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London, E14 4QZ

19 April 2021

To:

CC: [RemediesMonitoringTeam@cma.gov.uk](mailto:RemediesMonitoringTeam@cma.gov.uk)

**Re: The future oversight of the CMA's open banking remedies, consultation**

Dear Adam,

Below is FDATA Europe's response to the consultation put forward by the CMA on UK Finance's report on the proposed Open Banking Future Entity; we are grateful for the additional time provided in order to properly respond to the questions raised. We would like to highlight few points before presenting out formal response and

recommendations: **Do not rush this decision: any future entity needs to be future**

**proof:**

- UK Finance is not considering what happens next after Open Banking (i.e., Open Finance); the report is looking for a less expensive way for banks to meet the CMA Order. For example, having a board with bank representatives on it would alienate other financial sectors like investments and pensions. If this is Entity is going to be a vehicle for Open Finance as well as Open Banking, the Board should be **fully independent**
- The HM Government and the FCA have been slow to act in Open Finance, in part due to Covid 19, so there is no legal basis yet to mandate the banks or other financial institutions build anything beyond PSD2. **The future Entity needs to wait until HMG and the FCA have developed the Open Finance legislative framework**, so that the future entity has the mandate to ask the banks/financial institutions to fund API development beyond PSD2
- While we wait for a future Entity, and the Open Finance legal feameoek, the existing OBIE should be maintained as-is, and **the current OBIE [Roadmap](#) should be**

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sweeping/VRP. This will keep the lights on while we wait for the Open Finance framework and a future Entity

## Governance

- Without an **independent board**, the funding model could lead to banks having undue influence, and refusing to fund things that would benefit TPPs to the detriment of banks; afterall, Open Banking and Open Finance are meant to inject competition into the market, and are viewed as being detrimental to the banks but necessary to improving the end customer's financial outcomes

## Funding

- Banks should be fully funding the development/maintenance/oversight of APIs that allow them to comply with PSD2, as well as any other mandatory requirements that may come along
- The current funding model needs careful consideration. The proposed renewal period for funding (after three years, then every two years thereafter) creates risks, as the banks can threaten to walk away at the renewal period if they did not get their way, giving them undue influence. There needs to be a permanent, ongoing funding solution

## Immediate Next Steps

- In early 2021, the Treasury and FCA should extend the requirements for read/write API access to retail bank savings accounts
- HM Treasury and the FCA should support the work of OBIE to develop [variable recurring payments](#) (VRP), to enable open banking payments to compete with cards and direct debits
- The OBIE should be maintained beyond its [current roadmap](#) to develop the open savings and VRP standards

Again, we are grateful for the additional time extended to us in order to provide a comprehensive response to the consultation. As always, we are happy to discuss any points made below, or should any questions arise, we are at your disposal.

Yours sincerely,

Ghela Boskovich  
Regional Director, FDATA Europe

## Future Entity Leadership

**Q(a)** It is envisaged by UK Finance that the Members of the Future Entity would appoint the Chair with “votes weighted by participant type.” This process is not explained in detail and we will seek further clarity from UK Finance. However, it may give rise to a risk that a particular stakeholder group (eg the largest banks) would have an inappropriate degree of influence over the appointment. What process and criteria should be used to identify suitable candidates for the Chair? Who would be responsible for doing this, who should be kept informed and whose approval should be sought for decisions at this stage? Should the Members alone approve and appoint the Chair or should the CMA’s approval be required, as was the case in the appointment of the Trustee?

### R(a)

FDATA agrees that the UK Finance proposed model gives too much power to incumbent industry banks to influence disproportionately the criteria, review, and selection of the Chair.

We share the CMA’s concerns about the lack of clarity regarding votes weighted by participant type, and the risk that this could give the largest banks undue influence over the appointment. Given the entity will remain responsible for development and maintenance of API standards that underpin compliance with the CMA order, the CMA should lead recruitment for and appoint the chair (as they did for the Trustee of OBIE). The recruitment could have observers from the FCA and HM Treasury, if the entity will also have a role in underpinning PSD2 compliance or Open Finance development. The Chair should have proper independence from both banks/ financial institutions and TPPs, but should have experience with technological innovation.

**Q(b)** Does the proposed composition of the Future Entity Board constitute independent leadership? On its face, the composition of the board would suggest a balance of perspectives will be represented. However, should the CMA seek further information or assurances before concluding that the proposals will result in an independently led organisation?

