti-competitively then there is an element of doubt to the reduced penalties.

Manx Gas Limited
This section on whistleblowers is of little relevance to Manx Gas.

OFT Overall Response
Provisions relating to whistleblowers and reduced penalties are desirable and will require very careful thought. The intention is to include enabling provision within primary legislation and detail the methodology for determining penalty levels and reductions for "whistleblowing" and other co-operative activity. Those rules would require Tynwald approval and would offer a fair and transparent methodology. The primary legislation would also provide an appropriate and independent appeal mechanism.

Question 4

Do you agree with the proposed approach in relation to investigations in situations where there is major public or economic concern?



COMMENTS TO QUESTION 4

Sure (Isle of Man) Limited

Sure has no difficulty with the OFT having the ability to investigate markets in a wider sense than just focusing on prices. However, we believe that it is of far greater importance for the OFT to consider a review of the current convoluted process for investigations, which relies on repeated referrals to the Council of Ministers before any enforcement action can even be considered.

Under the current process, the Council of Ministers decides which practices should be investigated under the FTA by referring matters to OFT. If the OFT finds that there has indeed been a breach of the FTA, it can only ask the perpetrator of that breach to offer an undertaking – for example, to stop the offending behaviour. If the perpetrator refuses to offer such an undertaking it seems that all the OFT can do is to draft a report to the Council of Ministers. The Council of Ministers can then make a competition reference by referring the matter to any other body – such as the Communications Commission - that it feels is appropriate to investigate the matter. That body then produces a report for the Council of Ministers, which could include recommendations. The Council of Ministers can then ask the OFT to seek suitable undertakings from the perpetrators of anticompetitive activity. But if the undertaking refuses to give an undertaking, the OFT has to refer the matter back to the Council of Ministers who at that point can, if it wishes, issue an Order. Such a process can be very long and drawn out and all the while the market continues to feel the effects of any anti-competitive behaviour.

Research that was conducted in 2012 for Sure when it was part of the CWC group found that the OFT had only opened ten investigations under Part 2 of the FTA and only one of those investigations had related to anti-competitive conduct. We note from the OFT's website that there was one other investigation of potentially anti-competitive behaviour conducted in March 2013. We find it difficult to believe that the reason for the small number of investigations is because no companies in the Isle of Man engage in anti-competitive behaviour and believe that the procedural hoops that have to be overcome to start an investigation and then bring it to a conclusion must be partly to blame. We are therefore

surprised that the consultation does not include any discussion of whether the current process needs changing. We would respectfully suggest that it is in desperate need of a complete overhaul. The OFT must be given the ability – in terms of legal powers and resources - to investigate issues of anti-competitive behaviour itself and to impose effective penalties for any proven cases of anti-competitive behaviour, without the need to refer the matter back and fore to the Council of Ministers. We would suggest that the Council of Ministers should only need to be involved at the very end of the process and only in cases where significant breaches have been found to have been committed and significant enforcement action is felt to be justified.

We have already stated in our response to question 2 that financial sanctions are likely to represent the most effective enforcement action for anti-competitive behaviour. We cannot see how the current system of asking for voluntary undertakings can ever be as effective. A firm will continue to have the incentive to engage in anti-competitive behaviour that will result in financial gain for itself (or inflict financial pain on its competitors) if it knows that the worst that will happen to it if it is "found out" is that it will be asked to stop – and then only after a tortuously long process. The firm's incentives to engage in anti- competitive behaviour will change however, if it is has to weigh up the risk of being subject to significant fines if caught.

OFT Response
As Sure are aware in another context the OFT accepts that the current legislation has significant deficiencies – that is after all why the OFT has prioritised competition and pricing and hence this consultation.

The OFT agrees that new legislation needs to provide a straightforward process to address failing markets. Those investigations may lead to further actions in relation to anti-competitive practices or they may lead to the need for structural changes. The key factor to cause an investigation should be prima facie evidence that a market is failing; the cause of failure needs to flow from the investigation.

Douglas Borough Council
The OFT should be proactive in identifying and investigating all markets where unfair competition is possible. Those of major public or economic concern should take precedence but all markets should be examined. However there should be no requirement to seek the approval of the Council of Ministers, or for that body to test whether there is proof of unfair competition in the market, as this should be the purpose of the Office of Fair Trading.

