

OPEN BANKING

JROC's proposal for the design of the future entity for UK open banking

Response from OBL

May 2024

Introduction

We welcome the Joint Regulatory Oversight Committee's (JROC) recommendations on the design of the Future Entity and the creation of the Interim Entity. We fully support the commitment to establishing a Future Entity that will be central to (a) delivering a well-functioning, commercially viable and sustainable open banking ecosystem, (b) building on the foundations of what has been achieved under the CMA Order, and (c) ensuring the UK's continued leadership in open banking. This will provide the means for transitioning ongoing Order-related requirements to a long-term framework and the future success of open banking.

All open banking activities, whether they be Order or non-Order related, share a common vision and purpose, namely to deliver enhancements for the benefit of the wider ecosystem, including consumers and businesses, together with the UK economy as a whole. We believe that ensuring this commonality of vision is key to effective attainment of these desired outcomes and facilitates the delivery of them. This is a key principle that must underpin the evolution of open banking. It is also critical to ensure that the delivery approach is as cost-efficient and cohesive as possible.

The direction that is set out in the report will provide the right foundations to take forward open banking and allow expansion of both the Interim Entity and Future Entity's remit to develop Smart Data in other sectors and to drive the development of account-to-account retail transactions to offer consumers and businesses an attractive alternative to card payments. This aligns with the PSR's objective to support the development of account-to-account retail transactions and the FCA's objective to have a variety of safe payment methods. This can only be a good thing for the future of open banking and Smart Data more broadly.

Following the direction from JROC, OBL has already commenced work on the JROC workstreams and has made substantive progress across all workstreams. The commitments secured by JROC from ecosystem firms to fund the next stages of the JROC workstreams is an important step that will allow further progress to be made. It will be critical to demonstrate rapid and effective progress to these firms, together with JROC and the wider ecosystem, rewarding them for their investment and encouraging their continued funding support. Delivery momentum is critical across all the workstreams to evidence progress and convince these and additional firms of the value in continuing their support in future funding rounds.

OBL already has made progress on the workstreams and now that the short-term funding issue looks to be resolved, we believe we can step up work immediately to support continued progress. We believe it is essential that the momentum that has been created on the JROC workstreams is maintained whilst the Interim Entity is being established as this could take some time. Slowing or stopping the workstreams until the Interim Entity is set up is not to anyone's benefit, moreover it will be difficult to recover from lost momentum at this point. Hence, whilst the Interim Entity is being established, we propose that OBL continues to take forward the workstreams. These will be passed to the Interim Entity when it is fully established.

We recognise that there is a need to separate the funding and governance of Order and non-Order related activities in the period ahead of the workstream ownership being passed to the Interim Entity. We have proposed mechanisms which ringfence non-Order funds, providing transparency and accountability to funders, and introduce independent control over how funds are utilised. In parallel with this, we are currently developing programme governance proposals that give JROC and industry significant direction and oversight over the programme and underpinning activities. We believe that these enhancements will address any possible concerns before the Interim Entity is fully established.

OBL and the Interim Entity will deliver different capabilities and carry out different activities, but it is vital to note that there is a shared purpose and vision. We remain concerned that the duplication of management, leadership (i.e. Chair and CEO roles), and roles and responsibilities for OBL and the Interim Entity could create confusion and complexity for employees and wider stakeholders. To mitigate this, it will be important for the two organisations to work closely together and coordinate effectively to ensure we arrive at a future state that will maximise the benefits of open banking for all stakeholders.

Fundamentally, OBL sees establishing the Future Entity as quickly as possible being critical. This will minimise the period of OBL and Interim Entity dual running and provide the single body which can drive the wider open banking/finance and aspects of the Smart Data agenda. We encourage JROC to review ways of expediting the creation of the Future Entity as we believe this body will be crucial to delivering the open banking/Smart Data benefits to the wider ecosystem and the UK economy as a whole.

We broadly support the approach recommended by JROC and have suggested some practical enhancements that could be adopted that we believe could improve attainment of the core objectives that are sought. This includes the reduction of risk, improvement of operational efficiency, and expeditious establishment of the Interim Entity.