### R(b)

CMA should solicit additional perspectives and more detail on the board composition before assuming the proposed structure would ensure it would be an independently led organisation.

FDATA support a truly independent board that can weather any future expansion of the remit or the entity to accommodate the additional verticals under its purview as open finance opens up new sectors.

The UK Finance proposed Board would not be suitably independent to lead the Entity for the following reasons:

- **Future proofing** - The UK Finance proposal notes that the operating model should evolve to support 'extension to future changes such as Open Finance and Smart Data'. However, we believe the proposed make-up of the Board will cause issues with expanding the role or remit of the entity to other open finance sectors, such as investments, pensions or insurance. Each sector would want to have a representative on the Board. Either the Board would become unwieldy (contrary to UK Finance's desire to keep the Board limited in size), or new sectors will be excluded and feel alienated from the decision making process and will be less likely to engage constructively with the entity.
- **Resource asymmetry** - Banks will likely be able to afford to field extremely well qualified and experienced board members. TPPs and consumer groups have fewer resources to call on and to commit. There would be a risk of skewed voting outcomes, e.g. where independent reps or consumer groups do not have the resources or capacity to present arguments that would persuade against those put forward by the banks, leading to bank proposals gaining the most votes.
- There is no clarity on how the CEO (who is also proposed to be a Board member) would be appointed, and there is an indication (as noted by CMA) that the Chair could be appointed in favour of the banks. This would further skew decision making in favour of the banks.
- **Regulatory oversight:** we consider that it is important that whichever governance process is decided upon, that regulators such as the CMA and FCA are involved in Board meetings or have oversight of the decision making of the entity. This should ensure that there is an independent observer at the table who could help bring more objectivity to key decisions.

Our recommendations to address these issues are:

- To address concerns around independence of the Board, more consideration needs to be given to creating strong accountability of the Board and the Executive to the CMA and the Monitoring Function (for delivery against mandatory requirements and delivery roadmaps), and to the Advisory Committee for ensuring all open banking/ open finance stakeholders are properly consulted
- At 8+ members, the Board may already be unwieldy. The Board could be simplified to six members consisting of:
  - two TPPs (it should be noted that most TPPs undertake both AIS and PIS, so splitting into individual AIS and PIS representatives would not work).
  - two financial institutions (rather than two ASPSPs)
  - two NEDs - rather than having a standalone consumer representative, the



forum, and to represent views taken from these fora at the Board (we discuss this below).

- The Board will act in an oversight capacity for the executive. However, UK Finance’s proposal does not include much detail about the executive. There needs to be a rigorous process for appointing the executive. Further consideration needs to be given for how the executive discharges the Vision and Mission of the entity, and the process for management decision making.
- To address future proofing, the composition of the Board will need to be reviewed once Open Finance rules/ BEIS legislation has been finalised, when new sectors may need to be brought under an implementation entity. Initially, the two ASPSP seats could be renamed ‘financial institution’ seats so that they will accommodate future members from e.g. investments/ pensions/ sectors, not just banks that are subject to PSD2.
- Regardless of Open Finance developments, there should be a review of the Board every two years to ensure it is properly representing the views of participants and the market. • Both the Chair and CEO should be appointed in a process overseen by the CMA. • Regulatory oversight - it is important that whichever governance process is decided upon, regulators such as the CMA and FCA are involved in Board meetings or have oversight of the decision making of the entity. The CMA and FCA should act as independent observers at the table in order to bring more objectivity to key decisions.

In the meantime, during a transition phase, we recommend that:

1. IESG should continue to support the Trustee on policy until there is clarity on the design of Open Finance or Smart Data; no change to the current arrangement should be made
2. The Trustee’s Office should continue to supervise compliance as currently performed, with no change to the process
3. The CMA should supervise Open Banking Limited’s appointment of a board, as per our suggestion above, to include two NEDs with expertise in risk and business performance/auditing.

We also stress the importance of assembling a diverse and inclusive Board and senior management for the Future Entity.

**Q(c)** To whom should the board be accountable. Should their accountability extend beyond the membership of the Future Entity? Are there transparency or reporting requirements that it would be appropriate to impose on the Entity’s Board similar to those imposed on the OBIE?

