

The logo consists of the word "Matheson" in a white serif font, underlined, set against a solid red rectangular background.

Matheson

**SUBMISSION BY MATHESON TO THE COMPETITION AND CONSUMER PROTECTION  
COMMISSION REGARDING ITS STRATEGY STATEMENT**

**27 FEBRUARY 2015**

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## Introduction

This submission on behalf of Matheson is in response to the Strategy Statement consultation issued by the Competition and Consumer Protection Commission (“**Commission**”).

Matheson is Ireland’s largest law firm, with over 600 people. Our principal office is in Dublin and we also have offices in London, New York and Palo Alto, California. Matheson’s EU, Competition and Regulatory Group comprises specialist lawyers with many years of experience in advising on all aspects of EU and Irish competition law and regulatory matters, including merger control, cartel and dominance cases, public procurement law, State aid rules, competition law audits and compliance, competition litigation and sectoral regulation.

Matheson is the law firm of choice for international companies and financial institutions doing business in and through Ireland. We welcome the opportunity to comment on the Commission’s Strategy Statement and share our insights as part of this important consultation process. We consider that the Strategy Statement presents the Commission with an opportunity to consolidate existing competition and consumer law objectives and outlook in a single document. We regard the practice of ‘strategy setting’ on a three-year cycle as a useful and proactive process which should improve the effective regulation and enforcement of competition law in Ireland. That this process has now been placed on a statutory footing by section 30 of the Competition and Consumer Protection Act 2014 (“**2014 Act**”) is an enlightened development.

Prior to addressing the substantive questions below, we make a number of general comments designed to assist the Commission develop a clear, coherent and effective Strategy Statement which will provide transparency for all stakeholders (ie, the Commission, consumers, businesses in Ireland, and their legal advisors).

## Independence

It is critical to the credibility of the Commission and to the attractiveness of Ireland as a place to do business that the Commission is recognised by all as independent from Government and that its strategy and decisions are made without interference from / influence of Government apart of course, from those instances where the Commission is under a statutory duty to carry out a study or analysis pursuant to section 10(4) of the 2014 Act. While the consultation mentions in passing that the Commission is an ‘*independent advocate*’ (page 10) and there is reference to ‘*impartiality*’ and ‘*independence*’ in the “Mission, Vision and Values” statement, we recommend that this point be given greater prominence. We suggest that the Minister’s powers under section 30(6) (to issue directions or guidelines to the Commission concerning the preparation of its work programme) and 30(7)(c) (to direct the inclusion of matters in the Commission’s Strategy Statement) of the 2014 Act be used sparingly and fully transparently in order to guard the independence and impartiality of the Commission and ensure that this important feature is understood by, and accepted by all.

## Collaboration

The Strategy Statement refers to collaboration to “get the best results”. We suggest that the Commission identify the importance it attaches to alignment between the work of the Commission and

that of other regulators (including sectoral regulators in Ireland and international competition regulators) identifying the fact and nature of the collaboration and explain how this will be reflected in the Commission's work and subsequently make its report on that basis. While the Competition Authority's Annual Reports often referred to activities with other authorities (eg, in Ireland or internationally via the European Commission / European Competition Network ("ECN")) little detail of the work involved was provided and we believe the Strategy Statement should outline how the Commission will proactively engage and collaborate and how the effectiveness of such engagement will be measured to establish its effectiveness.

### **Transparency**

Transparency is a fundamental principle that should underpin the work of the Commission and be mentioned in its Strategy Statement. Firstly, the Commission's activities must be given due prominence and publication in order for it to be effective at encouraging compliance / deterrence of anti-competitive behaviour. For example, we consider that the Commission should publish information on the nature of its enforcement and other activities at regular intervals, with due regard for confidentiality of any parties involved in an investigation. Secondly, we consider that the Commission should have a formal policy on how it will ensure respect for the principles of transparency and procedural fairness vis-à-vis parties involved in an investigation. This policy should be published and should specify standard operating procedures for enforcement cases and merger cases (not notified to it under Part 3 of the Act), such as (i) written notification (to subjects of investigations and other interested parties) when an investigation has been opened, closed or halted in the short-term, (ii) written notification of the precise grounds for an investigation, (iii) written notification of the identities of case teams / decision-makers and the planned order and timing of proceedings, (iv) written updates at certain regular intervals on case status and the agencies' theories of harm, and (v) written notification of any interim or final decision taken as part of an investigation and full reasons for it.

