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Response to the consultation on the future oversight of the CMA's open banking remedies on behalf of Bud Financial. Bud are a TPP & TSP engaged in both AIS and PIS activities.

## Future Entity Leadership

- 1. It is envisaged by UK Finance that the Members of the Future Entity would appoint the Chair with "votes weighted by participant type." This process is not explained in detail and we will seek further clarity from UK Finance. However, it may give rise to a risk that a particular stakeholder group (eg the largest banks) would have an inappropriate degree of influence over the appointment. What process and criteria should be used to identify suitable candidates for the Chair? Who would be responsible for doing this, who should be kept informed and whose approval should be sought for decisions at this stage? Should the Members alone approve and appoint the Chair or should the CMA's approval be required, as was the case in the appointment of the Trustee?*
- 2. 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?*
- 3. 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?*
- 4. 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?*
- 5. 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?*

## Bud Response:

Bud is concerned that the proposed composition of the Future Entity by UK Finance does not demonstrate suitable independence and accountability to fulfil the needs foreseen in paragraph 17 of Part A of Schedule 1 of the Explanatory Note to the Order and requirements in Articles 12-14 of the Order.

We believe that the Future Entity should have a fully independent Chair that has sound knowledge of Open Data and Open Finance initiatives and has both the flexibility to build on the good work of OBIE as well as the ability to grow the Future Entity as the world of Open Finance opens up. We share the CMA's concern regarding votes weighted by participant type and could risk giving the largest banks undue influence over the appointment. We believe that the independent Chair should be appointed for a fixed term, and that recruitment and nomination of

the chair should be led by the CMA, with confirmation by a majority of the Future Entity board. This ensures that the entity has a suitable mandate for the development of standards that underpin compliance with the CMA Order. If the Future Entity is to also have a role in the future of Open Finance development and/or PSD2 Compliance then FCA or HM Treasury involvement in the CMA recruitment and nomination process should also be sought.

While the board composition may appear balanced on the whole, we would seek clarity to ensure that independent directors are suitably independent and are appointed for offset fixed terms. Bud would also note that due to resource asymmetry banks will likely be able to appoint more experienced board members that have more resources to call on in comparison to the consumer, independent and TPP representation on the board leading to possible skewing of results. Bud would also seek clarity on the appointment and confirmation process of the CEO of the Future Entity such that it can be ensured that they are both suitably qualified, accountable and independent.

The board must be accountable to the CMA as well as other entities as required as its role shifts to incorporate Open Finance such as HM Treasury, BEIS and/or the FCA. We believe that as currently proposed the Future Entity is not sufficiently accountable to any entity or group of entities other than its members who will be ASPSPs and at present there are not sufficient safeguards in place to prevent focus solely on ASPSP commercial interests. There should be robust measures in place to ensure that the Board has properly and transparently consulted the Advisory Committee, when making key decisions. Future Entity delivery against mandatory requirements it is responsible for should be subject to transparent reporting and consultation as well as oversight and reporting to relevant regulators as is currently the case with OBIE.

Bud also believes that it is important for the regulators to play an active ongoing role in the governance of the Future Entity, manifesting in at least representation by the CMA and FCA at board meetings to bring objectivity as well as regulatory input.

On the areas of scope for the Future Entity, Bud acknowledge and encourage the BEIS Smart Data team work on mandating on data-sharing across numerous sectors but we would urge caution about establishing one entity to solve all problems and believe a continued focus on financial services (especially less mature areas of Open Finance including Mortgages, Pensions, Investments, Credit and Insurance) will provide a better quality of service. Bud believes incorporating further industries beyond Financial Services at this time could result in less financial services ecosystem interest representation in the Future Entity governance structures and result in outweighed views of largest corporations, who would in the financial services sector be the largest banks.

