



Isle of Man

Ellan Vannin

AT 18 of 2021

COMPETITION ACT 2021



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**Isle of Man***Ellan Vannin*

COMPETITION ACT 2021

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

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

PART 1 – INTRODUCTORY

1 Short title

The short title of this Act is the Competition Act 2021.

2 Commencement

- (1) This Act (except sections 1 and 3 and this section) will come into operation on such day or days as OFT may by order appoint.
- (2) An order under subsection (1) may make such consequential, incidental, supplemental and transitional provisions as appear to OFT to be necessary or expedient for the purposes of the order.

3 Interpretation

- (1) In this Act —

- “**authorised officer**” means an officer appointed by OFT for the purposes of this Act;
- “**distortion**” means a state of affairs in which prices or supply are different from what they would be in a competitive market;
- “**enforcing authority**” has the meaning given in section 12(1)(b)(ii);
- “**FSA**” means the Isle of Man Financial Services Authority¹;
- “**information**” includes a document and any other instructive material;
- “**justice**” means a justice of the peace;
- “**market**” means an economic activity related to the supply of goods or services within the Island provided by persons, irrespective of whether they are, or any of them is, present or based in the Island;
- “**merger**” has the meaning given in section 22;
- “**OFT**” means the Isle of Man Office of Fair Trading²;
- “**police**” means the Isle of Man Constabulary;
- “**restriction**” means the presence of conditions that have the effect of limiting access to a given market.
- (2) Wherever in this Act a notice is required to be published and no specific method of publication is stipulated, the person required to publish the notice must do so in such manner and for such duration as the person considers likely to bring the notice to the attention of affected persons.

PART 2 – ANTI-COMPETITIVE PRACTICE

4 Prohibition on preventing competition

- (1) A person must not enter into any arrangement which, —
- (a) may affect trade within the Island; and
 - (b) has as its object or effect the prevention, restriction or distortion of competition within any market.
- This subsection applies whether the arrangement is to be acted upon in the Island or elsewhere and is subject to the other provisions of this Part.
- (2) Subsection (1) applies, in particular, to arrangements between persons which —
- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;

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

² *Ibid.*

- (b) limit or control production, supply, markets, technical development or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
 - (e) make the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.
- (3) An arrangement is void to the extent that it comprises or includes an arrangement prohibited by subsection (1).
- (4) For the purposes of this Act, a person is considered to be in contravention of subsection (1) if the person is a party to an arrangement which subsection (1) prohibits.

5 Prohibition of abuse of a dominant position

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

6 Meaning of “anti-competitive practice”

- (1) In this Act, “anti-competitive practice” means either or both of the following, as the context may require –

- (a) conduct that tends to prevent, restrict or distort competition, including but not limited to conduct specified in section 4;
 - (b) abuse of a dominant position, including but not limited to conduct specified in section 5.
- (2) Conduct engaged in pursuant to any enactment may constitute an anti-competitive practice unless the enactment disapplies or limits, in whole or in part, the provisions of this Act.
- (3) A breach of the relevant competition provisions applied to the Island by the Payment Services (Competition) Regulations 2015³ constitutes an anti-competitive practice for the purposes of subsection (1).
- (4) The Council of Ministers may by order amend subsection (3).
Tynwald procedure – negative.

7 **Anti-competitive practice**

All persons participating in a market are prohibited from engaging in an anti-competitive practice, irrespective of their nationality or ownership status.

This prohibition is subject to the power of the Council of Ministers under section 8.

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

- (1) The Council of Ministers may make regulations which provide for exemptions, on the grounds of public policy specified in subsection (4), from the prohibition of anti-competitive practice imposed by section 7.
Tynwald procedure – approval required.
- (2) Without limiting subsection (1), regulations under this section may exempt any one or more of the following –
 - (a) a sector of the economy;
 - (b) a specific person;
 - (c) specific practices in general;
 - (d) specific practices by a specific person.
- (3) Regulations under this section may do either or both of the following –
 - (a) provide for an exemption to be absolute or subject to conditions;
 - (b) be time limited.
- (4) In order to make regulations under this section, the Council of Ministers must be satisfied on reasonable grounds that the exemption contained in the regulations –

