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Competition and Markets Authority
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By email: RemediesMonitoringTeam@cma.gov.uk

Dear Sir/Madam,

Financial Services Consumer Panel response to Competition and Markets Authority (CMA) Consultation: Future Oversight of the CMA's open banking remedies

The Financial Services Consumer Panel is an independent statutory body. We represent the interests of individual and small business consumers in the development of policy and regulation of financial services in the UK.

We welcome the opportunity to respond to the CMA's consultation on the future oversight arrangements for Open Banking. We believe that Open Banking can be a force for good in making financial institutions more competitive by allowing consumers and small businesses to have greater access to their own financial data. However, there are significant potential risks to consumers if things go wrong. The governance and oversight arrangements will be decisive in determining the future success (or not) of Open Banking. We believe the following points are essential to ensuring the right governance arrangements exist:

- The governance must be led by an independent and independently-appointed chair, and the Board must be comprised of representatives from end users, including consumers. These should sit together with a mix of independent experts who bring particular skills (i.e. data, technology, security, risk management). This structure will deliver better results than one where governance is divided between particular commercial interests.
- There must be strong and effective consumer representation in any future governance arrangements. This includes within the body setting the future strategy for Open Banking, the operational Board and within working groups or panels. We are keen to see sufficient consumer representation to ensure risk management and redress systems are designed for the benefit of consumers, and not on the basis of what systems currently exist.
- At the heart of Open Banking there needs to be a joined up regulatory framework to ensure that consumer data is used securely, ethically and in a way that benefits individuals, small businesses and the UK economy.
- We believe there should be a 'duty of best interests' within financial services that requires firms to act in the best interests of their customers. There should therefore be a general principle that Open Banking be governed and operated to work in the best interests of consumers. This should be enshrined in any Future Entity and performance reviewed by CMA and/or FCA.
- The transition from the current Open Banking Implementation Entity (OBIE) to any future entity must be well-managed, prompt and conducted in such a way as to

minimise disruption and potential harm to end users. Outcomes for consumers should be monitored throughout the transition process.

Our responses to the questions posed in the consultation are included at Annex A below.

Yours sincerely,

Wanda Goldwag
Chair, Financial Services Consumer Panel

ANNEX A – Responses to questions

Leadership of the future entity

Q1. 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 (e.g. 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?

The Panel supports the appointment of an independent Chair of the Future Entity. To be clear; by independent we mean independent of the regulated firms delivering the Open Banking remedies; and with a clear obligation to serve the public interest. This is vitally important as the Chair will set the tone and strategy for the entire future organisation. A truly independent Chair will allow this tone and strategy to be fairly balanced between different stakeholder groups and help the Future Entity deliver its stated vision to “enable UK consumers, small businesses and corporates to benefit from a highly efficient, safe and reliable Open Data and Payments market”.

We believe the appointment of the Chair and possibly other members should be run by the [Public Appointments Commissioner](#) or similar body.

Q2. 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?

We believe there needs to be strong consumer voices on the Future Entity Board. We do not believe that the proposal for a single non-executive director (NED) to represent consumer interests is sufficient. Instead, we would like to see a 50/50 split between subject matter experts (i.e. risk, technology, data, security) and consumer interest representatives on the Board. This would align with the Bank of England’s rules for financial market infrastructures¹ and the Payment Systems Regulator’s (PSR) approach to the governance of payment systems². We provide further detail on our views of Board composition in answers to questions 11-13.

Q3. 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?

¹ <https://www.bankofengland.co.uk/-/media/boe/files/financial-stability/financial-market-infrastructure-supervision/the-boe-approach-to-the-supervision-of-fmi.pdf?la=en&hash=CD95F6E8C2093172F4EA183E0A552D815FAAB5C5> p7

² <https://www.psr.org.uk/how-we-regulate/governance-of-payment-systems/>

We believe the Future Entity Board should report to the CMA annually on the performance of the Future Entity. This CMA oversight should be ongoing to ensure that the long-awaited benefits of the CMA Order are delivered.

In addition, we believe the Future Entity should be required to consult on and deliver a roadmap of its activities - including how it will improve on delivery for consumers - every 1-2 years and have this agreed by the FCA. Consumer interests are very unlikely to be met without regulatory pushes. We believe the Future Entity should be subject to transparency requirements, similar to those required by the PSR for the governance of payment systems³.

Q4. 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?

The Panel believes that a system that partly involves levy funding should be considered in order to break the automatic link between the CMA9 and the future direction of the Future Entity.

Q5. 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?

Central to good governance is an effective system for resolving disputes and complaints that cannot be resolved directly with the firm. This should be factored into the future governance model and there should be a clear process to let consumers know who is responsible for what and where they can go if they wish to make a complaint.

Adequate resourcing

Q6. 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?

AND

Q7. 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?**

AND

³ <https://www.psr.org.uk/how-we-regulate/governance-of-payment-systems/>

Q8. 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?

