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LMA response to the Competition and Markets Authority's (CMA's) Consultation on the Draft Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (the "Draft Guidance")

The Lloyd's Market Association (**LMA**) welcomes the opportunity to comment on the CMA's public consultation on the Draft Guidance launched on 25 January 2023, in particular in relation to Chapter 10 (Standard Terms).

Please note that this response is submitted solely on behalf of the LMA in its own right.

The LMA

The LMA is an association representing the 52 managing agents at Lloyd's, with 93 active syndicates underwriting in the market. The LMA also represents three members' agents which act for third party capital. Managing agents are "dual regulated" by the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA). Members' agents are regulated by the FCA.

The LMA's members service a wide constituency of insureds. They range from everyday consumers to multinationals with complex, global insurance needs. The vast majority of the risks insured by the Lloyd's market tend to focus on specialist risks that require individual underwriting, and where the insured is represented by a specialist broker. The risks are placed on a subscription basis and consequently, a number of syndicates, represented by different managing agents, will participate on a single insurance policy.

One of the LMA's important roles is to publish wordings and clauses as optional model clauses for those trading in Lloyd's and the wider insurance market. These model clauses are purely illustrative and are neither binding nor recommended. They are prepared following a rigorous, transparent and inclusive process, drawing upon the high level of expertise of those participating, resulting in technically proficient wordings, contributing to an understanding of coverage issues and aiding in contract certainty. Members are free to accept, reject or vary the terms of the model wordings and clauses.

The process for the drafting and publication of LMA model clauses has been in place for many years. Typically, new clauses are drafted by the appropriate underwriting committee for the class of business impacted. Participation in drafting clauses within an underwriting committee is unrestricted, with a good cross-section of the interested Lloyd's market participating. The draft clauses are then reviewed for technical and legal compliance by the LMA's wordings committee (which is a committee made up of wordings experts, representatives of the LMA Underwriting Team and its Legal Director) before being sent for final approval to the relevant underwriting committee. They are produced as a tool for market participants. Participation in the process is not restricted and the clauses are made freely available to the whole industry to adopt or amend as appropriate.

The competition enhancing nature of draft model clauses are numerous including transaction cost savings (as a number of syndicates are able to participate on a contract with agreement as to the appropriate terms, without the need for the broker and insured to negotiate with each individual syndicate) and legal certainty; many of the LMA's model clauses are adopted by non-Lloyd's insurers both domestically and sometimes internationally, so will be considered by numerous legal

teams and wordings experts and may ultimately be tested in the Courts. They provide one option for insurers, intermediaries and insureds to frame the negotiation of insurance terms. They provide one possible benchmark from which broader cover, exclusions or write-backs can be negotiated. They facilitate comparison of coverage, simplify the process of subscription market insurance (underpinning the Lloyd's market), switching between carriers and obtaining competitive quotes on comparable terms in a highly liquid and professionally intermediated business-to-business market place.

Threshold concern with the draft Horizontal Guidelines

The treatment of insurance standard terms in the EU Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements (the "EU Guidance") resulted from the EU policy shift in the 2010s against sector specific exemptions. Prior to this, the competition enhancing nature of non-binding standard wordings in the insurance sector was well established in EU competition law. The EU automatically exempted wordings bodies from EU competition law in its first insurance block exemption in April 1993. In 2009, there was a shift against sectoral exemptions in favour of soft law measures, such as guidance, applicable to all industries.

The change from block exemptions with respect to insurance was not well executed in the drafting of the EU Guidance and our concern is that this has been carried through to the new Draft Guidance, which is heavily based on the current EU Guidance. We believe that this is the opportunity to up-date the drafting to take into account the differences between insurance and other products. Our main concern is that the Draft Guidance and the EU Guidance both suggest that where standard terms define a product (as in insurance) then this potentially restricts competition. However, we believe that the competition enhancing nature of standard terms (such as those produced by the LMA), and particularly in the Lloyd's market, is that there is no competition restriction *at all*. Indeed, we say that model clauses (clauses that are not mandatory and may be amended by any party wishing to do so) are an important part of enhancing competition between carriers (through the amending of such model clauses to suit the client's needs) and generating market efficiencies, comparing quotes, switching insurers, assembling co-subscribers to a risk and so on.

This much is acknowledged in the Draft Guidance from an example given that accurately describes the competition enhancing nature of the practice:

> *"[F]acilitation of comparison by consumers of conditions offered by insurance undertakings…. Those comparisons in turn facilitate switching between insurance undertakings and thus enhance competition. Furthermore, the switching of providers, as well as market entry by competitors, constitutes an advantage for consumers. …The standard policy conditions are also likely to reduce transaction costs and facilitate entry for insurers on a different geographic and/or product markets."*
>
> (example 3, pages 201-202)

In light of the clearly acknowledged competition enhancing nature of the practice of the development and use of model clauses – we believe that the Draft Guidance gives the UK the opportunity to correct what we consider was a weakness in the development of the EU Guidance, and make clear that the use of standard terms / model clauses in the insurance industry is not restrictive of competition, where appropriate compliance safeguards are followed.