### **Excellence**

While reference to '*expertise, rigour and professionalism*' is made in the "Mission, Vision and Values", again, we suggest this point should receive greater emphasis in the Strategy Statement. By analogy, we note that one of the UK Competition and Markets Authority ("**CMA**") strategic objectives is '*achieving professional excellence*'. We would encourage the Commission to include a similar objective in its Strategy Statement in order to encourage a culture of professional excellence throughout the Commission. We note that the Commission will "objectively" analyse its work to achieve continuous improvement. We would respectfully point out that there is a limit to any entity's ability to be objective about its own work and that the Commission should ask independent third party experts to review aspects of its work that it considers might be improved. We refer to the suggestions of Professor Gorecki at the Public Policy Institute forum in this regard.

### **Outputs**

We consider that the Strategy Statement should specify the 'outputs' which the Commission intends to produce. This is important and explicitly provided for in section 30(7)(a) of the 2014 Act. We consider that the Commission should publish a list of the documents / reports etc. that each of its divisions will aim to prepare at regular intervals. Moreover, a key theme that we think the Commission could improve upon is ensuring that (a) regular, and (b) easily accessible, information is published on the

Commission website on all areas of its activities. Publication of certain activities in the Commission's Annual Report alone does not sufficiently inform interested parties of matters under review, their status etc, or raise awareness of the Commission's work. Further, we recommend that the Commission should both publicly consult upon and publish the 'work programme' that it is required to prepare in advance of each year under section 30(5) of the 2014 Act.

## Targets

The Commission should set itself transparent targets that are publicly available eg, x number of investigations, x number of public appearances / lectures etc. It would be helpful to quantify the impact of the Commission in terms of savings made by consumers in Ireland. For example, the CMA has agreed with UK Treasury that it will deliver direct financial benefits to consumers of at least ten times its relevant costs to the taxpayer (measured over a rolling three-year period).<sup>1</sup> This agreement feeds into the CMA's prioritisation principles in terms of deciding where best to target resources.

We suggest that the Commission could set itself a target in terms of the financial benefits of its activities to the taxpayer, which would be a principle applying across all of its activities. It could include this target in its Strategy Statement and / or its work programme to be submitted to the Minister for Jobs, Enterprise and Innovation under section 30(5) of the 2014 Act.

## Flexibility

The Strategy Statement is forward-looking and therefore must be designed without full knowledge of future market conditions. It must, of course, be ensured that the Strategy Statement will not hinder the Commission from investigating competition concerns or issues in developing sectors that are currently unforeseeable. Therefore, we consider that a degree of flexibility should be incorporated into the Strategy Statement to allow for events or market developments which are outside of the planned scope / remit of the Commission's original strategy.

Our responses below follow the order of the consultation:

### 1 **How should we prioritise sectors of the Irish economy that would benefit most from intervention to increase competition and promote overall economic welfare?**

#### 1.1 **General comments**

In our view, prioritisation principles should not only apply when choosing between different 'sectors' – the same principles should apply when choosing between individual cases / issues to pursue across all divisions / activities of the Commission.

The Strategy Statement should distinguish between competition advocacy in relation to (i) existing market structures; and (ii) in relation to future market structures. In relation to the latter, we recommend that the Strategy Statement refer to the possibility of the Commission

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1. Prioritisation principles for the CMA, April 2014, CMA 16. Available at: <https://www.gov.uk/government/publications/cma-prioritisation-principles>

engaging with Government in order to encourage greater regard to competition law issues at the *early stages* of policy-making, ie, in advance of Heads of Bill if possible so as to be best placed to influence legislative developments and reduce the likelihood of adverse impacts on competition when legislation is introduced. In our view, early intervention in legislative developments is key.

