

Investigation of Open Banking Limited

Independent report by Alison White

1 October 2021

Alison White



Alison is an experienced Non-Executive Director, who works with a range of organisations undergoing transition and change.

Her executive background is in business: having qualified as an accountant and MBA, she led operations and commercial business for the Royal Mail Group and then for the next five years, a range of businesses in turnaround as an interim Chief Executive.

Alison now has a portfolio of appointments and interests, including her role as Lead Non-Executive Director for the Office of the Secretary of State for Wales; chairing audit committees in diverse areas of public services, and advising organisations about governance and risk, in all of which areas she blends strong strategic, financial and commercial skills, with professional expertise in corporate governance, risk management, stakeholder engagement, Board accountability, proportionate regulation and the transformation of organisational performance.

This report has been prepared by Alison White and provided to the CMA. In line with the recommendation of Alison White, the CMA is publishing this report. The CMA's approach to making redactions to the published report has been to carefully balance the CMA's own [transparency obligations](#) as a public body with the requirements of the UK GDPR, the Data Protection Act 2018 and the requirements of the Enterprise Act 2002. Whilst the CMA has sought to protect the personal data of many individuals mentioned in the report, in cases where the CMA intends to publish the personal data of individuals, it is satisfied that it has a legal basis to do so under Article 6(1)(e) of the UK GDPR (the performance of a public task in the public interest) in conjunction with its statutory power to publish information as provided for at s.6(1)(b) of the Enterprise Act 2002. In these limited cases, the CMA considers it is necessary to publish personal data of such individuals for the purposes of enhancing public understanding of the investigation. The CMA's [personal information charter](#) set out the standards you can expect from us when we collect, use or share personal data and provides details in respect of how to contact us.

Background

In September 2020, I was appointed to chair an independent investigation, the origins of which arose from a written complaint made to the Competition and Markets Authority (CMA) from an anonymous individual (the Whistle-blower), which set out a number of allegations in regard to the Open Banking Implementation Entity (OBIE) and Open Banking Limited (OBL), certain current and former senior staff members of the OBIE and the Trustee. The CMA wished there to be a comprehensive and independent investigation of those allegations to enable it to determine whether the requirements of the Retail Banking Market Investigation Order 2017 (the Order) are being, and have been, complied with.

Before my engagement, I had no prior involvement with OBL or the wider banking sector, and had never previously been engaged by the CMA. I work as a non-executive director with experience of chairing audit committees predominantly in the public sector. I have previously conducted and overseen whistleblowing inquiries, and advise organisations about corporate governance and risk management. I had not seen the complaint prior to my engagement and was not advised of the identity of the Whistle-blower (with their permission) until 20 December. The critical component of my appointment was my absolute independence from any stakeholder of the process; I wish to confirm that the observations and recommendations in this report are mine alone and have not been influenced by any stakeholder, but driven entirely by analysis and consideration of the evidence (see below for more detail about how that analysis and consideration has been arrived at).

Governance of investigation

The CMA decided to establish an Oversight Committee (OC) with terms of reference (which appear at Annex A) agreed by me, as its Chair. The other member of the OC was Colin Garland, a CMA Director of Remedies, Business and Financial Analysis—a “Chinese Wall” was established by the CMA in regard to his membership of the OC. The OC is formally constituted as a committee of the OBL Board (and reports to it by presentation of the minutes of meetings). OBL determined (in consultation with the CMA) to appoint an independent law firm to conduct the investigation. Following due process, the firm appointed was Mishcon de Reya (MdR), on 18 September 2020.

The role of the OC (and most especially myself) was to ensure a comprehensive and independent investigation was carried out regarding the issues contained in the complaint and additional material, and to oversee the preparation of a report to the CMA setting out the findings of, and any recommended actions arising from, the investigation, including whether the subject matter of any of the allegations should be referred to any other body for further consideration. The investigation should consider not only individual allegations but the combination of all of them on the leadership and governance of OBL.

The OC has met at key decision points, and provided the minutes of its meetings to the required stakeholders. Additionally, it has overseen the management of the costs of the investigation. There

have also been occasional updates made by me to the CMA9 about the process of the investigation, at the instigation of (and attended by) the CMA.

Confidentiality

From the outset, confidentiality has been a key priority for the conduct of the investigation. Stakeholders of the investigation have a right to expect that appropriate legal and ethical standards will be upheld, both in the methodology of investigation and in reporting. Sensitive and confidential materials have been shared by OBL and are owned by it in respect of legal privilege. OBL has consented to a limited waiver of privilege for the CMA only, so that the CMA can fully understand the report's findings, and has confirmed it would not onwardly disclose the privileged material to any third party.

Personal information has been processed on the basis that it is necessary for the purposes of the investigation and thus falls within the legitimate interest exception for processing: this extends to the inclusion of personal information in draft versions of the report disclosed to me as Chair (and the OC). In the best interests of all concerned, I have decided not to include personal information in this report, that may be disclosed to other third parties or published, with the exception of personal information pertaining to the most senior leaders of OBIE/OBL. This appropriately balances the legitimate interests of the public interest and individuals' interests. I have been advised that consent is not required if processing personal information on the basis of legitimate interests.

All witnesses have been asked to keep their participation in, and evidence to, the investigation confidential. Nevertheless, I am fully aware of (and concerned about) anxieties expressed by some individuals about a range of potential personal and professional repercussions associated with their involvement. Where possible, such issues have been addressed through anonymization, but where it might be possible for an individual to be identified notwithstanding anonymization, I have agreed that other approaches to protecting identities will be used, including (in those circumstances where there remains a risk that a witness could be identified from the substance or context or their evidence) removing specific details from the report altogether.

Process of investigation

At the outset of the process, the OC determined that the initial complaint; further complaints that were identified (some of which had previously been investigated by OBL, or the CMA, or both); further material provided by the whistle-blower, and subsequent evidence provided by other witnesses that came forward, should be used as a resource to address a number of key questions. It was not the role of the OC or Mdr to re-investigate those complaints which had previously been investigated, but to consider all the evidence presented in regard to them, where an important common factor was the raising of issues as to whether OBIE had been "properly managed" (in accordance with [The Retail Banking Market Investigation Order 2017](#), Schedule 1, paragraph 2). Additional overlaps were identified in areas concerning the Trustee's and Programme Director's conduct; allegations of gender discrimination and other issues of diversity and OBL's HR/contracting practices more widely.

The key questions to be answered were:

1. In respect of the individuals named in the complaint, did they behave in accordance with the terms of their OBIE contracts and the policy in respect of conflicts of interest that were in place at the time? Is there any evidence that conflicts which should have been recorded in the Register of Interests were not so recorded or that individuals did not stand aside from making decisions where they were conflicted? How did OBIE handle competing interests where individuals held senior positions (e.g., as members of OBIE's leadership team) at the same time as being directors of companies with potentially competing interests?
2. Is there any evidence of OBIE functions (Sales, Business Development, Communications) or facilities (webinars or other events, social media or travel expenses) being used inappropriately by the individuals named in the complaint? Is there any evidence of exploitation of OBIE contacts, resources or opportunities for personal gain?
3. Given the limited nature of OBIE HR/procurement policies in place at the time, when contractors named in the complaint were being appointed to carry out services for OBIE, did those appointments breach legal, regulatory or generally accepted corporate standards?
4. Given that there was no formal scheme of delegation in place at the time, what due diligence was carried out in respect of appointment of the contractors named in the complaint, (especially those where individuals were directors of competing companies at the same time as being potentially controlling managers of OBIE)? How were decisions made about remuneration/contract pricing and commissions (finders fees)?
5. Is there any evidence that actions by OBIE contractors/employees in respect of conflicts of interest breached legal, regulatory or generally accepted corporate standards?
6. Is there any evidence that actions by OBIE contractors were ultra vires of the Order?
7. The data room contains contractual information about the list of contractors extracted from the complaint-is there any evidence of inappropriate practice (financial or otherwise) in respect of OBIE's relationship with those contractors, separate from anything identified in the questions above?
8. In the context of the limited policies and approach to measuring or reporting equality and diversity in place at the time, is there any evidence that any of OBIE's contractors or employees breached the laws on equalities (especially sex or racial discrimination)?
9. Is there any evidence that OBIE employment and contracting practice was not compliant with IR35 requirements in the period addressed by the complaint?
10. Is there any evidence of inappropriate behaviour by the Trustee and/or Programme Director in any area?

MdR decided that it would be most expeditious to combine these questions under a number of key themes, as follows:

- Management of Conflicts
- Procurement
- Ultra Vires Actions/Corporate Governance
- Discrimination
- Trustee/Programme Director
- Tax.