Our proposed enhancements are as follows:

Enhancement 1: Ensuring OBL is able to discharge its corporate governance obligations in relation to the Interim Entity

We understand the concerns around the need to manage and ringfence the Interim Entity's liabilities and recognise the need for a degree of separation between the Interim Entity and OBL. However, the adoption of this approach gives rise to a number of operational challenges that need to be addressed. In particular, as the Interim Entity will be a wholly owned subsidiary of OBL, this structure necessarily imposes corporate governance obligations on the OBL Board in relation to the management and operations of the Interim Entity. Whilst OBL understands the need for the Interim Entity to operate with a high degree of autonomy, we consider that OBL's governance obligations could be discharged by taking the following actions:

- The CMA signing off the Interim Entity's constitution documents (e.g. Articles and Memorandum of Association, Terms of Reference of the Board and its key officers, etc)

- OBL Chair and CEO having observer status on the Interim Entity Board
- One OBL NED to sit on the Interim Entity Board
- OBL Trustee to have power of veto over Interim Entity activities in extraordinary circumstances (e.g. the actions or management decisions of the Interim Entity having a materially adverse impact on OBLs ability to carry out its CMA Order activities). We would expect the Trustee to consult with the CMA and JROC before this right is exercised
- Interim Entity to adopt OBL policies and procedures in the main and where it is operationally efficient to do so, but allow for customisation if necessary and required by the Interim Entity Board. In particular, this is intended to ensure consistency of approach and role clarity for the employees of OBL

We recommend that these enhancements are built into the design of the Interim Entity and its constitutional documents.

Enhancement 2: Clarifying the nature of the Interim Entity CEO role

Given the liability considerations, OBL understands the recommendation for the Interim Entity to have a separate Chair and CEO to OBL. However, we question the value of creating an Interim Entity CEO role at the formation of the Interim Entity. Our view is that the principle of cost optimisation and value for money, wherever possible, should be applied to the establishment of the Interim Entity to ensure that the voluntary funding obligations on industry are minimised so far as possible. Given the tightly defined workplan for the Interim Entity, at least initially, and the temporary nature of the role, we suggest that this role could be more of a Managing Director or Programme Manager type role. We believe this better reflects the activities on the Interim Entity work plan and may broaden the candidate market to make it easier to recruit for the role given the tight time constraints and temporary status. It should also assist to reduce the running cost. Regardless of the title or scope, we would still see this role reporting into the Interim Entity Chair.

As articulated above, given that the end goal of both OBL and the Interim Entity are largely aligned, namely to maximise open banking benefits for the UK economy, it would be counter-productive to create competition between the CEOs of the Interim Entity and OBL. This would be unhelpful and risks both organisations being misaligned and not working in the best interests of the broader ecosystem.

Enhancement 3: Provision of CRO services to the Interim Entity

JROC's report calls for the Interim Entity to have a separate Chief Risk Officer (CRO) who sits on the Interim Entity Board. We are unsure as to the rationale for the Interim Entity having its own CRO given the limited scope of its activities on commencement and in the interim period before the Future Entity is set up, and the lower risk profile that results from that. We believe that these CRO services could be provided to the Interim Entity by OBL as part of the

intercompany services agreement arrangements. We consider that in most instances, advice on business and operational risk which the Interim Entity could need should be provided by OBL as part of that intercompany services agreement arrangement. We do recognise there may be some exceptional circumstances where the Interim Entity may need to obtain independent advice and guidance from its own external advisors. As far as possible, these circumstances should be clearly defined and set out in the Interim Entity's own constitution documents and Terms of Reference (e.g. in cases where it would clearly not be appropriate for the CRO of OBL to provide advice or guidance on risk issues impacting the Interim Entity on the basis of a conflict of interest or otherwise), but it is acknowledged that not every circumstance can be anticipated and hence the Interim Entity Board will require some freedom in this respect.