## R(c)

The board should be accountable to the CMA. As Open Finance will be shaped by both legislative and regulatory input - as well as the market itself - there will undoubtedly need to be instruction given by



the CMA on what constitutes an appropriate competitive functional landscape. We anticipate that the CMA will need to instruct the market on what additional functionalities must be delivered to market under mandate in order to ensure a competitive landscape. In this, the new entity will surely be obligated to provide a roadmap and oversight of these functional capabilities. Therefore, we anticipate the CMA would require transparent reporting and updates from the new entity; as such, the new entity board should be accountable to the CMA.

Furthermore, the FCA's comments on their call for input on Open Finance specifically acknowledge the need for an independent entity to oversee the delivery of Open Finance to the market. Based on the FCA's conclusion, we anticipate the future entity would fulfill that need and therefore continue to have accountability to the CMA, and to an extent the FCA as well as BEIS when its Smart Data Initiative begins to roll out.

Review in terms of accounts, delivery expectations and plans/roadmap, should be approved by CMA.

FDATA believes similar transparency and reporting requirements to those of the OBIE should be continued to the future entity.

**Q(d)** Does the initial funding model envisaged risk undermining the Future Entity's ability to act independently because of the potential tension between the interests of the CMA9 (who will be providing all of the funding initially) and the objectives of the independent Chair? Can the CMA be confident that the Future Entity governance structure (including an independent Chair, NEDs and the Advisory Committee) will be sufficient to resist pressures that may arise as a consequence? And if we cannot be confident what steps should be taken to mitigate this risk?

## R(d)

Yes, the funding model risks bias, and opens up a path to asymmetric influence and pressure from those staking the majority of the budget. Moreover, the proposed initial funding model risks the independence of the Entity and appears to be inherently unstable, as acknowledged by UK Finance in its report.

Based on our review of OBIE's Financial Forecast for 2021, we note that the budget has trended down after peaking in 2019. Considering the efficiencies experienced in 2020, we assume many of those efficiencies will be translated into the new entity as well. Any concern about inflated budget for the new entity should be mitigated by the diminishing OBIE budget trend. The new entity will also be funded by an increasing number of participants, both in terms of larger financial institutions including investment, pension, and lending providers, and perhaps other market participants who do not fall under the mandate of PSD2. This means proportional costs decrease for each of those providers.

We must also note that the OBIE budget is a fractional cost of the overall price tag to deliver Open Banking; the vast majority of it has been the tech build itself. With a more rational, collaborative, and a demand-only oriented approach to prioritising functional builds, we also propose that the overall tech costs will trend downwards as well, and that cost efficiencies will be better realised under Open Finance if the lessons from delivering Open Banking are properly applied.

**Funding model instability:**

The proposal is for ASPSP *members* to fund the entity, however, ASPSP members are entitled to withdraw membership. As UK Finance notes, 'If ASPSP's removed their support in the early years, the entity would not survive financially'. This gives the ASPSP members significant leverage in decision making, because they can ultimately threaten to leave if they are unhappy. UK Finance's proposal to require the CMA9 to have an initial term of three years does not extinguish this problem, because CMA9 members can hold the threat of leaving throughout the initial term (and thus exercise undue influence).

Aside from undermining the Entity's independence from bank control, making funding reliant on membership calls into question the future of the Entity. Membership funding may be suitable for a payment scheme, where banks get tangible benefit from funding the scheme (i.e. ability to make interbank payments), but the Open Banking Entity does not deliver such tangible benefits for banks. Indeed, if it functions well, it could lead to some banks losing out to TPPs, or to other banks in fulfilling the competition mandate. A critical mass of banks could withdraw membership if they do not agree with the outcomes being delivered, which would create a funding gap.

We therefore agree that annual funding requirements should be covered by ASPSPs, but rather than tying funding to membership of the entity, the ongoing funding by the CMA9 should continue to be mandatory (collected in the same way the OBIE is funded, or an alternative method sanctioned by the CMA). This will provide continuity and stability, and avoid the undue influence described above.

It is fair for the CMA9 to recover costs from the assets for which they are funding the maintenance. This should be obtained in a way which does not contradict legal requirements (e.g. PSD2), nor frustrate competition. For example, the CMA9 could:

- Charge other ASPSPs (as ASPSPs) for the use of directory services (which benefit ASPSPs who value the security)
- Charge ASPSPs for the development and maintenance of standards for APIs outside of mandatory requirements (that might be commercially beneficial for ASPSPs)

Where Open Finance introduces new mandatory requirements for other financial institutions, these financial institutions could be charged specifically for new assets that

need to be developed and maintained for Open Finance.

