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Open Banking Implementation Trustee Response to CMA Consultation on The Future Oversight of the CMA's Open Banking Remedies

1. Summary of my opinion

I take great pride in the success of open banking in the UK and believe that the OBIE has played a significant role not only in this, but also in contributing to the development of a vibrant UK FinTech sector. Whilst I support changes that place the OBIE on a more permanent footing that builds on the current momentum, I believe that the UK Finance proposals fall significantly short of meeting the CMA's criteria. I set out my reasoning in Section 2.

Additionally, there is significant work to undertake in order to deliver both the Trustee's and the CMA9's obligations under the CMA Order. Whilst conformance, availability and performance have improved over the last two years, the quality of APIs and customer experience is still insufficient for many use-cases, especially payments. As a result, there is a continued requirement for an independent Trustee. I set out my alternative proposals in Section 3.

2. Concerns with the UK Finance proposal

I welcome the UK Finance work and believe that their proposals have merit. Trying to balance a range of competing interests is not easy, as we have learned during the delivery of open banking, and I appreciate their attempt to design an independent governance model.

However, I do not believe that the UKF proposal meets the CMA's four criteria and I am concerned that the strong momentum of open banking may be lost, and the potential benefits to consumers and small businesses not delivered. As I detail in section 3 below, I believe that many of my concerns can be addressed by splitting the current role of Trustee and OBL chair into distinct functions, and carving out the Office of the Trustee to sit alongside the Future Entity to ensure the ongoing obligations of the CMA Order are met by the CMA9.

Taking each of the CMA's four requirements in turn:

a. Independently-led and accountable

Despite their best efforts, I am not convinced that the Future Entity guarantees independence or accountability, given the proposal relating to weighted voting rights and the Future Entity's reliance on an unspecified commitment from the CMA9 to fund the shortfall for three years.

In my view, this means that the CMA9 would have an unreasonable veto over the activities of the Future Entity. It is further my understanding that the UK Finance proposal reflects far more the views of the CMA9 than its other members, and as a big bank lobby group it is clear that there is likely to be a misalignment of incentives between them and the wider ecosystem, something that has been overtly apparent throughout the delivery of the CMA Order to date.

Aside from the arguments I laid out above and the references from the FCA and BEIS regarding the benefit to Open Finance and Smart Data of a truly independent implementation entity, I would refer the CMA to concerns raised in the past about the governance of the Payments Council in an HMT report from July 2012¹. Paragraphs 4.18-4.26 under the heading "Problems with the current system" are particularly relevant, and I would call out from 4.20 and 4.21 "There are a number of reasons why the Payments Council's current structure undermines its ability to fulfil a

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/81567/setting_strategy_uk_payments190712.pdf

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strong advisory and strategy setting role...[t]he main reason is ***the Payments Council is dominated by the UK's largest banks.***" I believe this alone is sufficient justification for my proposal outlined below.

I am further concerned that the requirements UK Finance sets itself will be difficult to realise without regulatory backing and truly independent monitoring and enforcement: "The Open Banking operating model should evolve to support the service requirements of a) the CMA9 and the obligations of the CMA Order b) the needs of the PSD2 community and c) extension to future changes such as Open Finance and Smart Data d) the development of the EU SEPA API Access scheme and e) the call from HM Treasury in the Payments Landscape Review to develop the potential of open banking payments." The commercial incentives of the CMA9 are too misaligned, as we have seen recently, for example, in the very strong resistance to date relating to sweeping and Variable Recurring Payments. Quite frankly, Open Banking is a competition remedy, aimed at providing new forms of competition and innovation to large, incumbent, retail and business banks. Relying on those incumbents to support the ongoing delivery of open banking in the UK is not defensible.

To mitigate some of the risks relating to the independence and accountability of the Future Entity, I would further suggest:

- The Chair must be independent and, along with the CEO, must be appointed, or as a minimum approved, by the CMA and not the CMA9/UK Finance.
- The CMA should determine protections pertinent to the objectives of the Order and require that they are enshrined in the objects of the future entity.
- The CMA, or the Trustee as delegate, should oversee the OBIE and Future Entity until new governance arrangements are in place.
- The level of involvement by UK Finance in decisions about the Future Entity should be limited to their proposal. It is our view that UK Finance foresee a much more significant and ongoing involvement.
- It is important a board can unify around the objects of the company and therefore the Future Entity should not have self-interested member groups on the Board and in particular multiple banking representatives.

b. Adequately resourced to perform the functions required

I welcome the good faith commitment from the CMA9 to fund the majority of the running costs of the Future Entity for the next three years, however, no long-term funding structure is in place or proposed and therefore an unspecified and only three-year funding commitment by the CMA9 is insufficient. UK Finance has suggested that members of the future entity, i.e. organisations using these services, subsidise other functions currently paid for by the CMA9. This could price the current Directory at an uncompetitive level, threatening its sustainability. It is my strong view that funding requirements of the CMA9 should be set by the Trustee and the CMA to safeguard the Order until such time as an alternative and long-term funding model is in place. There needs to be specific commitment from the CMA9 and/or UK Finance members to fund certain activities, until such time as alternative funding streams are available, or until customer adoption is determined to have reached an acceptable level determined by the CMA.

