

CMA Consultation: The future oversight of the CMA's open banking remedies

UK Finance response

Summary points

UK Finance welcomes the opportunity to respond to the CMA's consultation on the future oversight of the CMA's open banking remedies. We have worked closely with the CMA, our members and other stakeholders, including end users, government departments and regulators over the last year to make proposals on behalf of industry on the successor body to OBIE (the Future Entity).

Our purpose is to secure the industry's investment in open banking, maintain the services that open banking customers now rely on and provide a platform for extension into open finance and open data.

We are grateful to the CMA for using our proposals to frame parts of its consultation and their constructive engagement.

The CMA's criteria are helpful to evaluate our proposals which command industry support. This is critical given that the Future Entity's remit extends beyond the scope of the CMA Order (after the implementation phase to support the residual maintenance requirements), into enabling firms to meet their PSD2 obligations efficiently and to provide services that meet industry's developing "open" requirements.

These industry requirements and opportunities are now emerging. A swift and efficient transition is necessary to ensure that they are not missed or that OBIE's capabilities diminish as the Roadmap nears its conclusion. Participant groups can begin to form and the market can consider how best to develop the ecosystem collaboratively and commercially in a way the current governance structure does not allow for.

The transition should not put at risk the delivery of the Roadmap and vice versa. We would recommend a number of steps to secure both the Roadmap and the transition:

- A stronger focus from the OBIE on completing the Roadmap. Whilst the engagement of OBIE in other activities outside the perimeter of the Order has been welcome, these activities should not have been undertaken at risk to OBIE's core purpose;

- The initiation and completion of activities that underpin the good governance of OBIE now and transitioning into the Future Entity. We welcome the recent Open Banking Annual Report as a stepping stone towards greater openness and scrutiny;
- The deployment of ring-fenced resource to mobilise the transition under the governance of a Transition Group (who would have full authority to mobilise the transition and take forward until the Chair of the Future Entity is appointed) and take it forward in parallel to the completion of the Roadmap – we attach draft terms of reference for the Transition Group;
- The CMA should be a member of the Transition Group and through it be able to slow or halt the transition process if it considers that the nature, direction or pace of transition is jeopardising the remaining deliverables in the Roadmap;
- Due diligence to ensure that the financial position and any contractual liabilities are fully understood that allow the retention of Open Banking Limited as the legal form;
- Setting up a Transition Group, at a minimum, made up of CMA, the Trustee, two representatives of larger retail financial institutions, OBIE representative. The Transition Group should also consider appointing Third Party Provider representatives from PISP and AISP communities, an end user representative and a trade body representative (to help ensure stakeholders are kept well informed and engaged in the transition process). The Transition Group should also appoint a Transition Lead. For the avoidance of doubt this would be outside of UK Finance governance and would not be led by the Implementation Trustee;
- Develop a more detailed transition plan and Identify the necessary activities and transition workstreams including the service capability reviews and the reviews to introduce a new funding structure. The ASPSP community, in particular, who will bear the largest part of the funding need early clarity on the likely obligation. Careful consideration will be needed for the sequencing of these reviews given the relationship between service scope, cost and value;
- Undertake preparatory activities to initiate the recruitment of the Chair. The role of Transition Lead will ultimately be filled by the Chair of the Future Entity. Until the Chair is appointed the Transition Group will appoint an interim Transition Lead;
- A timeline and activities to complete the transition by the end of January 2022 – an outline is annexed.

We would recommend that the CMA provides direction to the Implementation Trustee and OBIE on the support necessary to successfully house ring-fenced resource and a workstream to deliver the transition activities.

They should be clear that the Trustee has no decisive say in the transition to an industry successor body other than to ensure the successful completion of the Roadmap. The Trustee should be part of the Transition Group that provides the governance for the transition – draft terms of reference are attached.

The Trustee and senior OBIE team will have a critical role to play in enabling a timely, well-managed and effective transition to a new governance model. OBIE should provide the legal and financial umbrella for the transition and input into the Transition Group.

The Trustee is also the sole Director of Open Banking Limited. As Director, he should provide delegated authority to the Transition Group to make all decisions relating to the transition and provide the agreed budget to do so. In the event this authority cannot be provided the Board of Open Banking Limited should be expanded to include a representation from industry.

Mobilisation of the transition should not be construed as getting ahead of the CMA decision, but as preparatory activity. Once the CMA publishes its decision, the transition itself can get underway.

UK Finance stands ready to support the transition and mobilise the transition as the initial secretariat for the Transition Group, building on the work we have done so far, applying the same principle of inclusive stakeholder engagement. In keeping with that principle, we are sharing our consultation response with the Open Banking Futures Advisory Committee.