Comments on the Draft Guidance – Chapter 10 (Standard Terms)

The LMA appreciates the opportunity to comment on Chapter 10 (Standard Terms) in light of the general comments set out above. Whilst the LMA observes that many of the paragraphs in Chapter 10 remain unchanged from the EU Guidance, there are certain aspects of Chapter 10 which we believe could be clearer to reflect the distinct features of the UK insurance market in a post-Brexit environment. We therefore set out below comments on those specific aspects.

- **Paragraph 10.4**

Paragraph 10.4 states as follows:

> *"Standard terms can give rise to restrictive effects on competition by limiting product choice and innovation. If a large part of an industry adopts the standard terms and chooses not to deviate from them in individual cases (or only deviates from them in exceptional cases of strong buyer-power), customers might have no option other than to accept the conditions in the standard terms. However, the risk of limiting choice and innovation is only likely in cases where the standard terms define the scope of the end-product"*

Our threshold concern with the treatment of standard terms (as more fully described above) is contained within the final sentence of the above quote from paragraph 10.4 which carries over from the EU Guidance. There is no basis to state that a competition enhancing practice of this kind has the potential to restrict competition where standard terms define the end product, as is commonly the case in insurance. The LMA is therefore concerned that the last sentence in paragraph 10.4 makes an inappropriate generalisation which does not take proper account of the unique nature of an insurance contract, and how the insurance sector operates, particularly the unique position of the UK insurance market. The paragraph should instead explain, as example 3 makes clear, that non-binding non-recommended standard terms, which do not restrict pricing freedom, are not a restriction of competition.

For these reasons, the LMA would recommend that the last sentence of paragraph 10.4 is deleted or, in the alternative, that paragraph 10.4 is amended to place more emphasis on the mitigating factors, such as where clauses are required to comply with regulatory or legal requirements.

- **Paragraph 10.12**

Paragraph 10.12 states as follows:

> *"First, standard terms for the sale of consumer goods or services where the standard terms define the scope of the product sold to the customer, and where therefore the risk of limiting product choice is more significant, could give rise to restrictive effects on competition within the meaning of the Chapter I prohibition where their common application is likely to result in a de facto alignment. This could be the case when the widespread use of the standard terms de facto leads to a limitation of innovation and product variety on the market. For instance, this may arise where standard terms in insurance contracts limit the customer's practical choice of key elements of the contract, such as the standard risks covered. Even if the use of the standard terms is not compulsory, they might undermine the incentives of the competitors to compete on product diversification. This could be overcome by opening the possibility to insurers to also include risks other than standard risks in their insurance contracts."*

Again, this paragraph goes to the LMA's threshold concern that the draft guidance adopts the EU Guidance's approach to standard terms. Whilst the LMA recognises that paragraphs 10.12 – 10.18 of the Draft Guidance need to be read in conjunction with paragraph 10.10, the LMA is concerned

that paragraph 10.12 does not capture the business reality of the insurance sector, and in particular the Lloyd's market. The LMA's wordings are used by sophisticated insurers, in a highly intermediated space with sophisticated brokers acting on behalf of insureds. Standard terms are a tool available to market participants that are an important and rivalry-enhancing part of this competitive marketplace, in particular the Lloyd's market.

We recommend rephrasing to emphasise that non-binding non-recommended standard terms, which do not restrict pricing freedom, are presumptively pro-competitive. We do not find the paragraph particularly easy to follow, and wonder if it could be drafted in a clearer way (particularly the last sentence seems contradictory).

- **Paragraph 10.18**

Paragraph 10.18 states as follows:

> *"Moreover, should the standard terms (binding or non-binding) contain any terms which are likely to have a negative effect on competition relating to prices (for example terms defining the type of rebates to be given), they would be likely to give rise to restrictive effects on competition within the meaning of the Chapter I prohibition."*

It would be useful if the term "rebate" could be defined more clearly. In particular, we would appreciate clarification that it does not include provisions dealing with return of premium in the event of cancellation of a policy.

This change in approach to standard terms should also feed through into example 3 on page 201 of the Draft Guidance, where the analysis should make clear that there is no restriction of competition due to the rivalry enhancing nature of the standard terms described in that example.

Conclusion

Whilst the LMA supports the CMA's efforts to promote competition in the insurance market, the LMA believes that more work and thought is required to make Chapter 10 appropriate with regard to the UK insurance market. Whilst insurance is called out in the chapter, no regard has been given to the fact that in other sectors, the standard term is used in a contract which is subsidiary to a product, however, in the insurance sector, the standard term forms part of the product.

The LMA would welcome the opportunity to participate in dialogue with the CMA to ensure that Chapter 10 in the Draft Guidance is refined to achieve greater clarity such that the purposes of the CMA can be achieved whilst ensuring that the UK insurance market is not penalised for optimising efficiencies which could ultimately make it less competitive than its international rivals.

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