As a result of the potential seriousness of issues identified during the investigation about the late filing of accounts, an additional section is devoted to that issue. Finally, the investigation of the many human resource allegations that were made by witnesses has been incorporated into a section of its own. The structure of the report about all these issues is therefore set out in the following manner:

- Corporate Governance
- Late delivery of accounts
- Management of conflicts
- Procurement and value for money
- Human Resource Issues.

As Chair of the OC, I specifically considered whether the investigation had appropriately answered all the questions I originally asked, and concluded that it had, with the exception of question six which referred to allegations that actions by OBIE contractors were ultra vires of the Order. The OC determined that legal consideration of this issue was out of scope (although the process by which decisions were made by OBIE remained in scope).

When the investigation started, it quickly became apparent from consideration of documents provided both by OBL and by witnesses, including the Whistle-blower, that there were additional areas of complaint to be considered in addition to those raised by the Whistle-blower. This complicated and lengthened the investigation process. Given the number of complaints that emerged (28 witnesses complained about a range of issues), MdR also investigated the handling of complaints by OBL. All this added significantly to the length of, and resource required to undertake, this investigation. MdR conducted its first interview on 23 December 2020 with the Whistle-blower; its final interview occurred on 7 May 2021. Not everyone that was invited agreed to be interviewed - in total, MdR conducted 61 interviews with 49 individuals, including representatives of the CMA and CMA9. Some interviewees were far less forthcoming than others, and some preferred to answer the questions that were put subsequently, in writing. Some of the senior OBIE staff attended with lawyers present.

At the outset of the investigation, I requested a substantial body of information from OBL which was lodged in a confidential dataroom to which only the OC and MDR had access. MDR (and to a lesser extent myself) made subsequent requests for information. In some respects, provision of documents was slow and arrived in a piecemeal fashion. This may have been a reflection of poor record keeping within the organisation, particularly where records related to internal complaints and grievances.

The difficulties of information-gathering inevitably led to delays in interviewing witnesses, and the subsequent need for re-interviews when new information emerged at a later stage, which in the interests of fairness, then had to be put to those witnesses. MDR tried to keep the need for such practices proportionate, but some of the additional cost and time delays were directly related to these difficulties.

When interviewing witnesses, in some cases the investigating team from MDR were unable to disclose to the interviewee the source of evidence that was put to them. In some cases, this impacted upon the interviewee's ability to respond and appropriate allowance has been made for this in reaching any conclusions. The investigation was often presented with directly contradictory evidence from interviewees, in relation to which little or no documentary evidence has been provided which would have enabled conclusions to be reached based on contemporary documents. Various witnesses made claims about the lack of credibility of other witnesses. Invariably this has been where the person who is accused of lacking credibility has provided evidence which either contradicts the evidence provided by, or is critical of, the person who is claiming that person lacks credibility. Where the evidence of one person has been preferred over another, consideration has been given to claims of lack of credibility when reaching conclusions on the credibility or otherwise of witnesses. MDR also took into account where those claims have been made by someone who has a clear motive in seeking to discredit the other person's evidence.

This became a much more substantial investigation with a large number of witnesses and documents than was envisaged at the outset. During the investigation itself, further serious allegations were made which increased the scope. There were a substantial number of issues within scope. Under the governance of the OC, MDR undertook its investigation in a proportionate manner consistent with an internal investigation of this nature. Given the range and number of complaints and issues, it was not appropriate to pursue every line of enquiry or conduct a disclosure exercise akin to a criminal investigation. It was unnecessary to form a view on every single issue where there was conflicting evidence. There are a number of additional interviewees that could have been spoken to about issues uncovered during the investigation in order to cover every possible point. However, in order to keep the investigation as proportionate as possible, the number of interviewees (and re-interviews) was limited as far as possible.

In an investigation of this type, it is inevitable that some interviewees make representations in defence of their own actions which relate to the acts of and/or roles and responsibilities of others. No finding has been made for example, as to the adequacy or proportionality of the Open Banking remedy or compliance by the CMA9 with the Order, nor as to the acts of the CMA9 or CMA before

the appointment of the current Trustee. The report does contain some limited comment on such issues, but only where they explain matters which are in scope or highlight whether relevant individuals were, or may have been, at fault.

MdR has confirmed to me that it has undertaken sufficient work to form a view on the material allegations with an appropriate degree of confidence. As Chair of the OC, I specifically considered whether sufficient evidence had been considered to support the conclusions that had been arrived at, and concluded that it had.

[redacted].

Process of reporting

It can be seen from the description of the investigation process set out above that the methodology for reporting its findings would be similarly complex. The resultant report would necessarily contain many sensitivities-legal, professional and personal. It would contain material far beyond the scope of the complaints originally made by the Whistle-blower. [redacted]

As part of the reporting process, the CMA, OBL (Trustee and Programme Director) and the Whistle-blower received sight of extracts of evidence relevant to them / that related to their conduct or complaints respectively (with personal information redacted as necessary) for the purposes of fact and confidentiality checking (a process of “Maxwellisation”). The investigation sought to follow the principles and guidance in the report *A Review of 'Maxwellisation'* produced by Andrew Green Q.C. and other barristers of Blackstone Chambers for the Treasury Committee. By way of explanation, the Maxwellisation process involves the provision of extracts from a substantial report and by its nature involves the provision of extracts which are potentially critical of witnesses and where those witnesses have not had the prior opportunity to respond, for example in interviews or through subsequent correspondence. Information contained in the report that is positive, supportive and/or is accepting of the evidence of the witness or relates specifically to other witnesses or their evidence is not provided. It does not follow that the investigation necessarily accepted that evidence. As such, it is not possible (nor is it intended to be possible) for the witnesses to draw any inferences about the report as a whole or its conclusions, from those limited extracts. This point was confirmed in the legal challenges that were received on the subject.

MdR compiled a thorough and comprehensive report of the findings from its investigation, which appropriately took into account the feedback and comments received through the Maxwellisation process. As Chair of the OC, I specifically considered and approved the changes made between the draft and final versions of the report, to ensure fairness to all parties.

This report incorporates verbatim findings from the final MdR report; the remainder has been written by me as Chair. I wish to confirm that the observations and recommendations I have made are mine alone and have not been influenced by the representations or behaviour, legal or otherwise, from any stakeholder or other third party.

Report of findings in respect of questions asked by Oversight Committee (written by Mishcon de Reya)

Question 1: In respect of the individuals named in the complaint, did they behave in accordance with the terms of their OBL contracts and the policy in respect of conflicts of interest that were in place at the time? Is there any evidence that conflicts which should have been recorded in the Register of Interests were not so recorded or that individuals did not stand aside from making decisions where they were conflicted? How did OBL handle competing interests where individuals held senior positions (e.g., as members of OBL's leadership team) at the same time as being directors of companies with potentially competing interests?

- OBL had a policy for managing conflicts which required that staff declare conflicts. In general, contractors did declare conflicts appropriately.
- The policy provided that where conflicts were declared: "*Open Banking's Regulatory and Legal Function and/or HR Function will notify the Programme Director or the Implementation Trustee of Open Banking and await his/her guidance before taking further steps.*"
- Compliance with the policy was sporadic and we find that conflicts were not properly managed within OBL such that contractors were not given specific guidance about how to conduct themselves and mitigants were not put in place.
- [REDACTED].
- [REDACTED] (like other contractors) properly declared [REDACTED] conflict. However, when [REDACTED] became known to the Trustee and Programme Director, consideration should have been given as to whether [REDACTED] should be replaced. We recognise that OBL was initially envisaged to be a short-term project, was resourced entirely by contractors and the recruitment of appropriately skilled staff was difficult. Accordingly, for pragmatic reasons we consider that the engagement of [REDACTED] role might have been justified. However, in those circumstances, it is all the more important that strict controls be put in place to manage the conflict.
- [REDACTED], there was no proper enquiry into [REDACTED] interests until [REDACTED], following concern expressed by a third party. This enquiry took the form of a meeting [REDACTED] but was perfunctory in nature. There was no proper enquiry into [REDACTED], assessment of risks and consideration of appropriate controls until [REDACTED].
- There is no evidence of individuals being involved in decisions where they were conflicted. In respect of [REDACTED], controls were put in place to manage the inherent conflict and [REDACTED]. Whilst there was some confusion amongst management as to how this operated in practice, there is no evidence of inappropriate interference by [REDACTED].

