

5. CONSIDERATION OF CLAUSES

**5.1. Competition Bill 2020 –
Consideration of clauses commenced**

Mr Perkins to move.

The Speaker: We turn now to Item 5 on our Order Paper, consideration of clauses of the Competition Bill 2020, and I call on Mr Perkins to move clauses 1 to 3

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Mr Perkins: Thank you, Mr Speaker.

With your permission I would just like to make a few brief remarks before I proceed to the clauses debate today, if I may?

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The introduction of the Competition Bill is a specific action for the Office of Fair Trading for delivery under the Programme for Government, the need for this Bill having been highlighted during discussions with the UK government concerning Brexit, and future trade agreements negotiated for it on behalf of the Crown Dependencies. From these discussions it became clear that the UK government was looking to commit all the Crown Dependencies to maintaining effective competition laws: laws that covered anti-competitive practices and merger controls, while also upholding the right to provide for public policy exemptions.

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At present, both Jersey and Guernsey meet those standards, placing our Island at a potential disadvantage with respect to future trade agreements. When enacted, the Bill will replace Part 2 of the 'Anti-Competitive Practices and Prices' of the Fair Trading Act 1996, with a modern framework of competition law suitable for a small economy. In my opinion, the Bill therefore implements the necessary regulatory objectives to ensure the Island can benefit from being part of UK future trade agreements. **(Mr Thomas:** Hear, hear.)

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Turning to clauses, as advised to all Members by my email on 7th February, with your permission, Mr Speaker, I propose the consideration of clauses of this Bill be undertaken over two sittings. I would suggest that clauses 1 to 21 are considered today, with the remaining clauses considered at the next sitting of this House. **(A Member:** Hear, hear.) This will allow for further discussions with Members concerning Part 6 of the Bill, that is 'Merger Controls', and additional possible amendments to those provisions.

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Mr Speaker, I please ask the House if that is applicable.

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The Speaker: No need to ask the House, I was hoping you were going to move clauses 1, 2 and 3, which is what you are required to do, Mr Perkins.

Mr Perkins: Right, thank you, Mr Speaker.

Clauses 1, 2 and 3 moved together and voted on separately.

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Clause 1 provides for the short title of the resulting Act being the Competition Act 2021.

Clause 2 provides that aside from clauses 1 to 3 the Act will commence upon the making of an appointed day order by the Office of Fair Trading subject to consequential, incidental, supplemental or transitional provisions as they appear necessary or expedient to the OFT. It is anticipated that an appointed day order or appointed day orders will be made once necessary associated secondary legislation has been prepared. For example, until the OFT has drafted, consulted upon and submitted to the other place the rules of procedure in respect of carrying out investigations, and the regulations setting out the methodology to be applied in fixing penalties and restitution. It would not be seeking to commence Parts 4 and 5 respectively of the Bill by appointed day order.

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Clause 3 defines the terms used in this Bill and cross-refers to terms that are defined elsewhere in the Bill. In addition this clause requires that, unless specified, all notices published under the

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Bill must be published in a manner and for a period that is necessary to bring the notice to the attention of the affected persons.

Mr Speaker, I beg to move that clauses 1, 2 and 3 stand part of the Bill.

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The Speaker: Thank you.

Mr Boot.

Mr Boot: I beg to second and reserve my remarks.

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The Speaker: I call on Mr Thomas to move amendment number 1.

Mr Thomas: Thank you very much, Mr Speaker.

2365 Amendment number 1 is very simple, it basically omits the definition of 'public authority', which fills lines 10 to 13 on page 10 of the Bill. Essentially in the introduced Bill 'public authority' has the meaning given in section 6(1)(a) of the Freedom of Information Act 2015, including publicly-owned companies which has the meaning given in section 6(2) of that Act.

A publicly owned company means:

a company in which one or more public authorities owns, whether directly or indirectly, shares or other interests ...

2370 It is not fatal if my amendment does not pass today, because this is just a definition, it is not like last week when we were talking about the commencement provision. So therefore I would like to have a more substantive debate in terms of my second and third amendments later, in respect of how it would be. But it is wrong to define public authority. It should be removed from the definition, and my amendment that I will move later at Parts 2 and 3 covers that very clearly.

2375 Let me just be precise about this. Basically, if we define public authority according to the Freedom of Information Act, what we are actually saying is that competition law does *not* apply to all public authorities and all bodies. It only applies to those that at that time are inside Schedule 1 of the Freedom of Information Act, which is illogical and perverse. I could argue with anybody who does dispute that, and I will do!

I beg to move:

Amendment to clause 3

1. Page 10, lines 10 to 13, omit the definition of 'public authority'.

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The Speaker: Mr Shimmins.

Mr Shimmins: Thank you, Mr Speaker.

I beg to second and reserve my remarks.

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The Speaker: Hon. Member, you will not be able to reserve your remarks.

Dr Allinson.

Dr Allinson: Thank you very much, Mr Speaker.

I rise to speak to the amendment, really.

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I would like to thank the Hon. Member for circulating the email on 5th February outlining his plans. It said 'with brief explanation' – it took me a lot longer to go through it, though. In it, he says he bases his subsequent amendments which are dependent on this on the EU-UK Trade and Cooperation Agreement, which is a bit of a strange thing to reference, I suppose, when you are going through primary legislation.

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This is the 12,000 page document that dealt with Brexit, and I do not think it really should be held up as an example of good governance or particularly collaborative speech-writing. He says:

'In summary, how to treat public authorities is tricky, and seems to have been something with which the OFT and Government have struggled.'

2400 I disagree with that comment really in terms of what we have got before us, because the document he refers to, particularly in terms of his further amendment to clause 7, which is based on a comment made on page 181 of this, this entire document is looking at a level playing field. The European Union was specifically worried about workers' rights, competition, state-aid, taxation and social and economic protection, rather than looking at public services.

2405 When you go through what they have said in terms of a level playing field, it is all about that – it is about state aid, it is about looking at how states and governments interact with private corporations, and therefore that safeguard for clear competition obviously needs to be enshrined.

But what we are dealing with *here* on our Island is public services. The King's Fund have stated really, that:

Public sector procurement and oversight of health services are subject to domestic legislation and the [UK] government has publicly and repeatedly committed to keeping the 'NHS off the table' in future trade deals.

2410 We have seen that both with the EU and also with presumed trade deals with the United States through the WTO.

So in essence, Mr Speaker, I do not get it. I do not get the argument that we should remove the public sector from any protection in terms of competition. I am concerned, particularly, with the subsequent amendments to the Competition Bill that actually would open up the public realm not only to scrutiny and competition either from on Island or off Island, but actually open it up to attack in terms of what it actually supplies.

2415 So, for instance, from an Education point of view, we could be criticised as being unfair competition with private education firms, with those that give online learning; also, from a health perspective, we could be accused of unfair competition in that respect as well. So the blanket removal of public authorities from this protection I think is incredibly damaging, and I would just like the Hon. Member to explain what positives would come out of this.

Thank you.

The Speaker: Mr Perkins.

2425 **Mr Perkins:** Thank you, Mr Speaker.

I thank the Hon. Minister for his observations on that, it was a fairly weighty document and I am pleased to hear that he has picked the bones out of it.

2430 Mr Speaker, I rise to oppose Mr Thomas's amendment and also amendments 2 and 3 because these amendments, when they are considered together, will remove any reference from public authorities in this Bill – an attached statement of the Bill's application to such public authorities, as in clause 7. These provisions make it clear that competition law applies not just to the private sector but also to public sector bodies as well.

2435 Mr Speaker, in the past some public bodies genuinely believed that competition law did not apply to them, which is why this clause is necessary to remove any doubt. This therefore includes all Government Departments, statutory bodies and local authorities.

2440 Competition legislation must ensure a level playing field between the private and public sectors. This is crucial in meeting international standards and the importance of this was stressed by the UK Competition and Markets Authority and the Department for Business, Energy and Industrial Strategy. It would accordingly note that similar provision already exists in Article 4 of the Competition (Jersey) Law 2005 and section 56 of the Competition (Guernsey) Ordinance 2012. Otherwise, I would not have a particular objection to the addition of text similar to the amendment to ensure there is absolute clarity to the application of this Bill. However, the amendment as proposed would not resolve the UK's concerns.

Mr Speaker, I urge Members not to support this amendment.

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The Speaker: I call on Mr Thomas to respond to the debate on the amendment.

Mr Thomas: Thank you.

2450 I really do appreciate Dr Allinson's and Mr Perkins' intervention because at least, differently from last week, we have now got the arguments laid out which I am now going to attempt to demolish here, and also later on when I move 2 and 3.

2455 So the first point is: what I have recorded is that the intention of this amendment is to bring us exactly in line with Jersey and Guernsey, and that is a disputable fact which can now be disputed. I will not do it today at this stage, but it is a fact and if it turns out that is not the case, we will have questions asked of us later on in the process.

2460 The points I will argue today are at a more raw level. The first one is that the potential law as drafted at the moment, as introduced, means that competition law does not apply to all public authorities – differently from what the mover contends – it only applies to public authorities defined in Schedule 1 of the Freedom of Information Act, which does not include the Steam Packet. It does not include anybody else who is not, as yet, in the Freedom of Information Act like Meat, or like entities in the future which are created out of Government Departments, potentially like Bus Vannin or potentially other entities. It is a serious issue there if we are setting up public bodies to be absent from competition by law in statute. That would not go down well in the UK or the EU as a political point.

2465 The second point is that there is an illogical flaw in terms of the *own* terms of the introduced Bill in front of you. So in one of the clauses we get to right at the end – which used to be called clause 31 and it is now called clause 30 – there is reference in the transition provisions, I think it is, to the fact that those bodies who are already exempted from Fair Trading, like the Steam Packet, are actually continuing to be exempted. But there is absolutely no need to do that because 2470 the Steam Packet is not in Schedule 1 of the Freedom of Information Act 2015. So why would you need to exempt the Steam Packet if it is not already included inside the fair trading regime and the competition regime, because the place upstairs decided to exclude it? It is a logical flaw inside the own arguments of the Bill in front of you.

2475 Finally, and I really thank Dr Allinson for putting the case that he did, and I understand that is on behalf of the Council of Ministers, because unfortunately there is a logical flaw in the argument that he made. So essentially back in the consultation version of this Bill there was talk, there was sort of consideration of it in terms of public services, in the sense that originally this clause as drafted was going to specifically exclude the Department of Education when it provided education services, which would have meant it would have closed down competition from people who were 2480 trying to provide education services in competition to the College.