OFT Response
Prioritisation of very limited resources will always be an issue. The examination of all markets is significantly beyond the current level of OFT resources and there does need to be a cost benefit analysis. The OFT agrees that the initiation of an investigation should be a matter for the OFT.

Communications Commission
While the idea of economic importance or public benefit can be important in assessing competition, there needs to be considerably more definition than is currently in existence of what could constitute such things before such a policy is implemented.

OFT Response
Agreed – this concept should be included in primary legislation.

Confidential Respondent
Who would be the investigative authority? What experience would they have? Who would they be accountable to? What evidence is there to support a need for such a change?

OFT Response
The investigating authority would continue to be the OFT and it would continue to be able to bring in specialist resources as needed. That is no change. The difference is that the focus of any investigation would be market failure not just prices which are in fact but one outcome of a failing market. The evidence of the need for change is that the current system does not work.

Confidential Respondent
Yes, it allows early detection of problems in the markets the competition authority does not have to pre judge at the outset whether there is a problem with competition or price. If the investigation identifies failings with market behaviours by one company then preventions and penalties can be resolved early which is positive for the end consumer.

******** would value the anti-competitive strategy to include advertising governance also and not just be restricted to price.*

OFT Response
At present misleading advertising is a separate issue. It is primarily addressed by the advertising industry itself, through the Advertising Standards Authority in the UK. The OFT also has powers in relation to misleading advertising under Part 6 the Consumer Protection Act 1991. This system works satisfactorily from an OFT perspective and the OFT sees no merit in bringing advertising under the ambit of a competition framework.

Manx Gas Limited
The existing powers under the Fair Trading Act 1996 are adequate and consistent with the concept of "Light Touch Regulation". The consultation document does not evidence cases where the OFT has wished to investigate a matter using the Fair Trading Act but has been unable to do so. The proposal to allow investigations to commence without evidence to support concern of wrong doing is not consistent with the stated intention to maintain a light touch approach to regulation.

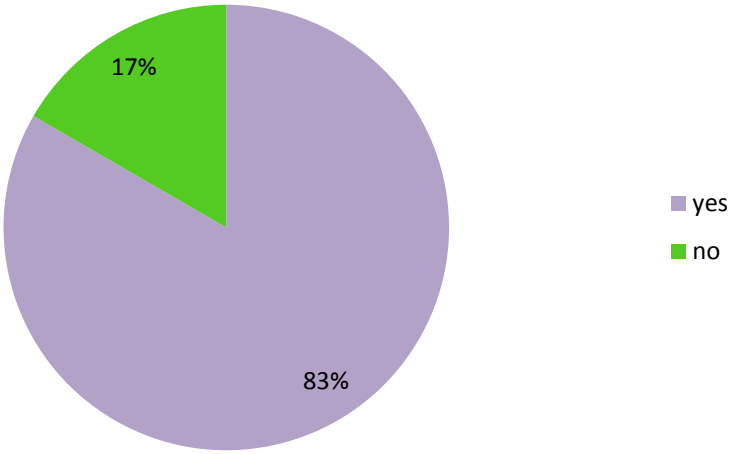
OFT Response
The OFT does not believe that Part 2 of the Fair Trading Act 1996 provides an adequate framework and as others have pointed out the absence of effective penalties is a substantial weakness.

Clearly the precursor to any investigation must be evidence that there is a problem. The 1996 Act requires the OFT to make a decision at the outset whether the problem in a market is one of competition or excessive prices. The OFT view is that the cause of the problem in a market should be determined by the investigation itself and not prior to the investigation.

As previously explained the OFT view of "light touch" regulation is that provided that market participants stay within the rules Government should not interfere. It is not a reason for having weak powers to deal with those who break the rules to the detriment of fair competition.

Question 5

Do you agree that it is desirable to have an approval system for mergers and acquisitions?



COMMENTS TO QUESTION 5

Sure (Isle of Man) Limited

Yes, Sure believes there is merit to the OFT introducing an approval system for mergers and acquisitions.