To conclude, the open banking ecosystem is at a key milestone, where the market must now lead the development of open products and services to allow competition to flourish, building on the catalyst provided by the CMA Order and PSD2. The Future Entity must evolve from OBIE to be more cost efficient, value oriented and commercially agile to take the opportunities now emerging. This requires further collaborative work which should begin at the earliest opportunity in parallel to completing the Roadmap.

Please find below our other comments on the consultation document.

Independently led and accountable

1a) 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?

We would distinguish the appointment of the first Chair from future appointments. For the first Chair appointment, a role profile should be drawn up, a recruitment agency engaged and a selection panel drawn up by the Transition Group.

1b) 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?

Careful consideration has been given to the governance structure and composition of the board of the Future Entity, to ensure its independence.

1c) 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?

The accountability should not extend beyond the Board and members of the Future Entity. We do not believe regulators should impose requirements on the Future Entity, which will not be performing regulated activities but supporting regulated market participants in performing those activities.

We do however set out proposals that improve the transparency of the Future Entity in comparison with OBIE, for example on operational and financial plans.

On Open Banking Payments, some UK Finance members take the view that light touch regulatory oversight may be necessary to ensure that there is a consistent approach adopted by the full market of ASPSPs.

To ensure a fair and appropriate governance model they believe the board should maintain accountability to the CMA during the transition phase. This could be reviewed once the Future Entity is in a steady state.

1d) Does the initial funding model envisaged risk undermining the Future Entity’s ability to act independently because of the potential tension between the interests of the CMA9 (who will be providing all of the funding initially) and the objectives of the independent Chair? Can the CMA be confident that the Future Entity governance structure (including an independent Chair, NEDs and the Advisory Committee) will be sufficient to resist pressures that may arise as a consequence? And if we cannot be confident what steps should be taken to mitigate this risk?

The CMA9 will not be providing all of the funding for the Future Entity – in contrast to the current arrangements. We do however expect larger retail financial institutions to initially provide a large part of the funding.

A key transition activity will be to determine the scope for both cost efficiencies starting from a **zero-based cost study**, the foundations for which come from the audit and revenue raising. This will identify the quantum of funding required to maintain services. The provision of the funding will require a funding metric based on market share but one which does not create anomalies.

Participant groups will be able to use the Future Entity to meet their new requirements so long as they provide appropriate funding. These groups may or may not include larger retail financial institutions.

A process of strategy development and business plan approval will be required so that the Future Entity is responsible for developing an Open Banking strategy which must be agreed, firstly with the participant groups and members and wider stakeholder community, then the board.

1e) 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?

Some members are concerned to address issues in the market that could impede the greater adoption of Open Banking Payments. They argue that while the UK Finance proposal goes some way to ensure a better representation for the payments agenda, it is important that the leadership is driven by a strategy that represents the view of a wider set of stakeholders than those that make up the proposed board for the Future Entity. The proposed governance model seeks to provide this engagement through the Advisory Committee, participant groups and membership model. The Board will need to also engage policy makers, HM Treasury, regulators and businesses who also have a deep interest in seeing Open Banking Payments succeed.

These members also raise a risk that into the future there could be more divergence within the ecosystem. At present there are the CMA9 and the non-CMA9. Along with this there are some mandatory and some optional items on the roadmap. It is their view that for Open Banking Payments to fully develop and bring benefits to consumers and businesses then the Future Entity must have a strategic ambition to see consistency across all account providers in the UK – in terms of performance, function and adherence to standards. UK Finance is undertaking further work on open banking payments

Adequately resourced

2a) 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?

UK Finance is confident that all of the necessary functions that the OBIE undertakes (as outlined in the Service Capabilities section) will be brought forward into the Future Entity, to ensure that the investment in Open Banking continues to be effective going forward. If the CMA identifies any areas which it believes the Future Entity will not meet, that are required under the CMA Order, then these will need further consideration.

2b) 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?*

As the CMA consultation document references there have been tenders in the market for which the Future Entity could have applied.

The funding of the Future Entity requires further work. UK Finance have recommended that there is financial due diligence, service capability reviews, and reviews of both cost efficiency and revenue raising. These activities need to get underway in the correct sequence as soon as possible to provide the confidence all stakeholders are seeking, and to inform the ASPSP community of their likely costs at the earliest opportunity. The outcome of the reviews will need to consider the impact of any additional costs, particularly on mid-tier ASPSPs.

The competing requests for investment in future developments will come from Participant Groups and will come with funding. The Board will consult on its business and financial plans in order to determine priorities.

2c) 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?

In framing the proposals, UK Finance took legal advice on TPP charging to ensure the proposals did not present an obstacle under PSD2. Some services to TPPs could be charged for where there is no legal impediment and a value proposition.