The Commission's decisions to prioritise certain matters should be supported by economic evidence where possible; including in particular data on (i) what economic activities / regular purchases are most important to consumers and businesses in Ireland, and (ii) what approximate level of economic value for Irish consumers could be generated from Commission intervention in a particular matter, with a view to reaching the specific "financial benefit" target suggested in the above introductory section of our submission.

Within the Commission's overall approach to prioritisation, special consideration should be given to certain discrete issues such as (i) the needs of vulnerable groups within Irish society, (ii) the balance that the Commission seeks to achieve between focusing on "business-to-business" and on "business-to-consumer" contexts, (iii) the balance that the Commission seeks to achieve between proactive activities (ie, issues not arising from complaints from the public or Government policy) and reactive activities (ie, issues arising from complaints).

## 1.2 **Advocacy**

In terms of prioritising sectors where the Commission should focus its advocacy resources, we believe that it should focus on industries where it can have the most impact on the daily lives of citizens. An approach that aims to improve the value obtained by consumers in their consumption of daily essential goods and services would be consistent with the joint competition and consumer functions assumed by the Commission, following its establishment in 2014. We believe that the '*basket of goods and services*' used by the Central Statistics Office ("CSO") to calculate the Consumer Price Index ("CPI") would provide a useful starting point and guide the Commission as to the sectors where it can most impact people's lives. The goods and services included in the basket are derived from the Household Budget Survey ("HBS"), which is conducted every five years.<sup>2</sup> The HBS determines the pattern of household expenditure in order to update weightings attached to categories of goods and services used for the CPI. The HBS categorises goods and services into:

- Food;
- Alcoholic drink and tobacco;
- Clothing and footwear;
- Fuel and light;

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2. The most recent HBS was carried out between August 2009 and September 2010. It is available at: <http://www.cso.ie/en/media/csoie/releasespublications/documents/housing/2010/0910first.pdf>

- Housing;
- Household non-durables;
- Household durables;
- Transport; and,
- Miscellaneous goods, services and other expenditure.<sup>3</sup>

The categories of goods and services encompassed in the HBS broadly captures the goods and services that Irish consumers spend their money on. The HBS also illustrates the average weekly expenditure per household on each category. Clearly, there will not be restrictions of competition in every sector where household expenditure is relatively high, but the HBS does provide a useful ‘first-step’ proxy for the Commission in considering sectors where it can have the most impact.

HBS categories with high average household expenditure may warrant a preliminary examination by the Commission to see whether there are any restrictions of competition keeping consumer prices artificially high. If that is the case, the Commission could identify whether it is best placed to initiate an investigation or whether the European Commission or another NCA might be better placed or, where the activity in question is in a regulated sector, eg, energy / telecoms, that another regulator may be better-placed (with Commission providing some direction and keeping progress under review). It should also consider whether advocacy is the appropriate tool in attempting to eliminate barriers to competition in these sectors. For example, legislation may be preventing goods or services in a particular category being delivered to consumers at an optimal cost. In a case like this, where it is not the conduct of any undertaking on the market that is problematic, advocating to government for changes to legislation may be the appropriate competition tool.

When the Commission reaches a conclusion on how it will identify sectors that would benefit most from intervention using its advocacy function, it should publish its methodology in its Strategy Statement. Consumers and businesses would benefit from knowing how the Commission will approach its advocacy mandate over the three year period of the Strategy Statement, both in terms of focusing resources on submissions to the Commission that are likely to have most impact, and in managing expectations as to how the Commission will deal with those submissions. It is inevitably the case that where the Commission indicates that it is considering the functioning of competition in a particular market, undertakings in that market are prompted to review their procedures and may make pro-competitive changes unilaterally as a result.

We believe that the Commission should examine its approach to its advocacy role in terms of the timing of its interventions. While formal submissions and general advice to

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3. Includes expenditure in categories such as medical, childcare, education, pensions, telephone, sports and leisure, betting and lotteries, and holidays.

government addressing competition issues are valuable policy tools, these activities could be complemented by the Commission involving itself in particular sectors at an earlier stage. For example, the Commission could examine the Programme for Government at the outset of the lifetime of each government to identify the policy initiatives where it could make the most impact. The Commission could then make proactive contributions to the legislative process in these areas, by way of early submissions to government and/or public statements. It could also publically indicate any concerns it might have so as to alert undertakings in the sector to initiate their own reviews.