Douglas Borough Council

In a small jurisdiction such as the Isle of Man, mergers and acquisitions can unbalance the market. There needs to be some form of control to prevent any entity artificially creating a monopoly, however the exact power that can be exercised by the Office of Fair Trading needs to be expressed clearly as in some cases, such as international mergers for example, these could not be prevented on the Island.

Communications Commission

As suggested in the consultation paper, market power can be considerably concentrated in small economies such as that of the Isle of Man. By the same token, however, economies of scale can be limited, thereby necessitating a certain level of market share to make an enterprise profitable. For these reasons, and taking into account proportionality, it is important to consider some mergers for approval.

Confidential Respondent

It is for the market and consumers to decide who/what services & products they purchase and from whom.

It cannot be a free market economy when a statutory board of government decides who/what services and products can circulate freely.

Investment will dry up if commerce and business do not have the confidence to trade without government interference.

A level playing field simply cannot exist when the largest monopoly provider of consumer services regulates suppliers of those services it does not wish to supply itself.

Confidential Respondent
Although the answer is yes I am not sure of the benefits to the IOM markets where mergers and acquisitions for small/medium enterprises may occur. A merger at local level may actually be beneficial to the IOM economy in creating a company that can have more impact against a UK company that has based itself on the IOM.

The IOM is influenced by its larger neighbours and it is not clear what the OFT could do to prevent a merger or acquisition of large companies in the UK/global economy.

Manx Gas Limited
This section on mergers and acquisitions is of little relevance to Manx Gas.

OFT Overall Response
The issue of the control of mergers and acquisitions highlights the ultimate conundrum facing those tasked with developing a new competition framework – in a small economy it is important to balance the benefits of competition against the conflicting benefits which come from the economies of scale deriving from monopoly or oligopoly in the provision of key services. Controls on mergers and acquisitions allow a competition authority to at least consider that balance in relation to a particular market and how that balance might change.

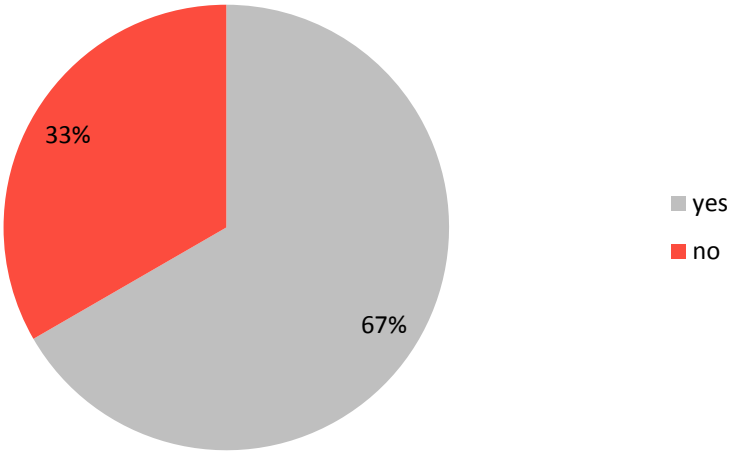
Equally over rigorous controls could tie the commercial market in red tape; and we should not underestimate the potential for market participants to attempt to abuse the process to protect market advantage.

The OFT believes that there is case in favour of an approval system for mergers and acquisitions but that it should be limited to key sectors of real economic or social importance. (See Q6).

Finally at this stage the OFT would wish to make it clear that dealing with mergers and acquisitions would require the use of external expertise at a significant cost over and above existing budgets.

Question 6

If you agree YES to question 5, do you agree that the system should only apply to mergers and acquisitions of significant consumer or economic importance?



COMMENTS TO QUESTION 6

Sure (Isle of Man) Limited)

Sure agrees that if an approval system is to be introduced it should be focused on only those mergers and acquisitions that have the potential to have direct and significant effects on the Isle of Man. This should also mean that the OFT should not waste its limited resources on conducting detailed reviews of mergers and acquisitions whose main effects will be felt in other jurisdictions, and where other competition bodies are already considering whether the merger should be allowed to proceed.

To use the Microsoft example that the OFT refers to in its introductory section to the consultation, it would seem inappropriate for the OFT to conduct a full investigation of the effects on Isle of Man consumers of a merger between say, Microsoft and Apple. Were such a transaction ever to happen it would be subject to a rigorous and detailed investigation by much better resourced and more powerful competition bodies than the OFT, such as the European Commission and the US Department of Justice and Federal Trade Commission.