I am sceptical about both the extent of potential cost saving efficiencies (unless to the detriment of services provided by the OBIE today) and service fee income opportunities; I suggest that this is raised with the FCA and monitored moving forward. My preferred approach, given the feedback on Open Finance and Smart Data, would be for the Future Entity to evolve into the body that delivers on Open Finance and a Roadmap for this to occur over the next 3 years seems an adequately lengthy time while ensuring momentum is not lost. It is worth noting that "respondents [to the BEIS Smart Data report] emphasised the importance of leveraging the experience and expertise accumulated in Open Banking" and it would be a huge waste to lose this and one that would ultimately cost the CMA9 more than they may save short term.

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I am additionally concerned that the proposed governance arrangements do not support new income, as the lack of capital base means that risks will not be taken to seek out sources of additional income. I would suggest the Office of the Trustee is entrusted with funding to support and deliver ecosystem stewardship to ensure innovation, as demonstrated by the recent tender process for open banking services by HMRC, continues to support the TPP community and its growth.

c. Dedicated to serving the interests of consumers and SMEs

The HMT July 2012 report provides the following quote from the TSC – “The Payments Council is dominated by the banks and other payment industry members . . . **Consumers are entitled to be suspicious of the motives of a body with such a composition proposing measures that are in the financial interests of its members.**” While it is not guaranteed the UK Finance model will lead to such a situation, the risk is evident and again provides strong justification for the need for a truly independent Trustee and Monitoring Function to work alongside it.

While I note and agree with the inclusion of a consumer non-executive director in the UK Finance proposal, it is only guaranteed that consumer and small business outcomes will be delivered if the commercial interests of the ASPSPs align. I am confident the existing consumer and small business representatives would agree given the frustration they have expressed to date and I would point to resistance to, for example, developing access dashboards and implementing app-to-app redirection as rationale for such fears.

d. Sustainable and adaptable to future needs of the ecosystem

My personal reading of the UK Finance proposal, supported by discussions held at IESG and in private, is that the approach of UK Finance and the CMA9 is suited to a set of Standards that are mature and static such as BACS.

I am extremely concerned that the current proposals raise a significant risk that much of the progress made to date will be lost and rather than acting as a springboard to Open Finance and Smart Data the innovative nature of open banking will be replaced by a purely “keep the lights on” approach. I would highlight that:

- There is no mechanism for governance to transition from open banking to “open banking plus” let alone Open Finance or Smart Data
- It is clear that UK Finance’s aim is to reduce the cost and implementation burden of open banking on the CMA9. They have no interest in extensibility, and their proposals on governance and funding support that view.
- The simplest way to ensure this would be for OBIE to be extended in its current form until such time as the roadmap to Open Finance/Smart Data was clear.

While the UK Finance proposal mentions a need to support “the extension to future changes such as Open Finance and Smart Data”, by not facilitating a continuation from OBIE through to Smart Data and Open Finance, there is a significant risk of loss of momentum, expertise and continuity that we feel the CMA and government should take seriously.

Government should prioritise this as a matter of urgency and, if not, the CMA must ensure that the successor to the OBIE is explicitly tasked with developing proposals for evolving its governance to be able to support Smart Data initiatives, including Open Finance. Key concerns include:

- The UK Finance proposals have a governance model for open banking only, including bank representatives on the Board.
- There is no mechanism for amending the governance to support wider open data initiatives.

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- Whilst the UKF document references support for the principle of additional “participant groups”, without amendments to the governance proposals, they are highly unlikely to succeed.
- The lack of long-term funding arrangements could make commercial arrangements to provide services to other sectors unattractive.

In order to maintain its global leadership position in FinTech, the UK needs an entity that supports a) the completion of the implementation of open banking and b) facilitates the implementation of Open Finance and Smart Data. The Kalifa Review recommends Smart Data be prioritised, with legislation enabling mandated delivery in individual sectors, and further recommends that Open Finance be a mandatory regime, funded by an FCA levy, with an implementing body, and using a phased “roadmap-style” approach, similar to Open Banking. The success of Open Banking is not an accident; the UK has more TPPs than the EU, and 3m end-users is just the beginning; it seems odd not to take advantage of the OBIE as it is today and widen that, rather than having a stopgap between now and the future via a Future Entity that may well push out the future indefinitely.

Given all of this, the model I outline below is the best model to maintain momentum, deliver the residual / ongoing obligations of the Order, and support the steps to Open Finance / Smart Data.

3. Proposed model for the Future Entity

The primary objective of my proposal is to ensure that the *ongoing* obligations of the CMA Order are met. Given that there is considerable work to be done to ensure that the requirements of the Order are delivered, both in terms of Roadmap-related delivery and the CMA9’s ongoing obligations, it is clear to me that the role of Trustee, appropriately supported and funded, must continue. This would entail a shift in focus away from implementation towards ensuring the ongoing obligations of the Order are met.