- There is evidence of a blurring of roles between OBL [redacted] in some circumstances, particularly in the holding of meetings [redacted]. There was no attempt to manage that conflict, for example by controlling who from OBL attended meetings.

Question 2: Is there any evidence of OBL functions (Sales, Business Development, Communications) or facilities (webinars or other events, social media or travel expenses) being used inappropriately by the individuals named in the complaint? Is there any evidence of exploitation of OBL contacts, resources or opportunities for personal gain?

- [redacted] had the opportunity to access potential customers of OBL and divert business away from OBL to their own company. Whilst there is no conclusive evidence that [redacted] did do this, there was an unacceptable risk that they may have done so. OBL did not put in place controls to mitigate or prevent this occurring and was inappropriately relaxed about the possibility - taking a view that: [redacted]. We do not consider that approach to be appropriate. [redacted].
- [redacted].¹
- [redacted].

Question 3: Is there any evidence that actions by OBL contractors/employees in respect of conflicts of interest breached legal, regulatory or generally accepted corporate standards?

- The only express requirements in the Order and Mandate which related to conflicts, relate to the Trustee only. There are no express requirements which relate to staff. Directors of OBL are subject to statutory provisions in the Companies Act 2006 which relate to conflict of interest which include that they must declare interests in transactions with the company to the board (and may not be able to vote on/take decisions relating to entering into them) and must avoid other outside interests unless they are first approved.
- There is no evidence that the Trustee or directors breached *legal, regulatory or generally accepted corporate standards* in respect of their own conflicts [redacted].
- In relation to contractors, OBL's standard contractor terms provided that "*The Agency and the Agency Staff shall be free to provide services to other persons provided that doing so does not conflict with the Company's interests or have an adverse effect on the Agency's ability to provide the Services.*"
- We consider the contractors discharged their duty to OBL by declaring their interests and following any rules or guidance provided by OBL for management of those interests. Where OBL failed to provide rules or guidance, contractors cannot be

¹ [redacted]

generally be criticised where they pursue outside interests (as they are entitled to do). By and large, failures were by OBL rather than contractors.

- We consider that in failing properly to manage conflicts – IG did not take sufficient steps to ensure OBL was properly managed [redacted].

Question 4: Given the limited nature of OBL's HR/procurement policies in place at the time, when contractors named in the complaint were being appointed to carry out services for OBL, did those appointments breach legal, regulatory or generally accepted corporate standards?

- We have found no evidence of corruption or similar wrongdoing. Appointments did not breach legal, regulatory or generally accepted corporate standards.

Question 5: Given that there was no formal scheme of delegation in place at the time, what due diligence was carried out in respect of appointment of the contractors named in the complaint, (especially those where individuals were directors of competing companies at the same time as being potentially controlling managers of OBL)? How were decisions made about remuneration/contract pricing and commissions (finders' fees)?

- We are satisfied that a system was in place to ensure contractors were not paid above market rate and that this was properly delegated [redacted] and that IG satisfied himself that the system was in place. We have also seen evidence that the implementation of the benchmarking process and "rate card" did result in reduction in rates in some cases [redacted].
- In respect of referral payments, the payment of a reward for referrals of staff is a common practice in businesses. The practice encourages direct recruits avoiding the need to pay considerably more expensive agency fees. Whilst we understand that referrers were not involved in the interview/appointment process, nevertheless, we do not consider that it was appropriate for managers to receive fees for hires into their own department which sometimes occurred.
- A number of people have described a culture whereby individuals within OBL recruited contacts or "mates". In a small sector, it is not unusual for individuals to know and be able to recommend other individuals.
- In general, appointments were made following an independent review process. [redacted].
- In other appointments, HR were sometimes overruled by the business function, but there is no evidence that this took place for improper motives.
- In respect of procurement more generally, systems and controls were in place but were poorly implemented and not always followed. A written procurement policy was not in place until May 2019. As a result of this, some outcomes may have represented poor value, although a contributory factor is the time pressure which OBL was under in

delivering outcomes. We have investigated the specific allegations of poor practice in the appointment of [redacted]. Deficiencies in the [redacted] were remedied prior to contract award. We have identified no deficiencies in the [redacted].

Question 6: The data room contains contractual information about the list of contractors extracted from the complaint. Is there any evidence of inappropriate practice (financial or otherwise) in respect of OBL's relationship with those contractors, separate from anything identified in the questions above?

We have not identified any other inappropriate practices.

Question 7: Is there any evidence that actions by OBL contractors were ultra vires of the Order?

- Allegations made in the Complaint Document accuse OBL of being an "organisation devoid of basic governance", with "no-one at the helm" and with a "total lack of accountability". It is these, more general, allegations about the governance arrangements which we address. This includes consideration of whether decisions to undertake activities alleged to be ultra-vires were made as part of a flawed decision making or governance process.²
- There is very little in the Order about the governance of OBL other than a framework for agreeing the governance of the entity with the CMA9 to be set out in 'Agreed Arrangements' and that the entity was to be set up by the CMA9. The Agreed Arrangements said little about governance of OBL (although it was to adhere to 'industry best practice'). We understand this was partly because OBL was expected to exist solely in the short term to deliver API standards. The structure was ill-suited to the longer-term project with a wider remit which OBL ultimately undertook.
- While a mechanism existed in the Order for the Agreed Arrangements to be varied by the CMA or Trustee with the CMA's approval, this was not done as the Open Banking project extended in time and scope.
- The articles of association of the company which was set up by Payments UK with the CMA9, are also poorly drafted and ought to be replaced. They are insufficiently tailored to the purpose for which the company was set up, do little to provide clarity on governance and conflict on important respects such as on director remuneration. This coupled with the lack of clarity on governance of OBL in the Agreed Arrangements gives a weak governance framework for the entity required to deliver open banking in the UK.
- Nevertheless, the Order required OBL to be 'properly managed' and its directors (including the Trustee) were required to comply with directors' duties in managing it. In the regulatory

² The CMA9 are generally aware of the activities of OBL which are alleged to be ultra vires. As set out in this report, the Trustee considers that the Order is sufficiently wide to justify the activities undertaken. A factual investigation of this kind is ill-suited to interpret the Order and adjudicate on what is a disputed point of law. By agreement with the Oversight Committee, we agreed that it would be disproportionate to investigate and beyond our remit.

context in which OBL was established and, given the wider impact it had on all stakeholders in the Open Banking ecosystem, including not only the CMA9 but customers and other businesses involved with it and its workforce, it was important that basic sound principles of governance be adhered to.

- We consider that too much power was vested in one individual (the Trustee) with insufficient checks and balances. The Trustee's role under the Order placed him in a position of conflict: he was responsible both for leading OBL and ensuring it was properly managed but also for supervising it and those that funded it (the CMA9). [§]. As we have noted in this report, under the Order, ultimately decisions on any amendments to the Agreed Arrangements and in relation to delivery by OBL, were to be agreed with and enforced by the CMA or by the Trustee, acting on behalf of the CMA.
- Under IG's tenure as Trustee, the Board of OBL has always been small, with no person appointed to provide independent challenge or scrutiny, having been a Board of two for most of IG's tenure as Trustee and, since Bill Suglani's resignation, with IG in sole control.
- Management of OBL appears to have been conducted informally with little process around holding board meetings, for example. Key roles were given to the Trustee and the Programme Director under the Order, described as being akin to 'Executive Chair' and 'Chief Operating Officer' respectively. It is not clear why, in that case, EC as Programme Director was not appointed to the Board, as had been the case under the previous Trustee - in our view (although not required expressly by the Order) EC should have been appointed director.
- There was a lack of clarity about responsibilities and reporting lines as between IG, EC and Bill Suglani. The Order provides that the Trustee will oversee the work of the Programme Director who reports to him. [§].
- There is evidence of both IG and EC seeking to distance themselves from management of OBL, [§]. Ostensibly, in IG's case, this was said to be because IG wanted to manage conflicts inherent in his role. However, nevertheless IG remained responsible under company law and under the Order for management of OBL. [§]. This failure meant that IG could not be sure that OBL was being properly managed. The use of a contractor-only model employed by OBL for much of its existence further increased costs.
- There was lack of clarity in the Order on the scope of the Open Banking project. As the project expanded in time and scope, OBL costs escalated far beyond the original estimate of £20 million in the CMA Report (stated to be now in excess of £150 million). It is recognised that the £20 million was an early estimate, assumed that the entity would be staffed with bank secondees and that some of the increased scope came from extensions to the Order due to the Payment Services Directive (PSD 2) and others which were consulted on and approved by the CMA9 themselves in some instances and by the CMA in others. We also recognise that failure by the CMA9 to deliver on the initial scope on time and the Coronavirus (COVID 19) pandemic may have been contributory factors.