2485 There was an specific exclusion for Health Services when they were provided by the Department of Health and Social Care, which would deliberately have closed down the opportunity for challenge from the substantial number of private providers of health care services; and there was a specific exclusion for anybody who had received Department for Enterprise financial assistance, because that has been there to help them get on and to dominate markets, perhaps, or to have significant market share in markets. But that was destroyed during the consultation and what you see today in the Bill that is being introduced eventually in 2020, is not anything to do with public services. Read it. We are talking here about a definition of public *authorities*.

2490 We need to get cleverer at the Council of Ministers when we come to think about the regulations and the guidance that is issued under clause 8 in terms of public services because they are worthwhile things to protect. But that is not what is on the Bill today. It talks about a prohibition on anti-competitive practice by public authorities, not in respect of public services. That is later on down the line when we have second-level legislation and policy that eventually 2495 the Council of Ministers will have to write down about how it randomly introduces exemptions

into fair trading and competition – apparently randomly, because as yet I have never got a clear answer about the thinking behind it.

2500 That brings me on to about whether or not the EU-UK Trade and Cooperation Agreement is a good source for all of this. Of course it is because as I explained in my email, the Chair, Mr Perkins, excellently explained at Second Reading that the point of this Bill was – and he has confirmed it today: to meet an undertaking that the Isle of Man has given to the UK government to update our competition legislation to bring it into line with similar legislation in the UK and the Channel Islands. It is also to ensure that the Island has a modern competition framework protecting consumers, markets and businesses to enable the Island to achieve equivalence with UK and EU standards.

2505 Well, I can assure this Hon. House and everybody else listening that the UK and the EU has thought a lot about the level playing field over the last three or four years, and they had to encapsulate that in a chapter entitled ‘Competition Law’ in that very long document that I have found. I would say that is a pretty admirable source and a pretty worthwhile source of what the best thinking is at the UK and the European Union, in terms of how you deal with unfair competition because of labour standards, because of environmental standards, because of market abuse and all of those other things. I suggest to you, nobody who has actually been involved from a technical level in terms of this sees any problem with this as an excellent source for a summary of what the UK and EU principles are.

2510 I will still be moving amendments 2 and 3, regardless of whether the definition is left in at this stage, because you can have a pointless definition in the legislation. But I hope Hon. Members are persuaded that this has got some way to go in the future.

2515 The most important thing is that competition law applies to all public authorities in the same way that it applies to everybody, except when there is a fair public policy exemption, made properly using proper logic, proper analysis and proper information by the Council of Ministers.

2520 Thank you, Mr Speaker.

Several Members: Hear, hear.

2525 **The Speaker:** I call on Mr Perkins to reply.

Mr Perkins: Thank you, Mr Speaker; and I thank the Hon. Member for moving.

2530 I think most of the arguments have been had on this particular subject. If it helps, we are willing to remove that word ‘regulated’ from the title. This may help the Hon. Member a little bit. If CoMin wishes to introduce controls on specific sectors such as transport, energy or economic regulation it could be done at a later date. The Competition Bill does not preclude any of this from taking place.

2535 The consultation that took place was about the introduction of a new Competition Bill, *not* an Economic Regulation Bill, which the Hon. Member seems to be pushing for. And particularly the definitions that he comes up with, yes, I can understand where he is coming from. But we have put this Bill forward in full understanding of what will be required for international standards.

One of the things in the public interest description is: ‘to avoid nationalistic allegations’. So that is where we are coming from.

2540 Hon. Members, I beg you not to support the amendment but to support clause 3 as it is in the Bill.

The Speaker: I put to you first amendment number 1 in the name of Mr Thomas. Those in favour, please say aye; against, no. The noes have it.

A division was called for and electronic voting resulted as follows:

FOR

Mrs Barber
Mrs Christian
Mrs Corlett
Ms Edge
Mr Hooper
Mr Moorhouse
Mr Peake
Mr Quine
Mr Shimmins
Mr Thomas

AGAINST

Dr Allinson
Mr Ashford
Mr Baker
Mr Boot
Mr Callister
Mr Cannan
Mr Cregeen
Mr Harmer
Mr Perkins
Mr Quayle
Mr Robertshaw
Mr Skelly
Mr Speaker

The Speaker: With 10 votes for and 13 against, the noes have it. The noes have it.

2545 Putting to you clauses 1, 2 and 3 that they stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.
Clauses 4 to 6, Mr Perkins.

Mr Perkins: Thank you, Mr Speaker.

2550 Moving clauses 4 to 6 together and voting on separately.

Engagement with consumers and the business community by the Office of Fair Trading has highlighted a deficiency in the understanding of what constitutes anti-competitive practice. The wording of the Fair Trading Act 1996 identifies the end result of that behaviour as being one that prevents, restricts or distorts competition, but does not provide an indication of exactly what that behaviour may be.

2555 Clauses 4 to 6 accordingly define anti-competitive practices exactly for the purposes of the Bill.

2560 Clause 4 provides for a prohibition on preventing competition. It specifies that a person must not enter into any arrangement that may affect trade on the Island and has its object to effect the prevention, restriction or distortion of competition within any market. This prohibition applies whether the arrangement is to be acted upon in the Island or indeed elsewhere. Such examples of such arrangements are listed, including directly or indirectly fixing prices, fixing purchasing or selling prices.

2565 Clause 5 prohibits the abuse of a dominant market position by one or more persons within any market. Such conduct may take a variety of forms. Examples of such conduct include, but are not limited to limited to: limiting production supply, markets or technical development to the prejudice of consumers.

2570 Clause 6 specifies the meaning of the term 'anti-competitive practice'. A practice may be anti-competitive if it breaches the prohibition on preventing competition, as described in clause 4; or the prohibition of abuse of a dominant position as set out in clause 5. A practice may also be anti-competitive if it is a breach of the Payment Services Regulations 2015.

Mr Speaker, I beg to move that clauses 4 to 6 stand part of the Bill.

The Speaker: Mr Boot, thank you.

2575 **Mr Boot:** I beg to second and reserve my remarks.
Thank you.

The Speaker: I put the question that clauses 4, 5 and 6 stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

2580 Clause 7, Mr Perkins.

Mr Perkins: Thank you, Mr Speaker.

2585 Clause 7 makes it clear that competition law applies not just to the private sector but to the public sector bodies as well. In the past, some public sector bodies genuinely believed that competition law did not apply to them, which is why this clause is necessary to remove any doubt. Therefore, this includes all Government Departments, statutory bodies and, indeed, local authorities.

2590 Competition legislation must ensure a level playing field between the public and private sector. This is critical in meeting international standards. The importance of this clause being in the Bill was stressed by the UK Competition and Markets Authority and the Department for Business, Energy and Industrial Strategy. For clarity, this is also one of the reasons why exclusions relating to specific activities of the Department of Health and Social Care, the Department of Education and Sport and Culture, and also the Department for Enterprise were not included in the draft of the Bill as introduced to this House.

2595 Mr Speaker, I beg that clause 7 stand part of the Bill.

The Speaker: Thank you. Mr Boot.

2600 **Mr Boot:** I beg to second and reserve my remarks.

The Speaker: Mr Thomas. Amendment 2.

Mr Thomas: Thank you very much, Mr Speaker.

2605 Amendments 2 and 3 are closely related and in essence, some of the things that have been said to date need strong refutation – they need refuting very strongly. The first one is that what is in front of you today in terms of my amendments is absolutely nothing whatsoever to do with economic regulation. It is about competition regulation, competition law. Economic regulation is about how you do something in advance, *ex ante*, because perhaps you have given up on competition in that sector. Competition regulation is about what you do *ex post*, after the event, when there might have been or there is evidence of anti-competitive practices.

2610 The second point that I want to refute strongly is that, in any sense, this has to do with national interests; completely the opposite. In actual fact, there is no reference whatsoever at the moment in the Bill introduced as drafted in front of you to do with nationality. The only concept is of public authorities. There is absolutely no mention in the Government's version of this Bill to do with nationality. However, the EU found this important enough to include it in terms of the definition of who and to whom competition law applies and that appears in the amendment I have in front of you.

2620 My amendment is very clear; basically, anti-competitive practice prohibition, unless there is a public policy exemption made in a proper way, applies regardless of ownership, i.e. public or private, and regardless of nationality. If you want to include nationality, you actually have to vote for my amendment.

2625 Another very important point is, and it builds on the discussion we had previously, about public authorities versus public services. It should be noted that the version of the Bill that you have in front of you today has not been consulted about. I can see why Dr Allinson will have got confused, because the consultation version of the Bill was all about public services and DHSC and DESC and so on. In July, I was passionate about how that could not work because of the way it was drafted and it was anti-competitive versus the private providers in education and health, and those who were not so lucky as having grants from it. That is why we have this new clause 7, but in July when I began my engagement, I wanted proper engagement, proper consultation about this new clause, and that has not happened. You cannot show me a consultation website. You cannot point me to all the lawyers who have been involved feeding into this process.

2630 I wanted to go back to the consultation responses, which were published very kindly after my meeting in July. I just want to draw your attention to the appendices in that document, particularly the one from DOI, which said, 'Oh, we had not thought about excluding public services around

2635 buses and ferries and airlines from competition like Department of Education and Department of Health and Care and Department for Enterprise have done; we probably should have done.’ That is all very clear, the evidence is all very clear in the letter from Mr Black to the Department, and that is what this is all about.

Of course, there are public policy reasons for exempting public services, but there is not, and there should not be, a blanket exemption on public authorities being exempted from competition. (A Member: Hear hear.) That is completely wrong.

That brings us on to my closing observation, which is that: do not be fooled into thinking that if you pass this clause on to the next place as drafted, you are actually asserting that all public authorities are subject to competition law; you are doing exactly the opposite. All we are saying is that the public authorities, those particular parts of local authority provision, those particular entities operating under the Departments which have got to – Schedule 1 of the Freedom of Information Act – have it asserted that they are included; but anybody who has not got to that illustrious status, like the Steam Packet or lots of other entities I can think of that are not inside Schedule 1, because the Schedule 1 takes positive action by the Council of Ministers to get them there. You are not actually doing anything of the sort, as has been stated, probably to the UK authorities, and has certainly been stated in this House today.

Please, Hon. Members, vote for sensible, practical, proper competition law in the future that will stand up to scrutiny on this Island more widely, scrutiny beyond in the United Kingdom and then eventually scrutiny internationally, once our little piece of legislation gets noticed. Let’s keep our standards high and let’s assert that competition law applies to everybody, regardless of whether you are in Schedule 1 of the Freedom of Information Act 2015 that governs the publication of public information, not who is a public authority for competition law.

Obviously from the voting, the DOI, DEFA, Council of Ministers’ block-vote is in force, so there are 12 votes that are already guaranteed against this, but that needed to be said. There is right, and then there is being on the right side of history in a few months’ time. (A Member: Hear, hear.)