The original governance and management of the OBIE reflected the CMA Order’s requirements to focus on OBIE’s delivery of standards and infrastructure, and the implementation of those standards by the CMA9. This required a single person to perform the functions of Trustee and Chair of Open Banking Limited (OBL). This made sense as control of OBL was critical to the delivering the Order i.e., in getting high quality standards published, assets such as the Directory built, and promoting the development of the open banking ecosystem. As a temporary legal structure, it has succeeded in its objectives, but both the CMA and I have recognised for some time that this is not an appropriate permanent arrangement.

My proposal is simple. Firstly, it is to separate the role of Trustee and OBL Chair, and secondly, to carve out the Office of the Trustee. Separating the role of Trustee and OBL Chair into two distinct role holders would allow the Trustee to ensure the ongoing obligations of the Order are met – including delivery of any outstanding Roadmap-related activity and implementation requirements – and allow an independent OBL Chair to ensure that OBL follows the strategic direction agreed by an independent Board, provided any ongoing obligations of OBL in respect of the Order are satisfied. Given the need for both roles to continue it is important that the organisational model clearly sets out the responsibilities and functions of both, and the arrangements for the two roles to work together.

This has the additional benefit of requiring little to no variation of the Order, as it would separate my current dual role as both Chairman of Open Banking Limited and the Implementation Trustee into its distinct parts, and it would address the requirement for permanent governance arrangements. The role and responsibilities of the Trustee as defined in the CMA Order continue unaltered given they already allow for ensuring the ongoing obligations of the Order are met, and the CMA will be able to rely on the Trustee to ensure this continues to be the case.

To provide for this model, the entirety of the Office of the Trustee, which I will refer to as the “Open Banking Trustee Function (“OBTF”) needs to be carved out and tasked solely with ensuring the Trustee can meet their ongoing obligations under the CMA Order. The OBTF would be separate but work alongside the Open Banking Future Entity (“OBFE”).

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Open Banking Future Entity (OBFE)

I am broadly supportive of the UK Finance (UKF) proposals for a future service company, focused on meeting the needs of participant groups. As laid out above in section 2, however, I have several fundamental concerns regarding their proposal, in particular the issues of governance, accountability and funding. I do not believe that, without substantial amendment, it satisfies any of the four CMA priorities outlined in the consultation.

It is important that these proposals are not taken forward as written, otherwise we risk undermining the significant progress made through open banking and the chance to maintain the UK's leadership role in the world of open data.

Open Banking Trustee Function (OBTF)

Requirement for supervision

I propose that the Trustee's monitoring and supervisory obligations under the CMA Order be continued under an independent OBTF, led by a Trustee appointed by the CMA. These obligations require that the CMA9 continue to both meet the ongoing requirements of the Standard, including performance and availability benchmarks, and provide implementations that enable third parties to offer reliable services to their customers.

This latter point is not always the case today and this is one of the main reasons why I consider that the Trustee must continue to play a supervisory role. It is instructive that since January 2018, at which point APIs were meant to be continuously available by the CMA9, there has been a significant need to issue Trustee and/or CMA Directions as shown below:

CMA9	Number of months under Directions (Total out of 40)	Number of months under Directions (Percentage out of 40)
ASPSP 1	39	97.5%
ASPSP 2	32	80.0%
ASPSP 3	18	45.0%
ASPSP 4	13	32.5%
ASPSP 5	11	27.5%
ASPSP 6	10	25.0%
ASPSP 7	10	25.0%
ASPSP 8	6	15.0%
ASPSP 9	5	12.5%
Average	16	40.0%

This demonstrates that the CMA9 would not have provided APIs anywhere close to the level on offer today without extensive oversight from the OBIE, the Office of the Trustee, the Implementation Trustee, and the CMA itself.

To be clear, the fundamental rationale for the OBTF is that whilst the implementation requirements of the Order are coming to an end, the outcomes sought by the CMA Order have not yet fully materialised. The current roadmap, when successfully delivered, fulfils the implementation requirements but not the ongoing obligations of the Order. Safeguarding the ongoing obligations of the Order will be the primary purpose of the OBTF once the implementation requirements have been completed.

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Relationship with OB Future Entity

The Trustee would need to be able to direct the OBFE to address issues as they arise, for example to amend the Directory in response to a new regulatory requirement, or to update the Customer Experience Guidelines to ensure continued best practice. It is essential that the Trustee has the powers, resources and independence required to not only ensure the CMA9's compliance with the Order, but also to ensure that the OBFE continues to deliver the spirit of the Order, support the development of the ecosystem, and drive end user adoption. This would be a continuation of one of the Implementation Trustee Functions found under Schedule 1 of the CMA Order, namely the function to "drive the project forward and take decisions in the interest of customers and the promotion of competition."