- An unfortunate climate of mistrust developed between the Trustee and the CMA (on the one hand) and the CMA9 (on the other) for which each bear some responsibility.
- We consider that the contractor-only model employed by OBL for most of its existence was only appropriate if OBL was to be a short-term project. The contractor-only model increased costs for OBL and presented difficulties in managing and training staff.
- When IG was appointed as Trustee, he took the view that the terms of the Order permitted him to take a more ambitious approach to the delivery of Open Banking than his predecessor. At this point we consider that it should have been clear that the costs and timing for delivery would increase and that the contractor-only model was no longer appropriate. We accept that at that time there may have been some opposition from the CMA9 to moving away from the contractor-only model, however, there is no reason why the issue could not have been explored. We consider that the move from contractor to permanent staff took too long. [✂].
- There was a significant amount of uncertainty and clear differences of opinion about responsibility in practice for governance of OBL as between the CMA, Trustee and CMA9. In particular, it was unclear:
 - (a) who was responsible for agreeing the terms and conditions and remuneration for the Trustee;
 - (b) who had responsibility for governance of OBL including as to whether the consent of the CMA or the CMA9 was required for appointments to the Board and determining the Trustee's salary; and,
 - (c) whether the CMA9 had a right to agree the budget for OBL spending and the amount of financial information they were entitled to.
- We consider that IG and EC did an effective job in delivering the open banking programme. However, whilst project delivery was important, insufficient attention was paid to management of OBL as a limited company. This included management of conflicts, internal HR matters and corporate governance in general. This in part was caused by lack of clarity about responsibilities and reporting lines as between IG, EC and Bill Suglani and evidence of both IG and EC seeking to distance themselves from management of OBL, [✂]. OBL could have benefitted from having an independent non-executive director on the Board to provide independent scrutiny and challenge.
- The set of facts set out in this paragraph demonstrates a pattern of weak governance at OBL and management failings when considered against basic best practice in relation to purpose, leadership and culture, board composition, having clear director responsibilities, managing directors' conflicts, engagement with stakeholders and ensuring there is independent oversight and scrutiny over the company's operations.

- A weak pattern of governance at OBL and management failings are also demonstrated by other findings in this report, including:
 - (d) Weaknesses in application of the company's policies and procedures around management of conflicts, inadequate HR and complaints procedures and inadequate procedures and protection for whistleblowing – these are examples of failings in the company's system of risk management and internal controls, responsibility for which ordinarily falls squarely in the remit of the Board.
 - (e) Workforce treatment issues for example in relation to bullying and the absence of fair and transparent process for termination of contracts demonstrate apparent failings in relation to management of culture and values at the organisation and failure to engage in effective workforce engagement, falling short of the standards which would be expected of an organisation of the size of OBL given the number of contractors it employed.

Additional question pertaining to late delivery of statutory accounts

- During the investigation we established that the Report and Financial Statements for the period 1 January 2018 to 31 December 2018 were filed late. The Accounts were required to be filed by 30 September 2019. In the event the Accounts were filed on 9 December 2019 – 70 days late.
- [✂].
- It is clear that the decision to delay filing the Accounts was taken by IG. IG's expressed justification for failure to file the Accounts on time was his difficulty in getting comfort to make the "going concern" assessment. We are unable to conclude whether that was the main reason. However, if one accepts that was the reason, we do not consider that IG took all reasonable steps to file the Accounts on time. In particular IG should have:
 - (f) raised the issue of the need to file the Accounts with the CMA at any early stage, in order to explore what comfort could be provided;
 - (g) taken professional advice on whether there was a going concern issue; and
 - (h) if there was a going concern issue, taken advice on what options existed to ensure the Accounts were filed on time.
- The timely publication of annual accounts is an important part of corporate governance. [✂]. For a company like OBL which was effectively performing a public function in implementing the Order, transparency is important. This was recognised

by OBL and media messaging around publication of the Accounts was carefully planned. For the reasons set out above, we do not consider that the filing of the Accounts was properly managed by IG.

Question 8: Is there any evidence that OBL employment and contracting practice was not compliant with IR35 requirements in the period addressed by the complaint?

- We have identified no evidence that OBL's employment and contracting practice failed to comply with IR35 requirements in the period addressed by the complaint.
- [✂].

Question 9: In the context of the limited policies and approach to measuring or reporting equality and diversity in place at the time, is there any evidence that any of OBL's contractors or employees breached the laws on equalities (especially sex or racial discrimination)?

- By instruction of the Oversight Committee, we were also asked to investigate complaints made by former or current contractors or employees of OBL. This has widened the scope of the investigation to also include consideration of the workplace culture, the abrupt termination of contractors' contracts, whether there is evidence of contractors being bullied or subjected to whistleblowing detriment, the handling of internal complaints and the efficacy of the HR function.
- *The Workplace Culture*
 - (i) During our investigation, we identified wide ranging concerns about the culture at OBL. The number of interviewees who described the working environment at OBL as "toxic" is overwhelming. We were also made aware of a number of incidents of alleged bullying and harassment (outside of conduct which might be unlawful under the Equalities Act-EqA), and complaints of bullying which had been upheld [✂].
 - (j) We consider that the key causes of these cultural issues were:
 - (i) the contractor-only model, which prevented the adequate management of HR issues;
 - (ii) [✂];
 - (iii) the failure to handle complaints adequately or at all; and
 - (iv) over-reliance on HR to manage the culture and deal with complaints.
 - (k) In our view, the inaction and failures of OBL's leadership to [✂] properly manage complaints allowed a culture of bullying and intimidation to prevail.

- (l) While the toxic workplace culture at OBL was not in and of itself discriminatory or otherwise unlawful, this culture, combined with these failures of management to adequately manage HR matters, created a real risk of legal claims from contractors alleging discrimination, harassment, victimisation and whistleblowing detriments.
 - (m) While beyond the scope of our investigation, a recent employee engagement survey suggests that the culture at OBL is improving.
- *Discrimination, victimisation and harassment*
 - (n) While we have heard multiple allegations of [redacted] bullying, intimidatory and/or harassing behaviours, we have found no evidence of collusion among senior men to exclude women. Where such complaints are made, we have found that senior men and women were treated equally poorly: there are allegations of side-lining and exclusion from both men and women.
 - (o) The image of a "boys' club" is likely to have been fuelled by the unchecked behaviour of a small number [redacted]. Any significantly male-dominated [redacted] risks these sorts of allegations, and where the culture is toxic, there is a lack of transparency and allegations of bullying, harassment and discrimination are not uncommon, it is unsurprising that such allegations are made.
 - (p) There is no disagreement from OBL that there has been insufficient gender diversity since its inception. While it is true that the senior management does not appear to be particularly gender diverse, we have not seen evidence that this is unusual in the industry, or that it indicates discrimination. We have seen and heard evidence that indicates that OBL is conscious of the need to improve gender diversity at all levels, and we have no reason to doubt that it now wishes to improve diversity.
 - (q) Contrary to the allegations of the Whistle-blower, we have found no evidence to suggest that IG holds a discriminatory attitude towards women, or that he treats women less favourably than men.
 - (r) Our investigation has not identified any evidence of systemic discrimination, victimisation or harassment contrary to the EqA. We have, however, identified the following incidents of potentially discriminatory treatment of contractors:
 - (i) The decision not to renew [redacted] contract [redacted] may have been less favourable treatment on grounds of sex and/or victimisation.

- (ii) [REDACTED]. We therefore find that sexist comments and comments that could be perceived as harassment towards women were tolerated in the OBL office.
 - (iii) The bullying [REDACTED], may have been racially motivated and therefore could have been less favourable treatment and/or harassment on grounds of race.
 - (iv) [REDACTED].
 - (v) Several allegations of abrupt contract terminations arise after contractors have raised concerns about treatment which would be unlawful under the EqA. If well-founded, this would amount to unlawful victimisation. By way of example: there is a possibility that [REDACTED] was victimised as a result of alleging sexist behaviours [REDACTED] contract was not renewed [REDACTED] contract was abruptly terminated, [REDACTED] also indicate potential victimisation of contractors at OBL.
- (s) Given the lack of evidence available, and OBL's failure to investigate or adequately record contractors' complaints, we have been unable to reach a conclusion in relation to a number of serious allegations of harassment ([REDACTED]), discrimination and victimisation. Had we been able to do so, we would have been able to ascertain whether there was a larger and/or more systematic issue within OBL. We find that OBL had no interest in establishing this, even when it was receiving a large volume of such complaints. [REDACTED].
- (t) In our view, the working environment at OBL and the way OBL was run together created a real risk that discrimination, victimisation and harassment could occur and could go unchecked. Leaving aside time limitation considerations, liability for such unlawful conduct could lie not only with any individual perpetrator but also with OBL, whether or not OBL had any knowledge of the act or provided approval. [REDACTED].
- Whistleblowing detriments
 - (u) A number of contractors reported to us that they feared they would lose their roles if they raised concerns [REDACTED], and others reported that they believed they did in fact lose their contracts as a result of raising such concerns.
 - (v) We have found two instances where it appears that contractors may have had their contracts terminated, and/or been subjected to other related detriments, because they blew the whistle [REDACTED].