And with that, I beg to move the amendment standing in my name:

Amendment to clause 7

2. Page 12, lines 9 to 11, for the existing text substitute the following –

«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.».

The Speaker: Mr Shimmins.

Mr Shimmins: Thank you, Mr Speaker.

2665 I rise to second Mr Thomas’s amendment and would join with him in refuting some of what we have heard today.

I would just like to make some more general comments. It was very interesting to hear from the mover of the Bill that the purpose and reason for this Bill were to bring us up to speed with international practice and the UK, and I think we would all acknowledge and support that. I would just like to put on record at this stage during clauses that, in this particular case, it does not do that, so Mr Thomas is trying to bring us up to that level, but in many other clauses, actually, the Office of Fair Trading is going way beyond what is permitted in the UK and some of the powers they are asking are really, in my view, completely over the top.

2675 The lack of consultation on some of the new items in this version of the Bill is causing a great deal of concern in the private sector. So the private sector are looking askance at this Bill and saying, well, where has this come from? There is some really odd thinking here, so I would just like to put that on record before we get to some of the other clauses, which go massively above the UK level, that the private sector is very unhappy both of the content and the lack of

2680 consultation, so I hope that the OFT will take that on board as we head through the journey on these clauses.

I would just like to make some general comments about ... First of all, let me take this back to basics. So, competition is good, okay? Competition is a good thing. It helps organisations become customer-focused and it helps them improve what they do. We should remember that the public sector is funded by the taxpayer, so we should welcome the fact that organisations which are subject to competition generally provide better customer service, and they do it in a more efficient way. So I think it is very important to understand that basic backdrop to the discussions as we move through this clause and the Bill.

2690 We have heard a wee bit about the national interest. That lack of definition is interesting, but I think also we need to be wary of the self-interest. So, often we can confuse national interest with self-interest, and sometimes when Departments are promoting something, that national interest is actually in the self-interest of the Department.

2695 One aspect which really concerns me; Mr Thomas referenced the letter from the Department of Infrastructure, which said, 'Wow, could we get exempted too? That would be really helpful for us, because we might have a few issues with Bus Vannin. So if you can exempt us, we will just carry on doing what we are doing.' I would submit to you, Hon. Members, that is really not the right thing, and if we want to focus on doing the right thing rather than what we have been told to do, or what we have been told is the correct thing, I would urge you to support Mr Thomas's amendment, which I think is the right thing to do.

2700 Thank you, Mr Speaker.

The Speaker: Dr Allinson.

Dr Allinson: Thank you, Mr Speaker.

2705 Following on from the previous speaker, I agree with you. Competition is good, but it has to be fair competition, and that is what I believe this Bill is about.

Coming back to the amendment, the use of this language comes from page 181 of the EU–UK Trade and Cooperation Agreement. We have a little Bill here, you are quite right, Mr Thomas. It is 28 pages, as opposed to 1,200 pages, and what we have got on page 181 is:

The competition law referred to in paragraph 1 shall apply to all economic actors irrespective of their nationality or ownership status.

2710 When you look back at paragraph 1, it is very much about the relationship between the European Union and the United Kingdom and it says:

However the Parties recognise that the purpose of this Title is not to harmonise the standards of the Parties. The Parties are determined to maintain and improve their respective high standards in the areas covered ...

That, Hon. Members, I think is what this Bill is trying to do, to harmonise and improve what we do on our Island; not to benchmark it to bigger disagreements between the EU and the UK, but to do what is right for the Isle of Man.

Thank you.

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The Speaker: Thank you.

Mr Hooper.

Mr Hooper: Thank you very much, Mr Speaker.

2720 It is quite informative, I think, that we have the Minister for Education responding to some of these comments, as opposed to the Minister for the Department who actually oversees the OFT, or in fact, any of the Members in that Department. I am just curious as to who has actually formulated some of the policy that is sitting in this Bill. Is it the Education Department? Is it the

2725 Minister? Is it the OFT? I am a little bit unclear really as to where some of these comments are coming from, but it is gratifying at least to hear the Government engaging in this debate, unlike they have done in the past.

I would just like to comment on something actually that, again, this is probably quite a technical question and I would not really expect an answer. Clause 7 very specifically talks about the prohibition in this Act as very specific and it applies to public authorities as defined earlier in the Bill. But actually, the prohibition in clause 4 of the Bill very specifically states, 'A person must not enter into any arrangement,' and then goes on to describe anti-competitive action. The abuse of a dominant position, clause 5, talks around any conduct on the part of one or more persons. Again, it refers to 'persons', not any other body. Now a person, in this context, I have assumed is an individual with a legal personality, so an individual, a real-life flesh and blood person, a corporate entity, or in fact a Government Department or public authority. They are all 'persons' in the context of the law. So clause 4 and clause 5 already say a public authority, who is a person, cannot engage in this behaviour. Not allowed to, it is against the law.

2730 Clause 7, then, is redundant. Totally redundant. Because clause 7 says, 'Oh by the way, also if you are classified as a public authority, you cannot do this,' but that is really a belt-and-braces clause, because the earlier clauses already prohibit anti-competitive action or abuse of a dominant position by public authorities, by Government Departments and Government-owned companies, etc. So we are having a debate on clause 7 as to how we define public authorities. That is what this is about, which is totally and utterly irrelevant, because the earlier parts of the Bill already explicitly prohibit anti-competitive action on the part of public bodies, private bodies or your dog. It does not matter.

2740 So, in honesty Members, support the amendment. Do not support the amendment. I will be, because generally I think the wording is better than what the OFT have proposed, but actually it does not matter. Whichever way you vote, public authorities will be subject to the clauses of this Bill unless the Council of Ministers decides to specifically exempt them under the very next clause, clause 8, by regulation.

2750 So, I do not really see this as a particularly contentious issue. I would encourage the Council of Ministers to support Mr Thomas's amendment, acknowledging that actually, this is just a belt-and-braces clause that says, 'For the avoidance of doubt you cannot get out this if you are the DOI, so please do not try.'

2755 And I just think support the amendment as it is and let's move on.

The Speaker: Mr Thomas to – Sorry, Mr Perkins, do you wish to speak to the amendment?

Mr Perkins: Yes if I may please, Mr Speaker.

2760 Just a quick – I will not go over all the arguments again. The one point I would pick out is that we have had we engagement with various Members, we have had drop-in sessions and several Members – I think three Members – have actually come forward and we have taken some of their points on board.

2765 In addition to that, we have had a meeting with a local law firm who raised certain questions, and again, the drafters have taken that on board. So I just refute those remarks that we have not consulted. There is further consultation to do when we put in secondary legislation, of course there is, and that is what I said in my opening remarks.

And with that, I beg Members not to support the amendment.

Thank you, Mr Speaker.

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The Speaker: Thank you.

Mr Thomas to reply to the debate on the amendment.

Mr Thomas: Thank you, Mr Speaker.

2775 I do not agree with Mr Perkins. The drafters and the policy people working on this have worked
diligently, thoroughly, but there is no consult.gov.im on the text of the Bill that has been
introduced that is before you. There has been no widespread notification to the people and to the
law firms about this Bill, despite the fact it has been going on since 2013. In 2013, the first
2780 consultation was launched on this Bill and the policies behind it. Good consultation, good
responses, full responses, Manx Gas, Sure – very well worth reading. All these points were there
in 2013. There was actual good consultation on an original text of the Bill, and I have talked about
that and the responses, those responses were published a couple of years late, but eventually
they were published in July 2020. There has not been detailed engagement and detailed
consultation in the text of the Bill.

2785 I want to thank my seconder and thank everybody for contributing; Dr Allinson for having
another valiant go to defend this point. But I really wanted to thank Mr Shimmins and Mr Hooper,
and I am going to focus on what Mr Hooper's comments are because they are absolutely brilliant.
I have not actually shared with Mr Hooper some legal advice I have received about how this law
will be construed later on and in actual fact, I think Mr Hooper has nailed it. Because of bad
2790 drafting, probably Deemsters will have to go to clauses 5 and 6, which will become sections 5 and
6, which do say that the anti-competitive practice prohibition applies to everybody, regardless of
what it says in this badly drafted clause 7, which says it only applies to some public authorities
that manage to make it into the Freedom of Information Act 2015, Schedule 1 when Council of
Ministers get round to thinking about how they should be there and what should be there and
2795 actually bringing it to Tynwald Court for confirming it.

So probably, as often, Mr Hooper has nailed this one, which is the law is just bad because it will
need construing by Deemsters later on. You will note that in my line amendment 3, I actually deal
with that, and that is how I know this background because I actually apply the exemptions
specifically to what it says in clause 7, whereas at the moment it currently says the whole Act. So
2800 I have been advised because, as it is in front of you, it currently says the whole Act, clause 7 is
irrelevant.

I just wanted to close on the history of clause 7 is, as Mr Shimmins sort-of suggested, basically,
it used to be something else; it used to be what Dr Allinson described it as. It was to protect public
services; that is a valid public policy reason. It then got perverted, subverted by all sorts of
2805 interests to come to what is now, with a bad definition of public authorities. There was not a
definition they could latch on to, so like happened with the Climate Change Bill, they just grabbed
one that was available, which was the one in the Freedom of Information Act. Nobody has
answered my point as yet about the Steam Packet. Why would you specifically exempt the Steam
Packet and the Post Office and the Milk Marketing arrangements from a law if, in one of those
2810 cases, the Steam Packet, you did not need to do it and, probably, the second one you probably
did not really need to do it with the Milk Marketing.

Clearly, the Post Office, with its excellent board and its excellent lawyers (*Laughter*) (**Ms Edge:**
Hear, hear!) actually spotted that it needed to be exempted because the two statutes were
contradictory, but it was pure politics, pure consultation responses, that got the other two
2815 mentioned, and it is absolutely contradictory for the Steam Packet to be covered in clause 30,
because it is not in Schedule 1 of the Freedom of Information Act. I am pretty sure we will establish
next week that there is no intention for Government ever to include it in the Freedom of
Information Act regime with the Question I have got down coming up next week.

Thank you, Mr Speaker.

2820

The Speaker: Knowing Mr Perkins' brevity for summing up, I will allow him to do that, we will
vote and then we will suspend the House until half past two.

Mr Perkins.

2825 **Mr Perkins:** Thank you, Mr Speaker.

Yes, we have been round the houses and we have had pretty good discussion on this. I thank Mr Hooper for his belt-and-braces approach. It is exactly that: it is a belt-and-braces approach. The provision of exemptions in the secondary legislation is to enable the necessary clarity that the Hon. Member Mr Thomas is requesting, and that is the exact nature of the secondary legislation.