The Trustee should remain accountable to the CMA, retaining an indirect link between the CMA and the OBFE. The OBTF's budget and business plan would be approved by the CMA, with any changes requiring CMA approval. The OBTF would continue to be funded by the CMA9 until such time as the CMA, advised by the Trustee, determines that the implementations by the CMA9 are of sufficient quality, or a new body has been created with similar powers to those of the Trustee (for example, to assist delivery of Open Finance or Smart Data).

The core remaining objectives of the Trustee, supported by the OBTF are, therefore, twofold:

1. To ensure the continued compliance with the CMA Order by both the CMA9 and the OBFE.
2. To act in a stewardship capacity to support the development of the ecosystem and encourage adoption, delivering the spirit of the Order.

Relationship with the CMA

The role of the Trustee would remain largely as is. [CONFIDENTIAL] This would maintain arms-length accountability between the CMA and the OBTF and provide impartial information to the CMA to allow them to carry out their duties and take enforcement actions where appropriate. The Trustee would sit on the Board of Directors of the OBFE² as a NED and take part in all decision-making, business planning and strategy setting, working closely with the independent Chair (whose appointment must be approved by the CMA).

The updated Articles relating to the OBFE would allow for the Trustee to issue Directions, request disclosures pertaining to Order-related activity, and instruct the OBFE in relation to the obligations of the Order. The IESG would continue and be held by the OBTF as the forum used by the Trustee to make all decisions relating to the Order affecting the CMA9 and/or the OBFE. The IESG would only be concerned with Order related activity.

Responsibilities of the Trustee

The Trustee, supported by the OBTF, would be responsible for ensuring the ongoing obligations of the CMA Order are met, specifically through:

- **Monitoring and supervision of the CMA9:** Ongoing monitoring of performance including API availability and consent success rates as well as assessment of MI delivered by the CMA9, with recourse to Directions and Performance Improvement Plans if necessary. Arrangements would need to be in place to ensure that OBTF is provided with the requisite MI and other information, and that the team within OBTF responsible for this monitoring have the necessary access to the CMA9.

² I considered here whether the Trustee would need to recuse themselves for non-Order matters, however, this delineation is not clear and the OBTF Trustee should be treated like any other board member. It is worth emphasising that the Trustee would not be independent or impartial, but rather concerned with the Order.

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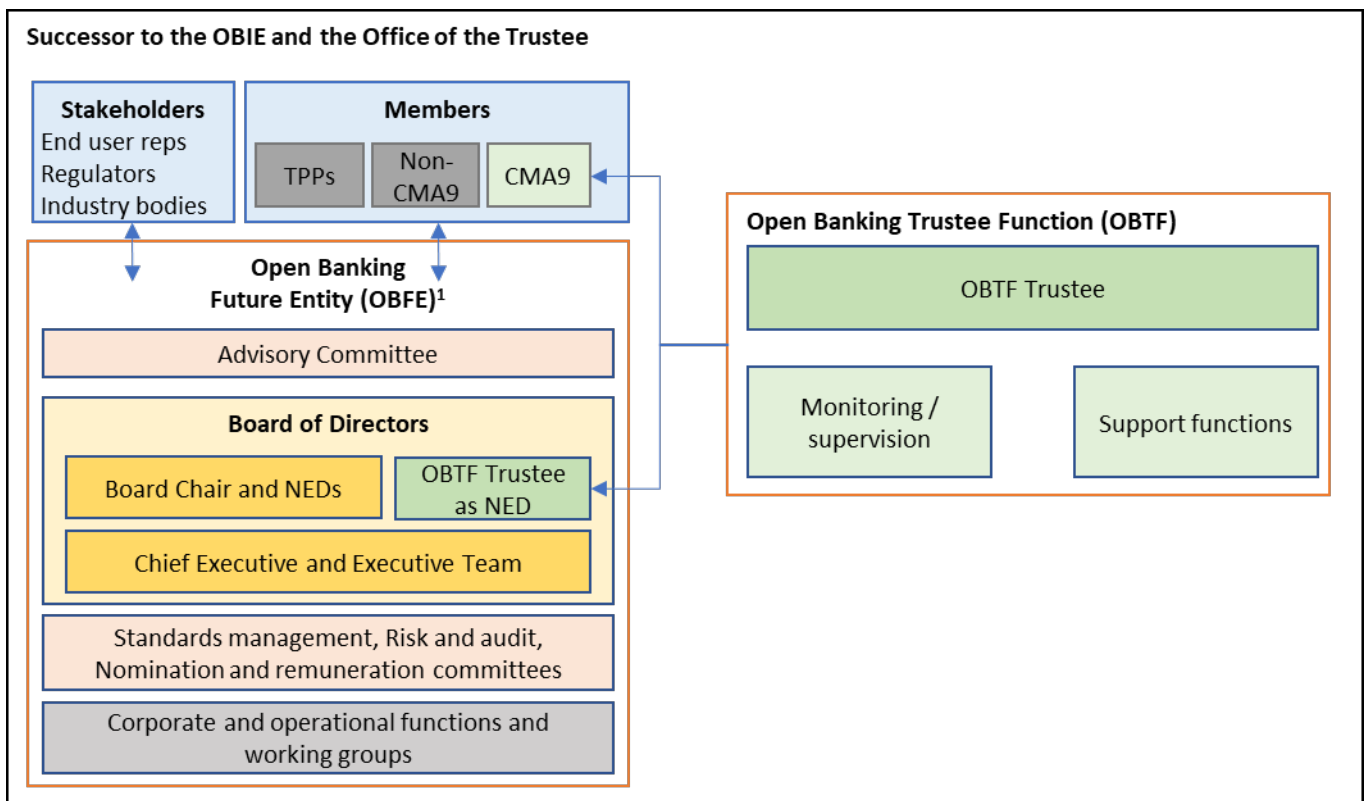
- **Delivery of the Open Banking Revised Roadmap:** This would need to be included in transitional activity, and I note that elements of this extend into 2022.
- **Monitoring of the OBFE and assuring that it meets the requirements and obligations of the Order:** Arrangements would need to be in place, including the Trustee's position on the OBFE Board alongside the independent Chair, to ensure the OBTF is provided with the level of information required to fulfil this aspect of monitoring. The Trustee should be provided with an annual Status Update that is also sent to the CMA. The Trustee would be able to issue Directions and issue Orders such as, for example, developing and/or adopting new standards³.
- **Ecosystem stewardship pertaining to the Order:** Acting as an independent representative on the OBFE Board, with a focus on delivering the requirements of the Order, the Trustee will ensure that the OBFE delivers on its commitment to drive positive consumer outcomes and adoption. For the avoidance of doubt this would by its nature be confined to the CMA Order i.e. Personal and Business Current Accounts of the CMA9.
- **Maintaining momentum:** Working with OBFE and relevant industry and government bodies to push forward into Smart Data and Open Finance only in so far as it promotes the successful outcomes determined by the Order.

