# Net-Zero Insurance Alliance: Response to CMA call for inputs on environmental sustainability and the competition and consumer regimes

The Net-Zero Insurance Alliance (NZIA) welcomes the opportunity to respond to the CMA's call for inputs on environmental sustainability and the UK competition and consumer regimes, in particular the application of the Chapter I prohibition to sustainability agreements. The NZIA recognises this is a critical time in UK policy-making regarding the intersection between competition law and sustainability, and net-zero and climate change objectives, especially given COP26 and the advice the CMA has been asked to provide to the Secretary of State for Business, Energy and Industrial Strategy.

The NZIA wishes to highlight the following:

- As an alliance between leading insurers and reinsurers formed to help accelerate the transition to net-zero emissions, the approach to sustainability agreements under competition (or antitrust) law is a key area for the NZIA and its members, recognising the importance of competition compliance.

- Having formally launched in July 2021, the NZIA places great emphasis on competition law compliance in shaping its proposed initiatives and has notably already encountered some challenges arising from the lack of guidance regarding the interpretation and concrete application of competition law in this context, for example, in the process of developing appropriate sustainability commitments that insurers/reinsurers need to accept to become NZIA members. The NZIA expects similar challenges regarding future workstreams. The NZIA would therefore welcome direct engagement with the CMA, at an appropriate time, to discuss relevant issues.

- Climate change and global warming together represent a real existential threat to mankind. We note that Mark Carney, Chair of the Glasgow Finance Alliance for Net-Zero, has told the BBC that, while there are parallels between the COVID-19 pandemic and climate change, damage to the environment and ecosystems has the potential to cause many more deaths. We also note Boris Johnson's comments at COP26 that the world is now at "one minute to midnight", having run down the clock on tackling climate change.

- It is, therefore, critical that beneficial sustainability agreements are not discouraged by concerns about competition compliance, difficulties in undertaking efficiencies analysis or uncertainty around the exact parameters of what is and is not permitted under competition law. Given this, we suggest that serious consideration should be given to whether sustainability agreements ought to be one of the limited types of agreements that fall outside the ambit of the Chapter I prohibition provided that they pursue a legitimate objective, that they do not go beyond what is necessary, and that any consequential restrictive competitive effects are inherent in the pursuit of that (legitimate) objective.

- Another option that we consider merits consideration (especially if the above approach is not adopted) is the introduction of a (rebuttable) presumption that sustainability agreements are beneficial. This would help to encourage more sustainability agreements by helping to reduce the burden on parties in terms of the need to compute complex efficiencies before entering into a sustainability agreement, while allowing for possible challenge by the CMA or a third party in the courts if there is evidence an agreement has not, in fact, proven to be beneficial within a reasonable period of time.

- Currently, uncertainty about the approach to the efficiencies analysis (including whether so-called "out-of-market" efficiencies for society as a whole can be taken into account) makes it challenging for parties to self-assess whether their sustainability agreements are compatible with competition

law, and is likely to have a "chilling effect" on potentially beneficial arrangements. It is vital that the position on the efficiencies analysis (applying section 9 CA98) is clarified as soon as possible given the urgency of transitioning to a net-zero economy and the role of sustainability agreements in helping to achieve this.

- The NZIA believes that a broad approach to the efficiencies analysis is appropriate, including acceptance of the principle that benefits to society as a whole are able to offset potential competition concerns, and that industry-wide initiatives should be able to meet those criteria. To the extent that the CMA or UK Government have concerns about how this might impact the approach to the efficiencies analysis for other types of agreements, such concerns could be dealt with by developing a specific efficiencies test, for example, for "relevant or special climate change benefits".

- The NZIA also recognises the importance of the CMA providing further published guidance on the treatment of sustainability agreements under competition law. The CMA Information Note on sustainability agreements published earlier this year is a useful stating point, but it has limited specific references or examples regarding sustainability agreements. As noted in the CMA call for inputs (paragraphs 20 and 23), there are a number of tensions regarding sustainability initiatives and competition law, and these are the types of areas we suggest could be covered in further guidance.

