

CMA Consultation on the Future Oversight of the CMA's Open Banking Remedies**Response of Santander UK plc****Executive Summary**

1. Santander UK (**San UK**) welcomes the opportunity to respond to the CMA's consultation on the future oversight of the CMA's Open Banking remedies dated 5 March (the **Consultation**). It is well understood that delivery of the revised Open Banking Roadmap approved by the CMA in May 2020 (the **Revised Roadmap**) will represent closure of the implementation obligations mandated of the CMA9 under the Retail Market Investigation Order 2017 (the **Order**). After a successful start to Open Banking over the last four years, now is the right time to draw a line under the Order and work to secure the long-term future of Open Banking. A key component of this will be shifting industry focus from regulatory compliance to the innovation Open Banking was designed to unlock, ensuring full and compliant participation from the wider ecosystem and encouraging consumer uptake.
2. We have responded to each of the Consultation questions in the annex of this paper but cover our key points in this Executive Summary. In summary these are as follows:
 - i) Although the Consultation appears to be predicated on the CMA approving the entire future state of Open Banking, legally the CMA's ongoing role in the oversight of Open Banking is limited to any monitoring function set up to assure CMA9 compliance with the Order, as delineated via this consultation, and approving any changes to the Implementation Entity insofar as it relates to any residual obligations under the Order. The CMA has no basis to decide on the future governance of Open Banking insofar as it relates to entities beyond the CMA9 or activities beyond the scope of the Order (which is the premise of the future model). To this end, it is not for the CMA to approve or reject the UKF Proposals and to do so would be *ultra vires*.
 - ii) Given this, the key concern from the CMA's perspective must be to ensure it is comfortable that the CMA9 will maintain ongoing compliance with the Order, via careful scoping of an appropriate monitoring function. As the salient Open Banking provisions of the Order have essentially been replicated in legislation with broader application than the CMA9 by the Payment Services Regulation 2017 (**PSR 2017**) and the associated Regulatory Technical Standards on Strong Customer Authentication (**RTS**) – and since the FCA is Competent Authority for enforcing compliance with these regulations - in our view there is good justification for either: a) revoking Part 2 of the Order in its entirety (which is specifically identified as a possibility following implementation in the Explanatory Note to the Order and for which there is precedent from the revocation of Part 6 relating to overdraft alerts); or b) transferring accountability for monitoring compliance with the Order to the FCA.
 - iii) We broadly support the UKF Proposals set out in the report dated March 2021 (the **UKF Proposals**), including the proposal to pivot the current Open Banking Implementation Entity (**OBIE**) to become the Future Entity, responsible for running the infrastructure that ensures the Open Banking ecosystem functions well (standards, directories etc) (in total, the **Future Model**). However, satisfactory outcomes to (and actions and commitments

following) the pending audit of the operational processes and financial health of OBIE, as well as industry agreement on a number of guiding governance principles, are essential pre-requisites to San UK supporting the OBIE transitioning to acting as the Future Entity. [§<]

- iv) The Revised Roadmap foresees delivery of the final remaining items of the Order (as expanded) within 2021. To ensure that the OBIE is properly established for success as the Future Entity – and in light of the sheer volume of work the transition process will require - a Transition Steering Group must be mobilised at pace. Since the types of issues in play at the outset will require limited OBIE involvement, this workstream can progress in parallel to ongoing delivery of the Roadmap. At the same time, the CMA must be firm with the Trustee and the OBIE that it is not appropriate at this juncture to be adding additional items to the Roadmap. Items such as MI and Variable Recurring Payments (VRP) are not only clearly outside the ambit of the Order and therefore *vires* (see below) but could, if appropriate and determined to be genuinely of value, be taken forward by the FCA or the Future Entity. These items are a distraction from concluding the implementation requirements of the Order, where OBIE resource could be better redirected to transition/audit.
- v) Finally, discussions around the Future Entity as a potential home for Open Finance, Smart Data, or digital ID&V initiatives are premature and should not form part of the discussion around governance. Whilst theoretically the Future Entity could in future provide the same infrastructure/operational services for Open Finance as it will for Open Banking and Pay.UK (standards, directory etc), the FCA’s recent feedback statement makes clear that a number of substantive issues need to be worked through before Open Finance policy is decided, and there will also be a need to enact primary or secondary legislation. As such, the operationalisation of these initiatives is not in the short term. Digital ID&V architecture and functionality must be left to the Department for Digital, Culture, Media & Sport and other government departments given the use cases have multiple societal touch points, as well criticality to financial crime risk management.

3. We provide more detail on each of these points below.

The CMA’s role must be limited to approving closure of the Order and defining the Monitoring function

- 4. Whilst San UK welcomes the CMA’s desire to ensure a robust governance framework for Open Banking beyond the confines of the Order to ensure it continues to thrive, we are concerned by the assumption within the Consultation that the CMA should approve or reject the entirety of the UKF Proposals, or that it may have an ongoing role in the ‘governance of Open Banking’ (e.g. the suggestion that it could approve the appointment of the Chair of the Future Entity) or monitoring performance of the wider ecosystem. In our view this fundamentally misstates the legal position.
- 5. Once the Revised Roadmap is delivered, the CMA9 obligations set out in Articles 10 and 12 – 14 of the Order have been met (and actually the CMA9 have delivered far beyond these). Article 10 provided that the Implementation Entity would agree, consult upon, implement, maintain and make widely available, without charge open and common banking standards. Articles 12 – 14 require only that the CMA9 make continuously available in accordance with the agreed standards

certain APIs in relation to personal current accounts (**PCAs**), business current accounts (**BCAs**) and SME lending products namely: a) specific product and reference information; b) service quality statistics; and c) transaction data sets, in accordance with agreed standards.¹ We do not at this juncture revisit how the Revised Roadmap has been allowed to expand so hugely. However, it is clear that provided the CMA9 continue to make these three APIs available within the agreed standards, and this is assured via a monitoring function, the CMA has no basis to put in place – or be involved in designing - further governance around the Future Model.

6. Indeed, there is legal incompatibility between: a) the aspirations of the UKF Proposals to establish a sustainable, long term future operating model for Open Banking to support and promote APIs for a broad spectrum of use cases and incorporate all stakeholders in the ecosystem; and b) the CMA’s legal power to mandate actions only in so far as it related to the Order: *“we are not able to require Providers to share data about products which are outside of our Terms of Reference and for which we have not found an Adverse Effect on Competition (AEC) that could be addressed by this remedy. We equally cannot impose an order on parties outside of our Terms of Reference and AEC findings [...]”*.² This is corroborated by the recognition within the Consultation that it may be appropriate to separate any monitoring function from the Future Entity.
7. The CMA will be aware that San UK has previously submitted that the Revised Roadmap contained a significant number of material items that could not be tied to the ambit of the Order and that the CMA had therefore acted *ultra vires* in approving these items.³ [3<]. Without any regulatory basis beyond the Order, the large part of the UKF Proposals are at the option of industry unless further primary legislation is enacted. We believe that it is incumbent on the CMA to learn the lessons of the past and not to seek yet again to improperly extend its jurisdiction.
8. The correct framing of the CMA role and mandate to approve the Future Model - which implies a regulatory underpinning - is of fundamental importance at this point of transition, with significant practical and legal implications. For example, it impacts the ability of the CMA or other regulator to compel further CMA9 funding or delivery obligations, as well as the CMA’s ability to override the industry consensus on the best way forward, including on transition arrangements. It is also a basic point of legal principle for the CMA as a government-funded body. The confusion between the Order and Future Model is woven throughout the Consultation, as well as into the UKF Proposals, illustrative of the depths of misinformation that is prevalent around Open Banking. It is critical that the CMA clearly states that its legal role in respect of the Future Model is limited to the limited residual function in Article 10(1) of the Order.
9. We recognise the CMA’s desire to ensure that the Open Banking ecosystem continues to thrive on a sustainable basis, and we ourselves share this aspiration. However we believe concerns on this front are unfounded. The CMA9 including San UK and broader ecosystem are fully committed

¹ https://assets.publishing.service.gov.uk/media/5ee0f1a786650c4211b12ac5/retail-banking-market-investigation-order-2017_1.pdf

²Explanatory note, para 38.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/614600/retail-banking-explanatory-note.pdf. The AECs identified in the Retail Banking Market Investigation comprised low customer engagement and barriers to searching, comparing and switching in the markets for personal current accounts and business current accounts and lending products for SMEs with turnover < £25m.