AND

Q9. 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?

AND

Q10. 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?

In terms of funding, we are concerned that the call on Future Entity members for funding creates the wrong balance of power, as governance and funding are intrinsically linked. If members are both funding and governing the Future Entity, then conflicts of interests may arise. Instead, as we said above, we believe a levy would work better.

Representation of consumers and SMEs

Q11. Will the proposed arrangements ensure effective representation of consumer and SME interests? Would any alternative arrangements be more suitable?

AND

Q12. Can the interests of consumer and SMEs be adequately represented by the same board member, say with support from the advisory committee?

We refer to our earlier comments that we do not believe the proposed arrangements ensure sufficient representation of consumer and SME interests. Further, we do not believe that the same board member can adequately represent the interests of both consumers and SMEs. The experiences of these two types of consumers vary significantly when it comes to banking, and 'SMEs' themselves are not a homogenous group. We would again call for a 50/50 split between subject matter experts and consumer interest representatives on the Board. This should include separate Board members to represent individual consumer and SME interests. Separate focus should also be given to consumer risk (in particular for the most vulnerable) and consumer opportunity. These roles should be remunerated and recruited transparently with participation from a wide pool of potential candidates encouraged.

We also believe that consumer engagement and representation needs to extend beyond the Board, and be properly resourced and paid for. Consumers and SMEs have a diverse and complex set of needs and it is unrealistic to expect Board representatives to be able to provide detailed input on this without being resourced to do so. This could take the form of consumer and SME panels that engage with the Advisory Committee, Participant Groups and Delivery Working Group.

Further, we believe that there is no need for extensive bank involvement on the Board per se. The need is for appropriate technical skill sets, rather than representation of particular Future Entity memberships.

Q13. 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?

We strongly support financial inclusion and so believe it is important that those consumers who may be more likely to be financially excluded have their interests fairly represented on the Board and Advisory Committee⁴. However, we share the FCA's view that all consumers can become vulnerable at some point in their lives⁵. This is especially true during the coronavirus pandemic when many households are facing job losses, income shocks and increased emotional distress. Therefore, it is important to ensure that the whole spectrum of consumers are represented on the Board and Advisory Committee, not just specific groups who may be at heightened risk of being vulnerable or excluded. This is another reason why we believe that there needs to be a more consumer representation on the Board and Advisory Committee, as outlined above. The Board and Advisory Committee should also have a duty to take into account equality, vulnerability and inclusion considerations.

Sustainability and adaptability

Q14. 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?

No comment

Q15. 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?

No comment

Q16. 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?

No comment

Q17. It could be argued that the maintenance and development of payment initiation standards should be dealt with separately from account information

⁴ For examples of such groups, see [this report](#) by the Fair 4 All Finance (May 2020)

⁵ <https://www.fca.org.uk/publications/finalised-guidance/guidance-firms-fair-treatment-vulnerable-customers>

and as a scheme. What should be the relationship between the new arrangements and the oversight of payment systems more generally?

No comment.

Q18. 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?

No comment.

Monitoring arrangements

Q19. 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?

We agree that it would not be appropriate for an industry-led body to conduct compliance monitoring of its members. This is best left to an independent third party, such as the FCA.

Q20. 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?

We understand that by 'ecosystem monitoring' the CMA means 'assessing how well the ecosystem is working overall in delivering outcomes for consumers'. It is important that this outcomes monitoring is given equal and separate focus to compliance monitoring. This is because compliance monitoring tends to be 'tick box' whereas good outcomes monitoring requires an in-depth understanding and analysis of complex data sets that allow the monitoring entity to understand the lived experience of consumers. This will likely require a different capability (both in technological and people terms) to that required for compliance monitoring.

The Future Entity should ensure there is continuation of the End User Risk Committee and the Consumer Outcomes Evaluation Framework so that it can demonstrate it is creating positive impact in the market, and preventing harm to consumers. This will need to be supported by a properly resourced strategy and policy function.

Q21. 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?

We do not believe it would be appropriate to appoint a professional services firm as a Monitoring Trustee. Instead, this could be done by the FCA.

Q22. 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.

No comment.

Q23. 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 CMA? To what extent would the FCA's current monitoring activities be an effective substitute for the activities of the Trustee's monitoring function?

Please see our answers to Q19 and Q21.

Q24. Are there any other issues regarding monitoring and compliance which the CMA should be aware of?

No comment.

Transitional arrangements

Q25. 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?

AND

Q26. 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?

AND

Q27. 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?

AND

Q28. 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?

AND

Q29. 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?

AND

Q30. Are there any other issues regarding transition arrangements which the CMA should be aware of?

In answer to all questions in this section, we would like to make the point that any transitions arrangements must include consumer representation and independent decision making. This will ensure a prompt, well managed transition that minimises disruption and potential harm to consumers.