

OPEN BANKING

DMS 2.0 DATA PROTECTION FRAMEWORK

1. BACKGROUND ABOUT THE DMS 2.0

- 1.1 The Dispute Management System ("**DMS 2.0**") is a solution being developed by the Open Banking Implementation Entity ("**OBIE**") to support secure communication between the ASPSPs and TPPs for the resolution of payment disputes and complaints in order to comply with the requirements in PSD2 regarding customer redress.
- 1.2 ResolverCoUK Ltd ("**Resolver**") has been chosen by OBIE as the technology provider for the DMS 2.0. Resolver's solution is known as Decider, which will be customised and developed to support the requirements of the DMS 2.0.

DATA PROTECTION FAQs

- 1.3 To help address any questions Participants may have relating to data protection compliance in relation to the DMS 2.0, OBIE (together with its external legal advisers Hogan Lovells) have produced:
- (a) this note on the DMS 2.0 data protection framework which Hogan Lovells prepared initially for OBIE to address questions raised by the CMA9; and
 - (b) a due diligence report relating to Resolver prepared by Hogan Lovells for OBIE.
- 1.4 Both of the above documents have been shared with the CMA9. OBIE is also happy for Participants to share these two documents with their own legal teams on a confidential "need to know" basis.
- 1.5 As well as this, addressed below with reference to the above documents are what OBIE anticipates to be the three most likely questions Participants will have in relation to the DMS 2.0 data protection framework:

(a) **What is the role of OBIE? Resolver? Each Participant?**

- OBIE provides the technology platform.
- Resolver is a sub-contractor of OBIE.
- In relation to the data protection aspects only of OBIE's relationship with Resolver: each Participant is a controller, OBIE acts as agent, and Resolver is the processor (see para 2.3 below).

(b) **Why is OBIE going down the agency route? Why is OBIE not entering into a controller-processor agreement with Resolver?**

This is largely for practical reasons given that there could be potentially hundreds, if not thousands, of Participants using the DMS 2.0 (see para 2.4 below).

(c) **What steps OBIE is undertaking to help the CMA9 and other Participants be sufficiently comfortable as controllers?**

OBIE (together with Hogan Lovells) has conducted a thorough due diligence exercise in relation to Resolver and extensive consultation with the CMA9 (see

para. 2.5 below and the Resolver due diligence report prepared by Hogan Lovells).

2. DATA PROTECTION FRAMEWORK SUMMARY

The ASPSP and TPPs customer personal data

- 2.1 Through the DMS 2.0, the ASPSPs and TPPs will be able to share information with each other with the intention of resolving payment disputes and complaints. This will necessarily involve the processing of personal data relating to the ASPSP and TPPs' customers. Such processing is subject to the data protection regime established by the Data Protection Act 2018 and the General Data Protection Regulation (EU) 2016/679 ("GDPR") (the "**Data Protection Laws**"). Prior to the commencement of any such processing, OBIE intends, in consultation with the CMA9, to implement a set of DMS 2.0 Data Protection Rules to govern the ASPSPs and TPPs' sharing and use of any information available via the DMS 2.0 to help ensure compliance with the Data Protection Laws.
- 2.2 The types and categories of personal data that may be processed via the DMS 2.0 include: personal information relating to customers including names and contact details as well as bank details including account numbers and references.
- 2.3 The proposed data protection framework is set out below:
- (a) **The ASPSPs and TPPs will be controllers of any personal data shared via the DMS 2.0:** Each of the ASPSPs and TPPs, as controllers of the personal data that each choose to share via the DMS 2.0, will be wholly responsible for the disclosure of such information to the other ASPSPs and TPPs.
 - (b) **OBIE will act as an agent on behalf of the ASPSPs and TPPs:** OBIE will not have access to or process in any way any ASPSP and TPP customer personal data shared via the DMS 2.0 by the ASPSPs and TPPs. OBIE will be neither a controller nor a processor for such data. Instead, OBIE, as agent for the ASPSPs and TPPs, has appointed Resolver to act as a processor on behalf of the ASPSPs and TPPs.
 - (c) **Resolver will be a processor of any personal data shared via the DMS 2.0:** Resolver will have access to the personal data processed via the DMS 2.0 in order to provide support and maintenance services to the ASPSPs and TPPs. OBIE entered into a services agreement with Resolver on 1 July 2019. The data processing terms included in the services agreement and entered into by OBIE on behalf of the ASPSPs and TPPs are replicated as Annex 1. For the avoidance of doubt, under this services agreement, Resolver is being appointed as processor for the ASPSPs and TPPs that choose to share personal data via the DMS 2.0. Since OBIE will not have access to any ASPSP and TPP customer personal data shared via the DMS 2.0, Resolver is not required to act as a processor for OBIE.
- 2.4 OBIE's justification for proposing this data protection framework is set out below:
- (a) **Volume of Open Banking participants:** As explained in recent PMG meetings, OBIE's vision is for all ASPSPs and TPPs within the Open Banking ecosystem to use the DMS 2.0. (Indeed, it is a requirement under the CMA Order for the CMA9 banks to make available the customer redress mechanism to all Open Banking participants.) It is not practical for an organisation, like Resolver, to enter into direct contractual relationships with all Open Banking participants (which number