2830 Happy to discuss with him the extension of this, if it is needed, and hence the consideration of the following clauses in two weeks' time. We can have a discussion about that before the clauses are actually brought to this House.

2835 I thank Mr Hooper again for highlighting the drafting on clauses 4 and 5. A 'person' does not indicate a natural person, as he has correctly pointed out, but an office or a company or whatever it is.

Mr Thomas, the Bill has been developed over a period of time and you were right in what you say, it started way back in 2013 or whatever it was, but it has actually been developed, and as Brexit kicked off we have had to adjust things.

2840 I appreciate the amendment, but it does not resolve the policy concerns that gave rise to this clause. The exemptions have been approved by Tynwald and they may be revoked in the future and reviewed if they are no longer considered necessary. So the policy of making exemptions is actually a matter for the Council of Ministers, and that is really all I have to say, Mr Speaker.

I beg to move.

2845 **The Speaker:** Putting first amendment number 2 in the name of Mr Thomas. Those in favour, please say aye; against no.

A division was called for and electronic voting resulted as follows:

FOR	AGAINST
Mrs Barber	Dr Allinson
Mrs Christian	Mr Ashford
Mrs Corlett	Mr Baker
Ms Edge	Mr Boot
Mr Hooper	Mr Callister
Mr Moorhouse	Mr Cannan
Mr Peake	Mr Cregeen
Mr Quine	Mr Harmer
Mr Robertshaw	[Mr Perkins]
Mr Shimmins	Mr Quayle
Mr Speaker	Mr Skelly
Mr Thomas	

The Speaker: With 13 for, 10 against, the amendment therefore carries.

Mr Perkins: I am afraid I pressed the wrong button. *(Laughter)*

2850

The Speaker: In which case 12 for, 11 against – the motion still therefore carries. *(Laughter)*
Putting to you then clause 7 as amended. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

2855 Thank you, Hon. Members. We will continue consideration of the clauses of this Bill at 2.30 p.m.

*The House adjourned at 1.03 p.m.
and resumed its sitting at 2.30 p.m.*

**Competition Bill 2020 –
Consideration of clauses continued**

The Speaker: Now we continue consideration of the Competition Bill 2020 and the clauses.
I turn to Mr Perkins to move clause 8, please.

Mr Perkins: Thank you very much, Mr Speaker.

2860 Clause 8 allows the Council of Ministers, by regulations that have been consulted upon with
the Office of Fair Trading and subsequently approved by Tynwald, to grant an exemption to any
economic activity from being an anti-competitive practice. The granting of any exemption would
be on the basis of the exemption being either necessary for exceptional or compelling reasons of
2865 public policy or the granting of an exception is likely to produce a better outcome for consumers
or the Manx economy, or for both of these reasons.

The regulations provide an exemption to be absolute time bound or subject to conditions. The
Council of Ministers may also, after consulting with the OFT and issuing a notice to the person
concerned, repeal or vary an exemption if the person behaves inappropriately by breaking any of
the conditions attached with the exemption. Similar processes are followed in other jurisdictions
2870 to ensure the application of competition legislation does not prevent the undertaking of practices
that are beneficial to the Island as a whole.

Mr Speaker, I beg to move that clause 8 stand part of the Bill.

The Speaker: Thank you, Mr Boot.

2875

Mr Boot: Thank you, Mr Speaker.

I rise to second and support clause 8. In rising to support the Hon. Member moving this clause
I note it is an improvement on the position at present whereby such exemptions may be made by
the Council of Ministers without any statutory requirement to consult the OFT. It also ensures that
2880 such exemptions are only progressed if it is likely that there would be a better outcome for
consumers, for the economy of the Island or that the exemption is necessary for exceptional and
compelling reasons of public policy. Such exemptions when granted may also be varied or
repealed by Council either of its own accord or at the behest of the OFT. This improves the present
position and encourages the OFT to monitor the use of such exemptions to ensure they remain
2885 necessary.

I recall during the debate on the Climate Change Bill last week there were some concerns
expressed as to how the duties and functions provided by that Bill may be resolved if they
presented competition concerns. The clause before the House provides a mechanism for such
issues to be resolved.

2890 I would not anticipate that such exemptions would be granted if applied for simply on the basis
of their possible relevance to climate change. Such exemptions as the Bill states may only be
granted if they meet the tests set out in this clause, having had regard to the just transition
principles set out in the Climate Change Bill. From my perspective, this clause provides for
improvements in the process of how exemptions from anti-competitive practice are currently
2895 granted and ensures the OFT role in that process is set out clearly on a statutory basis.

Thank you, Mr Speaker.

The Speaker: I call on Mr Thomas to move amendment number 3.

2900 **Mr Thomas:** Thank you, Mr Speaker, and I thank the House of Keys for the substitution in
respect of clause 7, immediately before lunch. That has an impact on my amendment number 3,
the amendment to clause 8.

Before doing that though, I just wanted to thank Mr Perkins and Mr Boot for very clearly laying
out why clause 8 as introduced and as presented to us today is much better than the *status quo*,

2905 than the existing situation. Of course, we need criteria by which to assess the exemptions that the Council of Ministers makes and we have not had that in the past. Of course we need those criteria laid out in regulations and guidance, just as identified in this clause and we have not had that in the past.

2910 I have got a couple of interesting questions, which I would like an answer, a hypothesis answer perhaps to be confirmed at Third Reading if they cannot come today, but presumably the Office of Fair Trading would look to consult more widely than just consider its own officers' opinion if it gets asked for an opinion by the Council of Ministers, because surely it makes sense for the Office of Fair Trading to take into account the interests of the consumers and the interests of the economy before actually giving an opinion to the Council of Ministers.

2915 And secondly, presumably as a regulator moving to a new level through this legislation, the Office of Fair Trading would agree with me that what it receives inside this Bill needs to be reviewed. In other words, the Council of Ministers has given those three exemptions in the past, and I would like to think the Office of Fair Trading board would immediately consider setting up a work plan to actually review the decisions that we are grandfathering through clause 30.

2920 My amendment is a very small one and it is along the lines sketched by Mr Hooper first and amplified by me to do with clarity about what is covered – so the general point about how this might be construed in the future is still relevant. But the very specific point, as drafted in front of us today, the requirement for the review is only of varying or decisions made in subsection (7), and to me there are all the other parts of the Act whereby this process would be beneficial. In other words, we do not need just section 7 there in the piece of legislation. We actually need all of the exemptions. The processes described to apply for everything that could change. To me it would be much better if we have a more comprehensive review in the light of the whole Act rather than just a very technical point in subsection (7).

2930 To me it is bad practice to make legislation on the hoof, especially as we have just made a very important, significant and worthwhile change at clause 7 before it, but I can assure this House that I am of the view at the moment, and have been legally advised, that we are better off allowing for this review across all of the parts of the Act and all of the sections of the Act as it will become, rather than just subsection (7) of section 8. I hope that Members today will support this amendment that is before you. And if not, I do think now, given that such an important, significant worthwhile amendment has just be made, the Legislative Council can review it further to make sure everything hangs together properly in the interests of the consumer and the economy of the Isle of Man.

2935 With that I beg to move the amendment standing in my name:

Amendment to clause 8:

3. Page 12, line 15, for 'this Act' substitute «section 7».

2940

The Speaker: Mr Shimmins.

Mr Shimmins: Thank you, I beg to second.

2945

The Speaker: Mr Hooper.

Mr Hooper: Thank you very much, Mr Speaker.

2950 It is just a very simple question, I hope, for the Minister, two questions in fact. The first one actually is something Mr Thomas touched on, there are some existing competition exemptions already, and I would just be curious as to what the Council of Ministers plan is for rolling those over, are they going to be remade under this new Act, following all the consultation provisions etc. or not?

And the second question is in terms of repealing or varying an exemption, there is a requirement to publish that intention and make a notice, make people aware of what is

2955 happening, it does not seem to me that there is a similar requirement in terms of making an
exemption in the first place, so it seems that when the Government makes its first exemption
there is no requirement to publicise that intention to make sure that anyone who may be affected
by it is made aware of it. I appreciate this may be covered by regulations, but it is explicit on the
face of the Bill in terms of varying one of those exemptions, you have to make people aware. I am
2960 just curious as to why the Government has not taken a similar approach for making the
exemptions in the first place, and if you can really advise on what the plan is for that?

The Speaker: Mr Boot to speak to the amendment.

2965 **Mr Boot:** To the amendment, Mr Speaker, thank you.
It is short and sweet this, in terms of Mr Thomas's amendment it is consequential as a result
of what has happened previously. Consequently I am happy to support to the same.

The Speaker: Mr Thomas to sum up on the amendment.

2970 **Mr Thomas:** Yes, just very briefly.
I appreciate that greatly. It shows that together we can all make this legislation work for the
consumer and the economy of the Isle of Man. Although I moved this amendment, and of course
I will be supporting it, I am delighted that it seems like the House is going to, I do think Mr Hooper
2975 has made a really valuable point, which is we now need to look at the whole of this Bill to get the
best out of the consultation and the best out of the engagement and the best out of the
intellectual and practical analysis of the consequences in the interests of the consumer.
I beg to move.

2980 **The Speaker:** Mr Perkins.

Mr Perkins: Thank you, Mr Speaker, and I thank the various contributors to the debate.

Mr Hooper first, just picking up his point, as I understand it the exemptions would be
transferred across and any new exemptions would follow the same route via secondary
2985 legislation. I do not see any reason why they should not be publicised. I think that is, again, a part
of the regulation that will be put forward.

Picking up Mr Thomas's point, my thunder was stolen by the Minister. We do support the
amendment that you have put through, and with that I beg to move.

2990 **The Speaker:** Thank you.

Hon. Members, putting first amendment number 3 in the name of Mr Thomas. Those in favour,
please say aye; against, no. The ayes have it. The ayes have it.

Clause 8 as amended: those in favour, please say aye; against, no. The ayes have it. The ayes
have it.

2995 Clause 9, Mr Perkins.

Mr Perkins: Thank you, Mr Speaker.

Clause 9 empowers the Office of Fair Trading to undertake an investigation if there are
reasonable grounds to suspect a person has been engaging or intends to engage in anti-
3000 competitive practice or if the market is not functioning in the interests of consumers or the
economy. 'Or intends to engage' means that the OFT may undertake an investigation on a pre-
emptive basis if there are reasonable grounds for it to do so and it may take measures to prevent
an anti-competitive practice from occurring.

3005 Without this ability, the OFT would only be empowered to investigate anti-competitive
practice after the fact, with irreversible damage possibly being already done to the Island's
economy. For example, an anti-competitive practice once undertaken may force other businesses

to close. It would not be within the OFT's powers to restore that business or businesses and the associated jobs and livelihoods, and consequently restore the market to the position that is in the best interests of the Island's communities or the economy as a whole.