Finally, Bud is particularly concerned that the option for ASPSPs to remove their financial support gives the ASPSPs significant leverage over the organisation. Bud believe that the result of the current funding model is that (a) the Entity will be unable to act independently, (b) result in an inability for the Future Entity to survive financially beyond the mandated 3 year membership period, and/or (c) reduce the capability of the Future Entity to meet the needs of TPPs. A critical

mass of banks could withdraw membership if they do not agree with the outcomes being delivered, which would create a funding gap. Even a smaller number of significant ASPSPs (CMA9) choosing not to participate only harms TPPs due to ecosystem fragmentation and ultimately this will increase overheads for all TPPs and their ability to make use of PSD2 services, disproportionately affecting smaller TPPs in the ecosystem and thus harming consumer interests. We expand further on thoughts regarding the funding model below. The simple threat of this undermines the potential independence of the Future Entity board as they are legally charged with obligations to their members and for the ability to continue to promote the success of the company, in particular its ability to operate as a going concern.

## **Funding model**

1. *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?*
2. *Does the proposed funding model give enough confidence about the resourcing of the Future Entity? In particular:*
  - a. *What evidence is there that external revenue is now, or will become, available to the Entity through the tendering of relevant projects?*
  - b. *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?*
  - c. *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?*
3. *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?*
4. *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?*
5. *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?*

Bud response:

It is our belief that the imperative for any successor body is to provide independent governance as the open banking sector expands into open finance and beyond. For that to happen, funding has to be similarly independent.

We believe it's fair that TPPs make a proportionate contribution to the ecosystem but that the contribution should be aligned with the furtherance of the body's future goals and not with enabling the CMA 9 to fulfil their regulatory obligations. The FCA levy would be an appropriate mechanism to achieve this with the volume of TPPs' qualifying revenue used to calculate an appropriate contribution. The level of TPP contribution should be calculated in such a way that TPPs become more material contributors as they scale and should avoid acting as a deterrence to new entrants. It should be noted that revenue directly derived from Open Banking access will likely be low-margin for the TPP and so a balance should be struck between the materiality of the contribution and the prevention of TPPs from carrying out profitable business.

It is important to consider the context of the CMA order when calculating a funding solution. The CMA order was designed to counter significant customer harm as a result of anti-competitive practice. Whilst the open banking ecosystem is developing well and there are early signs that those harms are being addressed by new entrants, it is far from clear that this momentum will continue. Services such as the onboarding offered through the OBIE are important to maintaining that momentum and any attempt to reduce the scope of measures designed to incubate the ecosystem should be resisted.

We are particularly concerned with stability and independence of the membership funding model. A short term commitment from the CMA 9 does not address this concern. Firstly, there is inherent instability in any system where members can choose to simply leave an organisation. Secondly, the financial reliance of the entity on the CMA 9's continued involvement means that it would be impossible for the entity to provide independent governance.

## **Sustainability / adaptability**

- 1. 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?*
- 2. 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?*
- 3. 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?*
- 4. 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?*

5. *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?*

Bud Response:

As answered previously, we believe the biggest threat to the sustainability of the proposed Future Entity is the leverage provided to banks by the ability to withdraw funding and potential impact on the Future Entity of such an action. We believe that they should not be able to withdraw in order to ensure long-term compliance with the CMA Order. In the event that funding is not mandatory long-term, we do believe funding commitments by ASPSPs should be for a term of five to seven years after the completion of CMA9 implementation of the current OBIE Roadmap to provide long-term stability for the entity into the future.

As discussed in our response to the funding section, we believe all ecosystems participants, including non-CMA9 ASPSPs could contribute to entity funding in a proportionate manner. However funding directly related to the CMA9 monitoring should be solely funded by the CMA9.

Bud believes that the Future Entity should serve as a suitable vehicle for future Open Finance initiatives and has the benefit of the learning and experience of the implementation of Open Banking and the CMA Order. However, as noted previously, we would caution against it being used for a vehicle for further Smart Data Initiatives as new participants (both from other sector equivalents of TPPs, ASPSPs and Consumer Groups as well as other relevant regulators and government bodies) would either need representation in governance or risk being excluded or alienated from the decision making process reducing the constructive engagement with such sectors.