We also do not consider that the CRO should be sitting on the Interim Entity Board as this is not aligned with standard corporate practice where the CRO would be expected to provide objective and independent advice to the Board on risk related issues based on their expertise and experience.

We believe our suggested approach is a cost effective and workable solution which allows for the Interim Entity to have access to the required level of support it needs on risk related issues, without having to incur expense and adding further layers of complexity.

Enhancement 4: Managing the implications for OBL's people

In setting up the Interim Entity to deliver non-Order work, OBL is aware of the implications for its people, who have been instrumental in the delivery of the open banking success story to date. Maintaining an engaged and motivated staff is critical to OBL's ability to continue to deliver on our mission to bring the benefits of open banking to the UK economy. Apart from the Interim Entity CEO (if JROC decides to proceed with creating that role), Chair and Board, we recommend that all other employees working on Interim Entity activities remain employed by OBL. Under such an arrangement, OBL staff will provide operational support services to the Interim Entity through an intercompany services agreement (ISA) arrangement on an arms-length basis. This arrangement should allow for role clarity, help mitigate any confusion from employees having dual reporting lines, and minimise the potential for any cultural conflict or divergence.

We remain concerned that employee attrition could be a risk when the recommended approach is implemented. This will be closely monitored by OBL management, with proactive plans put in place to minimise the risk.

To further mitigate against these risks, to the extent that the skills and capabilities of OBL's people match those needed by the Future Entity, we expect they will transfer to the Future Entity when it is established.

Enhancement 5: Ensuring the Order is protected and managing potential priority conflicts between OBL and the Interim Entity

As we progress with the activities to establish and operate the Interim Entity, the OBL Trustee fully appreciates that her primary obligation is to protect the Order. As described under enhancement 4, there are people risks that we will need to manage carefully.

There is also a concern around how activities are prioritised between the Interim Entity and OBL. As such, the Trustee seeks an assurance from JROC that any Order related activities will always take precedence over non-Order activities to ensure that the Order can be protected. We think that enshrining this principle in the Interim Entity's constitution documents is important to ensure that this is clearly understood and properly taken into consideration.

We cannot overstate the importance of the role of the ISA to be entered into between OBL and the Interim Entity, as it will govern how OBL will provide services and operational support capabilities to the Interim Entity, its Board and senior management. As such, it is critical that the terms of the ISA clearly and comprehensively set out the terms and conditions on which OBL will provide the services to the Interim Entity, as well as the rules of engagement for the delivery of those services (including as to cost, quality and compliance with SLAs, among others) and the management of the relationship. The ISA will need to clearly set out the roles and responsibilities of OBL staff when they perform services for the Interim Entity so as to not cause any adverse impact on their work on Order related activities. To allow for both entities to be efficiently supported, OBL will need to establish clear criteria for the prioritisation of resource deployment. Careful planning of the workplan will help mitigate this risk and consideration should be given to allowing the Interim Entity to acquire resources elsewhere should OBL not be able to provide them (although we expect this would be only in exceptional circumstances).

Enhancement 6: Maintaining the momentum on the JROC workstreams whilst the Interim Entity is being established

It will take some time to stand up the Interim Entity and its governance arrangements and for it to become fully established. During the intervening period, it is important that the momentum on the JROC workstreams is maintained and the necessary work continues. OBL therefore suggests that work continues with a temporary set of measures to fund the work. These measures should allow for clear separation of the voluntary funding from BAU OBL funding, with a clear and separate set of management accounts to track the funds and provide the necessary oversight, transparency and controls to give all stakeholders the assurance they need.

These measures will be stood down once the Interim Entity is fully established.

Enhancement 7: Clarifying the roles of OBL and the Interim Entity

Whilst OBL agrees with the principle that OBL should undertake Order-related activities and the Interim Entity should progress non-Order related activities, there are areas where further clarification is required on which organisation takes the lead where joint work is required. Future Entity design and planning is a good example of where the Interim Entity and OBL will both have roles and responsibilities. Further, given the existing Order mandate for the Trustee and OBL to engage in wider initiatives and promote open banking there should be no duplication of these roles and responsibilities between OBL and the Interim Entity.