3010 Now, this provision also provides the OFT to act on information provided by a whistleblower informing on an intention to engage in anti-competitive practice, for example, a cartel. The OFT may also decide to act when consumers contact the Office of Fair Trading to raise an issue but do not actually want to put in a formal complaint, as they often do not want to rock the boat. This clause allows the OFT of its own volition to investigate any market where it has reasonable
3015 grounds to believe that the market is not working effectively.

Finally, this clause also provides the ability for the Council of Ministers to request that the OFT undertake an investigation. Whether or not the OFT then undertake such an investigation would be determined by the OFT in the same manner as any other request. Now, let me be absolutely perfectly clear about this: a preliminary examination of any complaint or information that may
3020 result in an investigation is undertaken to assess the merits of that complaint or investigation, and if that examination identifies there are reasonable grounds to proceed with an investigation, then the OFT will instruct its officers to do so. Once the Office of Fair Trading has determined to undertake an investigation, it may be undertaken exclusively by the OFT, exclusively by a third party engaged by the OFT, or jointly with the OFT and that third party.

3025 This provision enables the OFT to obtain support and specialist advice for the undertaking of investigations. Given the potential sensitivity arising from the undertaking of such investigations, and to ensure they are fully conducted fairly and effectively, the clause requires the Office of Fair Trading to make rules of procedure in respect of carrying out an investigation. If at any point during the course of this investigation the person being investigated offers an undertaking to
3030 desist from that practice in future, the OFT may accept that undertaking and halt the investigation. Upon the conclusion of an investigation, the OFT may undertake a variety of actions. The OFT may, where evidence reveals an offence may have been committed, refer the matter to the Police or appropriate enforcing authority further to clause 12.

The OFT may also seek undertakings further to clause 13 or make an order to ensure the market functions in the interests of the consumers or the economy, further to clause 14. Alternatively, if the outcome of the investigation indicates that an anti-competitive practice has been or is likely to have been engaged in and forbearing to engage in that practice would provide a worse outcome for consumers and the economy of the Island, the OFT may submit a recommendation to the Council of Ministers that an exemption be granted further to clause 8 of
3040 the Bill. Over the course of an investigation, the OFT may engage the use of a third party if necessary to do so.

Mr Speaker, I beg that clause 9 stand part of the Bill.

The Speaker: Mr Boot.

3045 **Mr Boot:** Mr Speaker, I rise to second and support the Chairman of the OFT in moving this clause.

This clause provides the basis for the OFT commencing and undertaking investigations into anti-competitive practices in the future on its own 'violation' or further to the request of the Council of Ministers. It also enables the OFT to engage third parties or be supported by third parties in undertaking such investigation. This is an important provision to ensure that resources are only applied when required and that specialists can be engaged if necessary.
3050

I consider it to be an improvement on the existing provisions in the Fair Trading Act 1996 and for these reasons I would urge Hon. Members to support the clause.

3055 Thank you.

The Speaker: Mr Shimmins to move amendments number 4 and 5.

Mr Shimmins: Thank you, Mr Speaker.

3060 I suggest that I cover both amendments and then we vote on them separately, if that is in order? **(The Speaker:** Yes.) Thank you.

The first amendment, number 4 on the Order Paper removes the words 'or intends to engage' so 9(1)(a) would now read:

OFT may investigate any matter where it has reasonable grounds to suspect that a person –

(a) has been engaging in an anti-competitive practice;

Quite a wide power, particularly when it is of its own volition – or 'violation', which I do prefer.

3065 It is difficult to see why an investigation, with all the significance, because an investigation is an investigation that this entails. The detrimental impact that this would have on the accused in any investigation and the considerable work involved would be launched all on the basis of an intention to engage, not to actually engage in anti-competitive behaviour. And Hon. Members, from time to time you may intend to commit transgressions. *(Laughter)*

3070

Mr Hooper: Speak for yourself!

Mr Shimmins: They may range from minor matters to major matters. You might muse, 'If only I could do this.' *(Laughter)* You know it is against the law and generally common sense applies, and you do not actually transgress, you do not actually break the law. But the critical point, Hon. 3075 Members, it is not illegal for you to harbour these intentions. *(Laughter)* You do not have to commit – you do not commit an offence until you actually break the law, clearly.

3075

So the question I have for the Chairman of the Office of Fair Trading is how would you prove this intention in practice? How would you prove that someone is intending to do something? How 3080 would this actually hold up in court? I am very interested in that response. And I have asked previously, but I have not yet received a satisfactory response, so I am looking forward to a response.

3080

Hon. Members, George Orwell wrote a book called *1984*. I would just like to quote from it. It says:

The Thought Police would get him just the same. He had committed – would still have committed, even if he had never set pen to paper – the essential crime that contained all others in itself. Thoughtcrime, they called it.

3085

Hon. Members, it is best that we do not move into the dystopian realms of thoughtcrime here on the Isle of Man. **(A Member:** Hear, hear.) Reasonable grounds to suspect is already a wide power. So I hope, Hon. Members, that you will agree with me and support the amendment to remove the provision of intent from the Bill.

The second amendment, number 5 on the Order Paper, is relatively straightforward. It changes 3090 the Tynwald procedure for the Office of Fair Trading making the regulations for these investigations to approval, rather than laying only. And investigations can be devastating if not carried out in a professional prescribed manner. We heard earlier from the Chairman that these investigations can be carried out at the OFT's own volition and they can be carried out exclusively by them so as such approval feels to be the appropriate procedure.

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3095

Mr Speaker, I beg to move the amendments standing in my name:

Amendments to clause 9:

4. Page 14, line 1, omit ' , or intends to engage'.

5. Page 14, line 18, for the existing text substitute «Tynwald procedure – approval required.».

The Speaker: Thank you, Mr Thomas.

3100

Mr Thomas: Thank you very much, Mr Speaker.

I am very pleased to second both these amendments, persuaded by the logic and the oratory of the mover and also in my own case by another discussion with a lawyer who is eminent in this area who made the case to me that 'You do not need to investigate this, just trust me: the including of intention in this law, is not the same as in Jersey and Guernsey and the United Kingdom, it has gone way beyond that.' I know the mover wants to make sure that the Island has a modern competition framework, protecting consumers, markets and businesses, enabling the Island to achieve equivalence with UK and EU standards, so I was persuaded without doing my own investigation that if I was told by such an authoritative source that this was going way beyond normal practice elsewhere, we ought to take it out of the legislation, although I know the intention of including it was a good one.

Basically the Office of Fair Trading is being upgraded and is being empowered a great deal more, quite rightly, through this legislation, so it is an important piece of legislation, it is difficult to get it right, and it is important that we all work together through the next place as well if necessary, to make sure that we actually have the perfect legislation because this matters. This is about large sums of money and real people and it matters.

It seems to me the amendment number 5 in terms of the Tynwald procedure of positive approval rather than negative approval through laying before is an eminently sensible one as well and I commend that amendment to this House.

A Member: Hear, hear.

The Speaker: Hon. Member for Onchan, Ms Edge.

Ms Edge: Thank you, Mr Speaker.

I was going to just ask a few questions, but the Hon. Member for Middle's amendment has clarified that, but I do feel it should come to Tynwald because although we have hon. colleagues in OFT, the oversight of OFT is with DEFA, and I do have concerns about an appeals process. If somebody was in disagreement with the OFT and the Council of Ministers' decision process, what appeal process would there be for a company or an individual to go against what the Council of Ministers or the OFT have said, other than going straight to the court?

So I just wonder if the Member can clarify, did you consider an appeals process of some sort? However, I am happy that with the amendment that anything would come to Tynwald, if this is successful to go through this amendment.

Thank you, Mr Speaker.

The Speaker: Dr Allinson.

Dr Allinson: Thank you, Mr Speaker.

I would like to thank the Hon. Member for Middle for bringing these two amendments. I think his amendment in terms of the Tynwald procedure is eminently sensible.

I do have problems with his previous amendment, though, in terms of removing the intention, and I can see his concerns. Whilst I do not want to know the number of crimes he wants to commit this afternoon (*Laughter*) and if he should want to have a confession we could do that later, I think he is taking this a little bit too far. With the Orwellian reference, that was very much about the private realm and the Thought Police involved with this. What we are dealing with here is anti-competitive practice and the ability for the OFT to intervene, as the mover has said, if there is whistleblowing or if it comes to their attention that there is an intention to commit an anti-competitive practice.

I suppose one of the best examples of that from across would be one petrol station chain buying out another with the sole intention to close that chain down and convert them all into flats and therefore have an advantage. If the OFT cannot intervene before the act is done, the act is done, the damage is done, the anti-competitive practice is done. There is no going back. With a

lot of anti-competitive practices it is a matter of buying out a competitor to put them out of business one way or another, and once that is done you cannot reverse it.

3155 So I think the intention there, based on evidence that has been presented to them, is still quite important to preserve, to stop that damage happening in the first place.

Thank you, Mr Speaker.

The Speaker: Mr Hooper.

3160

Mr Hooper: Thank you very much, Mr Speaker.

I am more than happy to support amendment number 5. It is Mr Shimmins' rather interesting interpretation of the language around intention that I thought I would just speak on very briefly. It still surprises me that after nearly five years in this Hon. House there are Members who do not quite grasp legislative language.

3165

I would like to take Members back to what is undoubtedly my favourite piece of Manx legislation, the 1872 Criminal Code. It has a number of references in it to committing offences and actually the intention behind it. So the difference in the Code between murder and manslaughter, for example – murder is described as:

Whosoever shall unlawfully and feloniously kill another, with malice aforethought,

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– with the *intention* of it happening. Manslaughter is the opposite, it is where you unlawfully kill somebody without malice, without intent.

My favourite element, though, of the Criminal Code has to be the provisions around challenging people to fight a duel, which specifically makes reference to challenging someone to a duel is a criminal offence, but actually the language in the Act is very clear:

Whosoever ... who shall send or deliver any written or verbal message purporting or intending to be such challenge ...

3175

That has been on the Manx statute books for 150 years and I am pretty sure that it would still be effective in today's courts. So this idea of intention not being well understood in legal terms is quite thin.

The only other thing I would suggest to Hon. Members is intention is very much like conspiracy, in my mind. I am sure Mr Shimmins would very much like the Police to arrest me *before* I kill him, when that is my intent, as opposed to waiting for me to commit the act and then picking me up afterwards. (*Laughter*)

3180

So Hon. Members, support amendment number 5. Amendment number 4 I think has fundamental issues. (*Interjection by Mr Quine and laughter*)

3185

The Speaker: Mr Perkins to speak to the amendments.