³ See San UK’s formal response to the consultation on the Revised Roadmap dated 26 February 2020 and letters to the Trustee and the CMA dated 20 December 2019 and 29 January 2020 respectively.

to Open Banking and aligned in the need for a Future Model that ensures the integrity and well-functioning of the ecosystem and players within it, also to ensure customer confidence in Open Banking. We note that:

- i) The CMA9 and other financial institutions as Account Servicing Payment Service Providers (**ASPSPs**) are legally obliged under the PSR 2017 and RTS (as transposed into UK via Brexit SIs) to make available a dedicated interface to TPP via accessible APIs. These PSR 2017 and RTS requirements cover and extend beyond the Open Banking remedies. Conformed industry standards and performance levels are critical in ensuring individual and collective bank compliance with these legal and regulatory obligations, and also providing the industry with comfort they are meeting the regulatory standards. (The FCA is able to enforce these obligations as Competent Authority and take appropriate action if any organisation fails to meet its PSR 2017 and RTS obligations.)
 - ii) Open Banking is no longer just a competitive advantage for financial services firms but a commercial and regulatory reality. Indeed, APIs are not only the enabler of the innovative and real time customer experience and propositions that customers expect but also a critical component of the technological architecture and proposition of many financial services providers, and the enabler of third-party services and partnerships for customer benefit. The technical services Open Banking uses are now a fundamental part of the wider San UK infrastructure and are part a wider critical platform. The standards and services being provided by OBIE ensure that banks have comfort in the integrity of the third parties with which they and their customers interact.
10. We also note the financial services industry is well accustomed to collaborative schemes, for example, Pay UK, LINK and the LSB. These schemes have been in operation for many years and have delivered multiple benefits to the industry and consumers. This should provide adequate comfort to the CMA that the industry is capable of self-regulating, particularly where the incentives are so high.
11. As a final point on this topic, we note the positioning in the Consultation that the possibility of a successor entity to OBIE was always envisaged: *“In either case [of a successor body] we expect the FCA and the HM Treasury would play an important coordinating role [...] or it might be appropriate for the CMA to review whether parts of the Order should be amended or can be revoked because they have been superseded by longer-term arrangements.”*⁴ Whilst correct, it is incorrect to infer that the CMA considered it would itself have a defining role in this. In fact the opposite is clear when this statement is read in context, and corroborated by the CMA’s clear assertions over limits of its remit. Indeed, in our view this statement supports a transfer oversight of the Open Banking remedy from the CMA to the FCA or a withdrawal of Part 2 of the Order in its entirety given the changed environment post-PSD2.
12. *Notwithstanding the positioning in the Consultation paper, we urge the CMA to make clear in its response to this Consultation that its views in respect of the UKF Proposal are advisory only, other than in respect of the Implementation Entity’s residual functions under Article 10.1, at the same time as coming back with a firm proposal/ decision on the Monitoring Function. Open Banking has had a successful start, is to the CMA’s credit and must now move to the next chapter.*

⁴ Para 39, Explanatory Note.

Defining the Monitoring Function

13. In light of the points above, the CMA's focus must be on considering/understanding what is necessary and proportionate to ensure effective monitoring of CMA9 compliance with the Order on an ongoing basis.
14. Articles 12 – 14 of the Order require the CMA9 to make continuously available three specific APIs in relation to PCAs, BCAs and SME lending products for:
- i) Reference and Product Information in accordance with the Read only data standard (Article 12)⁵;
 - ii) Service Quality Indicators in accordance with the Read only data standard (Article 13)⁶; and
 - iii) Transaction history data sets in accordance with the Read/Write data standard and access requirement (Article 14).⁷
- These APIs must be provided in accordance with applicable data format standards, security standards, authorisation and authentication standard, standardised permission frameworks and whitelisting (Article 10).⁸
15. In September 2019, ASPSPs including the CMA9 became subject to an equivalent obligation under PSD2 (implemented in the UK by the PSR 2017 and RTS) to introduce a dedicated interface to TPP via accessible APIs.
16. In our view, three key principles are therefore relevant to defining the Monitoring Function:
- i) Whilst via formal approvals of Revised Roadmaps in May 2020 and July 2018 the CMA approved additional PSD2-related and other items within the Roadmap and judged these to be within the Order, the conversation becomes relevant again at this juncture. When considering the Monitoring Function the CMA must focus on the core provisions in the Order. [3<]
 - ii) As described in para 9(i) above, Part 2 of the Order is now replicated in legislation via the PSR 2017 and RTS; and
 - iii) The CMA should therefore consider the parallel role of the FCA in enforcing wider and equivalent PSR 2017 obligations and the extent to which these address the monitoring requirements in the Order.
17. Under s162 of the Enterprise Act 2002 the CMA has a duty to keep under review the carrying out of the Order. This includes a duty to consider, from time to time, whether the Order should be varied or revoked in the light of a change of circumstances. Providers may apply for a variation or cancellation of all or part of the Order on the basis of a change of circumstances, or recommend

⁵ Reference information includes branch and business centre locations, branch opening times, ATM locations (and any other reference information reasonably stipulated by the Trustee and agreed with the CMA); Product information includes in relation to personal current accounts, business current accounts and SME lending products: product prices, charges, features and benefits, MMCs, terms & conditions, customer eligibility criteria (and any other reference information reasonably stipulated by the Trustee and agreed with the CMA).

⁶ In relation to PCAs and BCAs.

⁷ (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/600842/retail-banking-market-investigation-order-2017.pdf, p 19.

⁸ Page 19.

that the CMA reviews the need for the Order or part of it. Indeed, the Explanatory Note to the Order envisages this very possibility.

18. Given the introduction of the PSR 2017 and RTS in September 2019, we believe it may be appropriate for the CMA to vary the Order and to remove Part 2, without any further action. Any hypothetical failure by the CMA9 to make continuously available a dedicated interface (i.e. including access to the APIs specified in Articles 12 -14 of the Order) could be and would be enforced by the FCA in its capacity as Competent Authority for PSD2. There is a specialist FCA PSD2 team which engages with ASPSPs to monitor availability and discuss bilaterally any concerns of TPPs as regards access to APIs or specific incidents impacting performance or availability.
19. In our view, this again would avoid the risk of further inconsistent policy positions between the CMA (OBIE) and the FCA, as San UK has experienced this year in respect of the approach to Secure Customer Authentication.
20. There is precedent for this: in December 2019 the CMA varied the Order and removed Part 6 (the requirement to introduce alerts for unarranged overdraft alerts) on the basis the FCA had implemented new High Cost of Credit rules – including a new programme of overdraft alerts– that represented a change in circumstances.
21. Alternatively, we agree with the suggestion in the Consultation to transfer the CMA’s responsibility for overseeing the Open Banking remedies to the FCA as the Competent Authority for PSR 2017, which possibility was envisaged at the time of the Order - see paragraph 39 of the Explanatory Note of the Order.⁹ This again would avoid duplication and inconstant positions between the CMA and FCA and ensure the best placed regulator monitors compliance with the Order.
22. As a final option, in the event the CMA wishes to retain oversight of the Open Banking remedies via a monitoring function notwithstanding the above, Part 12 of the Order sets out the Compliance and Monitoring obligations applicable to all remedies , which already includes, at Article 46, the requirement for each Provider to submit an annual Compliance Statements regarding its compliance with Part 2. For consistency with the approach taken in respect of all other remedies in the Order, as well as remedies in other market investigations, the CMA9 could annually submit a simple attestation of compliance with Part 2 of the Order.
23. Without getting drawn into discussions on ambit of the Order, it would be easy for the CMA to simply require the CMA9 to formally attest annually to Compliance with the Part 2 of Order. This approach would recognise that performance and conformance of APIs are already monitored by the FCA under the PSR 2017 and RTS, and that the Future Entity will maintain the infrastructure enable integrity of the ecosystem. If the CMA9 were unable to meet the standards set out by the Future Entity, they would not be allowed to feature in the directory and at that point would be non-compliant.
24. As a final point, we note that one of the outstanding Revised Roadmap builds which the Trustee wishes to take forward as part of the Revised Roadmap (see next section) appears to pre-judge