(w) OBL did not have adequate protections in place for whistle-blowers [REDACTED].

- *The Abrupt Termination of Contracts*

(x) We have been made aware of numerous allegations from former contractors regarding the manner in which their contracts were terminated or not renewed, as well as the manner in which the transition to employment roles was handled.

(y) The abrupt termination of contracts appears to have been a considerable problem at OBL, and was disconcerting and destabilising for the workforce as a whole. If inadequate or no reasons are given or communicated to the individual or the team, this inevitably leads to speculation as to why, and to further uncertainty amongst the remaining workforce regarding their own positions.

(z) Often decisions about contract terminations were made entirely without HR input. This hampered HR's ability to monitor where any such terminations might have been motivated by factors which could be considered to be unlawful or which perpetuated the cultural problems OBL was facing, or to do anything to prevent it. Despite the apparent level of concern around the issue of abrupt contract termination, there was no centralised oversight on decisions to terminate contracts and/or to not renew them, [REDACTED]. EC and IG appear to have had very little involvement in this, and no oversight whatsoever.

(aa) We find that there was a failure of management to prevent and/or manage this practice of abrupt contract termination, [REDACTED].

(bb) As a result, there was considerable risk of abuse of this practice, particularly in light of the multiple allegations of abrupt contract terminations following the raising of complaints: OBL left itself exposed to significant risk of claims of discrimination, harassment and victimisation under EqA, and of whistleblowing detriment.

(cc) [REDACTED]:

(i) [REDACTED];

(ii) [REDACTED];

(iii) [REDACTED],

(iv) [REDACTED].

- *The Handling of Internal Complaints by OBL*

- (dd) It is readily apparent that OBL did not have appropriate procedures in place to investigate complaints raised by contractors. We have heard from many contractors who say they raised concerns [§] and nothing was done in response.
- (ee) Where investigations were carried out, they were not motivated by a desire to protect the well-being of complainants or the workforce in general, to protect the culture of the working environment or even to reduce risk of legal claims and liability. Instead, they appear in large part to have been motivated by a desire to protect OBL from reputational damage. Further, OBL appeared to be satisfied to disregard complaints from contractors who were leaving, or who managers believed they did not need anymore.
- (ff) A number of the complaints we have identified during our investigation have not appeared in the records provided to us by OBL. While some of these complaints were about minor incidents and/or informally made, some were more serious. It is also of particular concern that a complaint of retaliation for participating in an investigation was not looked into or dealt with.
- (gg) We have reviewed the investigations which were carried out by OBL into complaints. These investigations tended not to follow best practice in at least some of the following respects:
 - (i) Appropriate records were not kept of the investigation. We have not seen a complete set of investigation documents for all of the investigations. In one case, evidence was destroyed after the investigation.
 - (ii) Investigations that were carried out tended to exclude the complainant entirely: complainants were rarely interviewed as part of the investigation and were rarely provided with information on the outcome of the investigation. It is an important part of the effective resolution of complaints that complainants understand what is being done to investigate their complaints, what the outcome is and, where appropriate, what will happen as a result of the investigation's conclusions.
 - (iii) In one case, an investigation report appears to have neglected to include a finding – or indeed any mention of - clear evidence of whistleblowing detriment that was uncovered during the investigation. [§].

- (iv) Not only were complainants kept in the dark about outcomes, so too were those accused of wrongdoing.
 - (v) OBL struggled to keep complaints confidential, [REDACTED]. Plainly, this will discourage others to come forward with complaints and leads to allegations that senior leaders are colluding to ensure that investigations are influenced and complaints are not upheld.
 - (vi) OBL did not always follow through on recommendations made in its reports, either effectively or in some cases at all.
 - (vii) No thought was given to where complainants should go if the complaint was about the Trustee, or indeed how to handle such complaints. OBL had no way of offering an effective resolution of complaints made against IG.
 - (viii) No right of appeal was ever offered to complainants.
- (hh) There are particular shortcomings in the manner in which serious allegations of sexual harassment have been investigated and handled by OBL to date. In our view, OBL has consistently failed adequately to respond to and investigate serious allegations of sexual harassment. In particular:
- (i) [REDACTED].
 - (ii) [REDACTED].
 - (iii) [REDACTED].
 - (iv) [REDACTED].

- *The HR Function*

- (ii) We find that the previous HR function at OBL – as an adjunct to the main responsibilities of the Finance Director - was not fit for the management of circa 200 members of staff. We do not consider this to be the responsibility of the incumbents at the time: [REDACTED] constrained by (i) OBL's and contractors' wishes that they avoid being treated like employees due to IR35 concerns; and (ii) a lack of interest or engagement on HR issues by EC or IG.
- (jj) As to the effectiveness of the HR function since its introduction in 2019, which now manages 77 employees (as at 31 March 2021) and a handful of contractors:

- (i) Our experience of trying to obtain documents from OBL on HR matters indicates that there are likely to be significant gaps and failings in record keeping [✂].
 - (ii) [✂] handling of [✂] contract termination [✂] was poor.
 - (iii) There was a failure to properly manage complaints internally. [✂].
 - (iv) The work done to move staff to permanent employment has taken longer than might be expected.
 - (v) [✂].
- (kk) It should be noted that we have not seen evidence of any complaints made to OBL by any employee. This may indicate an improved workplace culture and governance, and the effectiveness of the policies that have finally been introduced.

Question 10: Is there any evidence of inappropriate behaviour by the Trustee and/or the Programme Director in any area?

- In the case of the Trustee, we consider that in the late filing of the Accounts there are grounds to find that IG was in breach of obligations under the Companies Act.
- Both EC and IG failed to protect the confidentiality of a whistleblower in that they shared details of a whistleblowing complaint internally. [✂].

Investigation report written by Mishcon de Reya

Introduction

- OBL is a unique organisation which was set up quickly in order to complete a specific task. From the outset, witnesses report that the organisation was not operating effectively – which we attribute to the serious illness of the previous Trustee and the pro-tem arrangements which were put in place.
- We consider that IG, EC and the senior management team did a good job of getting the programme on track and managing the project to deliver the technical solutions required by the Order.

Corporate governance

- There is very little in the Order about the governance of OBL other than a framework for agreeing the governance of the entity with the CMA9 to be set out in 'Agreed Arrangements' and that the entity was to be set up by the CMA9. The Agreed Arrangements said little about governance of OBL (although it was to adhere to 'industry best practice'). We understand

this was partly because OBL was expected to exist solely in the short term to deliver API standards. The structure was ill-suited to the longer-term project with a wider remit which OBL ultimately undertook.

- While a mechanism existed in the Order for the Agreed Arrangements to be varied by the CMA or Trustee with the CMA's approval, this was not done as the Open Banking project extended in time and scope.
- The articles of association of the company which was set up by Payments UK with the CMA9 are also poorly drafted and ought to be replaced. They are insufficiently tailored to the purpose for which the company was set up, do little to provide clarity on governance and conflict on important respects such as on director remuneration. This coupled with the lack of clarity on governance of OBL in the Agreed Arrangements gives a weak governance framework for the entity required to deliver Open Banking in the UK.
- Nevertheless, the Order required OBL to be 'properly managed' and its directors (including the Trustee) were required to comply with directors' duties in managing it. In the regulatory context in which OBL was established and, given the wider impact it had on all stakeholders in the open banking ecosystem, including not only the CMA9 but customers and other businesses involved with it and its workforce, it was important that basic sound principles of governance be adhered to.
- We consider that too much power was vested in one individual (the Trustee) with insufficient checks and balances. The Trustee's role under the Order placed him in a position of conflict: he was responsible both for leading OBL and ensuring it was properly managed but also for supervising it and those that funded it (the CMA9). [§<]. As we have noted in this report, under the Order, ultimately decisions on any amendments to the Agreed Arrangements and in relation to delivery by OBL were to be agreed with and enforced by the CMA or by the Trustee, acting on behalf of the CMA.
- Under IG's tenure as Trustee, the Board of OBL has always been small, with no person appointed to provide independent challenge or scrutiny, having been a Board of two for most of IG's tenure as Trustee and, since Bill Suglani's resignation as a board member, with IG in sole control.
- Management of OBL appears to have been conducted informally with little process around holding board meetings, for example. Key roles were given to the Trustee and the Programme Director under the Order, described as being akin to 'Executive Chair' and 'Chief Operating Officer' respectively. It is not clear why, in that case, EC as Programme Director was not appointed to the Board, as had been the case under the previous Trustee - in our view (although not required expressly by the Order) EC should have been appointed to the Board.