³ S.D. 2015/0205

- (a) is likely to produce a better outcome for consumers or the economy of the Island;
 - (b) is necessary for exceptional and compelling reasons of public policy; or
 - (c) satisfies paragraphs (a) and (b).
- (5) The Council of Ministers must seek and have regard to the views of OFT prior to making regulations under this section.
- (6) The Council of Ministers may not repeal or vary an exemption unless it has published written notice of its intention to do so. Such publication must be —
 - (a) for a period of not less than 3 months before the date of the intended repeal or variation; and
 - (b) in such a manner as to ensure that it comes to the attention of persons likely to be affected by the repeal or variation.
- (7) Where a person exempted under this section contravenes any condition that, in accordance with a provision inserted in regulations by virtue of subsection (3)(a), is attached to the exemption, the Council of Ministers may repeal or vary the exemption either of its own accord or at the behest of OFT.

This is subject to subsection (8).
- (8) Where the Council of Ministers proposes to repeal or vary an exemption under subsection (7), either of its own accord or at the behest of OFT, it must, before doing so, —
 - (a) forthwith furnish the exempted person with, and publish, a written notice —
 - (i) stating its intention to repeal or vary the exemption;
 - (ii) stating the reasons for that intention; and
 - (iii) advising of the time within which and the method by which the exempted person may make representations to the Council of Ministers before the repeal or variation takes effect;
 - (b) afford the exempted person the opportunity to make representations in the manner and within the time set out in the notice; and
 - (c) take into account any representations made.
- (9) Where, following its determination under subsection (8), the Council of Ministers decides to repeal or vary an exemption, it must —
 - (a) in writing notify the exempted person of the decision and, where applicable, the extent of the variation; and

- (b) publish a written notice specifying the details referred to in paragraph (a).

PART 3 – INVESTIGATIONS

9 Investigations

- (1) OFT may investigate any matter where it has reasonable grounds to suspect that a person –
 - (a) has been engaging, or intends to engage, in an anti-competitive practice;
 - (b) has been breaching, or intends to breach, any condition –
 - (i) attached to an exemption; or
 - (ii) that OFT has imposed, under section 25(5)(b), as a consequence of a merger; or
 - (c) satisfies paragraphs (a) and (b),and must produce a written report of its findings during the investigation.
- (2) OFT may investigate any market where it believes, on reasonable grounds, that the market is not functioning in the interests of consumers or the economy. Such an investigation may be either of OFT's own volition or in accordance with subsection (3).
- (3) The Council of Ministers may request that OFT undertake an investigation under subsection (2).
- (4) OFT must make rules of procedure in respect of the carrying out of investigations under this section.
Tynwald procedure – approval required.
- (5) If the outcome of an investigation indicates that –
 - (a) an anti-competitive practice has been (or is likely to be) engaged in; but
 - (b) forbearing to engage in the practice would provide a worse outcome for consumers or the economy of the Island,OFT may recommend to the Council of Ministers that an exemption be granted.
- (6) If, at any point during the course of an investigation, the person being investigated offers to OFT an undertaking under section 13, OFT may accept this undertaking and terminate the investigation.
- (7) In this section, any power to investigate that is conferred on OFT may be exercised –
 - (a) by OFT directly and exclusively;
 - (b) exclusively by a third party engaged by OFT; or

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

but, for the avoidance of doubt, neither the power under subsection (5) nor the power under subsection (6) may be exercised by anyone other than OFT.

10 Investigatory powers

- (1) OFT may, by notice in writing, require –
 - (a) a body corporate to furnish an authorised officer with any information required for the purposes of an investigation, within such timescale as may be specified; or
 - (b) an individual (whether identified by name or by position) to attend at a specified place and time to be interviewed and answer questions.
- (2) An authorised officer may apply to a justice for a warrant to enter and search, in the course of an investigation under this Part, any premises in which the authorised officer has reasonable grounds to believe information pertinent to the investigation is being stored, and such application must set out the grounds on which it is based.
- (3) The justice to whom an application under subsection (2) is made must issue the warrant if the justice is satisfied that there are sufficient grounds to do so.
- (4) An authorised officer, acting pursuant to a warrant issued by a justice under subsection (3), –
 - (a) may enter any premises specified in the warrant;
 - (b) may inspect or seize any information found on the premises, provided the information appears to be relevant to the investigation;
 - (c) may, with or without the help of any individual on the premises, access any information stored electronically (whether or not with the use of cloud technology);
 - (d) may require any individual on the premises to provide an explanation of any information or state where it may be found;
 - (e) must be accompanied by a constable; and
 - (f) may be accompanied by such other person who, by reason of the person's expertise, is reasonably necessary to assist the authorised officer.
- (5) Nothing in this section compels a person to supply any information which the person would be entitled to refuse to produce or give in civil proceedings before the High Court.
- (6) If a person makes default in complying with a notice under subsection (1), the High Court may, on the application of the Attorney General, make