⁹ <https://assets.publishing.service.gov.uk/media/5ee0ec7d86650c42122f536e/retail-banking-explanatory-note.pdf>

the CMA's consultation on any Monitoring Function. The OBIE is seeking to require the CMA9 to build – at very significant cost – high frequency MI to monitor performance, which goes far beyond anything requested by our regulator (the FCA) in the normal course. It is for the CMA and policy-makers to decide on appropriate monitoring in respect of the Order, not the Trustee and an implementation entity. We urge the CMA to consider how this fits with the proposal to separate the monitoring function from the Future Entity. There are also questions of proportionality and *vires* (see para 26 below).

Closing down the outstanding items on the Revised Roadmap

25. As a predicate to defining the Monitoring Function, the CMA needs to confirm that delivery of the Revised Roadmap – and therefore implementation requirements of the Order - are complete. This is envisaged within 2021.
26. Beyond the agreed Roadmap items, the OBIE is still in the process of building a significant list of outstanding requirements for the industry to build and deploy as part of the Revised Roadmap. Some of these are functional, whilst others are monitoring based. All of these carry significant investment costs. These include:

OBIE item	San UK comment
90 Day Reauthorisation of SCA in consents	This is for the FCA as Competent Authority for the PSR 2017, not the OBIE – see FCA Consultation on reviewing the RTS dated 28.1.21 ¹⁰
Variable Recurring Payments (VRP)/Sweeping Significant new payment types which still to be standardised	1) Merchant acquiring is explicitly excluded from the Retail Banking Market Investigation/ Terms of Reference and is therefore <i>ultra vires</i> . ¹¹ 2) For Future Entity /FCA to decide if it wants to take forward – not a decision for an Implementation Entity
Contingent Reimbursement Model (CRM)/Confirmation of Payee (COP)	1) This is for the FCA as Competent Authority for the PSR 2017, not the OBIE – see FCA Consultation on reviewing the RTS dated 28.1.21. 2) For Future Entity /FCA to decide if it wants to take forward – not a decision for an Implementation Entity
A refresh of the Consents & Dashboard analysis and designs to replace the existing functionality.	1) Unnecessary and disproportionate in light of existent functionality (already built by CMA9 at cost). 2) For Future Entity /FCA to decide if it wishes to take forward on behalf of the whole industry – all players should be operating at the same

¹⁰ <https://www.fca.org.uk/publications/consultation-papers/cp21-3-changes-sca-rtts-and-guidance-payment-services-and-electronic-money-our-approach-and-perimeter>

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https://assets.publishing.service.gov.uk/media/545a981c40f0b6130e000011/Terms_of_reference_retail_banking.pdf

	standards for consistency, competitiveness and fairness.
High Frequency MI (in place of current MI and annual attestations) OBIE are seeking the provision of near real-time MI on performance and availability akin to 'super monitoring'	<ol style="list-style-type: none"> 1) Dependent of CMA view of Monitoring Function (see paras 13 to 24 above) – this would put the Monitoring Function within OBIE. 2) Industry are unanimously opposed to this – it is disproportionate, and unlike any other regulatory monitoring requirement known in any other context (including the PSR 2017 and RTS monitored by the FCA). The CMA would need to conduct a robust cost-benefit analysis in light of the cost. 3) CMA Order limited to read/write APIs for: a) Product and Reference information; b) Service Quality Indicators; and c) Transaction data sets.

27. At present the CMA9 are collectively at odds with the Trustee on inclusion of these items. We respectfully ask that the CMA is firm with the Trustee and the OBIE and confirms that it is not appropriate at this juncture to be adding additional items to the Roadmap. It is relevant to note that as at end 2019, the CMA9 had spent c.£1.5bn on Open Banking since 2016, including c.£147m on the operational costs of the OBIE alone. The contribution from Santander alone was c.£86m (as at a year ago). The Consultation offers an easy opportunity to learn the lessons of the past and draw a line under further Roadmap expansion. Moreover, in light of excessive cost relative to utilisation – as the industry has also seen in initiatives such as cheque imaging -any decision to expand scope and costs must be subject to a robust cost-benefit analysis and viewed through the lens of the current HMG review of competitiveness in financial services.

28. We also note that in addition to not duplicating or complicating industry efforts with the PSR in relation to fraud prevention and consumer protection, all proposals need to be properly assessed to ensure they do not introduce further fraud vulnerabilities into the system given the excessive levels of fraud that already exist in the UK financial system relative to other jurisdictions.

Comments on the UKF Proposals on the future Open Banking Target State

29. Without prejudice to our view that a CMA consultation on the UKF Proposals is misplaced (as explained at paragraphs 4 – 12 above), we summarise our key thoughts here on the basis this likely represents the main opportunity for the industry to formally comment on the UKF Proposals in a structured format. However, we would urge the CMA to share the non-confidential responses with UKF, and to agree that responses be taken forward by UKF as part of the Transition Mobilisation Group. San UK will share a non-confidential version of its own response with UKF.

30. While much of the detail in the UKF Proposals will need to be worked through in the transition period, given San UK's participation in the UKF-led discussions over the last few months we are broadly supportive of the UKF Proposals, including the concept of pivoting the OBIE into the 'Future Entity'. This support is subject to the following caveats:

- i) *Satisfactory outcomes from (and actions and commitments following) the pending audit of OBIE are an essential prerequisite to Santander UK supporting the OBIE transitioning to acting as the Future Entity.* To date the OBIE and Trustee have not been willing to allow the CMA9 rights of audit of the OBIE. The UKF Proposals have therefore been made without access to the level of detail from the OBIE that is required to truly understand costs, third party contractual liabilities and staffing. This audit is a critical element of due diligence to inform the UKF Proposals, including assessing the OBIE's fitness for purpose to pivot into the Future Entity.

[§<]. We would welcome CMA assistance in ensuring the audit takes place on a timely basis.

- ii) *Funding and governance:* the current UKF Proposals see the CMA9 contributing the majority of funding to the Future Entity in years 1 -3, whilst being given very little control or veto over the future projects of the Future Entity. Whilst we recognize there may be a short term (time limited) need for the CMA9 to bear a higher proportion of the wider ecosystem costs, it is important to recognize the Future Model is unrelated to the Order (all ASPSPs have obligations under the PSR 2017 and the RTS) and that a large number of players will use and benefit from the ecosystem and services provided by the Future Entity. An equitable new funding mechanism needs to be established as a priority to take account of the full spectrum of participants and benefits accruing, and that can be flexed in response to changing market dynamics. The governance provisions will also need to ensure funding entities have the ability to scrutinize the proposed activities of OBIE and spend, to ensure appropriate value for money and prioritization.

In terms of quantum, it is impossible to understand this until the audit of OBIE is completed, including contractor requirements and the concerns around conflicts of interest and proper processes in place around procurement. San UK will find it difficult to commit to any form of financial commitments without understanding the health of the OBIE.

- iii) *A Transition Steering Group needs to be mobilised at pace, as suggested in the UKF Paper on Transitional Arrangements.* The CMA9 are fully aligned on the need to deliver the Revised Roadmap within 2021 as a priority. However a very significant amount of existential, legal and organisational work will be required to establish the Future Model, even before operationalising it. Even if this work starts now, it is optimistic to consider it will be in place before the Revised Roadmap concludes.