Sure believes that one way for the OFT to consider the significance of a particular transaction to the Isle of Man is through the use of financial threshold tests, such as those used in the Guernsey merger control provisions. There, a merger is only notifiable to the GCRA if the combined turnover of the undertakings involved in the merger or acquisition arising in the Channel Islands exceeds £5million, and two or more of the undertakings involved in the merger or acquisition each have applicable turnover arising in Guernsey which exceeds £2million.

Douglas Borough Council

All mergers and acquisitions should be reported and examined to identify any that may be potentially prejudicial to consumers' or economic interest so that they can be investigated, however it would be assumed that there would be a threshold level in deciding whether or not to investigate.

Communications Commission
This question appears to be asking whether there should be a lower limit (in terms of economic value) to mergers/acquisitions to be considered by the OFT. This is the case in most jurisdictions with developed competition policy regimes.

In cases considered by the European Commission, for example, this is measured by the annual turnover of the combined businesses - if this exceeds specified thresholds in terms of global and European sales, the proposed merger must be notified to the European Commission, which must examine it. (Below these thresholds, the national competition authorities in the EU Member States may review the merger.) In the UK, there are two thresholds: the turnover of the business being taken over, and the market share of the combined businesses, the triggering of either of which is sufficient to require an investigation.

The Communications Commission would agree that there should be such a lower limit.

Confidential Respondent
As stated in point 5 it would seem to be a pointless exercise to monitor and control the merger/acquisition of small/medium businesses.

A recommendation here may be to consider having predetermined parameters that an investigation is the conclusion. For example the turnover of the companies, the number of employees going to be affected by such merger and the value of the company.

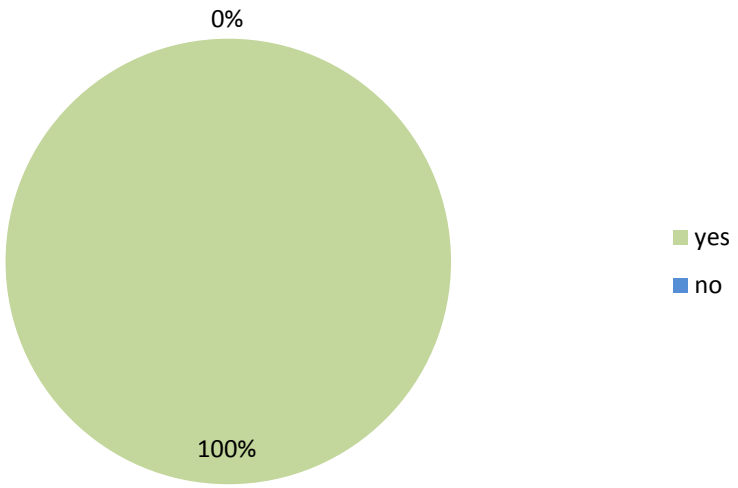
Manx Gas Limited
This section on mergers and acquisitions is of little relevance to Manx Gas.

OFT Overall Response
It is suggested that provisions should only apply to clearly defined markets and it suggested that responsibility for those definitions should properly rest with the Council of Ministers by way of an order requiring Tynwald approval to ensure transparency. Council would only seek to define markets which were considered to be of key economic or social importance to the Isle of Man.

It is further suggested that even within those defined markets there should be a high bar – for example in order to conduct a merger or acquisition review within a defined market, the merger or acquisition would also need to result in one party holding a prescribed market share (say 50% or above).

Question 7

Do you agree that there should continue to be provision for exemptions in the national interest or the interests of the economy?



COMMENTS TO QUESTION 7

Sure (Isle of Man) Limited

Sure believes that for any new legislation to be effective, there should be only limited circumstances under which exemptions from that legislation will apply, and the criteria for such exemptions need to be clearly specified and transparent to all market participants. We note that section 8(3)(b) of the current FTA identifies as an exclusion conduct related to the size of a business, either in terms of turnover or market share. We accept that generally such exclusions are appropriate and are in line with best international practice, where it is usually required for a competition body or regulator to establish that the alleged perpetrator of anti-competitive behaviour holds a position of market dominance. Otherwise, any conduct will not be capable of having an effect on the market. The usual exception to this exclusion is with respect to price fixing offences where best practice by regulators and competition authorities now is to have an absolute prohibition on price fixing behaviour, regardless of the size of the entity engaged in such behaviour. It may be a bit more difficult for the OFT to define what sort of anti-competitive behaviour should be exempted from the provisions of the FTA due to the national interest, which makes it all the more important that the OFT is completely transparent regarding the reasons for any specific proposed exemptions.