Mr Perkins: The amendments, yes please, thank you very much, Mr Speaker.

I take on board Mr Thomas's comments and Mr Shimmins' comments and I particularly enjoyed Mr Hooper's Criminal Code investigation, I think it is spot on quite frankly. I can picture Mr Shimmins in his house at night and a chap with a swag-bag going in the car, and the Police stopping this chap going with the intention of breaking into Mr Shimmins' house. I am sure he would be glad that the policemen turned him round and warned the burglar that it is just not on. (*Laughter*)

3190

This is not the chap in the pub saying, 'So-and-so is going to take over that – what do you think about that?' It is not that at all. This is about whistleblowing – people with inside information that make serious allegations. It is not just a whim. As the Hon. Member said, the fact after the event, you cannot piece it all back together again and restore the jobs and everything that has been damaged –

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3200 **Mr Thomas:** Will the Member give way?

Mr Perkins: Yes, of course.

3205 **Mr Thomas:** It is just a very brief point. I am just reading from the Jersey Law at the moment, and in the Jersey Law –

Mr Perkins: Will you just give way a minute? I thought you said that Jersey did not apply, from your...

3210 **Mr Thomas:** I just want to read exactly Jersey say, so in Jersey it says ‘intends to breach’ a specific article and intends to breach a specific ... It is slightly different, so perhaps the Chair could leave on record that he believes them to be the same and then we can consider ... Because I was advised quite clearly that it was different in Jersey from the Isle of Man because the Law is clearly written differently and probably Mr Shimmins was going to summarise those points.

3215 **The Speaker:** Mr Perkins.

Mr Perkins: Thank you, and I thank the Hon. Member for that correction.

3220 Yes, where was I? It is not at a whim of the OFT. This is a serious investigation and you cannot put the pieces back together again once it has happened. We are not going to be running around like headless chickens investigating any comment that may happen about a forthcoming investigation; we would need proper evidence before we investigate it, but it is better to nip it in the bud.

Thank you, Mr Speaker.

3225 **The Speaker:** Now, I call on Mr Shimmins to reply to the debate on the amendments.

Mr Shimmins: Thank you very much, Mr Speaker, and thank you very much to everyone who has responded, a high level of engagement, so that was great.

3230 I would just like to pick up on a few comments that were made. First of all, Mr Thomas made the very important point that the wording in this clause differs from the UK, Jersey and Guernsey. I would just like to take you back to discussions that we had right at the outset of clauses from the Chairman of the Office of Fair Trading, which I then amplified, which was, ‘We have been requested to bring forward this Bill to ensure that our legislation is brought up to date to be similar and match the UK and the Channel Islands.’ That is the commitment we have given. We have gone
3235 further than that commitment. This is just one of a number of situations whereby, unfortunately, the wording that is in the clause, and that is the important thing that we are being asked to opine on today –

3240 **Mr Hooper:** Would the Hon. Member just give way briefly? He has just said that the Bill in front of us is different to the UK. That is not strictly the case, and if he could just outline why that would be beneficial, I think.

Mr Shimmins: I do not think I said I would give way but I am happy to answer that.

3245 If you look at the wording, the wording is different. I think we have already heard the wording is different in Jersey and it is clear.

I will move on to Mr Hooper and his contribution, which I enjoyed very much. It was helpful, I think, because the distinction in the ancient Manx statute between murder and manslaughter, there is clearly an offence taken place there already, that is the whole point. Even in terms of the
3250 duel, if the letter which has been delivered, so something has happened, the letter has been

delivered – is that intended to result in a duel is the key point, I would suggest. So I am grateful for my hon. friend for bringing those up.

3255 The difference between intention and conspiracy is quite important. Conspiracy is much more complicated than intention. The wording in this Bill is ‘intention’. That is not satisfactory I would suggest to Hon. Members. A conspiracy is much more involved and, yes, a whistleblower may well report a conspiracy, but we need to be very wary about these investigations, which could be launched on the basis of one phone call, perhaps from a disaffected party who has seen a couple of competitors perhaps having a conversation, they have put two and two together, they get more than four and before you know it we have got an investigation.

3260 So the crux in this really is why are we differing from elsewhere who have better wording to cover this than what has been proposed. Because the wording is flawed that is why I have moved the amendment to withdraw.

3265 I am also grateful for Ms Edge and Dr Allinson’s contributions. I do not intend to address all the points. I think I have covered the key point, and I would urge Hon. Members to support the amendment to get the wording right in this important matter.

Thank you.

The Speaker: Mr Perkins to reply to the debate on the clause.

3270 **Mr Perkins:** Thank you, Mr Speaker.

In summing up, I do appreciate all the aspects that have been put into it. First of all, I would say that we agree with Mr Shimmins’ second amendment. I think that is a reasonable amendment to go with. But I would urge Hon. Members to look at the second amendment, and we have had discussion over intention, conspiracy and all the rest of it. The OFT would not undertake any of these allegations lightly, but they do need to be investigated if there is wrongdoing that is going to happen. In fact the Trading Act at the moment actually allows us to do that anyway, so we are not changing anything there, merely putting it into the new Bill to make sure we are covered.

3275 Ms Edge, just coming back to your comments, the appeal would actually go through to the High Bailiff if they were not happy with the outcome of an investigation, so there is an appeal mechanism there. Again, that could be changed with secondary legislation but that is the line that we are thinking of at the moment.

3280 Hon. Members, we have been through all the arguments and I think it all hinges on we do need this legislation. I thank for the input from everybody and with that I beg to move.

3285 **The Speaker:** Thank you very much.

Now, obviously there are two separate amendments to this, both in the name of Mr Shimmins. I will put to you first amendment number 4, where it says to omit the words ‘or intends to engage’. Putting that amendment first, those in favour, please say aye; against, no.

A division was called for and electronic voting resulted as follows:

FOR

Mrs Barber
Mrs Christian
Ms Edge
Mr Peake
Mr Quine
Mr Robertshaw
Mr Shimmins
Mr Thomas

AGAINST

Mr Ashford
Dr Allinson
Mr Baker
Mr Boot
Mr Callister
Mr Cannan
Mrs Corlett
Mr Cregeen
Mr Harmer
Mr Hooper
Mr Moorhouse
Mr Perkins

Mr Quayle
Mr Skelly
Mr Speaker

The Speaker: With 8 for, 15 against, the noes have it the noes have it.

3290 Turning then to amendment 5, which changes the Tynwald procedure to approval required, those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Putting clause 9 as amended, those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 10, Mr Perkins.

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Mr Perkins: Thank you, Mr Speaker.

Clause 10 empowers the OFT to issue a notice that requires a body corporate or an individual to provide evidence or documents for the purposes of an investigation over any time period necessary and be interviewed to answer questions.

3300 During the investigation, if the OFT was granted a warrant by a magistrate, the officers may enter any premises, both business and domestic, and seize any documents or material found on the premises, including any data stored electronically. An individual would commit an offence, punishable on conviction with a fine, if they refuse to co-operate in the investigation by not supplying the requested information or providing misleading information. The destroying,

3305 concealing or removing of any documents in relation to an investigation would also constitute an offence. However, nothing in this section would compel a person to supply any information that the person would be entitled to refuse to produce or give in civil proceedings before the High Court.

Alternatively, or in addition to these offences, a person in default of complying with a notice issued by the OFT under this clause may be compelled by the High Court upon application by the Attorney General to comply with a notice making good that default at their own cost. The failure to comply with such an order would also be, upon conviction, punishable with a fine.

3310 Mr Speaker, this clause ensures the OFT have the necessary powers to obtain information to support the undertaking of investigations into anti-competitive practices.

3315 I beg to move that clause 10 stand part of the Bill.

The Speaker: Thank you.

Mr Boot.

3320 **Mr Boot:** I beg to second and reserve my remarks.

The Speaker: Mr Hooper.

Mr Hooper: Thank you very much, Mr Speaker.

3325 It is only two very quick questions I think, for the Member moving this clause. Firstly, I think it is worth drawing Members' attention to this clause and actually the way that it is set out in terms of the OFT may send an official notice, they then need to go to a Justice of the Peace for a warrant to enter. There is no automatic right to enter premises. There is no automatic right to seize documents. All of this needs to be done underneath a warrant that has been duly authorised by a Justice of the Peace. This is in *stark* contrast to what the Department proposed under the Climate Change Bill with its regulations, which actually provided all of these powers as a matter of course.

3330 So really, I would just like to draw Members' and the Department's attention to what a sensibly structured set of enforcement provisions and powers might look like. I do query why they did not take this approach under the Climate Bill as well, seeing as the powers they are looking for are very similar.

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The question I have got for the mover, though, is there might be some circumstances in which sending a notice would actually give warning, tipping off essentially a perpetrator, especially if they are in the process of committing an offence. So what measures or what provisions are there to allow for action to be taken where, actually, serving such a notice would tip off the perpetrator?

3340 What provisions are there to make sure that that does not happen and to make sure that actually the Department can act as and when necessary, if tipping off would be a problem?

Thank you.

The Speaker: Mover to reply.

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Mr Perkins: Thank you, Mr Speaker.

I think the reason it was differently drafted in the Climate Change Bill is that we had different drafters and that is the basic reason why it was different. *(Laughter)*

The intention that you are ... An immediate reaction to an allegation it is proposed it will be put in, probably in secondary legislation to make sure that we can act with haste.

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With that, I beg to move clause 10.

The Speaker: Thank you.

I put the motion that clause 10 stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

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Clause 11, Mr Perkins.

Mr Perkins: Thank you, Mr Speaker.

Clause 11: with Part 2 of the Fair Trading Act 1996 applying across the whole economy, there are a number of important sectors where it has been desirable to create sector-specific regulations. These currently include the Financial Services Authority, the Isle of Man Communications and Utilities Regulatory Authority, and the Gambling Supervision Commission. Clause 11 allows for a joint investigation with such sector-specific regulators.

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Equally, there have been times when a cross-jurisdiction complaint has resulted in difficulties regarding how best to investigate. In order to ensure that there are no enforcement gaps, clause 11 also allows for joint investigations with regulators and competition authorities in other jurisdictions, such as the Competition and Markets Authority in the UK and the Competition Regulatory Authority in Jersey, or the Competition and Regulatory Authority in Guernsey.

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Mr Speaker, I beg to move that clause 11 stand part of the Bill.

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The Speaker: Thank you.

Mr Boot.

Mr Boot: I beg to second and reserve my remarks.

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The Speaker: Mr Thomas.

Mr Thomas: Thank you, Mr Speaker.

Fully supportive of this clause, except I want to raise four points to do with its operation, which perhaps needs to be thought about a little bit more.