It is therefore critical that a Transition Steering Group commences as soon as possible. In our view this workstream is distinct from discussions with the CMA on delivery of the Order implementation requirements and definition of the Monitoring Function. The initial work being undertaken by the Transition Steering Group is unlikely to involve much work for the OBIE in the design phase (beyond responding to the Audit), since the model is not underpinned by legislation but is industry-led.

San UK supports the UK Finance proposed approach to the Transition Steering Group – simply summarised as a UK Finance led 3-month period to drive quick stand-up of activity and resource: taking pressure away from OBIE but then transitioning into the OBIE to run in parallel with that activity.

An important feature of the clear functioning of this group is the transparency of approach. This should see the Implementation Trustee stepping back from the day-to-day activity, and forming a clear boundary to operate solely within the confines of the Implementation Trustees Office function. To ensure the Transition Steering Group protects the CMA requirements to finalise delivery of the Roadmap, we would support a limited form of “veto” for the CMA to ensure transition activities do not unnecessarily derail the Roadmap progress.

[3<]

Extension to Open Finance or Digital ID&V

31. In our view, it is premature to discuss the role of the Future Entity in the areas of Open Finance, as a standards body or otherwise.
32. Whilst in due course – and depending on where markets evolve – there may be a role for the Future Entity to manage standards and directories or other operational requirements in these areas, the OBIE as a precursor to the Future Entity lacks the expertise, experience or regulatory footing to take forward any form of policy-making, regulatory or Conduct Supervision that are necessary in driving these initiatives forward.
33. The FCA’s feedback statement on Open Finance published on 26 March makes clear that the FCA will take a leading role in driving forward Open Finance, as well as the fact there are a substantial number of very challenging legal, regulatory and ethical issues that will need to be resolved as part of this workstream (e.g., liability, data ethics). It also notes that Open Finance will require primary legislation.
34. In light of the above, standard-setting activity in this sphere is unlikely within at least the short term. The hypothetical role for the Future Entity as a standards body/ directory body providing analogous services for Open Finance as it does for Open Banking and Pay.UK can take place at a later juncture if required.
35. In terms of Digital ID &V, this must be considered out of scope. The Department for Digital, Culture, Media & Sport and other government departments need to be left to develop the architecture and functionality given the use cases have multiple societal touch points, as well as criticality to financial crime risk management.

Conclusion:

36. San UK welcomes the opportunity to respond to this Consultation. For the reasons explained above, we urge the CMA to:
 - i) Make clear in its response to this Consultation that in light of the Order/ remit its views in respect of the UKF proposal are advisory only, except in the very limited respects envisaged by the Order (i.e., the residual role of the Implementation Entity under Article 10.1), at the same time as responding formally with views on any Monitoring Function. The CMA should share non-confidential consultation responses received on the UKF Proposals with UKF;

- ii) Consider revoking Part 2 of the Order now that salient provisions are enacted as UK regulation for all ASPSPs via PSR 2017 and the RTS. Alternatively, the CMA should look to transfer obligations for monitoring compliance with the Order to the FCA as Competent Authority under PSD2;
- iii) Communicate to the OBIE that the introduction of the items listed at paragraph 26 should at this stage be stopped in light of discussion around the shape of the monitoring function and the FCA's role as Competent Authority for the PSR 2017 and RTS; and
- iv) Support mobilisation of a Transition Steering Group at pace to take forward development of the UKF proposals. We also ask that the CMA supports the CMA9 in invoking a timely audit of OBIE as a necessary element of the due diligence required to assure the proposals for it to pivot into the Future Entity. We believe clarity around the role of the Implementation Trustee (i.e. to finalise delivery of the implementation requirements and possibly transitioning into any monitoring function (if that is taken forward) is critical.

37. We would be happy to provide any further information or discuss any element of this response with the CMA if helpful. Please direct any reply to this response to Santander Regulatory Liaison (SantanderRegulatoryLiaison@santander.co.uk). In the meantime, please note that we consider the content of this response to be confidential and commercially sensitive in its entirety and do not consent to publication of this response either in whole or in part, without our prior written consent. [X].

Response to Consultation Questions**A. The UKF Proposals**

1. As a starting point, whilst San UK welcomes the CMA's desire to ensure a robust governance for Open Banking beyond the confines of the Order, we are concerned by the assumption within the Consultation that the CMA has a role in approving or rejecting the entirety of the UKF Proposals, or that it may have an ongoing role in the 'governance of Open Banking' beyond approving any transition of the residual role of the Implementation Entity under Article 10.1 to the Future Entity. In our view this fundamentally misstates the current legal position. Please see paragraphs 4 - 12 of the Executive Summary for an explanation of this view.
2. Without prejudice to our view that many aspects of the CMA's consultation on the UKF Proposals are misplaced, we summarise our key thoughts here on the basis this likely represents the main opportunity for the industry to formally comment on the UKF Proposals in a structured format. However, we would urge the CMA to share the non-confidential responses with UKF, and to agree that responses be taken forward by UKF as part of the Transition Mobilisation Group. San UK will share a non-confidential version of this response with UKF.
3. Having been involved in the process of developing the recommendations in the report, along with many other participants from the broader industry, San UK has had a chance to think through the pros and cons of the various options explored and what is most likely to succeed for the whole sector. We are broadly in agreement with the recommendations outlined in the UKF Proposals.
4. We believe that in developing these proposals UKF and Baringa have taken care to engage all stakeholders in the ecosystem and to consider the pros and cons of the various options explored from the perspective of the whole industry – not an easy task in light of the variety of participants in the ecosystem.
5. In our view, the UK Finance and Baringa teams have managed to find the right balance in undertaking the difficult task of trying to satisfy multiple stakeholders and having taken care to involve and engage all stakeholders over the past months.
6. We welcome the benefits that Open Banking has brought to customers over the past two years and look forward to being able to switch focus from delivery to innovation and focus more effort on innovative new propositions. To that end we look forward to a more collaborative way of working going forward.
7. Finally, while we are supportive of the proposals made, we note that the UKF work has had to be done without access to the level of detail from the OBIE that is required to truly understand costs, third party contractual liabilities and staffing. The next months are going to be critical as we come to understand further detail. This is particularly important here given [X] the skyrocketing OBIE operating costs over the past four years.

i) Independent and Accountable leadership of the Future Entity

- 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.
- a. What process and criteria should be used to identify suitable candidates for the Chair?
 - b. Who would be responsible for doing this, who should be kept informed and whose approval should be sought for decisions at this stage?
 - c. Should the Members alone approve and appoint the Chair
 - d. Should the CMA’s approval be required, as was the case in the appointment of the Trustee?
8. Please see paragraphs 4 – 12 of the Executive Summary for an explanation of San UK’s concerns with the CMA’s view that it should approve or reject the entirety of the UKF Proposals.
9. There does not appear to be a better model to appoint an independent Chair beyond the voting model that is being proposed that gives stakeholders a weighted vote (recognizing the need for more detail). The voting structure needs to reflect the additional volumes of usage volumes by the CMA9 and the proposed funding mechanisms, and the obligations on ASPSPs to make available a secure dedicated interface under the PSR 2017 – a responsibility not shared by third party participants (TPPs).
10. Timing of the appointment is one factor to consider within the Transition Steering Group - is the appointment of a Chair critical in the short term, or would there be benefit in allowing the Transition Steering group, coupled with an appropriately formed OBL Board structure, to function through a slightly longer timeframe (eg 12 months) prior to the appointment of the new Chair. This may allow a quicker short-term pace of change and consolidation.
- 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?**
11. Given the regulatory responsibilities of ASPSPs vs TPPs, we believe the proposal reflects a fair balance of perspectives and level of independence. However we are concerned that San UK (and other ASPSPs) will not have adequate oversight over the Future Entity and developments for Open Banking. In particular, given our role as a funding entity, we need to ensure that business cases for changes to infrastructure/standards etc are well considered and justified in terms of true end benefit to customers relative to overall cost, and that there is adequate transparency to assure this.
- 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?**