The Commission could also enhance the impact of its advocacy activity by getting closer to the centre of decision making in particular sectors. For example, we note from the Competition Authority's 2014 Annual Report that it had a representative on the Taxi Advisory Committee advising the Minister for Transport on issues that could have a negative impact on competition and consumers. Such early involvement of the Commission on committees advising government on policy making is to be congratulated as it will likely have an enhanced impact on competition, as opposed to a subsequent submission to government or general advice, where policy may have already formed and the potential for influence has reduced. The Commission should continue to attempt to obtain membership of such committees and advise Ministers in sectors where competition matters are likely to be at issue, so as to ensure considered policy-making with an emphasis on enhancement of competition.

### 1.3 **Financial sector**

The 2014 Act (at sections 10(3)(j) and 11(1)) makes specific reference to '*financial services*' as an area where the Commission is obliged to promote the interests of consumers. We recommend that the Strategy Statement should seek to explain how it expects to carry out this role and particular objectives of the Commission in this sector.

We note that the Chairperson of the Commission recently wrote to a Dáil TD (Michael McGrath) to confirm that:

*"a further study would not be useful at the present time as it would not resolve the issues inherent in the [financial] sector. Furthermore, I believe that the Commission's resources would be more appropriately utilised in other areas where our work could achieve meaningful change. I would point out however that the Commission continues to be active in the sector."*<sup>4</sup>

### 1.4 **Publication**

As a more general comment regarding the Commission's advocacy activity, we believe that it would be helpful for the Commission to publicise its activities to a greater degree. The 2014 Annual Report evidences the quantity of wide-ranging advocacy activity undertaken in 2014, from formal submissions to public consultations, to advice to government, and

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4. Letter from Ms Isolde Goggin, Chairperson of the Commission, to Mr Michael McGrath, TD, dated 1 December 2014.

speeches and presentations. Much of the advocacy activity of the Competition Authority was carried out without the knowledge of consumers or businesses. More on-going publicity for the Commission's advocacy activity, as it happens, would ensure more awareness of competition issues on the part of consumers and businesses. Once stakeholders are aware of the competition issues prevailing in certain industry sectors, they are likely to be more empowered to exercise their ability to switch suppliers or question certain practices.

## 2 How should we prioritise our enforcement activities?

We recognise that the Commission, like any organisation, is faced with limited resources. Accordingly, it is entirely sensible that the Commission must proactively select certain issues to focus on and critically evaluate when to engage its resources (including when *not* to act). We understand that this involves fraught and difficult decisions.

However, we consider that prior to engaging in 'enforcement activity',<sup>5</sup> the Commission should first consider whether it is possible to influence behaviour / outcomes following informal contact / direct communication to a sector / business engaging in contested conduct. If this is not possible, a range of criteria should determine whether enforcement is then necessary. While open to flexible interpretation, we consider that the Commission should set out a cascade of criteria which it will use to evaluate whether an intervention is necessary. For example, we set out a suggested cascade below:

### 2.1 Is the contested conduct expected to be a "one-off" or part of an ongoing practice causing concern? Is enforcement action necessary to modify the contested conduct brought to an end?

Where genuine harm has occurred / can reasonably be predicted, the Commission's limited resources should only be used in enforcement action for cases which cannot otherwise be resolved. If resolved without resort to enforcement, the Commission should still publish a 'non-enforcement' action (with due regard to confidentiality) to alert other market participants of its approach.

For example, we consider that the Competition Authority 'Short Case Summaries' are helpful demonstrations of 'non-enforcement' action. In general, these should be given greater prominence on the Commission website and produced more regularly but with the title changed. For example, we do not consider it reasonable to call a Commission document an "Enforcement Decision" where there is no formal finding made by the CCPC – only a preliminary view. Such practice can give rise to unfair and adverse comment about the affected undertakings including by media outlets who do not read the entire report.