We also considered various funding metric but concluded that one based on a simplistic metric for market share would produce anomalies. The funding metric will need to be considered carefully to allow for financial support to be available from larger companies benefitting from the services of the Future Entity.

2d) 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?

The service capabilities of OBIE will be maintained subject to the service capability reviews, although services that are currently free could be charged for in the future at a competitive market rate, so long as they did not create an obstacle under PSD2.

2e) 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?

Some stakeholders have suggested that an industry levy would be a more sustainable funding mechanism given that some services provided by OBIE have either public value or could create a free rider problem (for example, the development of open standards).

At present, there is no legal or regulatory basis for a levy which would mandate participation in the Future Entity and use of its standards. This would be a materially different approach given that the use of the OBIE standards is voluntary for non-CMA9 ASPSPs.

Dedicated to serving the interests of consumers and SMEs

3a) Will the proposed arrangements ensure effective representation of consumer and SME interests? Would any alternative arrangements be more suitable?

The UK Finance proposals go further than effective representation of consumer and SME interests – the vision and mission of the Future Entity put their interests front and centre. This principle would be written into the Articles and Memorandum of Association and other documents providing direction to the Board. Firms themselves are regulated and responsive to their customers' interests.

3b) Can the interests of consumer and SMEs be adequately represented by the same board member, say with support from the advisory committee?

Other non-industry Board members will play an important role bringing customer perspectives to the Board and with industry representatives being well positioned to represent the needs of their customer base, many of which will be SMEs. Further, non-industry representatives may have backgrounds in business, including the SME sector. The Advisory committee will also include an SME representative.

3c) 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?

UK Finance would suggest that consumer representatives should come from the consumer organisations, and in doing so, they are likely to have vulnerable and less well-off customers as their service users. In all other aspects, the recruitment process would be the same as for any other Board member.

Sustainable and adaptable

4a) 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?

The UK Finance proposals suggest that ASPSP membership will last a minimum of 2 years, and CMA9 membership an initial 3 years. We believe that this commitment will be sufficient to ensure continuity and give the Future Entity time to form and stabilise in the industry. The desire for CMA9 members to remove membership would be very limited, given the risk of disruption when moving technical services to a new provider. However, enabling the ability for firms to remove membership will drive competition, and keep the focus of the Board and Executive Committee on delivering valuable services to industry, in a cost efficient and effective manner.

More broadly, we would see the medium-term future as one where an open data/finance/banking eco-system is flourishing with a maturing market that provides competition at all layers leaving a thinning requirement for any central service beyond the network requirement for the development and maintenance of standards. The balance of funding, under such a scenario, will shift to development funding driven by Participant Groups (a broad term that could encompass a wide range of constructs that develop “open” requirements and provide funding for their development).

4b) 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?

The service and funding reviews referenced above need to ensure that the wider ASPSP community receives value from the Future Entity and that the funding requirement does not incentivise free riding.

4c) 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?

Yes, it would be possible for other “open” projects to create a participant group, for example, with the support of a trade body to develop requirements or respond to a regulatory mandate, or for the Future Entity to respond to a tender. All requirements on the Future Entity would need to be prioritised and resourced through an inclusive business planning process.

4d) 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?

UK Finance is setting up a working group bringing together its members and other stakeholders to consider the future strategy for open banking payments, including Pay.UK. This could evolve into a Participant Group.

The payments agenda will need to address issues such as consumer protection, end point availability, refunds, better support for indirect members, scheme (FPS) interface, liability, compliance to the standards and consequences for non-compliance. For these reasons a different solution could be required for payments, without which users and businesses will not benefit from Open Banking Payments.

A key line of enquiry for the working group will be therefore the scope for a Payment Arrangement to facilitate future development.

The European Central Bank's terminology and distinction between a payment scheme and payment arrangement is helpful here:

- A **payment scheme** is a set of formal, standardised and common rules enabling the transfer of value between end users by means of electronic payment instruments. It is managed by a governance body. The rules describe the procedures and payment scheme functions which enable payers and payees to use or accept electronic payment instruments. These functions cover, as a minimum, the governance of a payment scheme but may also include payment service provision, payment guarantee, processing, clearing and/or settlement. The latter can be provided by the governance body itself, participating payment service providers or technical service providers, or other third parties. The rules should be applicable for at least one payment service provider.
- The framework also covers **payment arrangements**. These may be a part of or separate from a payment scheme, or they may be provided by the governance body of a payment scheme. A payment arrangement provides functionalities which support the end users of multiple payment service providers in the use of electronic payment instruments. It is managed by a governance body which issues the relevant rules or terms and conditions. Such payment arrangement functionalities include (i) initiation, facilitation or requests to execute transfers of value and (ii) the storage or registering of personalised security credentials or data related to payment instruments.