The proposed funding is simple in that it would come from the CMA9 given that the Trustee is required to fulfil the requirements of the CMA Order and ensure that the ongoing obligations of the Order are being met. This would require the OBTF to be adequately resourced to meet ongoing obligations to support the Trustee. In addition, the OBFE would be required to support the Trustee in specific circumstances, for example by providing people with appropriate expertise and authority to support bilateral discussions with the CMA9, a role fulfilled today predominantly by the Programme Director.

My proposal is shown diagrammatically below:

³ I also considered that the Trustee could issue Directions to the CMA9 who could then instruct the Future Entity, however, to ensure the Future Entity is independent and not controlled by the CMA9 this approach is not viable and therefore the Trustee must be able to Direct the Future Entity directly. The Articles of the OBFE would provide for this.

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Without the continuation of the Trustee role, there is a significant risk that the Order’s objectives will not be met. As the Smart Data report makes clear “feedback from those involved in Open Banking is that mandating participation is a key step. Open Banking was around for a decade before it picked up pace, and the key impetus was legislation requiring banks to participate and fund an implementation body.” There is a clear need to maintain the statutory obligations and compliance with those obligations until other strategic initiatives are delivered, such as Smart Data legislation or Open Finance regulation. The Order can continue to provide the legal basis either in its current form or varied as the CMA deems appropriate.

The progress we have made to date has only been possible because we have mandated (through a combination of PSD2, GDPR and the CMA Order) the CMA9 to implement the standards, and only after extensive consultation process. It is not unreasonable to suggest that the level of implementation we have achieved would not have been possible in the absence of the Order. I do not think it is unreasonable to be concerned that the CMA9 will not perform as required by the Order if they feel less regulatory pressure. It is therefore vital to continue the current monitoring arrangements under the CMA Order and to ensure that consent success rates, a vital measure of the useability of the banks’ APIs, continue to improve from their current rates of approximately 60-65%.

In addition to the above, I am also convinced that the OBTF needs to have at its heart a commitment to continuing the core elements of what I call “ecosystem stewardship” moving forward and that the consumer outcomes envisaged by the Order are promoted and delivered. The UK has more TPPs than mainland Europe and I am in no doubt that is due to the work OBIE does today to champion the ecosystem and in particular support the fledgling TPP community.

While the OBTF will address some of my concerns, it is important in parallel for the CMA to ensure that the funding solution for the OBFE does not lead to the removal of activity related to championing the ecosystem. In particular:

- The UKF proposal does not include a commitment to fund the ecosystem stewardship element of the OBIE, which has been responsible for enabling TPPs to fix issues with ASPSPs, and for acting as a catalyst for growth.