TPPs should not be charged any fees for the maintenance or development of the Entity. This is because:

- The operation of the Entity will be part of the CMA Order and therefore it will be against the competition aims of that order to charge TPPs;
- The operation of the Entity will be part of enabling banks to (efficiently) meet their Payment Services Regulation requirements (PSRs), and it would be contrary to the PSRs to charge TPPs • OR, the Entity will have developed standards for APIs outside of regulation, which banks can charge TPPs for, and therefore, it would be unfair to charge TPPs to create an asset which TPPs are being charged for down the line. TPPs would be paying twice.

In summary, the CMA9 should continue to fund the Entity (with additional funders brought in through future Open Finance Regulations). Costs could then be recovered by:

- Charging other ASPSPs for services
- Charging TPPs for access to so called 'premium APIs' outside of regulation

The benefit of recovering costs from TPPs in this way is that ASPSPs are incentivised to firstly build the APIs well, and then maintain the APIs in good working order.

**Q(e)** Do UK Finance's proposals for the Future Entity raise any other concerns regarding its leadership and governance model? Are there any other alternative approaches which would be more suitable to address these types of issues?

**R(e)**

Yes FDATA members are concerned about the banks' 'step-in-rights' (their ability to influence agenda, priorities, and decisions). We also are concerned about the 2-year funding renewal cadence that allows for the CMA9 to opt out of participation, and the weighted appointment of the chair.

We support a fully independent board, with insulation from stakeholder influence.

FDATA has shared its "Blueprint for Open Finance in the UK" with the CMA, and within that document we offer an alternative approach to the future Open Banking Limited entity.

**Funding model & assumptions**

**Q(a)** In overall terms, is the framework proposed by UK Finance capable of performing the functions necessary to ensure the effectiveness of the CMA’s open banking remedies going forward? Are there alternative approaches that the CMA should consider?

**R(a)**

FDATA has shared its “Blueprint for Open Finance in the UK” with the CMA, and within that document we offer an alternative approach to the future Open Banking Limited entity.

**Q(b)** Does the proposed funding model give enough confidence about the resourcing of the Future Entity? In particular:

- What evidence is there that external revenue is now, or will become, available to the Entity through the tendering of relevant projects?
- Given that the anticipated external revenues may or not materialise in 2022 or be maintained after that date, how can the CMA and other stakeholders be confident that the budget of the Future Entity will be adequate to deliver the residual requirements of the Order?
- How should the Future Entity set priorities in the face of a potentially reducing budget and competing requests for investment in future developments, including from the Participant Groups? [footnote 18]

**R(b)**

Funding should continue to be met by the CMA9 as mandated, until the CMA9 can demonstrate that the Entity’s cost recovery activities are sufficient to fund the Entity. This timeline may be accelerated due to the inclusion of additional funding by those actors who fall under any new Open Finance legislation. As we pointed out earlier, additional actors funding the pool, and an assumed downward trending budget requirement would mean proportional funding amounts would also decrease. This should reduce the funding burden across all participants, which should have a positive effect on funding sustainability.

Putting additional proper audit and cost controls in place that ensure good management of funds would also allow central costs to be more manageable and appropriately directed. Ultimately, this would also mean that costs go down for all participants across the board.

Priorities must be set through a collective decision input process; FDATA supports a similar approach used by OBIE during the delivery of open banking.

We believe that the past experience of banks being required to fund builds for products that actually have very little market demand is one of the primary reasons the current funding model is called into question and why the UK Finance Report seeks to change the funding model. However, we believe the proposed funding model is an over-correction.

The TPP community agrees that prioritisation of products that have existing market demand should be de rigueur under the new entity model. Scarce resources should not be spent on building access to things that have no commercial demand. The UK would be better served with a future entity governance model that provides some industry roadmap and prioritisation.

FDATA suggests there are test environments that would be suited to assess the scope of market demand, and could inform in a neutral fashion, what builds should be prioritised and when. One such test environment is being built at the Global Open Finance Centre of Excellence (GOFCoE) in the guise of the Innovation Playground.

**Q(c)** The proposed funding model does not anticipate significant funding from the TPP community in the short term. Is this reasonable? Should more financial support be sought from firms acting as TPPs, some of which are quite large businesses and others, for example retailers, who are likely to benefit from the adoption of existing (rather than yet to be developed) open banking payment services in particular?