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The first one is we have used in legislation the sort of Manx word, which is 'jurisdiction' and I want to make sure that that is understood. That it is quite a Manx usage of the word because, for instance, the Competition and Markets Authority is actually a *UK* body, and you might get into some big difficulties if you start talking about the jurisdiction of the UK being the whole of the UK because the British-Irish Council, for instance, has got a lot of years of the politics of all of this and they use 'territories' and 'executives', and they are much more sensitive.

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3390 So I was quite surprised – and this is something I raised at the Second Reading – to see the use of the word jurisdiction in the long title and it is referenced here further. So that is the first thing that I hope that people can think about, because there are cross-jurisdictional regulators in places that regard themselves as having several jurisdictions as part of them.

3395 The second point is that when we come to talking with foreign regulators in drawing up a memorandum of understanding, some of the practical issues that have been raised by Mr Shimmins, Mr Hooper and myself to date could become very relevant. So for instance, if we do have a different definition of ‘intention’ slightly and we are now concerned about tipping off, it could be that nobody wants to talk to the Isle of Man because we accidentally tip off during very serious investigations because of our different definition of ‘intention’ and that might not have been the purpose for which all of this was intended. Likewise with the powers that we exercise in the Island relative to other places. We need to be very careful to make sure we have got the *right* drafter drafting the regulations, rather than the *wrong* drafter who drafted the climate change legislation.

3400 Then the fourth point is that in this legislation, as I have pointed out previously, we use the phrase ‘dominant position’ and in some of the other legislation that covers this sort of thing on a cross-sectional basis, for instance, the Communications Act, we talk about ‘significant market presence’ which apparently means pretty much the same thing as ‘dominant position’ and it is all to do with whether or not you are more UK or EU in your focus. But this sort of thing about clarifying when we use dominant position and how it compares when other people use significant market presence, we do need to clarify that when we come to draw up a memorandum of understanding with people who operate in different worlds, other than the nation or the country or the Island of the Isle of Man, who operate in different nations, countries, territories, and things that actually have legal presence more than the vague term ‘jurisdiction’, which I understand to mean whatever it means in terms of the particular Act in question.

Thank you.

The Speaker: Mr Hooper.

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Mr Hooper: Thank you very much, Mr Speaker.

Just a definitional question really, I suppose, for the hon. mover. The clause is very strangely worded. It says the:

OFT may conduct joint investigations with –
[...]
pursuant to a memorandum of understanding between it and OFT ...

3420 I am a little bit unclear, actually, who is the ‘it’ in this context. Is the OFT engaging with itself? But really the question I have got for the hon. mover is the phrase ‘competition authority’ is not really defined anywhere in the Bill, and neither is the phrase ‘regulatory powers’. My interpretation of that would be any body which has the powers to make regulations. That covers a very wide range of entities. In fact, practically any entity, I would have thought, on the Isle of Man in terms of the public sector, lots of government authorities and semi-government authorities in the UK. So again, I would just like to get some clarity on what is meant by the phrase ‘an authority which has regulatory powers’. How is that being defined? What does that look like? I cannot see it referenced in the Bill.

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The Speaker: I call on the mover to reply.

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Mr Perkins: Thank you, Mr Speaker.

Picking up the point of Mr Thomas’s comment, jurisdiction, in this context, means legally defined territory such as, for example, England and Wales. It does not mean different sectors

3435 within the economy. So the wording should be kept the same in order to allow for joint investigation with other regulators or competition authorities in different countries.

Turning to Mr Hooper's comment, I thank him for spotting that drafting error and we will certainly be amending that at a later stage. I am sure discussion will be taking place before the next sitting of the House. The OFT is aware of a wide range of bodies with various functions. We would only engage as appropriate and to support our own particular regulatory function. Again, we will be happy to look at this further along the line.

With that, Mr Speaker, I beg to move that clause 11 is part of the Bill.
Thank you.

The Speaker: I put the question that clause 11 stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 12, Mr Perkins.

Mr Perkins: Thank you, Mr Speaker.

3450 Clause 12: whilst a competition investigation is not a criminal investigation, it is feasible that what commences as a competition investigation may reveal evidence of criminality. It is therefore clause 12 enabling the OFT to temporarily or completely suspend an investigation and hand over evidence to the Police or other appropriate enforcing authority. The OFT investigation may then resume once the OFT has received written notification that the enforcing authority's investigation is complete.

3455 Mr Speaker, I beg to move that clause 12 stand part of the Bill.

The Speaker: Thank you.
Mr Boot.

3460 **Mr Boot:** I beg to second and reserve my remarks. Thank you.

The Speaker: I put the question that clause 12 stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 13, Mr Perkins.

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Mr Perkins: Thank you, Mr Speaker.

3470 Clause 13 enables the Office of Fair Trading to accept an undertaking from a person that will result in removing the anti-competitive effect of an economic activity. The purpose of such an undertaking is to ensure that after the entity modifies its behaviour, the market will be functioning in the interests of the consumer and the economy. Before an undertaking is accepted, a public notice must be issued setting out the basis for this undertaking; the course of conduct or market failure that led to the undertaking; and, indeed, the intended remedy. Such a notice may also provide a deadline by which any representations concerning the undertaking must be submitted to the OFT. The OFT is required to review any representation made to it and publish a modified version of the undertaking as a consequence. Once published, the undertaking must be kept under review by the OFT and if the OFT considers the undertaking is no longer appropriate by reason of any change of circumstances the OFT may release a person from that undertaking. Alternatively, the OFT may determine that an undertaking needs to be varied or superseded by a new undertaking. Before taking either action, the OFT must give a written notice to the effect to the person subject to that undertaking, as well as publicising the notice.

3480 Mr Speaker, the undertaking process set out in this clause provides a transparent mechanism whereby remedies can be applied and monitored via undertakings to correct anti-competitive practice and failing markets.

Mr Speaker, I beg to move that clause 13 stand part of the Bill.

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The Speaker: Mr Boot.

Mr Boot: I beg to second and reserve my remarks.
Thank you.

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The Speaker: I put the question that clause 13 stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.
Clauses 14 to 17, Mr Perkins.

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Mr Perkins: Thank you, Mr Speaker.

If an investigation concludes the market is not functioning in the interest of the consumers or the economy, then further to clause 14 of the Bill, the OFT will have powers to make an order which may set out a scheme to remedy the adverse effects explained in the investigation report. Such order cannot be made if the OFT is considering the offer of an undertaking further to clause 13 and any order that is made by the OFT could not come into effect until after it was approved by Tynwald.

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Clause 15 provides clarification on how an order may be made further to clause 14, may be applied in relation to the conduct of a person outside the Island. For such an order to apply outside of the Island, the person subject to the order must be either some form of British citizen or British national overseas, a body corporate incorporated under the law of the Isle of Man, or a person carrying on business on the Island, either alone or in partnership with one or more other persons.

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Clause 16 explains how an order under clause 14 is made. The OFT must publish a written notice providing exact details contained within the order while taking into account the interest of the individuals affected and the representation made further to the published notice.

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Clause 17 specifies that anyone who refuses to co-operate with the order under clause 14 is committing an offence punishable on conviction on information to a fine. This clause also enables the Attorney General to make an application to the High Court as a consequence of a person defaulting in any direction set out in such an order.

Together, these duties provide a mechanism, subject to Tynwald approval, for the OFT to issue orders for the purposes of ensuring market functions in the interest of consumers or the economy.

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Mr Speaker, I beg to move that clauses 14 to 17 stand part of the Bill.

The Speaker: Mr Boot.

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Mr Boot: I beg to second and reserve my remarks.

The Speaker: I put the question that clauses 14 to 17 inclusive stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clauses 18 to 21, Mr Perkins.

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Mr Perkins: Thank you, Mr Speaker.

Part 5 of the Bill sets out the sanctions that may be imposed following an investigation by the OFT. Clause 18 to 21: under Part 2 of the Fair Trading Act, while the OFT can investigate alleged anti-competitive practice and steps can be taken to stop them, that Act makes no provision for the penalty of the perpetrator of anti-competitive practices. This is clearly a deficiency in the current legislation. In addition, anyone who has suffered loss as a result of anti-competitive practice can take out civil action for damages against the perpetrator, but this is generally very difficult and can be costly taking someone to court.

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Clause 18 of the Competition Bill therefore specifies that once an investigation has been completed and, on the balance of probabilities, the OFT conducts a study that has engaged in an anti-competitive practice, the OFT would have a range of disciplinary measures and penalties at its disposal. These would include powers to issue a public censure; impose financial penalties that

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3540 may be substantial, having been calculated with respect to a percentage of worldwide turnover; order restitution; provide a recommendation to the Financial Supervision Commission that they may consider disqualification of directors in order to protect consumers and the economy. If any person believes that the penalty is unduly harsh, they can make an appeal to the High Bailiff. Under clause 19, the OFT may apply to the courts, with the consent of the Attorney General, for an injunction to prevent the undertaking of anti-competitive practices if the OFT is reasonably satisfied there are grounds that a person may be engaging in anti-competitive practice.

3545 Clause 19 permits the OFT to make regulations setting out a methodology of fixing penalties and restitution, taking into account whistleblowers and those co-operating with the investigation. Most jurisdictions offer a whistleblower some form of exemption from, or a reduction in, the level of penalty for providing evidence to a competition authority of an anti-competitive practice. This approach provides for a considerable incentive to a cartel member to break away and report their activities to the competition authority.

3550 While whistleblowing is most relevant in relation to cartels, it is also relevant to forms of other market abuse. This clause allows the OFT to take into account whistleblower co-operation and thus a commuted penalty. These regulations will be submitted under the negative Tynwald procedure. However, the OFT would not be concerned if this were to be changed to an approval procedure. In the event a company has been found guilty of engaging in anti-competitive practices, clause 21 provides further detail as to how the OFT officers would pursue the matter of potentially disqualifying directors in order to protect consumers and the economy in the future from any further action. The OFT would submit a report to the Financial Services Authority who may then take steps to have the individual disqualified as a director or other further officer to a company and refer to the Company Officers (Disqualification) Act 2009.

3560 Mr Speaker, clauses 18 to 21 enable the OFT to impose, for the first time, a wide range of sanctions against persons who have been found to be undertaking anti-competitive practices.

Mr Speaker, I beg to move that clauses 18 to 21 stand part of the Bill.

3565 **The Speaker:** Mr Boot.

Mr Boot: I beg to second and reserve my remarks.

The Speaker: Mr Hooper.

3570 **Mr Hooper:** Thank you very much, Mr Speaker.