such order as the court thinks fit for requiring the default to be made good, and any such order may provide that all the costs or expenses of and incidental to the application will be borne by the person in default or by any officers of a company or other body who are responsible for its default.

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

11 Joint investigations

- (1) OFT may conduct joint investigations with —
- (a) any Department or Statutory Board which has regulatory powers; or
 - (b) pursuant to a memorandum of understanding between it and OFT —
 - (i) a competition authority; or
 - (ii) an authority which has regulatory powers, in another jurisdiction.

- (2) Joint investigations may be carried out equally or with a single party leading and the other supporting, and the decision on which of those methods to use must be made on a case by case basis by OFT and the Department or Statutory Board or other body concerned.
- (3) The Council of Ministers may by order extend powers under this Act to any Department or Statutory Board, and such extension may be subject to such modifications as the Council of Ministers deems necessary.
This is subject to subsection (4).
Tynwald procedure – approval required.
- (4) Where an extension under subsection (3) is granted –
 - (a) it may be limited in scope; and
 - (b) the Department or Statutory Board will hold concurrently with OFT the powers so extended.
- (5) OFT and any Department or Statutory Board holding concurrent powers under subsection (4) must consult each other before taking any action in relation to matters covered by those concurrent powers.

12 Procedure where offence detected on investigation

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

13 Undertakings relating to anti-competitive practices and failing markets

- (1) Where it appears to OFT that –

- (a) there are reasonable grounds for believing that any person is engaging, or has engaged, in a course of conduct which constitutes an anti-competitive practice; or
- (b) a market is not functioning in the interests of consumers or the economy,

OFT may accept an undertaking offered by any person that OFT is satisfied is sufficiently connected with the course of conduct or market malfunction in question. OFT must signify its acceptance of the undertaking by giving written notice to the person by whom it is offered.

This is subject to subsection (2).

- (2) OFT must not accept an undertaking offered under subsection (1) unless —
 - (a) it is satisfied that the honouring of the undertaking would, as the case may be, —
 - (i) sufficiently modify the course of conduct in question so as to remove its anti-competitive effects; or
 - (ii) remedy or prevent effects adverse to the interests of consumers or the economy; and
 - (b) it has —
 - (i) arranged for the publication of a written notice complying with subsection (3); and
 - (ii) considered any representations made to it in accordance with the written notice.
- (3) A written notice under subsection (2)(b)(i) must —
 - (a) state that OFT is proposing to exercise its power under subsection (1);
 - (b) identify the course of conduct or market failure which prompts the exercise of that power;
 - (c) identify the person who OFT believes —
 - (i) is engaging, or has engaged, in the course of conduct; or
 - (ii) is sufficiently connected with the market malfunction, as the case may be;
 - (d) in respect of a course of conduct, identify the goods or services in relation to which OFT believes the person is engaging, or has engaged, in that course of conduct;
 - (e) in respect of a course of conduct, specify the effects which that course of conduct may now or in future have;
 - (f) in respect of market malfunction, set out the reasons why OFT believes that the market is not functioning in the interests of consumers or the economy;