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- The proposal references promoting open banking payments, yet this is counter to the interests of some of its largest members, and so an appropriate ringfencing or safeguarding solution will need to be found to ensure that this important work – crucial to improving competition and choice in payments – is continued.
- The UKF proposal would not, for example, have led to the market-catalyst work of the OBIE team supporting HMRC in its consideration of open banking payments, which has led to HMRC agreeing to roll-out open banking payments as an option for payment of taxes.
- This ecosystem support role is a public good, as the benefits accrue to society as a whole – from the increases in innovation, competition and choice - rather than specific participants or participant groups. The current UKF proposal is reliant on the goodwill of the CMA9 for funding this in the short-term, which does not provide the level of certainty or clarity that the FinTech sector requires if it is to continue to invest in the UK.

Whether the OBTF could be expanded to perform all activity related to this function, or if the UK Finance proposal explicitly needs to commit to maintaining and funding such work, the importance of this activity demands that it be protected. If the OBFE are to be responsible for promoting the interests of the ecosystem, I propose an escalation model as follows to safeguard the ongoing advocacy and evolution of open banking:

1. The Trustee would raise their concerns at the OBFE Board and remedial activity agreed.
2. If the Trustee remains unsatisfied, Directions would be issued on the OBFE.
3. If the Trustee remains unsatisfied, a disclosure report from the OBFE on their activity would be required and shared with the CMA.
4. If the Trustee remains unsatisfied, then, in extremis, they will instruct the OBTF to take responsibility for the activity; this would require additional budget and the approval of the CMA.

The OBTF would not be required indefinitely but would, however, need to continue until the obligations of the Order are met. I would hope and expect that a clearer model for either Open Finance or Smart Data will have developed before then, such that the functions of both the OBTF and OBFE can be taken on by a more strategic solution to the delivery of open banking payments and open data access in the UK.

As outlined in section 2, in addition to demanding the creation of the OBTF, the CMA will also need to address and indeed resolve the fundamental deficiencies within the UKF proposal to meet the CMA's four priorities for the future arrangements.

Two alternative approaches

While the OBTF is my preferred option strictly under the CMA Order, there are two other models I have considered. The first, a pathway to Open Finance, may be unlikely given where we are today, but reflects my view that were the proposals for Open Finance and/or Smart Data ready then we would most certainly be arriving collectively at a very different model to that envisaged by UKF. The second, a continuation of the OBIE, could be a useful stopgap while a pathway is developed and mitigates my serious concerns with the current UK Finance proposal.

1. Clear pathway to Open Finance

If the proposals for Open Finance and/or Smart Data were ready, a strategic transition from open banking to Open Finance and/or Smart Data would be my preference. This is built on the clear evidence from the FCA's FS21/7, BEIS's Smart Data report and the Kalifa Report as to the beneficial role of an implementation entity and the need for legislation to ensure industry participation. While there are certainly lessons to be learned and improvements to be made based on the experience of the OBIE, these can be built on and the expertise and approach developed to deliver open banking – recognised as a success – adapted for the future. This would essentially involve taking the OBIE and transitioning to a Smart Data Implementation Entity, with an industry verticals approach to funding.

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While this may be unlikely now, if the alternative below is taken forward as a “holding pattern” then, with the right collaborative spirit, transition to Open Finance/Smart Data would be viable and desirable.

2. Continuation of the OBIE and Office of the Trustee

Given my reservations outlined in section 2, I believe that the CMA should actively consider the continuation of the OBIE until such a time that the roadmap to Open Finance and Smart Data has been produced by Government. This approach would ensure the successful completion of the delivery and implementation of the Revised Roadmap and enable the Trustee to continue to ensure that the CMA9 deliver on their obligations. The opportunity could also be taken to address other issues that are referenced in the UKF proposal, for example:

- Appointing independent NEDs to the OBL Board
- Committing to a full review of OBL finances, with a view to reducing costs and finding new revenue streams
- Setting up a cross-organisation open banking payments working group (to include membership from pay.uk, the PSR and HMT), to consider how best to drive forward open banking payments strategy.

4. Specific responses to the consultation questions

Independent and accountable leadership

a) It is envisaged by UK Finance that the Members of the Future Entity would appoint the Chair with “votes weighted by participant type.” This process is not explained in detail and we will seek further clarity from UK Finance. However, it may give rise to a risk that a particular stakeholder group (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?

My response: *As suggested above I believe there is a significant risk of the largest ASPSPs co-opting the Future Entity for their own benefit. Weighted voting is obviously inappropriate, and the CMA must be involved in the selection of an independent Chair, with a similar process and criteria as to that taken in 2016 for the appointment of the Implementation Trustee. Given the importance of the role, I suggest the CMA set up a panel, that could include UKF and FDATA representation, that makes the final decision.*

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

My response: *I believe that it is important that the NEDs have sufficient authority and experience to be able to hold the executive team to account. I don’t believe Boards work well when self-interested representatives attend as Boards should seek to unify around the objectives of the company (representative interests are best dealt with through participation committees or other forums). In addition, it is important that executive team members are able to attend Board meetings, thereby ensuring a better flow of information from the Board. It will be particularly important to ensure that both Chair and CEO are seen to be independent of CMA9, UKF and FDATA. My proposal for an Open Banking Trustee sitting on the Board as an independent director may alleviate any concerns and keep the CMA indirectly involved moving forward.*

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

My response: A government body, whether the CMA or FCA, should be involved. Transparency should be paramount through publication of minutes of key meetings and key decisions. The proposed Advisory Committee should be considered in more detail to ensure fair representation of all stakeholder groups with an interest in open banking. The annual Status Update to be provided to the Trustee and the CMA is also important as a mechanism to ensure the OBFE Board are committed to delivering the ongoing obligations of the CMA Order.