currently in the hundreds and could potentially grow to the thousands). Therefore, it makes practical sense for OBIE to act as the ASPSPs and TPPs' agent in this regard, particularly as OBIE already has (or will have) direct contractual relationships with the majority of Open Banking participants;

- (b) **OBIE's role in delivering Open Banking:** Since OBIE is governed and funded by the CMA9, it is congruent with OBIE's role more generally that it should act as the agent of the ASPSPs and TPPs – implementing the DMS 2.0 and engaging Resolver as a processor on behalf of the ASPSPs and TPPs is simply part of OBIE's role in implementing the requirements of the CMA Order.
- (c) **Data Protection Laws:** Our view is that OBIE does not fall within the definition of either a controller or a processor set out in the GDPR for the following reasons:
 - (i) OBIE will not have access to or process in any way any ASPSP and TPP customer personal data shared via the DMS 2.0;
 - (ii) OBIE will not determine the purposes or means of the processing in respect of any ASPSP and TPP customer personal data shared via the DMS 2.0. All decisions, including whether it is appropriate to share the information via the DMS 2.0 and which information to share, will be made by the ASPSPs and the TPPs.

There is nothing in the Data Protection Laws that prohibits an organisation from acting as an agent in appointing a processor on behalf of a controller or controllers.

2.5 Steps OBIE has taken as a diligent agent to ensure that the ASPSPs and TPPs' position as controller is safeguarded:

- (a) **Supplier due diligence:** We understand from OBIE that it was discussed in the PMG meeting of 15 October 2019 that OBIE has during the pre-contract phase and continues to conduct due diligence on Resolver from both a data protection and Information Security perspective to ensure that Resolver has appropriate data protection and information security practices in place prior to commencing work as processor for the ASPSPs and TPPs. OBIE will share the data protection due diligence report once this diligence is complete. The Information Security Report will be presented and discussed at the Security and Fraud Working Group.
- (b) **Consultation with CMA9:** OBIE has kept the CMA9 up to date with its intention to implement the DMS 2.0 and to act as their (and the other ASPSPs and the TPPs') agent in appointing Resolver as their processor for the DMS 2.0. This has included giving the CMA9 the opportunity to consider and comment on the proposed DMS Data Protection Framework and the data processing terms to be included in the services agreement between OBIE and Resolver. The data processing terms were subsequently updated to reflect any CMA9 comments. Those updated terms were also made available to the CMA9 for consideration. We understand from OBIE that it was discussed in the PMG meeting of 15 October 2019 that OBIE:
 - (i) has previously answered the questions raised by each of the CMA 9 through an exchange of e-mails on a bilateral basis;
 - (ii) issued a short paper on the key themes/questions (with corresponding answers) raised collectively by the CMA9; and

- (iii) is happy to conduct bilateral calls with each of the CMA9 so that each of the CMA9 are satisfied that their questions have been adequately addressed as it appreciates that it is not always easy to get this comfort through e-mail exchange.
- (c) **DMS 2.0 Data Protection Rules:** As mentioned above, prior to the commencement of any processing of any ASPSP and TPP customer personal data shared via the DMS 2.0, OBIE intends to implement a set of DMS 2.0 Data Protection Rules to govern the ASPSPs and TPPs' sharing and use of any information available via the DMS 2.0 to help ensure compliance with the Data Protection Laws.

DMS 2.0 on-boarding personal data

- 2.6 **OBIE as a processor of any DMS 2.0 on-boarding personal data:** Prior to a new ASPSP or TPP being added to the DMS 2.0, OBIE will undertake various on-boarding activities (including verification of contact details for that ASPSP or TPP) before allowing that ASPSP or TPP access to any information shared via the DMS 2.0. This will involve the processing of personal data which will be subject to the Data Protection Laws. The personal data in question will be limited to business contact details of the person nominated by the relevant ASPSP or TPP to correspond directly with OBIE about accessing the DMS 2.0. Appropriate data processing terms will be included in the agreements between OBIE and the relevant ASPSPs and TPPs.