**R(c)**

One potential approach is to tax directory service calls (usage based) which would also include retailers/ecommerce merchants who use open banking payment services.

However, FDATA members believe funding should continue to be met by the CMA9 as mandated. The CMA9 can recover costs front the assets for which they are funding the maintenance in such a way that does not contradict legal requirements (like PSD2) nor frustrated competition.

As suggested above, the CMA9 could:

- Charge other ASPSPs (as ASPSPs) for the use of directory services (which benefit ASPSPs who value the security)
- Charge ASPSPs for the development and maintenance of standards for APIs outside of mandatory requirements (that might be commercially beneficial for ASPSPs)

Where Open Finance introduces new mandatory requirements for other financial institutions, these financial institutions could be charged specifically for new assets that need to be developed and maintained for Open Finance.

TPPs should not be charged any fees for the maintenance or development of the Entity. This is because:

- The operation of the Entity will be part of the CMA Order and therefore it will be against the competition aims of that order to charge TPPs;
- The operation of the Entity will be part of enabling banks to (efficiently) meet their Payment Services Regulation requirements (PSRs), and it would be contrary to the PSRs to charge TPPs • OR, the Entity will have developed standards for APIs outside of regulation, which banks can charge TPPs for, and therefore, it would be unfair to charge TPPs to create an asset which TPPs are being charged for down the line. TPPs would be paying twice.

In summary, the CMA9 should continue to fund the Entity (with additional funders brought in through future Open Finance Regulations). Costs could then be recovered by:

- Charging other ASPSPs for services
- Charging TPPs for access to so called 'premium APIs' outside of regulation

The benefit of recovering costs from TPPs in this way is that ASPSPs are incentivised to firstly build the APIs well, and then maintain the APIs in good working order.

**Q(d)** The OBIE has performed functions and supplied services which while not stipulated in the Order have, in the opinion of many parties, proved fundamental to maintaining a well-functioning ecosystem. These include, for example, the onboarding services that OBIE provides to help TPPs interface with ASPSPs. Can the CMA and other stakeholders be confident that these will be maintained?

**R(d)**

FDATA believes it would be a criminal offense to lose the assets OBIE has built over the years, including onboarding services and monitoring services. However most critically, the OBIE service desk and relationship managers who monitor and investigate bank API issues are assets that have order of magnitude value to the entire ecosystem.

The UK Finance proposal does nothing to offer safe harbour to these critically valuable services that aren't strictly stipulated in the Order, but which do close the gap to actually fulfilling the intention

(spirit) of the Order. Rather, the UK Finance proposal cuts back on those services, noting that the future Entity ‘would not be predominantly focused on the compliance requirements of the CMA9’.

This shift away from compliance enforcement is a mistake. Compliance has been the primary differentiator between the UK and the EU in terms of delivering a workable Open Banking ecosystem. OBIE’s capacity to monitor, scrutinise, and follow up on issues with the CMA9 open banking API matters is the reason why the UK is so far ahead of the EU in open banking adoption.

The OBIE has fulfilled a significant gap in the supervision and enforcement of the CMA Order, when the FCA was reluctant to step into the fray - the FCA did not actively supervise the performance of the ASPSP APIs.

Instead, TPPs have turned to the OBIE when there are API outages and performance issues that require oversight to resolve, not the FCA, as the FCA has proved an impotent and apathetic source of conformance support.

The future Entity should continue to have a role in ensuring the performance and availability of bank (and other financial institution) APIs. It seems the CMA recognises this critical service, by carving it as a separate section of this consultation. However, FDATA disagrees that a future Entity is not an appropriate compliance monitoring body. Based on experience with the current OBIE, only a legislative empowered body can truly enforce compliance and conformance. Any independent body that does not have the legislative authority to enforce its supervision and policing of the future open finance ecosystem for performance and conformance is a toothless body ineffective of helping resolve API availability and performance issues.

**Q(e)** Do UK Finance’s proposals for the Future Entity raise any other concerns regarding its proposed resourcing? Are there any other alternative approaches which would be more suitable to address these types of issues?

**R(e)**

FDATA has shared its “Blueprint for Open Finance in the UK” with the CMA, and within that document we offer an alternative approach to the resourcing of the future Open Banking Limited entity.