- (g) set out the terms of the undertaking which OFT is proposing to accept;
 - (h) identify the person who is offering to give the undertaking; and
 - (i) specify the deadline by which representations about the proposed undertaking must be made to OFT.
- (4) Once OFT has considered any representation made to it in accordance with a written notice under subsection (2)(b)(i), that subsection does not apply to the acceptance of a modified version of the undertaking.
- (5) OFT –
 - (a) must, once it has accepted an undertaking under this section, arrange for the undertaking to be published in such manner as appears to it to be appropriate;
 - (b) must keep under review the carrying out of any such undertaking and from time to time consider whether –
 - (i) by reason of any change in circumstances, the undertaking is no longer appropriate; and
 - (ii) it is appropriate in the current circumstances to –
 - (A) release the person concerned from the undertaking; or
 - (B) demand that the person concerned vary the undertaking in a manner, or replace it with a new undertaking, that meets the requirements specified by OFT;
 - (c) must, if it appears to OFT that the person concerned has failed to carry out the undertaking, give the person written notice of that fact;
 - (d) may, where it gives written notice under paragraph (c) with respect to an undertaking that relates to –
 - (i) a course of conduct, –
 - (A) take action under section 18 despite its having terminated, in accordance with section 9(6), the investigation in the course of which the undertaking was offered to and accepted by it; or
 - (B) apply for an injunction under section 19, depending on which of those actions OFT considers more appropriate; or
 - (ii) a market malfunction, make an order under section 14.
- (6) If at any time OFT concludes under subsection (5)(b) –
 - (a) that any person can be released from an undertaking; or
 - (b) that an undertaking needs to be varied or superseded by a new undertaking,

it must give written notice to that person stating that the person is so released, or specifying the variation or, as the case may be, the new undertaking which in its opinion is required.

OFT must publish any written notice it gives under this subsection.

- (7) Where a written notice is given under subsection (6) specifying a variation or new undertaking, the notice must state the change of circumstances by virtue of which the written notice is given.
- (8) OFT may at any time, by written notice given to the person concerned (a “subsection (8) notice”) –
 - (a) agree to the continuation of an undertaking in relation to which it has given written notice under subsection (6) (a “subsection (6) notice”) specifying a variation or new undertaking; or
 - (b) accept a new or varied undertaking which is offered by that person as a result of a subsection (6) notice.
- (9) OFT must publish a subsection (8) notice.

PART 4 – ORDERS FOLLOWING AN INVESTIGATION

14 Orders in respect of market malfunction

- (1) This section applies only where –
 - (a) OFT has completed an investigation under section 9(2) and has concluded, in the written report it produced in accordance with section 9(1), that a market malfunction exists; or
 - (b) a market malfunction has not been remedied, due to a person’s failure to carry out an undertaking –
 - (i) which was given by the person to OFT in the course of OFT’s investigation under section 9(2) into the existence of the market malfunction; and
 - (ii) OFT’s acceptance of which, in accordance with section 9(6), resulted in the termination of the investigation.
- (2) OFT may by order set out a scheme for remedying or preventing any adverse effects of the market malfunction, and such an order must contain directions to a specified person or persons.

Tynwald procedure – approval required.

15 Orders under section 14 – supplemental

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

- (a) a British citizen, a British Overseas Territories citizen, a British Overseas citizen or a British National (Overseas);
 - (b) a body corporate incorporated under the law of the Island; or
 - (c) a person carrying on business in the Island, either alone or in partnership with one or more other persons.
- (2) An order under section 14 may extend so as to prohibit the carrying out of arrangements already in existence on the date on which the order is made.
- (3) Directions in an order under section 14 may mandate a specified person or the holder for the time being of a specified office in any company or association —
- (a) to take such steps within the person's functions (as may be specified or described in the directions) for the purpose of carrying out, or securing compliance with, the order; or
 - (b) to do or refrain from doing anything so specified or described which the person might be required by the order to do or refrain from doing,
- and may authorise OFT to vary or revoke any directions so given.

16 Procedure for orders under section 14

- (1) Before making an order under section 14, OFT must publish a written notice —
- (a) stating its intention to make the order;
 - (b) indicating the nature of the provisions to be embodied in the order; and
 - (c) stating that —
 - (i) any person whose interests are likely to be affected by the order, and who is desirous of making representations in respect of it, should make those representations in writing;
 - (ii) those representations must specify the person's interest and the grounds on which the person wishes to make representations; and
 - (iii) the representations must be made before a date specified in the notice (that date being not earlier than the end of the period of 30 days beginning with the day on which the notice is published).
- (2) OFT —
- (a) must not make an order under section 14 before the date specified in the notice in accordance with subsection (1)(c)(iii); and
 - (b) must consider any representations duly made to it in accordance with the notice before that date.