- There was a lack of clarity about responsibilities and reporting lines as between IG, EC and Bill Suglani. The Order provides that the Trustee will oversee the work of the Programme Director who reports to him. [✂].
- There is evidence of both IG and EC seeking to distance themselves from management of OBL, in EC's case in particular regarding finance aspects. In IG's case, this was said to be because IG wanted to manage conflicts inherent in his role. Nevertheless, IG remained responsible under company law and under the Order for management of OBL.
- There was lack of clarity in the Order on the scope of the open banking project. As the project expanded in time and scope, OBL costs escalated far beyond the original estimate of £20 million in the CMA Report (stated to be now in excess of £150 million). It is recognised that the £20 million was an early estimate, assumed that the entity would be staffed with bank secondees and that some of the increased scope came from extensions to the Order due to the Payment Services Directive (PSD2) and others which were consulted on and approved by the CMA9 themselves in some instances and by the CMA in others. We also recognise that failure by the CMA9 to deliver on the initial scope on time and the Coronavirus (COVID 19) pandemic may have been contributory factors.
- An unfortunate climate of mistrust developed between the Trustee and the CMA (on the one hand) and the CMA9 (on the other) for which each bear some responsibility.
- We consider that the contractor-only model employed by OBL for most of its existence was only appropriate if OBL was to be a short-term project. The contractor-only model increased costs for OBL and presented difficulties in managing and training staff, which IG himself recognised. When IG was appointed as Trustee, he took the view that the terms of the Order permitted him to take a more ambitious approach to the delivery of open banking than his predecessor. At this point, we consider that it should have been clear that the costs and timing for delivery would increase and that the contractor-only model was no longer appropriate. We accept that at that time there may have been some opposition from the CMA9 to moving away from the contractor-only model, however, there is no reason why the issue could not have been explored. We consider that the move from contractor to permanent employees took too long. [✂].
- There was a significant amount of uncertainty and clear differences of opinion about responsibility in practice for governance of OBL as between the CMA, Trustee and CMA9. In particular, it was unclear:
 - a) who was responsible for agreeing the terms and conditions and remuneration for the Trustee;
 - b) who had responsibility for governance of OBL including as to whether the consent of the CMA or the CMA9 was required for appointments to the Board and determining the Trustee's salary; and,

- c) whether the CMA9 had a right to agree the budget for OBL spending and the amount of financial information they were entitled to.
- Whilst project delivery was important, insufficient attention was paid to management of OBL as a limited company. This included management of conflicts, internal HR matters and corporate governance in general. OBL could have benefitted from having an independent non-executive director on the Board to provide independent scrutiny and challenge.
- There was a pattern of weak governance at OBL and management failings when considered against accepted basic best practice.

Late delivery of statutory accounts

- The Report and Financial Statements for the period 1 January 2018 to 31 December 2018 (the Accounts) were required to be filed by 30 September 2019. In the event, the Accounts were filed on 9 December 2019 – 70 days late.
- [✂].
- It is clear that the decision to delay filing the Accounts was taken by IG. IG's expressed justification for failure to file the Accounts on time was his difficulty in getting comfort making the "going concern" assessment. We are unable to conclude whether that was the main reason. However, if one accepts that was the reason, we do not consider that IG took all reasonable steps to file the Accounts on time. In particular, IG should have:
 - a) raised the issue of the need to file the Accounts with the CMA at an early stage, in order to explore what comfort could be provided;
 - b) taken professional advice on whether there was a going concern issue; and
 - c) (if there was a going concern issue), taken advice on what options existed to ensure the Accounts were filed on time.

Management of conflicts

- OBL had a policy for managing conflicts which was approved on 26 September 2017. The policy provided that where conflicts were declared "*Open Banking's Regulatory and Legal Function and/or HR Function will notify the Programme Director or the Implementation Trustee of Open Banking and await his/her guidance before taking further steps.*" Compliance with the policy was sporadic and we find that conflicts were not properly managed within OBL such that contractors were not given specific guidance about how to conduct themselves and risk mitigants were not put in place.
- [✂].

- In most circumstances, we do not consider it appropriate that [redacted] in an organisation such as OBL carrying out a function of a public nature should have an outside interest which is closely connected to their function within the organisation. When [redacted] became known to the Trustee and Programme Director, consideration should have been given as to whether that was appropriate and whether [redacted] should be replaced. We recognise that OBL was initially envisaged to be a short-term project, was resourced entirely by contractors and the recruitment of appropriately skilled staff was difficult. Accordingly, for pragmatic reasons we consider that the engagement of [redacted] role might have been justified. However, in those circumstances it is all the more important that strict controls be put in place to manage the conflict.
- [redacted], there was no proper enquiry into [redacted] interests until [redacted], following concern expressed by a third party. This enquiry took the form of a meeting [redacted] but was perfunctory in nature. There was no proper enquiry into [redacted] interests, assessment of risks and consideration of appropriate controls until [redacted].
- We find that the lack of controls meant that there was an inappropriate blurring of roles between [redacted] and OBL. This included:
 - a) [redacted];
 - b) arranging meetings to discuss both OBL and [redacted] business, without consideration of whether it would be preferable for another OBL individual to attend; and,
 - c) the risk that OBL business development prospects could be exploited for private gain.
- We consider that that the failure to manage conflicts has adversely affected the reputation and credibility of OBL.
- We consider that in failing properly to manage conflicts – IG did not take sufficient steps to ensure OBL was properly managed [redacted].

Procurement and value for money

- We have found no evidence of corruption or similar wrongdoing. Systems and controls were in place for procurement but for smaller items were not always followed. Whilst there was a procurement department in place at an early stage and procurement practices were generally followed, a written procurement policy was not in place until May 2019. As a result of this, some outcomes may have represented poor value for money, although we consider this may have been as a result of the time pressure which OBL was under in delivering outcomes. We also consider that a lack of external scrutiny coupled with guaranteed funding from the CMA9 meant that there was a risk that insufficient pressure and focus was applied [redacted] to ensure good value outcomes.

- Similarly, systems were in place for the appointment of contractors which were generally, but not uniformly followed. Sometimes HR was overruled in appointing applicants to posts. OBL did have a system in place to ensure contractor remuneration was benchmarked to market rates.
- The original estimate for the open banking project contained in the CMA Report was £20 million. In the event costs to date have exceeded £150 million. In addition to the reasons given earlier, we consider that reasons for the increase include the approach the current Trustee has taken in interpreting the Order to give him wide discretion to increase OBL's activities with a view to promoting open banking generally and increasing take up by banks and other market participants - it is outside the scope of this report to determine whether this is the right approach. A further reason is the contractor-only model employed by OBL for much of its existence which increased costs.

Human resource issues

- We find that OBL had a toxic workplace culture where bullying was commonplace. We consider that the key causes of this were:
 - a) the contractor-only model, which prevented the adequate management of HR issues;
 - b) [redacted];
 - c) the failure to handle complaints adequately or at all; and,
 - d) overreliance on HR to manage the culture and deal with complaints.
- IG appeared largely oblivious to the cultural issues. [redacted]
- We consider that many of the HR issues described in this report could have been avoided, and/or more effectively managed if the workforce at the time was not contractor-based. OBL's management did not recognise, or feel it necessary to tackle, the problems this created for matters such as:
 - a) workplace culture;
 - b) the inability to manage people properly;
 - c) [redacted] a perceived threat of abrupt contract termination if contractors did not fall into line;
 - d) the failure to recognise the rights of individuals in the workplace; and,
 - e) the active avoidance of any measures that may have ameliorated any of these issues, for fear (as several managers have put it) of falling foul of the IR35 rules. [redacted].
- Until mid-2019, the Finance Director was in charge of an HR function that was not fit to manage a workforce of approximately 200 staff. Staff management was driven by IR35

considerations rather than considerations such as protecting staff from discrimination, harassment, victimisation and whistleblowing detriments (and OBL from liability in respect of the same). [redacted].