**Representation of consumers and SMEs**

<p><b>Q(a)</b> Will the proposed arrangements ensure effective representation of consumer and SME interests? Would any alternative arrangements be more suitable?</p>
<p><b>R(a)</b></p>
<p><b>Q(b)</b> Can the interests of consumer and SMEs be adequately represented by the same board member, say with support from the advisory committee?</p>
<p><b>R(b)</b></p> <p><b>Q(c)</b> What process and criteria should be used to select the consumer representatives on the Board and Advisory Committee? Should there, for example, be a specific reference to the needs of vulnerable or less well-off consumers?</p> <p><b>R(c)</b></p> <p><b>Sustainability / adaptability</b></p> <p><b>Q(a)</b> Is the assumed ability of one or more of the CMA9 to withdraw from the Future Entity a cause for concern in terms of the sustainability of these arrangements? Would the CMA9 not have to retain membership in order to comply with certain requirements of the Order, for example to maintain the network that supports the directory requirement in the Order? Would, in any case, the benefits of membership to CMA9 members be expected to outweigh the (minimal) cost savings from withdrawing (which we would expect to be limited)? Would, nonetheless, a longer membership commitment from the CMA9 (for example, 5 years) provide greater security for the Future Entity?</p>
<p><b>R(a)</b></p> <p>Yes, FDATA is also concerned that a backdoor exit option for any one of the CMA9 is an option in the proposed UK Finance model. We agree with the conclusion that the CMA9 will need to be members/participants of the future entity for longer than 3 years in order to meet CMA Order</p>

requirements, and that any option to step away poses significant risk to the shared services that the ecosystem depends upon to provide Open Banking services to the market.

We would anticipate that any withdrawal of CMA9 participation from a funding perspective would be mitigated after a particular benchmark number of participants is reached (in order to levy adequate budget for those shared services). However, an appropriate prioritisation of builds that have adequate market demand, as well as empowering the Entity to develop standards for APIs that can be commercialised by the ASPSPs as a means to cost recovery, would do two things:

1. lower overall costs for all participants, and
2. remove any incentive for the ASPSPs to leave the Entity

With the addition of Open Finance mandated incumbent firms, it also means a bigger pool of funders decreases the proportion of funding allocated to each participant. This results in lower costs across the board, with a higher number of participants. Moreover, the budget should not be allowed to be reduced, but maintained at a level agreed upon by industry and the CMA. Instead of reducing the budget, costs should be recovered through development of services that the CMA9 can sell to other ASPSPs, and the development of premium APIs for which TPPs are charged for using.

Five years seems reasonable to give enough funding runway to find the leveling off of the required budget to run the future entity.

**Q(b)** Would the membership / proposed funding model allow non-CMA9 account providers who had adopted the open banking standards, to “free ride”: enjoy the benefits generated by the entity without making an appropriate contribution? If so, and were it deemed necessary, how could this be avoided?

**R(b)**

One option is to tax based on the number of directory calls; this way no provider of banking services could free ride the system. This would amount to a fair and proportional usage levy taxed on each participant.

**Q(c)** Could or should the Future Entity, as UK Finance has suggested, be a suitable vehicle for the implementation of other “open” projects such as the FCA’s Open Finance initiative and the BEIS Smart Data project? The Open Finance and Smart Data initiatives are not, as yet, fully defined. How, therefore might the Future Entity be designed so as to accommodate their requirements?

**R(c)**

We anticipate that the future entity would fall under the functional layer of governance proposed by BEIS in the Smart Data Initiative.

And given the FCA's published feedback on their Open Finance Call for Input acknowledges the need for an independent implementation entity, we would anticipate that the future entity would be perfectly placed to help deliver Open Finance to the market.

It would be a waste of experience, talent, expertise, and the host of shared service resources that have been built and accumulated in OBIE, when there is a clear articulated need for an independent implementation entity.

**Q(d)** It could be argued that the maintenance and development of payment initiation standards should be dealt with separately from account information and as a scheme. What should be the relationship between the new arrangements and the oversight of payment systems more generally?

**R(d)**

We strongly disagree that PIS standards should be overseen as a scheme. Payment Schemes govern the execution and settlement of payments between banks. Payment initiation service providers sit above payment schemes, in an 'instructing layer'. The sole role of a PISP is to place payment orders with banks on behalf of customers, and that instruction functionality does not justify a scheme approach.

The messaging uses the same technology (APIs) and the same processes (identification with electronic certificates, exchange of tokens) as data access. There is no justification to treat open data and open payments differently.