17 Enforcement of orders under section 14

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

PART 5 – SANCTIONS**18 Disciplinary measures and penalties**

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

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

- (2) The actions referred to in subsection (1) are —
 - (a) issue a public censure;
 - (b) impose financial penalties;
 - (c) order restitution;
 - (d) provide a recommendation to the FSA that it consider disqualifying the directors or other officers, or any of them; or

- (e) in the case of an anti-competitive practice which is a breach of an exemption granted by the Council of Ministers, recommend to the Council of Ministers that such exemption be repealed or varied.
- (3) Any action taken under subsection (1) may be appealed to the High Bailiff, who may hear the appeal *in camera*.

19 Injunctions

- (1) OFT (or a Department or Statutory Board with concurrent powers) may, if satisfied on reasonable grounds that a person is likely to engage in acts which are anti-competitive, apply to the High Court for an injunction.
This power is subject to subsection (2).
- (2) The power under subsection (1) may not be exercised without the consent of the Attorney General.

20 Regulations on penalties and restitution

- (1) OFT may make regulations which set out the methodology to be applied in fixing penalties and restitution.
Tynwald procedure – negative.
- (2) Regulations under this section must provide a basis for penalties to be commuted for –
 - (a) whistle-blowers; and
 - (b) those who, at an early stage in an investigation, admit guilt and co-operate with the investigation.
- (3) In this section, “whistle-blower” means a person who informs on an anti-competitive practice.

21 Disqualification of directors

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

PART 6 – MERGERS

22 Meaning of “merger”

- (1) A “merger” occurs for the purposes of this Act when a person, or an individual who controls a person, directly or indirectly acquires or establishes control of another person or the business of another person.
- (2) Control of a business or person may be direct or indirect and exists if decisive influence is capable of being exercised in respect of it.
- (3) In determining whether decisive influence exists, all relevant facts and circumstances of the case must be taken into account.

This is in addition to the requirement to take into account the ostensible effect in law of any document, transfer, assignment or other instrument, act or arrangement.

- (4) A merger also occurs for the purposes of this Act –
 - (a) if –
 - (i) a person acquires the whole or a substantial part of the assets of another person; and
 - (ii) the result of the acquisition is to place the acquiring person in a position to replace or substantially replace the other person in the business in which it was engaged immediately before the acquisition; or
 - (b) if a joint venture is created.
- (5) A joint venture is created when a business previously carried out independently by two or more persons, or a new business, is carried on jointly by those two or more persons, whether or not in partnership or by means of their joint control of, or ownership of shares in the capital of, a body corporate.
- (6) Without prejudice to the generality of the foregoing, a merger may –
 - (a) be achieved in any manner, including –
 - (i) by purchase, lease, acquisition of shares or assets, or by some other disposition or arrangement or by operation of law; or
 - (ii) by amalgamation of or other combination between persons or their businesses,
and whether or not the parties to the merger, or their business or assets, thereafter maintain identities which are distinct;
 - (b) be effected by a single transaction or by a series of two or more transactions; and
 - (c) take place whether or not any property is transferred.

- (7) References in this section to a person or business are references to the whole or any part of the person or business.
- (8) OFT may by order amend the definition of “merger”.
Tynwald procedure – approval required.

23 Notification of proposed merger

- (1) Whenever –
 - (a) any two or more parties propose to merge; and
 - (b) a financial threshold or other economic criterion, prescribed by OFT by means of an order that specifies the relevant value to which the threshold or criterion relates, is likely to be met by the proposed merger,

the parties must, in the form and manner specified by OFT, notify OFT of the proposed merger before it is completed.

Tynwald procedure – approval required.
- (2) Where –
 - (a) a merger which meets the criteria in subsection (1) and is accordingly required to be notified to OFT is completed without the parties’ to it having notified OFT in accordance with subsection (1); and
 - (b) the Council of Ministers considers there to be exceptional and compelling reasons of public policy that make doing so desirable,

the Council of Ministers may take steps it considers appropriate to mitigate the effects of the merger.
- (3) OFT may impose on each party to a merger who contravenes subsection (1) a fine not exceeding 10% of the party’s annual global turnover for the immediately preceding financial year, provided that –
 - (a) a hearing into the contravention has been held –
 - (i) in accordance with rules of procedure made by OFT and approved by Tynwald; and
 - (ii) at which the party has been afforded the opportunity to make representations on its behalf and to be represented;
 - (b) the evidence presented at the hearing satisfies OFT on a balance of probabilities that the contravention occurred;
 - (c) the party is afforded and advised of the opportunity to appeal the finding that it contravened subsection (1), or the fine imposed by OFT on the basis of such contravention, or both, and either –
 - (i) an appeal is not filed within the permitted time of which OFT has informed the party; or