12. Please see paragraphs 4 - 12 of the Executive Summary for an explanation of San UK's concerns with the CMA's view that it should approve or reject the entirety of the UKF Proposals.
 13. There needs to be transparency in terms of overall cost and justification of decision making around, for instance, any improvements or enhancements to the services that would benefit the industry, users and improve customer protection or reduce risk. This transparency will help to ensure that all industry stakeholders are clear on the independence of the Future Entity, and that its decision making is done in a transparent and auditable way. However, the accountability should not extend beyond the Board and members of the Future Entity. In particular we note that at present the Future Entity is intended to operate akin to a scheme and there is no legal basis for any regulator to impose requirements on the Future Entity, or for the Future Entity to be accountable to anyone other than scheme members and the Board (other than in respect of the limited residual function under Article 10.1 of the Order).
 14. We do see issue with Scheme bodies being formally regulated and, whilst we appreciate the benefits in the systemically important services, such as CHAPS and Faster Payments, the constraints a Regulator would have to put onto OBIE will lead to a detrimental ability to be able to flex the innovative and commercial focus we anticipate for this organisation.
- 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?**
15. Please see paragraphs 4 - 12 of the Executive Summary for an explanation of San UK's concerns with the CMA's view that it should approve or reject the entirety of the UKF Proposals.
 16. San UK is keen to ensure that our customers really benefit from the benefits of Open Banking in terms of propositions and services, but most importantly that customers are kept safe. Pressure from the CMA9 will simply be the same pressure that guides every day decision making for every product that is made available to customers. The Future Entity governance structure and Board should have the same considerations front of mind. The Future Entity Board should be held to the same expectation. Once again transparency is important as will allows the leadership of the entity to scrutinise and demonstrate 'end' customer focus, as well as direct 'participant' customer focus.
 17. The current UKF Proposals see the CMA9 contributing the majority of funding to the Future Entity in years 1 – 3. While we recognise there may be a short term (time limited) need for the CMA9 to bear a higher proportion of the wider ecosystem costs, it is important to recognise the Future Model is unrelated to the Order (all ASPSPs have obligations under the PSR 2017 and the RTS) and that a large number of players use and benefit from the ecosystem. An equitable new funding model needs to be developed as a priority to take account of all market participants and benefits accruing, and that is flexible in response to changing market dynamics. The governance provisions will also need to ensure funding entities have the ability to scrutinize the proposed activities of OBIE and spend, to ensure appropriate value for money and prioritization.

18. We would see that a key activity in the transition period will be to determine any possible cost efficiencies and the need for an equitable funding proposal beyond the CMA9.
19. In terms of quantum, it is impossible to understand this until the audit of OBIE is completed, including people and resource requirements and the concerns around conflicts of interest and proper processes in place around procurement. As noted, this includes appropriate Board composition and governance. San UK will find it difficult to commit to any form of financial commitments without understanding the health of the OBIE.
- 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?**
20. Learnings can be taken from other independent schemes in the past where too much independence and lack of accountability can lead to scope creep and escalating cost without realising the anticipated end benefit.
21. It is also important the people with relevant skills and experience and used to support the decisions of the Future Entity, to allow effective challenge and debate on the value of change and process; good, valid business cases can provide valuable support (or not) to proposed change.
22. From our perspective, the most concerning outcome would be if the Future Entity management committee had too much independence which led to customer detriment, i.e. an unaccountable body without a regulatory underpinning forcing the industry to make changes to agreed standards, the benefit of which is unsubstantiated and that actually results in some unintended harm to consumers, for example negative impacts on competition or diverted spend and management time resulting in stifled innovation.
23. It will be important to ensure as part of the transition that a clear expectation around the purpose and scope of the Future Entity is set and mandate agreed in the legally binding Articles of the company.
- ii) Question on whether the future entity is adequately resourced to perform the functions required***
- f) 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?**
24. Please see paragraphs 4 – 12 of the Executive Summary for an explanation of why this question is misplaced. The ongoing compliance of the CMA will be assured via the monitoring function as defined, not the Future Entity. This is limited to Articles 10 and 12 – 14 of the Order.
38. Please see paragraphs 13 - 24 of the Executive Summary for San UK’s proposals in respect of the monitoring function. We note that in September 2019, ASPSPs including the CMA9 became subject to an equivalent obligation under PSD2 (implemented in the UK by the PSR 217 and RTS)

to introduce a dedicated interface to TPP via accessible APIs. In this sense compliance with the Order is already assured. The Future Entity will play an important role – and is already resourced – to maintain and run the infrastructure that is a critical component of ensuring the integrity of the ecosystem and customer confidence in it.

g) 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?**

25. Please see paragraphs 4 - 12 of the Executive Summary for an explanation of San UK's concerns with the CMA's view that it should approve or reject the entirety of the UKF Proposals. The CMA has no mandate in respect of questions about funding, since the vast majority of the UKF Proposals are unrelated to the Order and relate to activities and participants beyond the CMA9.
26. The current UKF Proposals see the CMA9 contributing the majority of funding to the Future Entity in years 1 – 3. While we recognise there may be a short term (time limited) need for the CMA9 to bear a higher proportion of the wider ecosystem costs, it is important to recognise the Future Model is unrelated to the Order (all ASPSPs have obligations under the PSR 2017 and the RTS) and that a large number of players use and benefit from the ecosystem. An equitable new funding model needs to be developed as a priority to take account of all market participants and benefits accruing, and that is flexible in response to changing market dynamics. The governance provisions will also need to ensure funding entities have the ability to scrutinize the proposed activities of OBIE and spend, to ensure appropriate value for money and prioritization.
27. Any short term burden on the CMA9 should be limited to a matter of months not years.
28. We would see that a key activity in the transition period will be to determine any possible cost efficiencies and the need for an equitable funding proposal beyond the CMA9.
29. While the non CMA9 participants have been very vocal about their desire that the cost of running the services that are used by all participants in an equitable way, we share the concern that there is a risk that external revenues may not be significant going forward, particularly if there are market alternatives that can be developed more cost effectively that can perform some of the same functions.
30. In terms of quantum, it is impossible to understand this until the audit of OBIE is completed, including contractor requirements and the concerns around conflicts of interest and proper processes in place around procurement. San UK will find it difficult to commit to any form of financial commitments without understanding the health of the OBIE.

h) 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?

31. We do not agree the proposal is reasonable. The current UKF Proposals see the CMA9 contributing the majority of funding to the Future Entity in years 1 – 3. It is important to recognise the Future Model is unrelated to the Order (all ASPSPs have obligations under the PSR 2017 and the RTS, and the directory is an input for confirmation of payee) and that a large number of players use and benefit from the ecosystem.

32. A new equitable funding mechanism will need to be developed at pace, that will need to be flexible in response to changing market dynamics. We believe that any disproportionate burden on the CMA9 should be time limited to months not years. The governance provisions will also need to ensure funding entities have the ability to scrutinize the proposed activities of OBIE and spend, to ensure appropriate value for money and prioritization. A sustainable future would ensure the supporting entity is paid for in an equitable and compliant way by all competing users of the service.

33. The Order has set out a framework to enable more competition in the marketplace, the delivery of which is now nearing completion. In addition, we are minded of the obligations within the PSR 2017 to ensure that barriers to TPP entry (including contracts or funding) is applied to TPPs. We expect any movement in this direction would face significant challenge from the TPP community.

34. We would see that a key activity in the transition period will be to determine any possible cost efficiencies and the need for an equitable funding proposal beyond the CMA9. That will help us understand what the spend in place today really supports, and then we should consider whether it is appropriate for the current funding model to continue to support all this activity. It may be that some niche offerings are so bespoke that the benefitting TPPs/ASPSPs fund more towards that.

35. In terms of quantum, it is impossible to understand this until the audit of OBIE is completed, including contractor requirements and the concerns around conflicts of interest and proper processes in place around procurement. San UK will find it difficult to commit to any form of financial commitments without understanding the health of the OBIE.

i) 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?