We recommend that the roles and responsibilities of OBL and the Interim Entity in relation to these areas should be clearly defined. This is important given the inclusion of transition activities in the Order which create a legal mandate for the Trustee. It will also help minimise confusion for all stakeholders.

We primarily see the role of the Interim Entity largely as a project delivery vehicle with a well defined scope, which should be set out clearly in the Interim Entity's articles of association.

OBL's response to JROC's consultation questions

Future Entity

1. Do you agree with JROC's preliminary recommendation of the Future Entity being a company limited by guarantee? If not, what corporate structure would you recommend and why?

OBL agrees with the recommendation that the Future Entity is a company limited by guarantee with the Board members being the only guarantors. We believe this provides a sound approach which allows the Future Entity to act in the best interests of the wider ecosystem.

2. Do you consider there to be a risk that the recommended funding model, and underlying principles, may unintentionally engender behaviours that are not in the best interests of the entire open banking ecosystem? If yes, how might these be mitigated?

OBL believes there is a potential risk that the underlying funding model for the Future Entity could lead to some stakeholders having undue influence over the direction of the Future Entity. However, we feel that there are a series of mitigations which can help to protect against this:

- The role of the NEDs will be critical to help mitigate this risk. We think the NEDs should have experience across a range of sectors and specialisms. However, we would caution against the NEDs being direct representatives from particular ecosystem firms to avoid potential conflicts of interest
- Giving the Regulator observer status at the Board will provide oversight to help mitigate this risk. This would be a continuation of the role for the Regulator suggested for the Interim Entity (3.46).
- The advisory groups will play an important role to help mitigate the risk by ensuring that the Board has access to soundings from a wide range of stakeholders.
- The objectives for the Future Entity should be set out with clarity in its constitutional documents, including its articles of association. This will remove any doubt on the intentions for the Future Entity and what success looks like. We further suggest the Future Entity's mission and objectives should be set out in the Long-Term Regulatory Framework.
- The proposed funding approach also helps to mitigate this risk. Initially, by moving to a broader base of funders, we remove the risk of a small group of stakeholders holding too much influence. Further, as the future approach to funding is developed, such as other models which include an element based on participation and usage, the risk can be further mitigated. We appreciate that any model needs to be carefully

thought through and tested, especially relating to the funding of future (optional) initiatives/innovations. It is the funding for these initiatives which carry the higher risk for certain firms potentially having disproportionate influence.

Ultimately, JROC will need to reassure itself that the Future Entity is working in the best interests of the entire open banking ecosystem. As such, it may be prudent to require the Future Entity to provide an annual report to the FCA to demonstrate that it is acting in the best interests of the broader ecosystem, and to report its operations and achievements against the Future Entity's objectives. The FCA may also wish to reserve some powers for itself in the Long-Term Regulatory Framework to allow it to step in where it reasonably considers that the Future Entity has failed to meet its mission and or it is not working in the best interests of the wider open banking ecosystem.

Interim Entity

3. Do you agree that the Interim Entity should be a subsidiary of Open Banking Limited? If not, what structure do you prefer? Please explain why.

OBL agrees that the Interim Entity should be a wholly owned subsidiary of OBL. We believe this should enable the existing momentum to be maintained on the JROC workstreams and broader open banking agenda. In particular, the Interim Entity will have the opportunity to build on the VRP developments in line with the PSR's strategic direction to create more choice and competition in the payments arena.

Whilst we broadly support the approach recommended by JROC, we believe there are a series of enhancements that could be adopted to assist JROC to achieve its core objectives, namely the reduction of risk, improved operational efficiency, and expedited creation of the Interim Entity. These are set out in the suggested enhancements in the introduction section of our response.