The other lines of enquiry on open banking payments that our work will explore include:

- Ensure that both the standards and the implementation of the standards is consistent and across the industry - all ASPSPs – avoid any fragmentation so that businesses (payees) can be certain their customers (payers) will enjoy a compliant and frictionless experience.
- Decoupled Experience – with a focus on the user journey and experience – noting how transformative the development of a decoupled authentication flow would be.
- Constant, Available and Reliable - for payments over Open Banking to be effective it must be constant and reliable – focus on the availability of PIS end points and ensure reliably as a real payment option.
- Consumer Protection – how can consumer protection be progressed in the current model – should this be linked to the underlying scheme?
- What additional fraud and risk management controls may be added to the standards?
- How to land Variable Recurring Payments successfully in the market?

4e) Do UK Finance's proposals for the Future Entity raise any other concerns regarding the sustainability of the proposed approach? Are there any other alternative approaches which would be more suitable to address these types of issues?

No comment.

Future monitoring

We have received no comments from non-CMA9 members on future monitoring. We expect the CMA9 and other interested parties to respond individually on the future monitoring arrangements directly to the CMA. We also expect government and regulators to maintain a strategic interest in open banking and its extension to other open initiatives.

The transition

6a) 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?

The ongoing services are not impacted by the transition so the risk should be minimal.

An effective and well managed transition to new funding and governance requires to support of the OBIE senior team, but dedicated resource would ensure the Roadmap is not put at risk. The transition activities should be housed by OBIE who would provide the contracting party and funding under the governance of a Transition Group. The CMA must ensure that OBIE mobilises to support the transition.

6b) 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?

We would suggest:

- the new monitoring process is in place before the Trustee's current monitoring is "switched off";
- the arrangements for the monitoring process are separated from the other "service capabilities", funded separately and do not transition to the Future Entity.

6c) 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?

The independent chair should be appointed first by the Transition Group that brings together representatives of the key stakeholders. This group will oversee the establishment of the Future Entity, with clear roles and responsibilities defined.

The OBIE should also be partly responsible for the smooth transition to the Future Entity. The OBIE senior team remuneration and bonus structure should be contingent on a smooth transition.

6d) 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?

We would anticipate that the design of the majority of the remaining roadmap items will be completed prior to transition, with only CMA9 implementation/delivery of mandatory items remaining. If there are any design requirements remaining at point of final transition, then these can be passed into the Future Entity, which will have the resource and capability to complete this work. This entity is in part being established to enable firms to meet their regulatory requirements (per its Vision), therefore this is a suitable and appropriate vehicle to house this type of work.

We would therefore not advise the full completion of the Roadmap before the transition takes place. This would stall any development outside of the Roadmap. The Future Entity needs to become the

enabler of change in the ecosystem and so there is benefit of transitioning as the final few Roadmap items are being implemented.

Firms will still be regulated so there is no risk that items will be incomplete.

6e) 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?

Once the final remit of the Future Entity is agreed, industry's attention can shift to the development of future requirements. Participant groups can begin to form and the market can consider how best to develop the ecosystem collaboratively and commercially in a way the current governance structure does not allow for.

6f) Are there any other issues regarding transition arrangements which the CMA should be aware of?

No comment.

Transition activities and timeline

Activity	Timing	Responsibility
Transition mobilisation	No later than 31 May	Transition Group
<ul style="list-style-type: none"> - recruitment agency selected and draft Chair role profile prepared; - due diligence scope agreed and firms selected¹; - data room set up to provide as-is position; - Transition Group and interim secretariat appointed and terms of reference agreed, including delegated authority; - Draft transition plan and advisory support scoped including funding and service capability reviews and legal support. 	During this period OBIE are focussed on the Roadmap and dedicated resource supports the transition	
CMA decision on Future Entity	By 1 June	CMA
Transition Day O	No later than 1 October	Transition Group and Transition Team
<ul style="list-style-type: none"> - Transition plan complete and confirmed - Advisory support appointed - Chair and CEO role profile confirmed, search, selection and appointment - Due diligence complete - Funding and service capability reviews initiated - Governance and corporate documents drafted 	During this period the transition activity become embedded in OBIE depending on stabilising the Roadmap	

¹ Some due diligence may proceed to an earlier timetable.

- Subject to Chair appointment, Board and CEO appointed
- Business and Financial Plans under development

Transition Day 1	By 31 January 2022	Chair and Future Entity governance and senior team.
<ul style="list-style-type: none"> - Key appointments made and legal transition to new model - Governance and corporate documents complete - Funding model consultation - Business plan consultation - Membership prospectus 		