36. Please see paragraphs 4 – 12 of the Executive Summary for an explanation of why there is no legal basis for the CMA to approve the entirety of the Future Model: *“we are not able to require Providers to share data about products which are outside of our Terms of Reference and for which we have not found an Adverse Effect on Competition (AEC) that could be addressed by this remedy.*

*We equally cannot impose an order on parties outside of our Terms of Reference and AEC findings [...]”.*¹²

37. Yes - the CMA9 have proven their willingness to work with OBIE, and fund activity outside of the Order – on services that will benefit customers, such as OBIE ECA (additional customer attributes) when a clear customer need can be addressed. It is difficult to anticipate this type of requirement when legislation is written detailing all of the potential technical requirements. However, all players continue to engage in good faith to solve problems in a pragmatic way, and we expect that they will continue to do so.
- j) 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?**
38. We are aware of suggestions at industry around a possible levy being applied for all participants. However, we are unsure how this would practically work and do not see this as a viable option. The Transition Group should be enabled to consider resourcing levels and ensure that the focus of people is in the right areas, with clear objectives and outcomes. A clear cost-conscious organisation will benefit for delivering the right things for customers.
- iii) Representation of consumers and SMEs**
- k) Will the proposed arrangements ensure effective representation of consumer and SME interests? Would any alternative arrangements be more suitable?**
39. In our view there has been sufficient and engagement and active participation from consumer and SME groups in the formation of Open Banking and the OBIE. The expectation is that this will continue and is in fact critical given the points made earlier around clear customer benefit and risk mitigation needed for any future changes or development.
- l) Can the interests of consumer and SMEs be adequately represented by the same board member, say with support from the advisory committee?**
40. Yes, we have seen the ability of the consumer and SME reps to work collaboratively to date on Open Banking, mostly with shared views. Support from the advisory committee could supplement any specific knowledge or input needed. It is important that the expectations on the SMEs are clear and that they bring a common & collective position for their sector, not the individual organisations position for example.
- m) 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?**

¹²Explanatory note, para 38.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/614600/retail-banking-explanatory-note.pdf. The AECs identified in the Retail Banking Market Investigation comprised low customer engagement and barriers to searching, comparing and switching in the markets for personal current accounts and business current accounts and lending products for SMEs with turnover < £25m.

41. A standard application approach would be a suitable way to leverage the Board and Advisory Committee members, a set of clear and representative role descriptions will ensure a wide spread of interest being presented – a Head-hunter approach is probably not necessary, but could be considered if the quality of applicants is not as expected. We would expect that consumer representatives could come from consumer organisations who represent the needs to vulnerable and less well-off customers.

iv) Sustainability / adaptability of OBIE (historically a Special Purpose Vehicle)

n) 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?

42. This question illustrates the fundamental confusion that is prevalent around the Order and the Future Model. The CMA9's ongoing compliance with the Order will be assured by: a) the monitoring function as defined in this consultation (see paragraphs 13 – 24 of the Executive Summary); and b) the legal requirements on all ASPSPs including the CMA9 under the PSR 2017 and the RTS to make continuously available a dedicated interface for API access.

43. The Future Entity is intended to operate as a scheme that provides the infrastructure that supports the above – the CMA9 will in practice require access to assure performance. As such, the CMA9 are unlikely to drop out.

44. While the CMA9 and other ASPSPs will still have the requirement for services that maintain Open Banking remain uninterrupted, it is also important that there is the opportunity in the future to do things in a different way, given the potential competitive change in the marketplace in future. Hence any commitment from the CMA9 to the new entity cannot be open ended. A three-year commitment provides the correct balance between certainty on the one hand, an ensuring an efficiently run organization that is not un-competitive in the long run on the other hand.

o) 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?

45. Yes – there is a very real risk of this. Please see responses to questions (g) and (h) above regarding sharing the cost of running the Future Entity equitably.

p) 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?

46. In theory the proposed model could accommodate supporting activities for Open Finance, Smart Data or digital ID&V in future. However it is premature to discuss the role of the Future Entity (OBIE) in these areas, as a standards body or otherwise.
47. As a starting point, the OBIE is an implementation entity. Whilst in due course - and depending on where markets evolve - there may be a role for the Future Entity to manage standards and directories or other operational requirements in the areas, the OBIE as a pre-cursor to the Future Entity lacks the expertise, experience or regulatory footing to take forward any form of policy-making, regulatory or Conduct supervision that are necessary in driving these initiatives forward.
48. The FCA's feedback statement on Open Finance published on 26 March makes clear that the FCA will take a leading role in driving forward Open Finance, as well as the fact there are a substantial number of very challenging legal, regulatory and ethical issues that will need to be resolved as part of this workstream (e.g., liability, data ethics). It also notes that Open Finance will require primary legislation.
49. In light of the above, any standard-setting activity in this sphere is unlikely within the short term. The hypothetical role for the Future Entity as a standards body/ directory body providing analogous services for Open Finance as it does for Open Banking and Pay.uk can take place at a later juncture if required.
50. In terms of Digital ID &V, this must be considered out of scope. The Department for Digital, Culture, Media & Sport and other government departments need to be left to develop the architecture and functionality given the use cases have multiple societal touch points, as well as are intrinsic to financial crime risk management.
- q) 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?**
51. Account information and payment initiation services are inextricably linked from a technology and knowledge perspective so that it would be very risky to separate the two services. Invariably within both ASPSP and TPP organisations it is the same people who deal with and have knowledge of the both AIS and PIS capabilities and some services aggregation and money management services rely on both. They have been built together in the context of OBIE, and the FCA has regulatory oversight of both.
52. This however does not mean the Standards have to be developed by the same entity. The Transition Group, coupled with the Standards review work underway within UK Finance should consider whether separating Payments away from OBIE will bring more benefit or more harm/confusion to the ways of working. There is a clear need to ensure that Pay.UK and other schemes are very aware and close to developments in the Future Entity. the question of whether they should own the Standard needs further consideration, in part to ensure any destination-organisation is capable of delivering the required quality and focus.

53. It may be better, at least in the short term, to manage this via the advisory committee or by selecting board members with knowledge of payments in general.

r) 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?

54. Please see paragraphs 4 – 7 above.

B. Monitoring Arrangements

39. Articles 12 – 14 of the Order require the CMA9 to make continuously available three specific APIs in relation to PCAs, BCAs and SME lending products for:

- i) Reference and Product Information in accordance with the Read only data standard (Article 12)¹³;
- ii) Service Quality Indicators in accordance with the Read only data standard (Article 13)¹⁴; and
- iii) Transaction history data sets in accordance with the Read/Write access (Article 14).¹⁵

40. These must be provided in accordance with applicable data format standards, security standards, authorisation and authentication standard, standardised permission frameworks and whitelisting.¹⁶ The Terms of Reference for the Investigation deliberately exclude merchant acquiring.¹⁷

41. In September 2019, ASPSPs including the CMA9 became subject to an equivalent obligation under PSD2 (implemented in the UK by the PSR 217 and RTS) to introduce a dedicated interface to TPP via accessible APIs making equivalent information available.

42. There are three key principles to guide the discussion on the Monitoring Function:

- i) Whilst via formal approvals of Revised Roadmaps in May 2020 and July 2018 the CMA approved additional PSD2-related and other items within the Roadmap and judged these to be within the Order, the conversation becomes relevant again at this juncture. When considering the Monitoring Function the CMA must focus on the core provisions in the Order, namely ensuring the CMA9 continue to make the relevant information available in accordance with the defined standards. [X]

¹³ Reference information includes branch and business centre locations, branch opening times, ATM locations (and any other reference information reasonably stipulated by the Trustee and agreed with the CMA); Product information includes in relation to personal current accounts, business current accounts and SME lending products: product prices, charges, features and benefits, MMCs, terms & conditions, customer eligibility criteria (and any other reference information reasonably stipulated by the Trustee and agreed with the CMA), subject to the exceptions detailed.

¹⁴ In relation to PCAs and BCAs.