To create a scheme to govern PIS would be disproportionate and unnecessary. To subject PISP's to oversight by the Payment Systems Regulator would also be disproportionate and unnecessary as PISPs are already authorised and supervised by the Financial Conduct Authority.

**Q(e)** Do UK Finance's proposals for the Future Entity raise any other concerns regarding the sustainability of the proposed approach? Are there any other alternative approaches which would be more suitable to address these types of issues?

**R(e)**

**Monitoring**

**Q(1)** Our working assumption is that it would not be appropriate for an industry-led body – such as the Future Entity - to have responsibility for compliance monitoring of the conduct of some of its members. However, we envisage that whatever entity does undertake compliance monitoring will rely in part at least on data provided by the successor body to OBIE which it may also use for its own purposes. Is this reasonable? Could, with appropriate governance, the proposed Future Entity be given the responsibility for monitoring the compliance of the CMA9 with the Order?

**R(1)**

We strongly support the continuation of a monitoring function.

OBIE's capacity to monitor, scrutinise, and follow-up on issues with CMA9 open banking API issues, has been the main reason why the UK is at least 12 months ahead of EU countries in terms of open banking adoption. OBIE has filled a significant gap where the FCA has decided not to actively supervise the performance of bank APIs.

We suggest that data on bank API performance should be obtained from independent sources who are calling the bank APIs. Companies like API metrics can provide this service. This would give a realistic perspective on the issues that real TPPs are facing in terms of outages, processing times, latency etc.

Data from such an independent source could be checked against data being provided by the banks, to test whether the banks own monitoring is detecting issues.

**Q(2)** We have identified ecosystem monitoring as an important function that may, for example, indicate the need for product or other developments. Would this role fit best with the entity charged with compliance monitoring or conversely, would this role fit better with the successor body to OBIE?

**R(2)**

We support the continuation of ecosystem monitoring which has been critical to the development of new Roadmap items such as refunds and VRP, which are set to ensure the viability of PIS as an ecommerce payment method.

Ecosystem monitoring must be independent from the banks (including an industry led Entity that may be effectively run by the banks). A previous industry body, the Payments Council, was criticised, and eventually abolished because it undertook ecosystem monitoring, identified areas for change, but ultimately failed to agree on implementation of that change, due to the influence of banks, who wanted to maintain the status quo, rather than invest. This was ultimately why the Payment Systems Regulator was established - to address failures of strategy in payment systems.

Placing responsibility for ecosystem monitoring with an industry led body, risks repeating a similar mistake.

The Entity should be responsible for Roadmaps for delivery of change which has been identified by the independent monitoring function, but identification of the Roadmap items should remain independent.

**Q(3)** The CMA commonly appoints an independent professional services firm as a Monitoring Trustee to monitor compliance with remedies imposed after Market Investigations or Merger Inquiries. Would this be appropriate in this instance and if so, which types of firms or other bodies could be considered? Would it be practicable to find a firm that was not conflicted?

**R(3)**

The current monitoring function will have built up a large amount of expertise on previous and ongoing market/ ecosystem issues. Appointing an external firm would risk starting from scratch. Additionally, each time the contract was renewed, the knowledge base for the monitoring would be lost.

There should be a permanent, long term body responsible for monitoring, which can maintain and build on expertise.

**Q(4)** ASPSPs may challenge suggestions that they are non-compliant and, currently, the Trustee's monitoring function makes an initial assessment which may be subsequently passed to the CMA. Should the new monitoring entity perform this initial screening, or should this reside with the CMA's enforcement function? We envisage the former but invite views, including to the contrary.

**R(4)** The new monitoring function should perform the initial screening. The CMA may not have the bandwidth or expertise to adequately carry out the screening and assessment.

**Q(5)** Is it necessary to continue monitoring activities at all since the FCA is already responsible for ensuring compliance with the (similar) requirements of the PSR including by the CMA9? To what extent would the FCA's current monitoring activities be an effective substitute for the activities of the Trustee's monitoring function?

**R(5)**

We strongly disagree that the FCA's current monitoring activities would be an effective substitute for the activities of the Trustee's monitoring function.

OBIE's capacity to monitor, scrutinise, and follow-up on issues with CMA9 open banking API issues, has been the main reason why the UK is at least 12 months ahead of EU countries in terms of open banking adoption. OBIE has filled a significant gap where the FCA has decided not to actively supervise the performance of bank APIs. It is the OBIE that TPPs turn to when there are API outages and performance issues that need resolving, not the FCA.