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5. Where the Commission refers to 'enforcement activities', we understand that it is referring to occasions where it is exercising its formal civil and criminal powers including (i) investigation powers under sections 36 (non-competition) and section 37 (competition) of the 2014 Act, (ii) power to obtain commitments under section 14 of the Competition Acts 2002 – 2014 ("**Act**"), (iii) power to investigate persons under section 18 of the 2014 Act, and (iii) power to initiate proceedings under Parts 2 and 2A and section 26 of the Act and Part 5 of the Consumer Protection Act 2007.



## 2.2 **Does the conduct have a detrimental impact on consumer welfare?**

This is, perhaps, the single most important consideration that should focus enforcement activity of the Commission.

We consider that it would be to the Commission's advantage to publish a list of priority areas / industries upon which it will focus in its first three years. Economic evidence to demonstrate the consumer welfare impact of contested conduct should be used to assist decision making. We recommend that the Commission should continue to focus on basic inputs that are required for the average family / consumer basket of goods (see above at 1.2).

As part of this consideration, the Commission should additionally consider whether the contested conduct has a detrimental impact on business welfare, particularly SMEs. We consider that it is increasingly important for the Commission to focus on barriers to entry for SMEs. Standard business inputs such as basic professional services, the market for office space, communication systems etc should be kept under active review. For example, the CMA states in its 'Prioritisation Principles' (see footnote 1 above) that where it considers that there will be a benefit to businesses resulting from its intervention, it assumes that the benefits will be passed on to consumers unless there is evidence to the contrary. It would be helpful to know if the Commission has a view on this approach.

## 2.3 **Is the Commission best placed to remedy such conduct?**

Often persons subject to contested conduct may be better placed to remedy their position through the use of negotiation, bargaining, switching and / or private enforcement. In other cases, the Commission should clarify whether a sectoral regulator or, indeed, the European Commission is playing a lead role in competition law enforcement in a particular sector.

We note the CMA specifically asks itself whether it is best placed to act when it proposes to act. While the context is different in Ireland (less private enforcement and fewer regulators with competition powers), it would still be useful for the Commission to ask itself this question before it chooses to proceed (particularly with enforcement action, but also with advocacy).

## 2.4 **Will enforcement activity have a deterrence effect on the wider market?**

Enforcement activity can only have a significant impact on the wider market where the enforcement outcome is clearly communicated to other market participants. At the very least, the Commission must improve the transparency of how enforcement activity is undertaken and when / how it is published. Without such visibility, other market participants may not be motivated to modify or correct anti-competitive behaviour. In our view, basic communications tools such as the Commission website and press / news release section must improve to ensure visibility of its activities. By analogy, we consider the CMA's recent update / press release (February 2015) concerning an on-going investigation in the commercial catering sector in the UK a good example of best-practice

for such publications, including a high-level description of the suspected breach, market sector, case timetable and case officers involved.<sup>6</sup>

While we consider that Commission ‘wins’ do have a strong positive effect on the wider market, Commission ‘losses’ equally create strong negative effects on the wider market. For example, prolonged and indecisive enforcement activity produces legal uncertainty, scepticism and inconsistent market reaction.

## 2.5 **Can the Commission commit sufficient resources to get a result?**

The Commission should seek to intervene when it can ensure that it will have sufficient resources to “follow-through”. If proceedings are instituted in the Irish Courts, the Commission should ensure that adequate resources are available to it, including technical, economic and other IT services etc. Equally, if the Commission carries out an investigation, it should ensure that resources are available to ensure that it can cover its costs and ensure that the rights of the defence are properly vindicated, in particular by reference to the new statutory mechanism for obtaining legally privileged material (section 33 of the 2014 Act). To the extent that these costs are high and the risk of consumer detriment is low, the Commission should articulate what cases ought to be prioritised in such circumstances.

In both scenarios, the Commission should appreciate that its actions often impose a heavy cost / administrative burden on the undertaking involved.