- The NZIA also considers that further consideration should be given to a possible formal competition law exemption for sustainability agreements which meets clearly defined requirements. Such exemptions had been rare prior to the COVID-19 pandemic, but have proven vital in providing reassurance to companies in relevant sectors that they could cooperate to ensure the ongoing supply of essential goods and services without fear of infringing competition law (notably the public policy exemption under para 7 of Schedule 3 to the Competition Act 1998). While the COVID-19 pandemic is an extreme event, climate change will potentially have a greater impact in the long-term.

In the rest of this submission we: (i) provide information about the NZIA in Section 1; (ii) explain our approach to responding to the CMA call for inputs in Section 2; and (iii) set out our responses to specific questions in the call for inputs in Sections 3 and 4. Please let us know if it would be helpful to discuss any aspect of this submission.

## 1 About the NZIA

1.1 Convened by the UN Environment Programme Finance Initiative (specifically, the Principles for Sustainable Insurance Initiative[1]), the NZIA brings together a number of the world's leading insurers and reinsurers to play their part in helping accelerate the transition to net-zero emissions economies and achieving the goals of the Paris Agreement. As risk managers, insurers and investors, the insurance industry has a key role in supporting the transition to a net-zero economy.

[1] There are four Principles of Sustainable Insurance (PSI), which have been adopted by over 180 organisations worldwide, and serve as a global framework for the insurance industry to address environmental, social and governance (ESG) risks and opportunities, and consist of a global initiative to strengthen the insurance industry's contribution as risk managers, insurers and investors to building resilient, inclusive and sustainable communities and economies on a healthy planet: (i) Principle 1 – we will embed in our decision-making ESG issues relevant to our insurance business; (ii) Principle 2 – we will work together with our clients and business partners to raise awareness of ESG issues, manage risk and develop solutions; (iii) Principle 3 – we will work together with governments, regulators and other key stakeholders to promote widespread action across society on ESG issues; and (iv) Principle 4 – we will demonstrate accountability and transparency in regularly disclosing publicly our progress in implementing the Principles.

1.2 The NZIA was formally launched in July 2021 with eight founding members: (i) AXA (Chair); (ii) Allianz; (iii) Aviva; (iv) Generali; (v) Munich Re; (vi) SCOR; (vii) Swiss Re; and (viii) Zurich. Another six insurers/reinsurers have also since become NZIA members: (i) American Hellenic Hull; (ii) Hannover Re; (iii) ICEA LION Group; (iv) NN Group; (v) Shinhan Life Insurance and (vi) Matmut Group , and recently Lloyd's Corporation also joined the NZIA.

1.3 NZIA members have committed to individually transition their underwriting portfolios to net-zero greenhouse gas (GHG) emissions by 2050, consistent with a maximum temperature rise of 1.5°C above pre-industrial levels by 2100, taking into account the best available scientific knowledge including the findings of the Intergovernmental Panel on Climate Change (IPCC). Subject to compliance with applicable laws, this commitment includes NZIA members individually setting science-based intermediate targets every five years and independently reporting on their progress publicly on an annual basis. The NZIA are at an early stage of exploring the development of further potential sustainability initiatives.

1.4 The commitment entered into by NZIA members to transition their underwriting portfolios to net-zero GHG emissions by 2050 has been published here, and is accredited by the UN Race to Zero having been reviewed by an independent expert review group, comprising scientific and technical experts and practitioners.

1.5 The NZIA is not the first initiative of its kind in the finance industry. Notably, the Net-Zero Asset Owner Alliance (NZAOA) and the Net-Zero Banking Alliance (NZBA) were established in 2019 and early 2021, respectively[2]. Prior to the NZIA being launched, a number of NZIA members had also already taken part in contributing to the goals of the Paris Agreement as members of the NZAOA. The NZIA is a member of the Glasgow Finance Alliance for Net-Zero.

## 2 NZIA approach to responding to the CMA call for inputs

2.1 NZIA note that the Secretary of State has asked the CMA to consider the following questions:

(a) If, and how, do current competition and consumer legal frameworks constrain or frustrate initiatives that might support the UK's net-zero and sustainability goals?

(b) Are there changes to the UK's competition and consumer law that would help to achieve the UK's net-zero and sustainability goals?

(c) Are there other opportunities within the UK's competition and consumer policy toolbox that would support the UK's net-zero and sustainability goals, which the Government should be considering?

2.2 The CMA call for inputs sets out 19 questions covering competition law enforcement, merger control, consumer protection law, the markets regime, and other considerations.