- (ii) an appeal filed by the party has been heard and has been unsuccessful.
- (4) In this section and in sections 8(4)(b), 24(4)(b), 25(7)(b) and 26(2)(c), “exceptional and compelling reasons of public policy” are public policy reasons that are prescribed by order made by the Council of Ministers.
- Tynwald procedure – approval required.

24 OFT procedure following merger notification

- (1) Upon receipt of a notification of a proposed merger under section 23, OFT must make an initial assessment of whether the proposed merger could lead to a substantial lessening of competition in the market.
- (2) If OFT assesses that the proposed merger is not likely to lead to a substantial lessening of competition in the market, it must so advise the parties in writing. The parties will thereafter be free to merge without further reference to OFT.
- (3) If OFT assesses that the proposed merger could lead to a substantial lessening of competition in the market, it must –
 - (a) so advise the parties in writing; and
 - (b) require the parties to produce evidence that OFT considers relevant to the process of determining whether the proposed merger is likely to do so.
- (4) If, following production by the parties of the evidence requested under subsection (3), OFT determines that the proposed merger is unlikely to lead to a substantial lessening of competition in the market, OFT –
 - (a) must, following discussions with the parties, in writing notify them that it has no objection to the proposed merger; and
 - (b) where OFT considers that there are exceptional and compelling reasons of public policy that the Council of Ministers need to consider with respect to the merger, must submit to the Council of Ministers a report on the proposed merger, setting out –
 - (i) why OFT considers the proposed merger unlikely to lead to a substantial lessening of competition in the market; and
 - (ii) in detail, any advice that OFT has given to the parties.

25 Power of OFT to approve or forbid merger

- (1) If, following production by the parties of the evidence requested under section 24(3), OFT determines that the proposed merger is likely to lead to a substantial lessening of competition in the market, it must –
 - (a) either approve or forbid the proposed merger;
 - (b) in writing notify the parties of its decision in this regard; and

- (c) lay this notification before Tynwald.
This is subject to subsections (2) to (8).
- (2) Before approving or forbidding the proposed merger in accordance with subsection (1), OFT may investigate the proposed merger, but must not commence its investigation unless it has notified the parties of its intention to investigate.
- (3) An investigation under subsection (2) may be carried out –
- (a) by OFT directly and exclusively;
 - (b) exclusively by a third party engaged by OFT; or
 - (c) jointly by OFT and a third party engaged by OFT.
- (4) Where it does investigate the proposed merger, OFT must, –
- (a) in writing, advise the parties beforehand of the identity of the investigator; and
 - (b) in due course, advise the parties of the outcome of the investigation.
- (5) If, following completion of an investigation under subsection (2), OFT decides to approve the proposed merger, it has the following two options –
- (a) to approve the merger unconditionally; or
 - (b) to approve it subject to conditions.
- (6) OFT must, in writing, advise the parties which of the options in subsection (5) it decides to exercise and of the reasons for its decision.
- (7) Where OFT –
- (a) approves a proposed merger subject to conditions; and
 - (b) considers that there are exceptional and compelling reasons of public policy that the Council of Ministers need to consider with respect to the merger,
- it must advise the Council of Ministers of those conditions.
- (8) OFT is responsible, in accordance with section 9(1)(b)(ii), for enforcing the conditions which it has imposed under subsection (5)(b).
- (9) In any event, OFT must make a decision under subsection (1) within 3 months of having received notification of a proposed merger in accordance with section 23.
- (10) Subject to this section and section 24, OFT must make rules of procedure in respect of the carrying out of investigations under this Part.
- Tynwald procedure – laying only.

- (11) Written notification that OFT forbids a proposed merger is to be deemed to be an order under section 14 and, if the parties merge in defiance of OFT's prohibition against doing so, —
- (a) the parties commit an offence under section 17; and
 - (b) the purported merger, for all purposes in law, has no effect and is to be deemed to never have occurred.

