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Dear Sirs

## **Response to Public Consultation on a Simplified Merger Procedure for the Review of Certain Mergers & Acquisitions**

Matheson welcomes the opportunity to comment on the Competition and Consumer Protection Commission's (the "**CCPC**") Public Consultation on a Simplified Merger Procedure for the Review of Certain Mergers & Acquisitions (the "**Consultation**").

Matheson is responding in the context of its experience of advising clients in relation to the CCPC's merger review process and agrees that the Irish regime is out of step with the majority of EU Member States, and indeed the EU Commission, due to the absence of a simplified procedure and that reform is needed.

Matheson broadly welcomes the CCPC's intention to take steps to reduce the burdens associated with a merger notification for transactions that clearly do not raise competition concerns. Matheson believes that the introduction of a simplified procedure will assist in reducing regulatory disincentives to operations in Ireland by reducing the time and cost involved in obtaining CCPC clearance.

While acknowledging the benefits stemming from the CCPC's proposal to introduce a simplified procedure, Matheson would like to make three specific points in response to the Consultation.

### **1 Criteria for Simplified Procedure**

- 1.1 In response to the CCPC's question at paragraph 2.13 (a) of the Consultation, we consider that the qualification criteria proposed for the simplified procedure are unduly conservative.
- 1.2 At paragraph 2.12 that the CCPC has proposed that parties involved in a merger or acquisition, active in the same product or geographic market (ie where the overlap is

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- Tax Principals: Greg Lockhart, John Kelly, Catherine Galvin. - Head of U.S. Offices: John Ryan - Of Counsel: William Prentice, Chris Quinn, Liam Quirke.

horizontal), must have a combined market share of less than 15% to qualify for the simplified procedure, extending to 25% where they are active only in upstream or downstream markets (ie where the overlap is vertical).

- 1.3 The CCPC recognises in the Consultation that the European Commission applies the simplified procedure for mergers which involve parties that are active in the same product market with a combined market share of 20%, extending to 30% where they are active only in upstream or downstream markets.
- 1.4 In light of the successful application of the simplified procedure by the European Commission over many years, we consider that the CCPC ought to increase the market share thresholds for their simplified procedure to the same level to maximise potential efficiencies.

## 2 Requirement to engage with CCPC prior to submission

- 2.1 At paragraph 2.9 of the Consultation the CCPC has proposed that pre-notification consultations take place between the CCPC and the notifying parties to ensure that a transaction is appropriate for the simplified procedure.
- 2.2 Whilst pre-notification discussions can be useful in cases raising genuine uncertainty as to whether or not the criteria for use of the procedure are satisfied, Matheson considers that it should not be compulsory and that self-assessment by notifying parties should be otherwise encouraged. Otherwise there is likely to be an erosion in the intended efficiency benefits of implementing a simplified procedure if parties are expected to substantiate at the outset through (potentially detailed) discussion with the CCPC that the criteria are met.
- 2.3 Encouraging self-assessment will reduce the burden on both parties and the CCPC, noting that the CCPC remains entitled to request further information from parties should it transpire during the course of its review that the criteria for use of the simplified procedure were not met.

## 3 Time Period for Clearance

- 3.1 The CCPC recognises at paragraph 2.5 of the Consultation that a simplified merger procedure can lead to a more “*efficient*” merger process. Matheson considers that the primary benefits of a simplified procedure are reducing the information requirement on the parties at the outset (ie formalising the current approach to waiving the requirement to complete section 4) and, of equal importance, an expected reduction in the waiting period before the transaction can complete.
- 3.2 In that regard, as highlighted at paragraph 2.7 of the Consultation, simplified notifications are “*not likely to require such extensive analysis [by the CCPC] as those notified under the standard procedure.*”
- 3.3 Matheson would expect that the time period required to issue a clearance determination at the initial review phase, in cases utilising the simplified merger procedure, should be considerably less than the maximum period of 30 working days that the CCPC has to reach an initial view on all cases (including those involving material overlaps).

- 3.4 The European Commission, which deals with added cross-border complexities, has an upper limit of 25 working days for clearance of mergers under Phase 1 (both simplified and standard mergers, provided no remedies are being offered).<sup>1</sup>
- 3.5 Further, the CMA aims to clear 91% of less complex merger cases within 35 working days (ie 5 working days less than the statutory maximum of 40 working days that it has to investigate all mergers at phase 1).<sup>2</sup>
- 3.6 In light of the above, Matheson would encourage the CCPC to commit to issuing clearance determinations for mergers utilising the simplified merger procedure in a shorter time period than the current maximum of 30 working days (ie within 15 - 20 days).
- 4 Transparency**
- 4.1 Matheson believes that this Consultation offers the CCPC an opportunity to consider more broadly the structure of its merger review process and its approach to engaging with notifying parties.
- 4.2 While there are many positive examples of proactive engagement between case teams and notifying parties, Matheson believes that the system would benefit from a more predictable, structured and transparent approach that provides for updates and communications with the notified parties, at defined milestones during the CCPC's initial review and decision-making process.
- 4.3 Specifically, Matheson would encourage the CCPC to commit to informing parties submitting a notification under the simplified merger procedure that they have no further questions by, for example, Day 10 of the CCPC's review period. For mergers not utilising the simplified merger procedure, where early indications from the CCPC are particularly important to ensure a timely determination can be issued, we would encourage the CCPC to commit to holding a call with the notifying parties by no later than Day 15, which would indicate the direction of travel of the CCPC's investigation (including any early feedback from its market testing).
- 4.4 In this regard, we note that 'state of play' calls of this nature are common in the European Commission's procedure and at the UK's Competition and Markets Authority (the "**CMA**"), which commits to holding a "*state of play*" by Day 15-17 of the initial phase 1 process to provide parties with an update on the investigation and an indication of the next steps in its review.<sup>3</sup>

We hope that the above is clear and helpful.

Yours faithfully

Sent by email, bears no signature.

## **MATHESON**

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1. Article 4(4), EC Merger Regulation
  2. Competition and Markets Authority, "Annual Report and Accounts 2017/18" (24 July 2018) at page 46.
  3. Competition and Markets Authority, "Mergers: Guidance on the CMA's jurisdiction and procedure" (10 January 2014) at para 7.8.