2.3 Given the nature of the NZIA and the time available for this response, we have not sought to provide answers to all 19 questions in this submission. Instead we have focused on the key issues regarding NZIA initiatives, and therefore have limited our responses to questions 1 and 2 regarding application of the UK competition law prohibitions under the Competition Act 1998

[2] As well as these UN-convened initiatives in the finance industry, we note that a range of industries and sectors are considering how to meet climate goals (e.g. the Law Society of England and Wales published a climate change resolution in October 2021 to support solicitors and the companies or firms they work for, to develop a climate-conscious approach to legal practice).

(CA98). In doing so, we have also taken into account the Secretary of State's questions to the CMA. We are also open to further dialogue with the CMA if that would be helpful.

## 3 Question 1: Are you aware of examples where the CA98 regime has constrained or frustrated actual or potential agreements or initiatives that could support the UK's net-zero and sustainability goals? Please explain the issue faced and any solutions identified.

3.1 The UK competition regime (like many other competition regimes, including the EU regime) generally requires companies to self-assess whether their arrangements are compatible with the UK competition law prohibitions under the CA98. This approach has the benefit of giving businesses flexibility to enter into agreements without needing to wait for formal approval, but comes at the expense of certainty as to whether an agreement does or does not infringe competition law.

3.2 Sustainability initiatives are a relatively new area under competition law, raising a number of potentially novel issues, not least the appropriate approach to the efficiencies analysis (as recognised in the CMA's call for inputs, in particular, Appendix B). Along with a paucity of case-law and limited specific guidance regarding sustainability agreements, there are a number of tensions regarding competition law and sustainability initiatives (such as those identified at paragraphs 20[3] and 23[4] of the CMA call for inputs). In this context, it can be particularly challenging for parties to self-assess their sustainability arrangements.

3.3 Given the potentially significant adverse consequences of committing an infringement, the ultimate danger is that parties adopt an overly cautious approach and are disincentivised from, and do not proceed with, potentially beneficial sustainability initiatives due to concerns about the costs, challenges and associated uncertainty of undertaking the appropriate competition analysis, including efficiencies analysis.

3.4 [...] Moreover, as an alliance whose members are active across multiple jurisdictions, competition law and antitrust considerations are also made more complicated by having to apply the competition rules across a number of different jurisdictions. Due to concerns and uncertainty about the application of competition law in this area (in a range of jurisdictions, including under

[3] The examples at paragraph 20 are: (a) competitors agree to phase out particular products or technologies in pursuit of sustainability objectives – this could, in some circumstances, amount to a collective boycott that restricts competition; (b) competitors seek to impose new industry-wide standards which go beyond national laws or regulations to meet sustainability objectives (e.g. in relation to the environmental performance of products) – this could, in some circumstances, give rise to restrictive effects on competition, e.g. where other companies do not have fair access to the standard; (c) competitors exchange competitively sensitive information as part of a sustainability initiative or during the course of discussions about establishing a possible initiative (e.g. sensitive information about new technologies such as carbon capture technologies); (d) businesses making significant investments in unproven, innovative technologies, may wish to mitigate associated risks by entering into long-term agreements for cooperation between actual or potential competitors (or exclusive supply or purchasing) – these agreements may restrict existing competition or prevent new players or technologies from entering the relevant market; and (e) competitors agree a common roadmap concerning the increased use of recycled raw materials or phasing out existing unsustainable modes of production and make binding commitments to adhere to the roadmap, which could potentially increase the cost of the final product.

[4] The examples at paragraph 23 are: (a) a business with market power changes its pricing policies to incentivise customers to purchase more sustainable products and/or to use the relevant products or services in a sustainable way; (b) a business with market power seeks to ensure it can recoup the cost of significant environmental investments through increasing prices or entering into long-term exclusive arrangements; (c) a business with market power changes the terms on which it sells its products or services in connection with a sustainability initiative, e.g. making the purchase of one product or service conditional on the purchase of another sustainable product; and (d) a business with market power refuses to deal with suppliers or customers who do not meet sustainability criteria that the business with market power has set and which are not required by law.

the UK's CA98 regime), we decided to adopt a very conservative approach when drafting the NZIA commitments and, for example, [...].