An increased scope of representation in governance from other sectors would risk making elements such as the board unwieldy and would also likely result in the reduction of engagement and influence of smaller [financial services] entities who are disproportionately TPPs rather than ASPSPs.

Bud firmly believes that AIS and PIS standard development should be dealt with together as the underlying technology for supporting these two activities is the same and a significant proportion of ASPSPs and TPPs operate in both spaces. Splitting up these activities could create disproportionate extra regulatory, operational and technical burdens on both TPPs and ASPSPs and ultimately risks having a negative impact on consumer journeys and experience.

## **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?*

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

#### Bud response

It is not possible for a body reliant on voluntary funding from an organisation to provide effective monitoring and governance of (elements of) that organisation. The Payments Council serves as a good example where an attempt was made to to perform ecosystem monitoring but ultimately failed to accomplish improvement and investment due to the influence of its members [banks], leading to the establishment of the independent PSR. However, if sufficient independence and accountability to the CMA and FCA can be achieved we believe that the integration of these two activities in the Future Entity would make sense but there must be safeguards in place to ensure transparency, independency and accountability of this function directly to the Regulators.

In absence of this, Bud believes an independent body, accountable directly to the CMA and adequately resourced by mandatory CMA9 funding is best positioned to fulfil these missions and goals. It is essential that there is proactive monitoring and use of metrics contributing on an ongoing basis towards this goal rather than a complaints-based approach (as FCA monitoring is focused towards) so this must be adequately resources.

We agree that it is reasonable to delineate between compliance monitoring and performance monitoring but argue that a reasonable degree of performance is fundamental to a healthy ecosystem which, in turn, is fundamental to fulfilling the goals of the order and for this reason, believe that it is not sufficient to fall back on existing FCA monitoring activities.

Bud believes OBIE's involvement and capacity to monitor, scrutinise, and follow-up on issues with open banking API issues, has been the main reason why the UK is at least 12 months ahead of other EU countries in terms of open banking adoption and this should be an important

learning as we look to the scope of Open Finance and how to make such an initiative successful on its goals.

### **Transitional arrangement questions**

- 1. What measures should the CMA adopt to mitigate the risk that the OBIE's ongoing services will be interrupted or disrupted during a transition process?*
- 2. How should the ecosystem's performance be monitored during a transition process? Should, for example the Trustee's current monitoring function be maintained during a transition process and if so where would it be appropriate to site it?*
- 3. Who should be held accountable for managing the transition process and what incentives should be put in place to reinforce their obligations to ensure continuity?*
- 4. What steps should the CMA take to mitigate the risk that any remaining deliverables from the Roadmap are left incomplete? For example, should the CMA refuse to permit the commencement of the transition process before all of the elements of the implementation are in place? If not, what assurances should it seek and what safeguards would need to be put in place to eliminate the risk that the final elements of implementation would be unreasonably delayed or left uncompleted?*
- 5. Once the final remit of any new organisation to succeed the OBIE is agreed, for example its ability to undertake development work that is currently beyond its scope, would it be desirable to reflect this during the transition period?*
- 6. Are there any other issues regarding transition arrangements which the CMA should be aware of?*

#### **Bud Response:**

Bud believes the priority should be minimising the impact and disruption of any transition so that the current operations and roadmap of the OBIE are not affected. It is essential that remaining projects and deliverables are completed, and that ongoing services continue to be fully operational throughout the transition and into the future. This includes the full funding of Open Banking in its current state until the current roadmap has been implemented by the CMA9.

We believe there is a strong case for transforming the OBIE to meet the future Open Banking and Open Finance needs and that loss of key personnel with significant experience in the area should be avoided, particularly as most other candidates with industry experience are likely to come from either TPPs or ASPSPs which could cause a shift in biases and result in loss of independence.