26 Power of Council of Ministers to overrule OFT's decision on merger

- (1) Subject to subsection (2), the Council of Ministers —
- (a) may overrule OFT's decision under section 24(4) or 25;
 - (b) on exercising the power under paragraph (a), must issue a direction that —
 - (i) requires the parties to the merger or proposed merger to take any specified action or refrain from taking any specified action; or
 - (ii) in the case of a proposed merger, has the opposite effect of OFT's decision under section 24(4) or 25.
- (2) The Council of Ministers may not exercise its power under subsection (1) unless —
- (a) it has consulted with OFT and the parties to the merger or proposed merger;
 - (b) no more than 6 weeks have elapsed since OFT made the decision referred to in subsection (1)(a);
 - (c) it considers there to be exceptional and compelling reasons of public policy that make it desirable to do so; and
 - (d) it reasonably considers that the provisions of the direction under subsection (1)(b) are necessary and proportionate for the purpose of preventing, remedying or mitigating those public policy concerns.
- (3) Any direction issued under subsection (1)(b), including any variation of any such direction, must —
- (a) state —
 - (i) the date on which it comes into force;
 - (ii) the reasons for making or varying the direction; and
 - (iii) the possible consequences for not complying with the direction; and
 - (b) provide information about how to —
 - (i) apply for the direction to be varied or revoked;
 - (ii) appeal the issue of the direction.

- (4) Where, in accordance with subsection (2)(a), the Council of Ministers consults OFT in respect of a merger or proposed merger, –
 - (a) OFT must publish the advice it gives to the Council of Ministers; and
 - (b) the Council of Ministers must publish its reasons for overruling or forbearing to overrule OFT's decision.
- (5) A direction issued by the Council of Ministers under subsection (1)(b)(ii) is to be deemed to be an order under section 14 and, if the parties merge in defiance of the direction –
 - (a) the parties commit an offence under section 17; and
 - (b) the purported merger, for all purposes in law, has no effect and is to be deemed to never have occurred.

27 Publication of reports

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

PART 7 – CONSEQUENTIAL AMENDMENTS AND SAVING

28 Amendment to the Fair Trading Act 1996

- (1) The *Fair Trading Act 1996* is amended as follows.
- (2) Part 2 is repealed, subject to section 30 of this Act.

- (3) Section 20 is amended by omitting from subsection (2) “(as defined by section 8)” and substituting **63** (as defined by section 6 of the *Competition Act 2021*) **62**.
- (4) Section 21 is amended in subsection (3)(a) by substituting —
 - (a) **63** level 5 on the standard scale **62** for “£5,000”; and
 - (b) **63** or **62** for the “and” that appears immediately after the comma.
- (5) Section 24 is repealed.
- (6) Section 25 is amended —
 - (a) in subsection (4), by inserting **63** or the *Competition Act 2021* **62** immediately after “this Act”; and
 - (b) in subsection (5) —
 - (i) by substituting **63** level 5 on the standard scale **62** for “£5,000”; and
 - (ii) by inserting **63** or **62** immediately after the semicolon at the end of paragraph (a).
- (7) Section 26 is amended by substituting the following for the definition of “anti-competitive practice” —

63 “anti-competitive practice” has the meaning given in section 6 of the *Competition Act 2021*; **62**.
- (8) Schedules 2 and 3 are repealed.

29 Amendment to the Company Officers (Disqualification) Act 2009

- (1) The *Company Officers (Disqualification) Act 2009* is amended as follows.
- (2) In paragraph 4(2) of Schedule 1 —
 - (a) omit “and” from immediately after the semicolon at the end of subparagraph (e);
 - (b) omit the full stop at the end of subparagraph (f) and substitute **63**; and **62**; and
 - (c) insert the following immediately after subparagraph (f) —

63(g) section 4 (prohibition on preventing competition), section 5 (prohibition of abuse of a dominant position), and section 7 (anti-competitive practice) of the *Competition Act 2021*. **62**.

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

As of the date on which section 28(2) of this Act comes into operation, all orders already made under section 8(2) of the Fair Trading Act 1996 are saved and continue in operation as if they were regulations made under section 8 of this Act.

ENDNOTES

Table of Endnote References