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

My response: As I have made clear above this clearly is a very real risk and my proposal is that the CMA impose a funding requirement in advance and review it on a periodic basis, allowing for additional requirements to be imposed.

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

My response: While I appreciate the efforts that have been made to create an independent governance model, this is by no means guaranteed and it will be difficult to correct course if any of the risks highlighted by me and the CMA itself in the consultation questions eventuate. My proposal for an Open Banking Trustee Function (OBTF) and an independent Trustee on the Board of the Future Entity should help mitigate these risks and bring other benefits outlined above.

Adequately resourced to perform the functions required

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

My response: My view is that they do not. Please see my earlier comments.

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

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

My response: No. There is a need for more clarity on the obligations and commitment of the CMA9 to continue to fund the majority of the requirements and likely for longer than the currently envisaged 2-3 years. The funding commitment needs to be specific and include the legal/governance framework behind it. There needs to be further clarity on the mechanism by which the OBFE will be capitalised (e.g. working capital from the CMA9 as equity) and

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the rights of the OBFE. Without any of the above it is highly unlikely other sectors will be comfortable about working with the OBFE in future to develop Smart Data.

Regarding external revenue, there are significant opportunities to tender for projects such as those in the communications, investments, pensions and energy sectors. There are also opportunities to offer additional services to current open banking participants, such as technical services providers. However, the proposed governance and funding model is not set up to take investment risks, it is set up to run an operation with a view to reducing costs, not adding costs and taking risks. The question of capitalisation is not addressed as far as I can tell in the UKF proposal.

Regarding the residual requirements of the Order and the prioritisation of future activity, the OBTF funded by the CMA9 should at least protect these elements.

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

My response: *I have no objection in principle to TPPs contributing to funding. However, some important principles are required first, which the UKF proposals do not contemplate. For example, if we accept that consumers should have the right to access data held by incumbents, then that data must be provided free of charge, and without obstacles, if the consumer requests it. However, TPPs could, for example, pay for the provision of identity certificates and/or contribute towards the maintenance of the ecosystem, in line with their size and capability. I have argued for some time that the most appropriate mechanism for this is via some form of levy which would, of course, adjust for the relative size of participants, whether ASPSP or TPP.*

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

My response: *No. There is a significant risk that the UKF proposals would lead to a reduction in the provision of services which neither meet a regulatory requirement nor have no direct commercial value to banks. I have expanded on this point at length earlier.*

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

My response: *Please see my earlier comments, and my counterproposals.*

Representation of consumers and SMEs

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

My response: *It is imperative that consumer/SMEs have a strong voice at the Future Entity and to this end I would suggest an additional NED (one with a consumer background and the other an SME background). Additionally, my proposal for the Trustee to have a seat at the Board of the Future Entity will also help ensure decisions made at the Board adequately reflect CMA Order's desired consumer outcomes. The role of the Advisory Committee will also play a crucial role in ensuring consumer and SME input.*

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

My response: *Given its importance, and the very different needs and desires of consumers and small businesses, I believe the interests of consumers and SMEs require a NED each. I also remain unclear as to the make-up of the Advisory Committee and believe the CMA needs to be involved in defining its role and the appointment of its members.*

c) 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?

My response: *It is important that the consumer and SME representatives have the resources available to each of them, funded by the Future Entity, to convene with their community stakeholders such as from Which?, Citizens Advice and the Federation of Small Businesses. As with choosing the Chair and NEDs, an appointments panel with support from an experienced recruitment agency should ensure a rigorous process.*

Sustainability / adaptability

a) 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?

My response: *As is hopefully clear from the above this is a significant concern of mine. It is most definitely a risk and why I propose that the CMA mandate a specific funding commitment from the CMA9 for the full time period, to include the funding of ecosystem support activities that do not satisfy either a regulatory requirement or a commercial objective, until a clear path to open finance and Smart Data is set. I would hope this could be done in the next 3 years so momentum is not lost.*

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

My response: *As I have written previously, the funding proposals in the UKF proposal are inadequate. The mere fact that they are reliant on the goodwill of the CMA9 is either unfair on the CMA9 (as a result of this “free rider issue”) or, more probably, will result in extreme pressure on the ability of the Future Entity to deliver the level of support to the ecosystem that it requires.*

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

My response: *This is the most logical and efficient approach and it is an area that should be focused on by the CMA, in discussion with the FCA and BEIS. In order to accommodate new sectors, the Board must not have any open banking-only stakeholder representatives. It should be set up from Day 1 to be able to accommodate additional products and sectors.*

