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Competition and Markets Authority
By email to sustainabilityhbersreview@cma.gov.uk

Dear Sir/Madam

**Lloyd's Market Association's response to the Competition and Markets Authority's Consultation on Draft Guidance on the Application of the Chapter I Prohibition in the Competition Act 1998 to Environmental Sustainability Agreements (the "Draft Guidance")**

The Lloyd's Market Association (LMA) represents the 50 managing agents at Lloyd's, with 93 active syndicates underwriting in the market, (together "the Lloyd's market") and also the three members' agents which act for third party capital. Managing agents are "dual regulated" firms by the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) and members' agents are regulated by the FCA. For 2023, premium capacity was in excess of £48 billion.

Our members are supportive of the ambition of the Competition and Markets Authority (CMA) to ensure that competition law is not an unnecessary barrier to companies seeking to pursue environmentally sustainable initiatives. However, we do not believe that the insurance industry has been adequately considered in the Draft Guidance. To that end, we note only one mention of the word "insurance" in paragraph 2.5 of the Draft Guidance which gives an example of "an agreement not to provide support such as …insurance to fossil fuel producers", and the Draft Guidance does not come to a conclusion as to whether this example, if implemented, would be acceptable. Neither does the Draft Guidance refer to any other insurance examples which might provide assistance to insurers.

By way of context, the Lloyd's market is involved with numerous environmental initiatives, a few examples of which are:

1. Considering innovative products such as "build back greener" and providing insurance for innovative environmental products such as batteries, green energy etc.;

2. Measuring an insured's environmental impact and looking at the impact of existing insurance products on insured's behaviours e.g. the insurance of coal mines;

3. Measuring and assessing an insurer's own environmental impact.

Insurance plays a role in defining the scope of particular types of economic activity and insurers, including those in the Lloyd's market, want to play their part in contributing to environmental initiatives. To that end, we make the comments below on specific paragraphs of the Draft Guidance which we believe are most relevant to insurers, together with some general observations.

## DRAFT GUIDANCE – SPECIFIC COMMENTS

### Section 3 - Environmental sustainability agreements which are unlikely to infringe the prohibition

**Pooling information about suppliers or customers (paragraphs 3.9 - 3.10)**

We appreciate the CMA's efforts to provide clarity around pooling information about suppliers and customers. This, we hope, will lead to a uniform measurement of the environmental impact of an insured customer across insurers providing insurance to the same customer (through the provision of different products, for example) or using the same supplier to provide services.

**Creation of industry standards (paragraphs 3.11 - 3.12)**

As the CMA will be aware from the LMA's response to the CMA's consultation on the Draft Guidance on the Application of the Chapter I prohibition in the Competition Act 1998 to Horizontal Agreements, 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. In our response to that consultation, we expressed our concerns and proposals in relation to chapter 10 of that draft guidance on Standard Terms, reflecting the position that, due to the unique nature of insurance, the development of standard terms for use in an insurance contract is competition enhancing.

Without wishing to detract from the generality of that position, we feel it would be helpful if the current Draft Guidance would confirm the same position applies to the creation of optional model insurance clauses / wordings aimed at promoting beneficial environmental behaviour by insureds.

Examples of such clauses could include :

1. splitting the increased costs of "building back greener" with the insured in the event of a loss;

2. exclusions from cover of certain environmentally damaging materials or the consequences of producing those materials (e.g. cover for litigation or the costs of litigation); or

3. Exclusions from cover of environmentally damaging behaviours or the consequences of those behaviours

If such clarification were made, it should be clear that no inference could be drawn that only standard clauses aimed at making products or processes more sustainable are permissible.

**Phasing out / withdrawal of non-sustainable products or processes (paragraphs 3.13 – 3.14)**

Many insurers already have their own individual position in relation to the insurance of industries which are regarded as not being environmentally friendly, such as coal fields. As noted earlier, paragraph 2.5 of the Draft Guidance provides the example of an agreement not to provide insurance to fossil fuel producers. However, the Draft Guidance is unclear as to whether similar actions would be permissible in wider industries regarded as not being environmentally friendly. It would be helpful if the Draft Guidance would clarify the extent to which insurers could agree to a joint position on the provision or withdrawal of insurance to such industries, as this does not currently fall within the scope of paragraphs 3.13 or 3.14. This is a theme that we return to in our consideration of later sections of the Draft Guidance.

**Industry-wide efforts to tackle climate change (paragraphs 3.15 – 3.18)**

We read paragraph 3.17 as including the potential for insurers to develop a common methodology to measure and price for insureds' emissions and risks of contamination, or cooperating in relation to the type of coverage available to insureds with significant exposure to litigation as a consequence of their activities (for example, standard exclusion clauses in areas such as Directors and Officers insurance).

While this common methodology would mean that insureds are measured by the same criteria by all insurers, it has the potential to lead to more uniform pricing, which might be incompatible with competition law. It would therefore be helpful to provide further guidance on the limitations of industry-wide efforts.

**Section 5 – Exemption for environmental sustainability agreements generally**

The type of environmental sustainability agreements we can foresee being of interest to insurers include the following:

1. Discriminatory pricing / provision of benefits as between insureds using different types of energy e.g. cheaper premiums for those relying upon renewable sources of energy;
2. Better terms for parties mitigating the environmental impact of their activities e.g. tree planting; and
3. Agreements as to standard exclusions for environmentally unfriendly behaviours e.g. in respect of environmentally damaging practices or materials.