3.5 As the NZIA continues to explore further potential sustainability initiatives, we expect further challenges to arise in this regard and therefore believe that direct engagement with the CMA is likely to be helpful regarding NZIA initiatives at an appropriate time.

## 4 Question 2: Are there changes to the CA98 regime that would help to achieve the UK's Net Zero and sustainability goals? If so, what changes should be made to the regime, and what would they achieve?

***Approach to efficiencies analysis***

4.1 The NZIA considers that the most pressing issue is the approach to the efficiencies analysis for sustainability agreements, as well as potential options to reduce or remove the burden of efficiencies analysis for parties. We discuss these points below.

4.2 As noted in the CMA's call for inputs, there is considerable international debate and uncertainty about the approach to the efficiencies analysis for sustainability agreements. This also includes debate about whether sustainability agreements ought to be treated as one of the limited types of agreements that fall outside the scope of competition law entirely on the basis that they are justified by a legitimate objective and any consequential restrictive effects are inherent in the pursuit of that legitimate objective. Until there is clarity on these points, it will continue to be challenging for parties to self-assess the legality of their sustainability agreements. It is therefore vital that the approach in this regard is clarified as soon as possible.

4.3 We would urge the CMA and the UK Government to adopt a world-leading approach in this regard and to confirm a positive approach to sustainability agreements under the CA98 regime, recognising the global threat of climate change and the critical importance of cross-industry sustainability agreements to achieving climate goals.

4.4 As mentioned in the CMA's call for inputs (paragraph 17 and Appendix B), the EU courts have, exceptionally, concluded that certain agreements that might have restrictive effects on competition can fall outside competition law entirely where they are justified by a legitimate objective and where any restrictive effects are inherent in the pursuit of that objective[5]. Given the threat posed by climate change and the difficulties in achieving net-zero by 2050, we suggest that the CMA and the UK Government give serious consideration to the option that sustainability agreements that are beneficial in terms of climate change objectives should fall outside competition law. Action at government level is not enough to achieve net zero: any action by the private industry players to cut emissions should be welcomed and not be fettered by competition laws which may no longer be fit for purpose.

4.5 Another option we believe merits consideration would be the introduction of a rebuttable presumption that sustainability agreements have positive effects in terms of climate goals, which may be sufficient to outweigh any potential harm to competition. There are different potential options in terms of how such a presumption might work in practice. One option could be that, such a rebuttable presumption would arise where, upon concluding a sustainability agreement, for instance an appropriate transition period is conferred onto or agreed with counterparties before

[5] For example, Case C-309/99 – *Wouters and others*, Judgment of 19 February 2002 and Case C-519/04 P – *Meca-Medina and Majcen v Commission*, Judgment of the Court of 18 July 2006.

the measures of the agreement be implemented. This period would be presumed to mitigate or negate any potential negative effects on their businesses as businesses would have time to adapt and, if required, voice their concerns about any such action which could be addressed in the interim. Another option could be that, only after an agreement has been in place for an appropriate period of time for the benefits to be demonstrable, would it be open for the CMA (or a third party via the courts) to provide evidence to rebut the presumption that the agreement has been beneficial. Either option would, therefore, provide a transition period between the conclusion of the agreement and the moment in which the effects are ascertained for the purpose of deciding on its compatibility with competition law[6]. This proposal would help to encourage more beneficial sustainability agreements (by reducing the need for parties to undertake detailed and typically complex efficiencies analysis before entering into such agreements), while allowing the possibility of challenge at an appropriate later time if the expected benefits are not delivered.

4.6 In terms of the approach to any efficiencies analysis, we consider that as a minimum the CMA and UK Government should confirm a broad approach regarding the application of the efficiency criteria for sustainability agreements under section 9 CA98. To the extent that the CMA or UK Government might have concerns about how this could be detrimental to the approach to efficiencies analysis for other types of agreements, such concerns could be dealt with by developing a new specific efficiencies test, for example, for "relevant or special climate change benefits".

4.7 Key in terms of efficiencies analysis for sustainability agreements is that benefits for society as a whole ought to be permitted to be taken into account when applying the second of the efficiencies criteria (i.e. the requirement that consumers receive a fair share of the benefits), without the need to quantify whether such a benefit amounts to a "fair share".

4.8 For an industry-wide alliance such as the NZIA it is also critical that the fourth of the efficiencies criteria (which requires that an agreement does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question) can be met by industry-wide initiatives.