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

My response: *I believe that there is merit in the following approach to payments:*

- *As there is little synergy between payments messaging standards (the focus of Pay.uk's work) and API/customer experience standards (the focus of the OBIE), but there is synergy across API and customer experience standards, separation of technical and customer experience standards between data and payments is not advisable.*
- *However, payments strategy in the UK requires more co-ordination than has hitherto been the case. The New Payments Architecture (NPA), in my view, should focus on API-based ways of paying, and address issues around trust (and trust marks for open banking payments), minimum consumer protection standards and, subject to industry and regulatory agreement, help determine multilateral rules (for example, around liability).*

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

My response: *Please see my earlier comments. I believe that the UKF proposals could damage the progress made so far by the CMA and OBIE, have a negative effect on the growth of FinTech in the UK, and are not scalable to either open finance or Smart Data.*

Monitoring Arrangements

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

My response: *The Future Entity should not be charged with monitoring, but should be required to assist the Trustee and the Open Banking Trustee Function with the provision of MI.*

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

My response: *Both the Future Entity and the Open Banking Trustee Function may determine requirements for developments (for example, for changes to the Directory). For this reason, it is imperative that the Trustee has a position on the Board and is able to instruct the Future Entity in certain circumstances (limited to the Order). The escalation process I outlined in section 3 should be sufficient to protect this activity. The CMA could determine that it should sit with the OBTF from day 1.*

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

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My response: In order to safeguard the progress and potential of the outcomes sought by the Order the Monitoring Trustee will need to do more than simply monitor, and will need the support of some kind of Open Banking Trustee Function. Please see my earlier comments. I do not think this capability can be readily and efficiently sourced from a traditional professional services firm.

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

My response: I agree with the CMA's views.

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

My response: The FCA have only a narrow remit with respect to monitoring as it pertains to PSD2. As discussed previously, the CMA9 are currently falling well short of their obligations under the Order. In EU jurisdictions without an implementation entity, where the compliance functions of NCAs mirror that of the FCA, performance and availability is poor, and one reason for the EU's relative failure to come close to the UK's success in consumer adoption. There is much more work for the CMA9 to do, and there would be a significant risk that relying on FCA's monitoring powers would both undermine the progress we have already made and risk the future progress we need to make.

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

My response: Please see my earlier comments.

Transitional arrangements – design considerations

- 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?

My response: The CMA should ensure that the priority for OBIE is the delivery of the remaining items of the Roadmap agreed in May 2020 and the ongoing obligations of the order. Therefore the CMA should reserve the right to pause or amend the timing of transition activity. In order to ensure that the OBIE can continue to provide services, the Open Banking Limited board should delegate authority for all transition work and be the responsible entity to decide on transition governance and funding, including terms of reference and decision-making.

- 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?

My response: The Trustee and supporting Office of the Trustee continues throughout and beyond the transition.

- 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?

My response: The OBL Board should be the entity ultimately responsible for their transition process, delegating authority, where relevant, to a transition advisory group, with the composition to be agreed by the CMA and

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OBIE. A transition lead should be appointed by the OBIE, agreed by the CMA and OBIE to manage the transition. The programme director should represent the OBIE on the transition group to ensure continuity and manage any operational risks posed to the OBIE's programme, together with the Implementation Trustee. The Trustee and Programme Director should also ensure appropriate liaison between current OBIE senior management and the Future Entity. We note that the UKF proposal envisages the continuation of all of OBIE's current functions and therefore do not consider it appropriate to amend staff contracts. If this were to be deemed necessary at a later stage, then this must be carried out sensitively and in line with best HR practice.

- 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?

My response: *The OBIE, following an agreement at the March IESG, is pulling together all outstanding Roadmap-related deliverables into a single document. The completion of the Roadmap must be prioritised over transition and, whilst I support the UKF proposals to "ring-fence" the two sets of activities from each other, there are some key personnel who will need to work on both. It is therefore essential for the CMA to reserve the right to pause transition activity if Order obligations are at risk, as determined by the Programme Director or Trustee. If there is any doubt about the commitment of the CMA9 to delivering on their obligations then Directions must be considered.*

- 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?

My response: *There is a risk that important decisions are not made during transition, which comes at a time when there may be interest in OBIE's services from parties outside of open banking. The current OBIE ExCo should be empowered to make decisions as it deems appropriate, under current governance, and subject to stakeholder engagement as necessary, until such time as the transition is complete.*

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

My response: *Whilst I recognise the ambition of UKF to move forward at pace with what it describes as "no-regrets moves", we must respect the transparency and impartiality of the CMA's decision-making process and in no way pre-empt the outcome of that process to maintain the confidence of the ecosystem and other key stakeholders. In addition, it should be recognised that delivering a rushed transition is not in the interests of the open banking remedies. Our overriding priorities should be to ensure the delivery of the Order and to determine the most appropriate model for the future.*