Some of the above could also arise indirectly out of the use of common methodologies referred to in paragraph 3.17 of the Draft Guidance. Accordingly, specific guidance is needed if this is indeed the kind of practice that the Draft Guidance intends to promote amongst insurers.

**Condition 3: Consumers receive a fair share of the benefit (paragraphs 5.15 - 5.18)**

This section refers to benefits for UK consumers and defines relevant consumers as the consumers of products or services to which the agreement relates. We think that the use of the term "consumer" is unhelpful, especially where financial services are concerned, because consumer has a specific meaning in a regulatory context – see, for example, the lengthy definition of consumer in the glossary of the FCA Handbook**.** Indeed the use of "consumer" is inconsistent within the Draft Guidance – at paragraph 1.7, a distinction is drawn between "consumers" and "businesses". We would suggest that unless the CMA means "consumer" as defined by the FCA, that the Draft Guidance uses the word "customer" instead. Alternatively, the Draft Guidance should make clear what is meant by "consumer" in this context.

Having said that, the concept of customers / consumers receiving a fair share of the benefit does not fit neatly with insurance – the tools available to the insurer i.e. pricing and terms, whether the customer is a consumer or a corporate entity, are unlikely to substantially benefit the customer, as the customer may face tighter insurance terms and prices as a result of methodologies employed by insurers to promote sustainability.

However, we note that the Draft Guidance suggests that a party can demonstrate that customers / consumers have received a share of the benefits by taking into account the totality of the benefit to all UK customers / consumers arising under the agreement. We would suggest that this test should be wider because the Lloyd's insurance market is an international insurance market. As such, many of its products, such as insurance for energy producers, are sold to foreign insureds. The benefits to UK customers of encouraging environmentally friendly practices in foreign insureds may be difficult to measure. Therefore, we believe that the test should not only be limited to UK

customers, but applied to customers in general. We would urge that careful thought be given to this in order to prevent any unintended consequences by applying too limited criteria through a focus on UK customers.

## DRAFT GUIDANCE – GENERAL OBSERVATIONS

### Large collective agreements to tackle climate change

We believe that the Draft Guidance needs to provide a better indication of how far insurers will be permitted to go in relation to agreements on environmental sustainability. By way of example, in recent years we have seen Lloyd's syndicates being targeted by activists regarding the continued insuring of companies involved in the extraction of fossil fuels. Taking into account what is stated in paragraphs 2.5 and 4.11 of the Draft Guidance, if all Lloyd's syndicates were, hypothetically, to come to a collective agreement that insurance would no longer be provided to coal mining companies (for example) for the purpose of reducing greenhouse gases, it is unclear whether this kind of action would be permissible by the CMA, notwithstanding the benefits to (UK) customers of reduced carbon emissions. Such action, for example, might appear to breach condition 4 (No elimination of competition).

The Draft Guidance provides few examples on collective initiatives such as a collective agreement to change suppliers or the business' internal policies to be geared towards sustainability. The examples do not highlight business critical changes or moves away from environmentally damaging practices.

From an insurance perspective, one such live international initiative is the Net-Zero Insurance Alliance (NZIA). NZIA is a UN backed initiative and consists of insurance companies committed to reducing the risks associated with climate change and promoting sustainability across the insurance industry, while also collaborating with other stakeholders to support policy changes and promote public awareness of the importance of net-zero emissions. Several of our members' parent companies, as well as the corporation of Lloyd's, have signed up to NZIA.

However, we note that a significant German reinsurer (Munich Re) has recently pulled out of the NZIA citing "material antitrust risks" in collective approaches to decarbonisation. Their decision has been followed by Zurich, a large Swiss (re)insurer. In light of these developments and our comments above, further guidance to the insurance market in relation to initiatives such as NZIA would clearly be beneficial.

### Agreements with foreign competitors

The Draft Guidance does not, at present, mention environmental sustainability agreements or climate change agreements with competitors in a foreign jurisdiction. From a Lloyd's market perspective, it is conceivable that agreements could be entered into with (re)insurers in Germany or Switzerland for example. The guidance does not give any indication as to whether this would fall into the scope of the prohibition and if so, whether the same rules would apply. We would suggest more guidance on this point, as the objective of sustainability and the extreme effects of climate change are not a UK issue alone but a global consideration and we consider allowing greater cooperation with foreign parties to be vital to the continuing fight against climate change.
It would therefore be helpful to have this type of foreign cooperation expressly mentioned, with examples of the types of agreements that could be made within the rules.

## CONCLUSION

The LMA supports the CMA's efforts to promote environmental sustainability. However, as set out above, having given an example of an insurance agreement in the introduction of the Draft Guidance, insurance is not then further addressed in the Draft Guidance which concentrates on

the supply of goods rather than on services.  We would therefore like to see more practical examples given in relation to services (in particular, involving (re)insurance).

In these circumstances, the informal guidance approach set out in the consultation seems a reasonable next step.

Furthermore, we also have pointed out the international nature of some initiatives, such as NZIA. Although outside the scope of the Draft Guidance, we would like to see the CMA use its position to influence other domestic and international regulators to bring clarity to their own position on the matters set out in the Draft Guidance.

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

Yours faithfully

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**Legal Director**
**Lloyd's Market Association**