- [redacted].
- The handling of internal complaints has been inadequate and at times non-existent. OBL's decisions not to involve complainants in, or inform them of, the outcome of the investigations has been counterproductive and led to whistle-blowing complaints to the CMA. Similarly, the failure to offer the right of appeal, or to consider how to handle complaints against IG or EC, has forced contractors to seek redress outside OBL. OBL's approach to complaints has often failed to protect either the complainant or OBL.
- We are of the view that had OBL handled: (i) the termination of contracts, and (ii) complaints that arose on termination, appropriately and transparently, it is possible that the escalation of complaints to the CMA could have been avoided.
- We find that while the toxic workplace culture at OBL was not in and of itself discriminatory or otherwise unlawful, this culture, combined with these failures of management to adequately manage HR matters, created a real risk of legal claims from contractors alleging discrimination, harassment, victimisation and whistleblowing detriments.
- The protection of whistle-blowers at OBL was wholly inadequate, and gives rise to considerable risk of retaliation against those who raise genuine concerns about wrongdoing. [redacted].
- We have found a number of isolated complaints that could evidence unlawful behaviour by OBL and/or certain of its contractors and which were either not dealt with at all or were mismanaged.
- [redacted]. We therefore find that sexist comments and comments that could be perceived as harassment towards women on grounds of sex were tolerated in the OBL office.
- [redacted]. It is possible that those complaints amounted to protected disclosure(s) for whistleblowing purposes, and that the termination of [redacted] contract [redacted] were whistleblowing detriments.
- We consider that [redacted] contract may have been terminated because of the complaints [redacted].
- [redacted] capable of amounting to race discrimination/harassment on grounds of race. [redacted].
- [redacted].
- In respect of [redacted], we find that OBL:

- a) mismanaged [redacted] contract termination;
 - b) [redacted] the decision not to extend [redacted] contract [redacted];
 - c) mismanaged [redacted] concerns and misrepresented the position [redacted]; and
 - d) refused to provide responses to [redacted] complaints.
- In light of the above, and in particular (b), we have found that there is a possibility that:
 - e) the decision not to renew [redacted] contract, [redacted] were acts of less favourable treatment on grounds of sex; and
 - f) [redacted] was victimised as a result of alleging sexist behaviours [redacted].
 - In certain cases, we have been unable to conclude whether serious allegations of discrimination, harassment and victimisation, and indeed patterns of such behaviour, are well-founded. This in large part due to a lack of evidence provided by OBL and a failure by OBL to investigate those complaints at the time. However, we consider that they were sufficiently serious, and/or formed part of a pattern of potentially unlawful conduct, such that they should have been investigated properly by OBL regardless of the complainant's wishes/cooperation.
 - A contractor who raised complaints of breaches of the Equality Act 2010 [redacted] contract abruptly terminated. OBL did nothing about these complaints.
 - We have found no issues of a lack of gender diversity beyond what would be expected in the tech and financial services sectors, and no issue of a cultural or generalised hostility towards senior women.

Proper management of OBL

For the reasons set out above, we do not consider that the Trustee ensured that OBL was properly managed in accordance with the Order.

Observations by Chair of Oversight Committee

The conclusions of this investigation do not make for pleasant reading. The bare facts of the situation are that 28 people gave evidence to the investigation about a range of complaints, some of which involved potentially serious issues of bullying, harassment, discrimination and victimization. They also alleged malpractice in how the organisation was being managed, and the investigation has found that there is sufficient evidence that there was indeed not “proper management”, as set out in the Order. These complaints were either not investigated at all or investigated inadequately, and even when they were investigated, improvement actions were either not implemented or implemented inadequately. The experiences of these witnesses shine a light through the window of what happened at OBL during a prolonged period, and it’s clear that some of those witnesses (most

especially the Whistle-blower) continue to suffer ([X]) detriment to date. The investigation has been a painful process for many stakeholders affected by it, which makes it all the more important that lessons should be learned from their experiences so that in future such a situation cannot be allowed to recur.

In overseeing this investigation, I have asked myself how it is possible for matters to go wrong in the way they did, and for no-one to have noticed, or done anything about it. Even when complaints were made to the CMA directly, there were no apparent alarm bells or investigations of the potential for deeper-seated problems. The CMA9 knew nothing of these issues at all: although there is clear evidence that relationships between OBL and the CMA9 have been worsening, [X], appears to have precluded any effective or timely action even in those areas. It does not appear that the CMA9 asked any questions in regard to corporate governance (or what was happening “under the roof”) at all. The governance processes of OBL clearly fell down the cracks between the CMA and the CMA9; the fact that this investigation has concluded that there was not “proper management” is not only a failing of the “managers” themselves, but also of the primary stakeholders.

When I first read the complaint from the Whistle-blower (and long before the investigation interviewed many other witnesses), it was apparent that what the whistleblower was saying potentially went to the heart of the leadership and governance of OBL-the complaint was not only about a series of individual issues, but also (and even more importantly) about the wider culture of the organisation. It is for this reason that the terms of reference for the investigation included the requirement to: “...consider not only individual allegations but the combination of all of them on the leadership and governance of OBIE...”.

Since I became a non-executive director, I have advised many organisations of different sizes about how to improve their corporate governance, and why doing so is critically important. Corporate governance is a system of policies, processes and rules that direct and control an organisation’s behaviour. It is the framework that defines the relationship between shareholders (the owners of an organisation), management, the board of directors and other key stakeholders. The primary objective of corporate governance should be safeguarding stakeholders’ interests in conformity with the public interest and fostering a culture of integrity, leading to a positive performing organisation. There are many studies which set out the benefits to organisations of effective corporate governance.

Corporate governance is expensive, and so should be directly proportionate to the size and nature of the organisation and its prevailing risk environment. Key design considerations for an organisation like OBL should include consistency with its relationship with the CMA (a public sector regulator) and the CMA9 (of which the constituent banks are subject to stringent regulatory requirements, and one member is partially owned by the taxpayer). The high-pressure environment within which OBL was working due to the expectations set by its stakeholders and the cost (not only of OBIE, but also the investment required by the CMA9 constituent banks) are in my view additional relevant risk factors to be considered in the design of OBL’s governance system.

Boards of directors (in this case, the Trustee and Finance Director, and latterly the Trustee only) are responsible for the governance of their companies. The role of those that formed the company (in this case the CMA and the CMA9 both had a role) in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place.

Good governance signals to the outside world that an organisation is well managed and that the interests of management are aligned with other stakeholders. Indicators that an appropriate governance structure is in place and working effectively should in my view include:

- A balanced, competent and diverse board, which regularly reviews its own effectiveness;
- Solid foundations for oversight and scrutiny, including appropriate and timely performance metrics, based on a balanced scorecard;
- Adequate disclosures around related parties' transactions and director's other interests;
- An effective risk management and internal control framework and periodically reviewing its effectiveness;
- Integrity in corporate reporting;
- Transparency for stakeholders both in the good and bad times to promote confidence and respect;
- An emphasis on integrity and promoting ethical behaviours.

It is clear to me from the investigation that the lack of appropriate corporate governance was directly responsible for what happened in this organisation. Too much power was vested in too few people, with insufficient checks and balances, and a complete lack of independent scrutiny and challenge.

The issues which the investigation has uncovered in respect of inappropriate management decisions (such as the contractor-only resourcing model, the delay in laying the statutory accounts and the methodology for deciding the remuneration of the Director); the failure to investigate or learn from complaints; the way in which some people were treated; the failure to properly mitigate conflicts of interest, risking the organisation's reputation and the deterioration of relationships between OBIE and some of its key stakeholders (such as the CMA9), could all in my view have been identified and addressed promptly if the organisation had had effective corporate governance processes in place. Unfortunately, it did not, and that situation remains to the present day-in my view, the sooner this situation is rectified, the better for all concerned.