## 2.6 **Can the Commission justify enforcement activity using a cost / benefit analysis?**

Closely linked to the assessment of whether the Commission has sufficient resources to obtain a result, is the question of cost / benefit analysis. It is important for the Commission to quantitatively demonstrate the value of its intervention. This improves the public’s perception of the use of public resources. For example, while the Commission should not shy away from difficult cases, we consider that the Commission should evaluate on a cost / benefit basis the impact of its intervention in dominance cases such as *Ticketmaster*,<sup>7</sup> *RTÉ*,<sup>8</sup> and *An Post*.<sup>9</sup> We consider that one helpful output of such a review would be that the Commission should be in a position to demonstrate the cost / benefit of its enforcement against the default position of forbearing to take any action at all.

Clearly, the above questions should assist rather than hinder the Commission when deciding what areas it needs to focus its limited resources.

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6. <https://www.gov.uk/cma-cases/commercial-catering-sector-investigation-into-anti-competitive-practices>

7. E/06/001

8. E/012/001

9. E/014/001

**3 How should the Commission encourage compliance with competition and consumer law?**

The Commission should encourage businesses to establish a competition compliance structure. As part of its engagement with stakeholders, the Commission should emphasise that it values investments by business in competition and consumer law training, policies and procedures. It would be helpful if the Commission were to state that it would make submissions on sentencing to DPP for use in Court with regard to leniency being shown to companies with a general competition compliance culture where training was put in place.

The consultation notes that “*law enforcement is a costly activity*” and that compliance activities must complement enforcement activities. We believe that compliance and enforcement should be seen as a single work stream rather than as complements. For example, the Commission should seek to use the lessons it has learned from enforcement activities to encourage businesses to comply with competition law. This approach is sensible in particular because it ensures that the costs of any enforcement actions that are not pursued are never “wasted” because the knowledge acquired is transferred to a compliance activity.

At present, stakeholders are unaware of the Commission’s experience-based views on the situations / factors that increase the likelihood of a competition law concern or investigation. This represents an opportunity wasted by the Commission. In particular, we believe that the Commission’s guidance documents and other compliance activities would be significantly more effective in deterring anti-competitive conduct by undertakings in Ireland if they included reflections on real cases, complaints etc.

**4 How should the Commission go about empowering consumers to be in a better position to make the right choices and assert their rights?**

We agree with the Commission’s view that consumer empowerment is important in ensuring that markets work competitively in practice. The pressure on businesses to innovate and compete very often comes more from consumers exercising their informed choice than regulatory action by the authorities.

The Commission could create a price comparison function on its website for consumers to compare prices and products in certain industries where there is evidence of limited consumer switching, or a lack of homogeneity between products and set out how simple switching is and / or perhaps reviewing companies procedures or switching where lack of transparency and inaccurate consumer concerns are a feature. There are examples of private sector initiatives in creating price comparison sites, where the Commission could draw from and improve upon. We note that the CCPC *consumerhelp.ie* webpage has a price comparison section for financial products, but we believe that with adequate publicity, the Commission could create a powerful tool for consumer empowerment in other industries where there is a perceived lack of switching / concern about switching.

The Commission could also commission surveys of particular consumer groups where there is a perceived lack of empowerment, in order to find out what barriers exist to

consumers exercising their choices in particular industries. The results of these surveys could be used to better target consumers with the relevant information enabling them to exercise their options, for example targeted online information on particular websites, or TV advertising at certain times of day or during certain programmes.

In its Prioritisation Principles document, the CMA states that it may favour projects that would benefit disadvantaged consumers that may be less well served by markets, eg, because they are in debt, have less market access or are more expensive to serve. The Commission could aim to empower these types of consumers by creating a similar prioritisation principle.

## 5 **Conclusion**

We view the creation of a three-year Strategy Statement and annual work programme by the Commission to be positive steps in creating certainty around the Commission's priorities in its various statutory functions, and we welcome the opportunity to feed into the Commission's strategy implementation process.

Increased engagement by the Commission with stakeholders should lead to more certainty, both amongst stakeholders as to the Commission's priorities, and within the Commission as to what stakeholders view as the key areas for its intervention. More two-way dialogue and consultation between the Commission, on the one hand, and consumers and industry on the other, is likely to increase mutual trust and confidence.

We trust that the Commission will find our submission helpful in designing a Strategy Statement that works effectively for all stakeholders for the coming three-year cycle.