We would also like to comment on the brief discussion of concurrent powers in this section. Whilst we agree that it may be appropriate for other regulatory bodies to have concurrent powers with the OFT we are concerned that this could result in issues being referred back and fore between relevant bodies before any action is taken. This would not be desirable and there must be safeguards put in place to ensure that this does not happen. This could include, for example, an obligation for either the OFT or the relevant other body to investigate an issue if there is sufficient prima facie evidence to suggest that there is a case to answer and where failure to address it would be likely to cause significant harm to the competitive process.

Douglas Borough Council

There needs to be transparency over any exemption granted and Tynwald consideration is the most effective method of demonstrating that.

Communications Commission
The Communication Commission agrees that as a sector regulator it should have concurrent competition powers with the OFT. The Commission is also of the view that it should be consulted before granting an exemption in relation to activities within the industries that are regulated by the Commission (e.g. telecommunications and broadcasting). Consulting the Commission will ensure that all relevant factors are considered, particularly factors with respect to which the Commission has specialist expertise.

Confidential Respondent
Who decides what the exemptions are and what the criteria is?

Who is accountable for making such decisions and what appeal process will be in place?

Confidential Respondent
In any decision made by the OFT there should always be transparency and accountability around any decision.

Is it the intention to make public the exemption orders granted by the Council of Ministers?

Manx Gas Limited
This section on mergers and acquisitions is of little relevance to Manx Gas.

OFT Overall Response
The OFT agrees that exemptions may be necessary in the wider economic interest. Under the current legislation exemptions are granted by the Council of Ministers and transparency provided by the requirement for an Order to be approved by Tynwald. The OFT believes that system should continue.

Responses relating to Competition Law in other jurisdictions

- **Which jurisdictions?**

Sure (Isle of Man) Limited
Sure has experience of competition law in Jersey, where there has been a specific competition law in place since 2005. A specific competition law was only introduced in Guernsey in 2012, although there are provisions in Sure's operating licence in Guernsey that are based on competition law principles, and which have been in place since 2002. As noted above, Sure also has experience of competition law in other jurisdictions, including large parts of the Caribbean and Panama, gained from when it was part of the CWC group.

Communications Commission
Communications Commission staff have experience of working in and with the competition authorities (and regulators with competition powers) in the UK, Ireland and the EU.

Confidential Respondent
Jersey and Guernsey

Manx Gas Limited
The ultimate parent of Manx Gas, Brookfield Infrastructure, has experience of competition and economic regulation in the Channel Islands, the UK, Europe, the USA, Canada, South America, Australia and New Zealand.

- **What are their strengths and weaknesses?**

Sure (Isle of Man) Limited
The Jersey competition law contains express provisions against anti-competitive conduct by dominant firms and cartel-type behaviour, and also includes merger control provisions. The law also includes clear provisions relating to enforcement action, including the ability to impose financial penalties of up to 10% of turnover of the firm committing a breach of the law, relating to the duration over which the breach occurred. As such, the Jersey law is consistent with best international practice. Sure's experience in Jersey has been that the main weakness of the Jersey competition law is not the law itself but the apparent reluctance of the Jersey Competition and Regulatory Authority to use the law in circumstances that seem to clearly warrant its use.