3575 Just a couple of questions for the mover on this section. So the disciplinary measures in clause 18 talk about restitution, talk about imposing financial penalties. There does not appear to be a cap, or a limit, or any framework around this, simply that the OFT may make regulations which set out a methodology. I wonder if he could advise what the limits are in this context, what the OFT's thinking is. Equally, the clause surrounding regulations is only enabling. It says they may make regulation. So there is no obligation on the OFT to make regulations before they start handing out penalties. So again, I would just like a commitment from the Chairman of the OFT that actually they will be bringing regulations forward in this respect before they start handing out penalties under this Act.

3580 The second question is around restitution. Restitution is an interesting concept. I do not recall seeing it elsewhere in Manx law, not in this way, and so it is quite interesting to see that the OFT have decided to bring that in. That is great news. Again, if he could expand on the OFT's thinking as to what that means. Again, there is no framework in the Bill around when restitution may be appropriate, what kind of restitution we are talking about. Is it purely monetary compensation? What is it we are talking about in terms of restitution?

3585 My third question is more of a technical one. He mentioned that it is possible the OFT can make a recommendation to the FSA to disqualify an individual from being a company director, and then he made a very specific reference to the Company Officers (Disqualification) Act. The FSA has

3590 broader powers as well in terms of prohibiting individuals to act in certain key functions under the
Collective Investment Schemes Act, Financial Services Act. So actually, I am just a bit worried that
this may be too limiting, actually. The OFT can say, 'We'd like you to disqualify this individual as a
3595 director', the FSA actually has broader powers, in as well as disqualifying directors, but also
disqualifying individuals from holding certain offices within regulated entities. That is not made
specific reference to here and again I am wondering if that is an oversight or if actually these
powers are intended to be that broad. It is just they make very specific reference to the Company
Officers (Disqualification) Act and not the other financial services Acts that we have.

Thank you.

3600 **The Speaker:** Mr Shimmins.

Mr Shimmins: Thank you very much, Mr Speaker.

I wonder if the Chairman could tell me what the largest fine is that the Office of Fair Trading
has actually ever handed out in the last five years? I would be quite interested to know. And also
3605 what experience it has on restitution.

The reason I ask these questions, I do have some overriding concerns about the expertise that
we have in the Office of Fair Trading and this feels like a *major* step up in terms of their activities.
Given the Manx Gas debacle and the lack of other similar, very complex –

3610 **Mr Perkins:** Would the Member give way, please? Mr Shimmins?

Mr Shimmins: Of course.

Mr Perkins: The Manx Gas debacle was taken out of the hands of the OFT and it was put in the
hands of the Cabinet Office.

3615 Thank you, Mr Speaker.

Mr Shimmins: I think perhaps there was a reason why it was taken out of the Office of Fair
Trading, (*Laughter*) in my view. (**A Member:** Hear, hear.) I am happy for the Member to clarify
that, because it underlines I guess one of my real nagging worry beads about this whole Bill and
3620 what is being proposed to this Hon. House, in that it is all very well having legislation. In my view,
some of this legislation is over the top, it should be consistent with other places. That is the way
that this type of legislation works: you need consistency and the differences are really ... not been
properly explained or why. It feels that we are falling down a number of potential pitfalls. But I
think partially the reason is because the people involved in this do not have the expertise. So I
3625 would also be interested to know from the Chairman who on the team has done this type of work
before? If you remember back to the Second Reading, I also asked what additional resources
would be put towards the OFT, and I was assured that none were required.

Now, I am getting very concerned about this, and I am also concerned because the Office of
Fair Trading reports to the Department of Environment, Food and Agriculture. I do not see the
3630 connection between the Department of Environment, Food and Agriculture and this very complex,
detailed law, which is often cross-jurisdictional in terms of competition and markets and mergers
and acquisitions – we have yet to get onto that; we will get onto that I am sure at some point in
the future. But when I hear these regulations are going to be made, I think, well, okay, but who
by? We do have some other professional regulators here. They have quite a different approach,
3635 in my view. They do not regard the Department in the way that the OFT regards the Department,
as their line managers. There are seen as independent regulators.

So I think it is probably a bit of an unfair question, to be honest, to the Chairman. It is probably
a wider question to the Council of Ministers. Are you convinced that DEFA is the right place for
the OFT? (**Mr Robertshaw:** No!) It is being expanded so much, I am not convinced and I am very

3640 concerned about this. It does not feel that we have got this quite right in a number of areas. But I welcome the Chairman's views at this stage.

Thank you.

The Speaker: Mr Robertshaw.

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Mr Robertshaw: Thank you, Mr Speaker.

3650 What the Hon. Member for Middle said. He absolutely nailed it, along with the Hon. Member for Ramsey. I am going along with this, but I really am concerned that the competencies are not there, and I cannot imagine us dealing with a matter related to a criminal issue without stipulating the outline limits on things. And yet here we go, hey ho, let's just sort of have a vague idea about what the impositions on the organisation would be. It is a real worry. I do not feel this is ready for us yet. We will carry on with it, but it is not good.

Thank you, Mr Speaker.

3655 **The Speaker:** Mr Thomas.

Mr Thomas: Thank you, Mr Speaker.

3660 I am going to go back from both those two positions. I am going to spin it positively and look forward and optimistically, because what I heard from the Minister for Policy and Reform very recently was that the Regulatory Review report, which was finished in December 2019, is actually being *really* finished at the moment and will be debated in April 2021. I am expecting questions of resource, capacity, legislative drafting, political control, corporate control, and all of those things to be on the floor of the place upstairs in April to be really well and truly thrashed out. So that is the positive way of looking at this.

3665 I think it has been accepted that this Bill is part of the passage of the Office of Fair Trading. It is part of its growing up and all those questions are accepted to be open and they will need to be answered. If not, I will feel incredibly let down. I just want to say I remain optimistic about this and I do think that these arguments are for another day and another place upstairs, but it has got to be very soon. We cannot deny that the Council of Ministers spent a lot of time in 2017, 2018, 3670 2019 – not at all in 2020, apparently, but – working on this very issue and we need now to have the fruits of that in the other place.

In terms of the gas regulation, as challenged to comment here, just to bring to the public's attention in case the Legislative Council is not a place that everybody on the Isle of Man is following precisely, the Gas Regulation Bill apparently did complete its passage upstairs today in 3675 advance of a Tynwald debate on gas regulation and the nature of the future of gas regulation next week in the place upstairs. So we are in the position at the moment where the Minister for the Cabinet Office, the Chief Minister, can sign an agreement for gas pricing forever. That is what the law says. The law says the Chief Minister, as Minister for the Cabinet Office, can sign an agreement for the pricing of gas forever, and I really do hope that with this amount of political pressure that will not happen in the next week, because that would be wrong in the light of all the questions that have been raised by Mr Shimmins and by Mr Robertshaw in particular.

3680 We can be in a very good place with regulations soon and the upgrading and the empowerment and the responsibility and the assumption of responsibility with accountability, Office of Fair Trading has to be part of that because we do need a good regulatory and competition authority that is independent of Government and is independent of politicians as soon as possible on this 3685 Island.

Two Members: Hear, hear.

3690 **The Speaker:** Mr Boot.

Mr Boot: Thank you, Mr Speaker.

I cannot help but comment on some of the way the debate has taken a left turn and moved away from the Competition Bill.

3695 During the climate change debate, we had a diversionary tactic and a small semi-debate around collective responsibility. Here we are now, halfway through the Competition Bill, and we are now talking about a regulatory hub and where we should be and where regulation is going. Can I assure Members that the OFT sits in DEFA for administrative purposes. It is an independent board and it operates independently, and it has a resource of expertise. (*Laughter*) So if it sat somewhere else, 3700 would it be any more competent?

And I have to pass comment on Mr Perkins indicated that it was taken from OFT and given to Cabinet Office, the gas regulation, and it sat there, Mr Thomas, in your remit for three and a half years! Thank you. (**Mr Quayle:** Yes. Shame!) Yes.

3705 **The Speaker:** Chief Minister.

Mr Quayle: Thank you.

I would also like to raise a point of order, Mr Speaker. When a backbencher, Mr Thomas, seems to have lost a vote, it is automatically, 'The Council of Ministers have a majority automatically 3710 here.' We have seen that to be absolute rubbish yet again today. We have lost a vote, others voted with us when they felt we were right. I would just like the Hon. Member to withdraw his comments, because it is on *Hansard*, he has accused the Council of Ministers of rigging the vote to make sure that we get everything through today. It is clearly not the situation and trying to imply that I am going to sign a gas regulation when it is well known that I was totally opposed to 3715 the deal from day one, it is just another sort of throwing these comments away, but they are on *Hansard*! They are not true, they are not correct and I just hope he will withdraw some of his mischievous comments.

The Speaker: Mr Perkins, to reply to the debate.

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Mr Perkins: Thank you very much, Mr Speaker. Right. Well ...

Taking Mr Hooper's point first, we will be following similar UK provision and the OFT are planning to make such regulations as a matter of urgency. The whole reason of being, this Bill, is to comply with the UK's requirements so they can negotiate for us.

3725 The restitution provisions would have to be fair, reasonable and proportionate, and based on the outcome of an investigation. The OFT may raise concerns to further actions would be at the Financial Services Authority, the discretion on how they would actually appropriately deal with the person that has been brought to their attention.

3730 Regarding Mr Shimmins on the level of fine, what is the biggest fine, I am afraid I do not have that information to hand. I would not even hazard a guess, to be quite honest, but if he would like that information, I will furnish it with you.

Mr Shimmins: I think everyone would like to know. Is it £100 or £1,000?

3735 **Mr Robertshaw:** Or £1 million?

The Speaker: Right, there are mechanisms if you wish to seek for an intervention. Otherwise, Mr Perkins, you have the floor.

3740 **Mr Perkins:** Thank you, Mr Speaker.

So the OFT is a separate body from the Department and we do not regard the Department as a line manager. The OFT has independent discretion-making powers and understanding its own functions. With regard to expertise, we are entitled to bring in expertise and in fact that is one of

3745 the things we are looking at at the moment, because there are various investigations going on and in this particular case, if there was a large multinational, of course we would have to get expertise. I think the Government as a whole would have to bring in expertise. We have certainly done it with the gas negotiation and there is no reason why the OFT should not do the same thing on any other investigation.

3750 Mr Robertshaw, the voice of reason there, and the single entity. I thank him for his comments and the provisions would be subject to commencement by appointed day order, and provisions would therefore be not commenced until appropriate regulations are in place.

Mr Thomas again, thank you for your point, sir, and we recognise there is need for consideration of your matters and the other matters regarding the regulation would no doubt be considered by this Hon. House going forward.

3755 Yes, I think with that, Mr Speaker, I beg to move.

The Speaker: Thank you.

I put the motion that clauses 18 to 21 inclusive stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

3760 Now, as was indicated by Mr Perkins at the start, that concludes consideration of the Competition Bill for today.