¹⁵ (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/600842/retail-banking-market-investigation-order-2017.pdf, p 19.

¹⁶ Page 19.

¹⁷

https://assets.publishing.service.gov.uk/media/545a981c40f0b6130e000011/Terms_of_reference_retail_banking.pdf

- ii) As described in para 9(i) above, Part 2 of the Order is now replicated in legislation via the PSR 2017 and RTS; and therefore
 - iii) The CMA should consider the parallel role of the FCA in enforcing wider and equivalent PSR 2017 obligations and the extent to which these address the monitoring requirements in the Order.
43. We note that one of the outstanding Revised Roadmap builds which the Trustee wishes to take forward as part of the Revised Roadmap (as detailed further below) appears to pre-judge the CMA's consultation on any Monitoring Function. The OBIE is seeking to require the CMA9 to build - at very significant cost - high frequency MI to monitor performance, which goes far beyond anything requested by our regulator (FCA) in the normal course. It is for the CMA and policy-makers to decide on appropriate monitoring in respect of the Order, not the Trustee and an implementation entity.
44. We urge the CMA to consider how this fits with the proposal to separate the monitoring function from the Future Entity. There are also questions of proportionality and *vires*. We respectfully urge the CMA to take a firm position with the Trustee and the OBIE and take this item off the table. This will assist in expediting closure of the implementation phase of the Open Banking remedies.
45. It is relevant to note that even a year ago the CMA9 had spent c.£1.5bn on Open Banking since 2016, including c.£147m on the operational costs of the OBIE alone. The contribution from Santander alone was c.£86m a year ago. Moreover, in light of excessive cost relative to utilisation – as the industry has also seen in initiatives such as cheque imaging – any decision to expand scope and costs must be subject to a robust cost-benefit analysis and through the lens of the current HMG review of competitiveness in financial services.
46. The Consultation offers the CMA an easy opportunity to now draw a line under further OBIE/Trustee Roadmap expansion and confirm conclusion of the implementation requirements of the Order. We would be happy to discuss this further bilaterally with the CMA if that would be helpful.
- s) 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?**
47. Without enacting legislation, the Future Entity will have no legal basis for monitoring the CMA9 or sanctioning it for non-compliance. Moreover, the perimeter of the CMA Order is very narrow and, in particular, the role of the Implementation Entity, per the express intention of the Inquiry Group.¹⁸
48. Under s162 of the Enterprise Act 2002 the CMA has a duty to keep under review the carrying out of the Order. This includes a duty to consider, from time to time, whether the Order should be

¹⁸ Para. 13.39 Final Report, “*the Implementation Entity should have a very clear and narrow focus*”.

varied or revoked in the light of a change of circumstances. Providers may apply for a variation or cancellation of all or part of the Order on the basis of a change of circumstances, or recommend that the CMA reviews the need for the Order or part of it. Indeed, this precise scenario is envisaged as a possibility in paragraph 39 of the Explanatory Note to the Order.

49. Given the introduction of the PSR 2017 and RTS in September 2019, we believe it may be appropriate for the CMA to vary the Order and to remove Part 2, without any further action as regards the FCA (since the FCA already has equivalent powers to oversee this matter). Any hypothetical failure by the CMA9 to make continuously available a dedicated interface (i.e. including access to the APIs specified in Articles 12 -14 of the Order) could be enforced by the FCA in its capacity as Competent Authority for PSD2 team. There is a specialist FCA PSD2 team which engages with ASPSPs to monitor availability discuss bilaterally any concerns of TPPs as regards access to APIs. This would avoid the risk of further inconsistent policy positions between the CMA and the FCA.¹⁹
50. There is precedent for this: in December 2019 the CMA varied the Order and removed Part 6 (the requirement to introduce alerts for unarranged overdraft alerts) on the basis the FCA had implemented new High Cost of Credit rules – including a new programme of overdraft alerts by the FCA – that represented a change in circumstances. The variation took effect from the day the FCA’s High Cost of Credit rules came into force.
51. Alternatively, we agree with the suggestion in the Consultation to transfer the CMA’s responsibility for overseeing the Open Banking remedies to the FCA as the Competent Authority for PSR 2017, which possibility was foreseen at the time of the Order.²⁰ This would avoid duplication and inconstant positions between the CMA and FCA and ensure the best placed regulator monitors compliance with the Order.
52. As a final option, in the event the CMA wishes to retain oversight of the Monitoring Function notwithstanding the overlap with PSR 2017, Article 46 of the Order provides that Providers annually submit a simple attestation of compliance with the provisions of Articles 12 – 14 of the Order. A simple Compliance Statement would be consistent with the approach taken in respect of all other remedies in the Order, as well as remedies in other market investigations. Where Part 2 is not revoked, the current reporting arrangements are more than adequate to ensure compliance with this part of the Order. This self-certification approach is operated in all the other Payment Schemes (with Pay.UK and Bank of England as examples) to ensure adherence, with Internal Audit teams and relevant SMF approvals sought – this provides a clear level of assurance that can then be reviewed or challenged.
53. Without getting drawn into discussions on ambit of the Order, it would be easy for the CMA to simply require the CMA9 to formally attest annually to Compliance with the Order (i.e. making continuously available the stipulated APIs). This would recognise that performance and conformance of APIs are already monitored by the FCA under the PSR 2017 and RTS, and that the Future Entity will maintain the infrastructure, enabling integrity of the ecosystem.

¹⁹ San UK has experienced challenges as a result of divergent positions taken in respect of Secure Customer Authentication (SCA) between the CMA (OBIE) and FCA.

²⁰ See paragraph 39 of the Explanatory Note to the Order.

- t) **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?**
54. The CMA has no legal mandate for requiring ecosystem monitoring or for mandating any action outside of the Order (i.e. unrelated to products that were the subject of the investigation, or remedies that cannot be tied to the identified Adverse Effects on Competition (AECs) or beyond the CMA9: “we are not able to require Providers to share data about products which are outside of our Terms of Reference and for which we have not found an AEC that could be addressed by this remedy. We equally cannot impose an order on parties outside of our Terms of Reference and AEC findings [...]”.²¹
55. However, the FCA already has responsibility for monitoring ecosystem performance. The CMA9 as Account Servicing Payment Service Providers (ASPSPs) are legally obliged under the Payment Services Regulation 2017 (PSR 2017) and the associated Regulatory Technical Standards on Strong Customer Authentication (RTS) (as transposed into UK via Brexit SIs) to make available a dedicated interface available to TPP via accessible APIs. These PSR 2017 and RTS requirements covers and extends beyond the limited obligations in the Order. The FCA is able to enforce these obligations as Competent Authority and take appropriate action if any organisation fails to meet its PSR 2017 and RTS obligations.
56. Given the introduction of the PSR 2017 and RTS in September 2019, we believe it may be appropriate for the CMA to vary the Order and to remove Part 2, without any further action as regards the FCA. Any hypothetical failure by the CMA9 to make continuously available a dedicated interface (i.e. including access to the APIs specified in Articles 12 -14 of the Order) could be enforced by the FCA in its capacity as Competent Authority for PSD2 team. There is a specialist FCA PSD2 team which engages with ASPSPs to monitor availability discuss bilaterally any concerns of TPPs as regards access to APIs. This would avoid the risk of further inconsistent policy positions between the CMA and the FCA.²²
57. There is precedent for this: in December 2019 the CMA varied the Order and removed Part 6 (the requirement to introduce alerts for unarranged overdraft alerts) on the basis the FCA had implemented new High Cost of Credit rules – including a new programme of overdraft alerts by the FCA – that represented a change in circumstances.
58. Alternatively, we agree with the suggestion in the Consultation to transfer the CMA’s responsibility for overseeing the Open Banking remedies to the FCA as the Competent Authority for PSR 2017. This would avoid duplication and inconstant positions between the CMA and FCA and ensure the best placed regulator monitors compliance with the Order.