The FCA appears to have committed very little resource to the supervision of open banking (possibly in line with its risk tolerance approach). Despite numerous failings by CMA9 banks, which have constituted breaches of the Order, as well as breaches of PSD2, no discernable action has been taken by the FCA against any of the CMA9. This has included outages for entire weekends, rate limiting, extremely poor customer journeys, lack of API support teams to deal with issues, and months long delays to resolve serious issues.

Additionally, the FCA's reporting tools - REP020 and NOT005 are not fit for purpose for capturing the granular, real-time data needed to properly monitor performance and availability of APIs.

REP020 is submitted by banks on a quarterly basis (any issues picked up by the FCA in this reporting have long since caused damage to TPPs). The metrics for reporting are also poorly drafted, and enable banks to report 100% availability when in practice, availability has been far lower.

NOT005 is a form that TPPs are able to complete and send to the FCA. However, the forms take 30 minutes for a TPP to complete, and therefore, not many are completed. When they are submitted to the FCA, each form gets sent to the individual bank supervisor, for the bank in question, and goes to the bottom of a big pile of higher priority issues.

In sum, it would be disastrous for UK open banking if the additional assurance provided by the monitoring function were to be replaced by FCA supervision.

**Q(6)** Are there any other issues regarding monitoring and compliance which the CMA should be aware of?

**R(6)**

## Tendering

Changes to the existing Directory will be extremely disruptive for TPPs - UK Finance state that ,“The service capabilities (in particular the Directory and DMS) need to be reviewed as a part of the transition to confirm whether they are fit for purpose, are compliant with competition law and who should provide them, consulting stakeholders, including regulators.”

This statement indicates that the existing directory could be put to tender by either UK Finance, or the proposed new entity. There are parties in the ecosystem, such as Konsentus (which now owns Open Banking Europe), who have questioned the not-for-profit nature of the OBIE directory service.

However, there should be very careful consideration about whether to expose the existing directory to competitive tender. This could lead to significant disruption for existing TPPs. Any changes to certificate management, for example, require months of lead time to prevent downstream impact on consumers (e.g. loss of consents or downtime).

### Transitional Arrangements – Design Consideration

**Q(1)** What measures should the CMA adopt to mitigate the risk that the OBIE's ongoing services will be interrupted or disrupted during a transition process?

**R(1)** The existing OBIE should remain fully funded and operational until the current roadmap (i.e. sweeping) has been implemented by the CMA9.

**Q(2)** How should the ecosystem's performance be monitored during a transition process? Should, for example the Trustee's current monitoring function be maintained during a transition process and if so where would it be appropriate to site it?

**R(2)** Yes, the current Trustee's monitoring function should be maintained. It should be sited within the current OBIE, which should also be maintained until any new entity is developed and established.

**Q(3)** Who should be held accountable for managing the transition process and what incentives should be put in place to reinforce their obligations to ensure continuity?

**R(3)** The CMA should ultimately be responsible for signing off on the establishment of the new entity. The banks should be incentivised to establish the Entity by being required to fully fund and maintain the existing OBIE, and its monitoring function, until the new Entity is fully operational.

**Q(4)** What steps should the CMA take to mitigate the risk that any remaining deliverables from the Roadmap are left incomplete? For example, should the CMA refuse to permit the commencement of the transition process before all of the elements of the implementation are in place? If not, what assurances should it seek and what safeguards would need to be put in place to eliminate the risk that the final elements of implementation would be unreasonably delayed or left uncompleted?

**R(4)** The existing OBIE should remain fully funded and operational until the current roadmap (i.e. sweeping) has been implemented by the CMA9. This does not mean that work cannot commence on the new Entity, but it will incentivise the banks to complete the roadmap if the costs are doubled up until it is finished.

**Q(5)** Once the final remit of any new organisation to succeed the OBIE is agreed, for example its ability to undertake development work that is currently beyond its scope, would it be desirable to reflect this during the transition period?

**R(5)**

**Q(6)** Are there any other issues regarding transition arrangements which the CMA should be aware of?

**R(6)** Transition should not be rushed. The OBIE runs and maintains critical infrastructure ASPSPs and TPPs rely on to comply with legal requirements (e.g. certificate management). Rushing the migration to the new entity could risk technical outages which would be disastrous for UK open banking.