It is probably too early to comment on the strengths and weaknesses of the Guernsey competition regime given that it has only been in place for a year. However, like the Jersey law, the Guernsey law does explicitly contain express prohibitions on anti-competitive conduct, and enforcement powers including the ability to levy financial penalties. Sure's only direct experience to date of the Guernsey competition law has been in relation to Sure's acquisition by Batelco, when we had to consider whether we would need to obtain explicit merger clearance in Guernsey. We found that the transaction was not regarded as a notifiable transaction requiring merger clearance as certain financial thresholds were not met by the transaction. This was in contrast to the position in Jersey, where the transaction did require specific merger clearance as it was caught by the "share of supply or purchase" test. This seemed disproportionate when there were no horizontal or vertical relationships between Sure and Batelco. The only market in which the share of supply or purchase threshold was met was in the market for mobile termination where, by definition, Sure has 100% of the market for calls terminating on its own network. We understand that the JCRA is considering whether to make the Jersey merger provisions consistent with the approach in

Guernsey, which would have prevented this requirement to obtain specific merger clearance. So from this perspective at least it seems that the Guernsey competition law is more proportionate than the Jersey competition law and it may be worth the Isle of Man considering this more pragmatic approach to merger control.

In terms of other jurisdictions, in February 2012, when Sure was still part of the CWC group we provided the OFT with a copy of an analysis that our external competition lawyers had undertaken of the Isle of Man competition regime compared to the 37 jurisdictions that CWC operated in at that time. Whilst Sure is no longer part of the CWC group, that analysis is naturally still of relevance and we would again refer the OFT to that paper.

Communications Commission
Strengths: Systems of competition policy based on decades of economic and legal research and practice; extensive jurisprudence, regular reviews and modification with changing markets; and demonstrable benefits flowing from the implementation of the policy developed.

Weaknesses: Can be unwieldy and prone to lengthy appeals; may not be suitable for wholesale import into a jurisdiction the size of the Isle of Man.

Confidential Respondent
As smaller jurisdictions Jersey and Guernsey have similar economies of scale, tax (both company and personal) implications and demographic assumptions. Gaining and sharing knowledge between other island communities can enhance the discussion process and allow an open discussion.

Also if the OFT and/or the Communications Commission were more actively involved in issues which appear to the consumer that the IOM is excluded from e.g. worldwide/European policies and practices.

Manx Gas Limited
From the perspective of developing a regulatory framework for Manx Gas it is important that the consultation on competition policy should clearly distinguish between the functions of competition regulation and economic regulation of prices.

The importance of this distinction can be clearly illustrated from Brookfield Infrastructure's experience in New Zealand. Until recently, Brookfield Infrastructure owned Powerco, the second largest electricity and gas distribution business in New Zealand.

The regulation of the electricity and gas distribution sector in New Zealand is an example of a regulator attempting to apply economic regulation to prices charged by a monopoly business through a competition regulation approach.

Competition regulation is about identifying anti-competitive behaviour and then imposing corrective and perhaps punitive action. Economic (price) regulation is about designing a framework (a set of rules) for setting a fair and reasonable price and then monitoring that the price remains within the rules.

Attempting to regulate monopoly prices through competition regulation in New Zealand, meant that appropriate rules had not been developed.
This gave rise to significant uncertainty for both investors and consumers and made the work of the regulator virtually impossible. Prices fluctuated over a wide range because

there was no framework for setting prices. The outcome of price reviews could not be predicted, which led to expensive litigation in a confrontational, unproductive process.

As a result of industry lobbying, the legislation was amended, paving the way for the current price setting framework, which has provided a much higher level of certainty and predictability for all stakeholders.

If this is of interest, we would be pleased to provide more detail on the New Zealand experience, including a discussion with Brookfield's regulatory manager who was directly involved in the process.

- **How are they better (or worse) than existing Manx law?**

Sure (Isle of Man) Limited
Sure's experience of the existing Manx competition law is that it is completely ineffective. This stems from the fact that the Manx law does not even contain any express provisions against anticompetitive behaviour; it merely defines what anti-competitive behaviour is. From that perspective alone, we have to say that the competition law we have experienced in other jurisdictions is better than existing Manx law.

Communications Commission
They are better:

1) For the reasons set out in the 'Strengths' section above; and

2) Because the Isle of Man system of competition regulation is currently insufficiently defined and developed to be optimally fit-for-purpose.

Confidential Respondent
Unable to answer this question as don't know sufficient about other jurisdictions law to compare to the IOM.

OFT Overall Response
The OFT believes that the competition frameworks in place in the Channel Islands represent a good starting point for developing a new framework for the Isle of Man but that there are key economic and social differences which also need to be recognised.