Recommendations

1. A proportionate system of corporate governance needs to be implemented for the successor organisation to OBL, with key priority actions for the Board

I have set out in my observations what I believe the key features of an effective corporate governance system to be. Whatever is decided about the role of the successor entity (post-OBL/OBIE), the mistakes that were made in the governance of OBL must not be repeated. In

transitioning to that successor organisation (for convenience I refer to it as NewCo) I recommend that urgent consideration is given to:

- Appointment of independent non-executives (and excluding any role, including of design, for directors from the predecessor organisation, to provide public confidence);
- Financial transparency, including urgent completion of the requested financial audit and ongoing open book accounting, for the organisations that finance NewCo;
- Redesign of corporate governance processes, including (and most especially) clarity of purpose through revised articles of association and a clear remit for the Board; an appropriate committee structure, including audit, risk, nomination and remuneration committees, and observer status for the CMA and CMA9 at all Board meetings;
- A programme of independent (internal) audit to review major areas of risk in NewCo's business;
- An organisation-wide review of resourcing in the context of the revised purpose, with independent oversight;
- Implementation of an appropriate suite of policies, to include management of conflicts of interest; procurement; remuneration (especially of directors); recruitment; diversity and inclusion; equalities; whistle-blowing; discipline; grievance and management of complaints;
- Implementation of balanced scorecard measures with transparent publication to the Board and key stakeholders, which include leading indicators such as turnover rates, complaints received, exit interview information; and appropriate scrutiny of that performance information by the Board on a regular basis;
- An external review of the effectiveness of the HR function, with Board oversight of the resultant improvement plan.

2. Exclusion of those responsible for past management failures from design and governance of Newco

It seems to me that there should be accountability for the failures identified in governance and management of OBL. I have no doubt that the CMA and CMA9 will consider together what form that accountability might take in the wider context of achievements elsewhere. In this section, I will restrict myself therefore to consideration of the design and leadership of the governance of both transition and NewCo. I view this in the context of the reputations of the CMA and CMA9, and their undoubted intentions to learn from this investigation in such a way as to regain the trust and confidence of interested stakeholders and indeed, the wider public. [✂] inappropriate for those managers, and especially the director, to play any part in the design or future governance of NewCo or the arrangements for transition to it.

3. The position of the complainants needs to be further considered

This report sets out the detriments suffered by some of the witnesses-some of those are whistle-blowing detriments. None of the witnesses has suggested to me that they are seeking compensation for those detriments and there are to my knowledge, no legal cases pending or prospective

litigation. I have been advised that class action is not available through the employment tribunal process, and there are time limits on bringing individual action, which have already expired. The investigation did not set out to determine liability and I am not aware that anyone is entitled to a settlement. However, by dint of the sheer number of complaints that were made and the findings of the investigation in regard to them, I recommend active consideration of the position of the complainants in the context of the reputation of the stakeholder organisations concerned and in the public interest. At the very least, an appropriate apology should be extended.

4. This report needs to be published to OBL, the CMA9 and the Whistle-blower, with appropriate communications to other witnesses

I am all too well aware that a report such as this is unlikely to fully satisfy any of the parties associated with the investigation. I know it makes for uncomfortable reading. But I strongly recommend publication to the interested parties at the earliest opportunity, with appropriate (and limited) redactions to protect confidentiality. I do not anticipate that any part of this report written by me will be redacted.

Statement of independence

I wish to confirm that the observations and recommendations in this report are mine alone.

ALISON J WHITE

Chair of Oversight Committee and Investigation

7 August 2021

ANNEX A

Oversight Committee

Terms of Reference

A. Background and purpose

The Competition and Markets Authority (the **CMA**) has received a written complaint from an anonymous individual (the **Complaint Document**). The Complaint Document sets out a number of allegations against the Open Banking Implementation Entity (**OBIE**), certain current and former senior staff members of the OBIE and the Trustee. In addition, in the context of an assessment by the CMA of a complaint by a former OBIE contractor, the CMA has received further material evidence relating to the issues raised in the Complaint Document (the **Further Material**).

The CMA wishes there to be a comprehensive and independent investigation of the allegations contained in the Complaint Document (the **Investigation**) that will enable it to determine whether the requirements of the Retail Banking Market Investigation Order 2017 (the **Order**) are being and have been complied with. It is also appropriate for the Investigation to consider other complaints received by the CMA and OBIE, including the Further Material.

A Committee (the **Oversight Committee**) shall be established to oversee the Investigation. The Oversight Committee shall be chaired by Alison White, as independent chair, with overall responsibility for ensuring a comprehensive and independent Investigation is carried out regarding the issues contained in the Complaint Document, taking into account the Further Material, and for preparing a report to the CMA setting out the findings of and any recommended actions arising from the Investigation, including whether the subject matter of any of the allegations should be referred to any other body for further consideration. The Investigation of the matters contained in the Complaint Document, including the Further Material, will be supported by an external law firm (the **Firm**).

The Oversight Committee will have one other member, Colin Garland, a CMA Director of Remedies, Business and Financial Analysis, with responsibility for supporting the independent chair and acting as CMA liaison concerning the CMA's assessment of whether the terms of the Order are being and have been complied with.

The Oversight Committee will be supported by a secretariat (the **Secretariat**) whose membership will be proposed by OBIE and approved by the Oversight Committee and whose activities will be directed by the Chair of the Oversight Committee. The Secretariat will work with the OBIE General Counsel, acting as liaison with OBIE in terms of provision of information, access to individual employees/contractors and practical arrangements. The Secretariat, working with OBIE General Counsel, will also ensure that their support functions are carried out objectively, effectively and efficiently and in accordance with OBIE internal policies, and will preserve the confidentiality, integrity and independence of the Investigation.

B. Scope of activities

1. Establish the process for the Investigation, including the appropriate sequencing, and agree with the Firm the matters on which it will provide support to the Investigation taking into account whether:
 - (i) there is sufficient level of specificity provided in the Complaint Document as to what conduct is alleged to have taken place in relation to each element;
 - (ii) there is reasonable and prima facie evidence provided in the Complaint Document which could be made available to the Firm;
 - (iii) if substantiated, the allegation could materially adversely affect OBIE's ability to meet its objectives under the Order which, for the avoidance of doubt, may include any allegation which appears to be sufficiently substantiated as to indicate that one or more OBIE employee, contractor or other individual connected to OBIE or with responsibilities under or governed by the Order may have been involved in the commission of an offence.
2. The Investigation will consider not only individual allegations but the combination of all of them on the leadership and governance of OBIE.
3. To assist the efficient operation of the Investigation, the Oversight Committee may assign the investigation of certain matters in the Complaint Document and Further Material to professional service providers other than the Firm if it considers that such matters would be more effectively investigated using an alternative resource.
4. Ensure the Firm, and any other professional service providers engaged, will carry out a detailed investigation of allegations assigned to it in a rational, coherent and proportionate way so that the eventual conclusions enable a report to be written which addresses the terms of reference for the Oversight Committee.

5. Following the agreement of the process for their investigation the Firm will provide a detailed scope, methodology and project plan within its agreed budget for review, comment and approval by the Oversight Committee. The Oversight Committee shall keep under review the Firm's progress as against its budget. If the Firm is to exceed its budget, prior approval is needed from the nine funding current account providers (the **CMA9**).
6. Review and approve any data/information requests and the list of individuals proposed by the Firm to be interviewed as part of the Investigation.
7. Review periodic updates from the Firm, provide comments/ input /challenges where necessary to ensure that the Investigation is carried out effectively and efficiently in accordance with the agreed budget, framework, scope and project plan.
8. Review and consider the findings from the Firm. Where relevant and appropriate, the Oversight Committee may ask the Firm to suggest best practices with regard to the allegations taking into account the size and maturity of OBIE.
9. Prepare a final report incorporating the relevant findings from the Firm and other resources to which elements of the Investigation have been assigned. It will be for the Oversight Committee to determine its timetable but the CMA's expectation is that the final report would be provided to the CMA within 3 months of instruction of the Firm.

C. Output

The Oversight Committee will prepare a draft report for review by the complainant, the CMA and OBIE for accuracy and confidentiality before preparing a final report for the CMA (and a version of the final report that can be shared with the CMA9 Heads of Retail with appropriate redactions) after the completion of the Investigation. This final report shall include a summary, findings, conclusion and recommendations (if any) from the Oversight Committee based on the findings from the Firm.

D. Agenda and frequency

1. The Oversight Committee is expected to hold 3 – 5 meetings during the period of the Investigation.
2. Other business to be dealt with bilaterally and via correspondence.
3. Any pre-read materials or documents to be provided within a reasonable time prior to the meetings.

E. Governance

1. A meeting of the Oversight Committee will be deemed quorate if both members are present.
2. OBIE General Counsel may attend meetings where requested by the Oversight Committee.
3. Minutes of meetings (or similar summary update reports) to be provided to the OBIE General Counsel, the Trustee and the CMA.
4. The final report will be addressed to the CMA. The CMA will be responsible for sharing the final report with other interested parties, taking into account measures to ensure personal data and confidential information is not inappropriately disclosed.