4.9 We also support the proposed approaches for the first and third of the efficiencies criteria set out in Appendix B to the CMA call for inputs – including that product sustainability itself should be a qualitative benefit able to be taken into account in applying the first of the criteria and that progress in terms of sustainability should be capable of meeting the criteria. In terms of the third of the criteria (i.e. the indispensability requirement regarding relevant restrictions) we consider that the types of situations mentioned in Appendix B (e.g. a restriction needed to overcome a first-mover disadvantage) ought to be capable of meeting the criteria.

***CMA guidance on sustainability agreements***

4.10 The NZIA note that the CMA published an Information Note earlier this year providing guidance on environmental sustainability agreements.

4.11 We welcome the CMA's willingness to provide guidance on sustainability agreements. However, while the Information Note is a useful starting point identifying the key risks regarding sustainability agreements, it lacks specific detail and nuance regarding sustainability agreements.

[6] This may be particularly important in case of agreements, which for instance seek to reduce carbon footprint, the positive effects of which may not be immediately evident.

4.12 We therefore consider that there remains a pressing need for detailed guidance on sustainability agreements (to the extent that sustainability agreements remain subject to competition law). As an example (and as mentioned in our response to question 1), paragraphs 20 and 23 of the CMA call for inputs provide examples of tension between sustainability initiatives and competition law. These are the types of areas where it would be useful for the CMA to publish specific guidance, but the CMA Information Note does not provide guidance in these areas.

***Direct engagement with the CMA***

4.13 We are aware that the CMA withdrew its "short-form opinion" process earlier this year, whereby parties to prospective agreements raising novel or unresolved questions of competition law could seek guidance from the CMA (with no applicant having ever met the required criteria). However, we understand the CMA remains open to giving non-binding views on the application of competition law to novel questions.

4.14 The legitimacy of sustainability agreements is an area where we consider it would be particularly appropriate for the CMA to engage in direct discussions with relevant parties and provide comfort to the extent it is able to do so (to the extent that sustainability agreements remain subject to competition law). Given the importance of such agreements in achieving climate and other sustainability goals and the novel issues and complexities involved, the NZIA regards the provision of so-called "letters of comfort" as of paramount importance.

4.15 The importance of combatting climate change and the challenges regarding sustainability agreements are unquestionable. Therefore, it may also be helpful for the CMA to develop a specific process for parties to engage with the CMA regarding sustainability agreements, although in designing such a process it would be important to ensure that parties are able to meet any required criteria for engagement (noting no applicant ever met the short-form opinion criteria).

4.16 As mentioned in our response to question 1, we believe that it will be helpful to discuss NZIA initiatives with the CMA at an appropriate future point.

***Possible formal exemptions***

4.17 In the context of the COVID-19 pandemic the UK Government has granted a number of formal competition law exemptions to enable competitors in certain sectors of the economy to cooperate to ensure that essential goods and services could continue to be supplied without fear of infringing competition law.

4.18 Prior to the COVID-19 pandemic such exemptions were rare, but the scale and impact of the pandemic justified increased use of such exemptions, as has the recent fuel crisis. Climate change has even wider and deeper impacts on society over time and therefore should warrant similar formal exemptions to allow competitors to cooperate regarding climate goals without fear of infringing competition law (to the extent that competition law continues to apply to sustainability agreements).

4.19 When the approach to efficiencies analysis is clarified, efficiencies analysis will remain complex and invariably require specialist economic advice. Parties may be dissuaded from conducting such analysis due to the costs involved, leading to potentially beneficial sustainability agreements not being pursued. A formal exemption for sustainability agreements that help combat climate change would be greatly beneficial in this regard. Such an exemption would need to apply for a longer period or potentially indefinitely, in contrast to the short-term COVID-19 exemptions.

4.20 We also note the growth of private competition enforcement in the UK. Damages risk is now the greatest potential risk for business in terms of any infringement of UK competition law, noting amounts claimed in damages often far exceed administrative fines. While informal advice from the CMA may provide comfort that an arrangement is unlikely to infringe the CA98 or be an enforcement priority, this may not provide sufficient comfort to parties particularly concerned about antitrust damages risk. However, a formal exemption would offer such comfort.

**Net-Zero Insurance Alliance**
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