²¹Explanatory note, para 38.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/614600/retail-banking-explanatory-note.pdf. The AECs identified in the Retail Banking Market Investigation comprised low customer engagement and barriers to searching, comparing and switching in the markets for personal current accounts and business current accounts and lending products for SMEs with turnover < £25m.

²² San UK has experienced challenges as a result of divergent positions taken in respect of Secure Customer Authentication (SCA) between the CMA (OBIE) and FCA.

- u) 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?**
59. The most common way of monitoring compliance with market investigation remedies that San UK are aware of – based upon experience with other remedies in the Retail Banking and PPI Market Investigations – is submission of annual compliance statements, where the firms attest to compliance with a specific remedy. The provisions around these are set out in Part 14 of the Order.
60. We are unclear why the Open Banking remedies would require a different approach, particularly in light of the equivalent regulation that assures compliance (the PSR 2017 and RTS), the fact that this was previewed at Article 46 of the Order, and in light of the industry voluntary creation of a Future Entity to provide the operational infrastructure needed for the ecosystem.
- v) 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.**
61. The relevant question here is in relation to the CMA9 not ASPSPs, for the reasons explained in paragraphs 4 – 12 of the Executive Summary.
62. In our view, compliance with Articles 12 - 14 of the Order is very straight forward and it will be hard to see how compliance/ non compliance is an issue. The CMA9 will either be making the specified information available in accordance with the data standards or they will not be. There have been some challenges with the OBIE over the past two years, where the OBIE has strayed into territory that is the remit of the FCA and taken policy positions that do not concord with those taken by the FCA. This needs to stop. In any event, the OBIE has no regulatory basis for deciding policy and this would also be the case for the Future Entity.
63. If the CMA decides to appoint a Monitoring Firm, that Firm will act as agent of the CMA.
- w) 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?**
64. We support this and consider Part 2 of the Order should be removed via variation of the Order – see paragraphs 13 – 24 of the Executive Summary. There is precedent for this as Part 6 of the Order was removed in December 2019 on introduction of the FCA’s programme of new overdraft alerts.
- x) Are there any other issues regarding monitoring and compliance which the CMA should be aware of?**

65. As a predicate to defining the Monitoring Function, the CMA needs to confirm that delivery of Revised Roadmap constitutes delivery of the Order.

66. Beyond the agreed Roadmap items, the OBIE is still in the process of building a significant list of outstanding requirements for the industry to build and deploy as part of the Revised Roadmap, in respect of items that were previously marked as for scoping. Some of these are functional, whilst others are other monitoring based. All of these carry significant investment costs. These include:

OBIE item	Comment
90 Day Reauthorisation of SCA in consents	For the FCA not OBIE – see FCA Consultation regarding SCA and RTS dated 28.1.21 ²³
Variable Recurring Payments (VRP)/Sweeping Significant new payment types which still to be standardised	1) Merchant acquiring is explicitly outside of Terms of Reference and this build is therefore <i>ultra vires</i> . ²⁴ 2) For Future Entity /FCA to decide if it wants to take forward – not a decision for an Implementation Entity
Contingent Reimbursement Model (CRM)/Confirmation of Payee (COP)	1) For the FCA not OBIE – see FCA Consultation regarding SCA and RTS dated 28.1.21 ²⁵ 2) For Future Entity /FCA to decide if it wants to take forward – not a decision for an Implementation Entity
A refresh of the Consents & Dashboard analysis and designs to replace the existing functionality.	1) Unnecessary and disproportionate in light of existent functionality (already built at cost). 2) For Future Entity /FCA to decide if it wishes to take forward on behalf of the whole industry – all should be operating at the same standards for consistency, competitiveness and fairness.
High Frequency MI (in place of current MI and annual attestations) OBIE are seeking the provision of near real-time MI on performance and availability akin to 'super monitoring'	1) Dependent of CMA view of Monitoring Function (see submissions on this point above) – this would put the Monitoring Function within OBIE. 2) Industry are unanimously opposed to this – it is disproportionate, unlike any other regulatory monitoring requirement. CMA would need to conduct a robust cost-benefit analysis in light of the cost.

²³ <https://www.fca.org.uk/publications/consultation-papers/cp21-3-changes-sca-rtts-and-guidance-payment-services-and-electronic-money-our-approach-and-perimeter>

²⁴

https://assets.publishing.service.gov.uk/media/545a981c40f0b6130e000011/Terms_of_reference_retail_banking.pdf

²⁵ <https://www.fca.org.uk/publications/consultation-papers/cp21-3-changes-sca-rtts-and-guidance-payment-services-and-electronic-money-our-approach-and-perimeter>

	3) CMA Order limited to APIs for: a) Product and Reference information; b) Service Quality Indicators; and c) Transaction data sets.
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67. In light of the points above in respect of the broader future state of Open Banking, the CMA's focus should be on considering/understanding what it considers necessary to ensure effective monitoring of CMA9 compliance with the Order on an ongoing basis, i.e. defining the Monitoring Function that was envisaged by the Order for Part 2, namely compliance statements in Article 46 and reporting and communication by the Implementation Trustee to the CMA as detailed in 2(h) of Schedule 1 to the Order.
68. The Consultation offers an easy opportunity to learn the lessons of the past and draw a line under further roadmap expansion. Moreover, in light of excessive cost relative to utilisation – as the industry has also seen in initiatives such as cheque imaging – any decision to expand scope and costs must be subject to a robust cost-benefit analysis and through the lens of the current HMG review of competitiveness in financial services.
69. We also note that in addition to not duplicating or complicating industry efforts with PSR in relation to fraud prevention and consumer protection, all proposals need to be properly assessed to ensure they do not introduce further fraud vulnerabilities into the system given the excessive levels of fraud that already exist in the UK financial system relative to other jurisdictions.

C. Questions on Transition arrangements

y) 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?

70. The Revised Roadmap broadly foresees delivery of the final remaining items of the Order within 2021. In our view, there are two key points:
- a. Recognition that the CMA9 are aware of their regulatory obligations and risk to the roadmap;
 - b. Stopping the discussion around inclusion of outstanding items within the Revised Roadmap that cannot be tied to the ambit of the Order – see the response to question (x). The CMA must be firm with the Trustee and the OBIE that it is not appropriate to be adding in additional items to the Roadmap at this stage (MI and VRP). These are not only clearly outside the scope of the Order and therefore the *vires* of these entities, but could, if appropriate, be taken forward by the FCA or the industry via the Future Entity in the future state.
71. We believe that with these items removed, it will be easy to guarantee closure of the roadmap within 2021. If appropriate/proportionate and determined to be of real value to consumers, items could be taken forward by the Future Entity. In the near future, allow the Transition Group to provide feedback and, if agreed, approval on items that are deemed urgent or needed.

z) 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?

55. See Section B above for San UK's views on future monitoring. Monitoring must be strictly limited to compliance with the Order and not the wider ecosystem, in respect of which there is no mandate in the Order.

aa) 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?

56. Please see paragraphs 4 - 12 of the Executive Summary for an explanation of San UK's concerns with the CMA's view that it should approve or reject the entirety of the UKF Proposals

57. The CMA9 have already clearly demonstrated their willingness to ensure continuity by sponsoring the UK Finance work that has precipitated this consultation and ensuring we get the transition team engaged as quickly as possible, and thus would expect accountability accordingly. This is, however, reliant on transparency and ongoing engagement of the current trustee and OBIE team to ensure a smooth transition, for which there has to be an expectation of accountability.

bb) 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?

N/A - please paragraphs 4 - 12 and 30(iii) of the Executive Summary, as well as the response to question (y).

cc) 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?

58. N/A - please paragraphs 4 - 12 and 30(iii) of the Executive Summary, as well as the response to question (y).

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

59. San UK would welcome CMA support in ensuring the audit of OBIE required for due diligence takes place in a timely fashion. The UK Finance proposals are substantively good and will enable a rapid evolution of the OBIE and Transition activity, But it is critical that clear lines of responsibility and control are clear from the outset, and clear and open engagement is prioritised. This can be done safely without detriment to the current plans or Roadmap delivery.