There are areas of activity that straddle Order and non-Order work where further clarification is required on which organisation takes the lead where they both have a joint interest in the outcome of the work. Future Entity design and planning is a good example of where the Interim Entity and OBL will both have roles and responsibilities. Also, as the Interim Entity takes forward the VRP development this may entail the development of a 'scheme' underpinned by a new commercial model which will be determining part of the revenue for the Future Entity and, hence impacting its financial sustainability. A priority for the transition phase is to test and establish an economically sustainable footing for the development of the open banking ecosystem so that it can grow beyond the current functionalities and bring further benefits to end users. This is a development that heavily impacts transition and OBL should have an input into.

4. JROC is seeking input on the method of obtaining appropriate advice for the Board in the interests of the entire ecosystem, including consumers and businesses. Would this best be achieved through advisory groups, or would directors representing certain areas of the ecosystem work better? Please set out your preference and if you believe another mechanism should be explored, please explain what and why.

OBL believes that a combination of both of advisory groups and directors with experience and understanding of certain areas of the ecosystem is the best way forward.

We agree with the proposal to establish advisory groups to provide soundings and advice to both the Interim Entity and Future Entity Boards. The exact nature and membership of the groups can be determined in the future, especially as the Interim Entity and Future Entity Boards will want to influence which groups should be created and how the membership is selected.

OBL believes that the Interim Entity and Future Entity Boards should be as independent as possible and be tasked with making decisions in the best interests of the entire open banking ecosystem. It is important that the NEDs should include individuals who have the requisite experience and understanding of certain areas of the ecosystem and need to appreciate the needs of the key stakeholder groups of the open banking ecosystem, including consumers and businesses. We believe that the NEDs should not be direct representatives of the firms (i.e. they should not be directly employed by TPPs, ASPSPs, etc) as this may lead them to providing views which are only relevant to or in the interests of their firm. We should ensure there is a breadth of experience on the Board.

To assist with continuity, we recommend that at least one existing OBL NED should be appointed to the Interim Entity Board. The Chair and CEO of OBL having observer status on the Interim Entity Board should allow the OBL Board to have a degree of visibility over the operations and management of the Interim Entity. We see this as being consistent with best practice as recommended by the UK Corporate Governance Code 2018 for parent companies exercising its governance responsibilities as a parent entity.

5. Which option do you think is most appropriate for the appointment of the Board for the Interim Entity? Why do you think that option is preferable?

OBL recognises the need to be able to continue the development of the JROC voluntary workstreams. As such, an expedient and pragmatic approach is required to establish the Interim Entity and maintain the momentum of the workstreams. OBL is concerned that the full process described in the consultation process could take too long, e.g. appointing committee chair, agreeing industry representatives for the appointments committee, the requirement to have the Interim Entity Board in place before appointing Interim Entity Exco members, etc. As

such, we see some value in a specialist consultancy firm being engaged directly by JROC with clear instructions to source the initial directors required to establish the Interim Entity, with JROC retaining oversight and final decision-making rights over the entire process, speed being a critical factor and the temporary nature of the appointments (i.e. the Interim Entity will eventually be superseded by the Future Entity).

On commencement, the Interim Entity will focus on delivering the existing JROC workstreams. We believe the adoption of the above process will be sufficient to allow these to proceed. If the Interim Entity's agenda is to be broadened significantly, we acknowledge that the more extensive appointment process may be required to ensure the Board has the necessary expertise to support the broader agenda. In this case, there will be the necessary time and space to undertake the more expansive process.

If JROC wishes to proceed with the more extensive appointments process for the Interim Entity Board, we think consideration should be given to the following:

- Who will appoint the Appointments Committee Chair?
- What is the process for agreeing TPP and ASPSP Appointment Committee representatives?
- Who makes the final decisions on the Interim Entity Chair and NEDs?
- Where will the funds for the recruitment consultant and the new senior roles be sourced from?
- What is the role of OBL and its Board in the appointment process given that the Interim Entity will be a subsidiary of OBL?

Conclusions

Both OBL and the Interim Entity have a crucial role to play in building on the success that open banking has achieved to date. We fully support the commitment to establishing a Future Entity and believe this it will be critical to the ongoing success of open banking in the UK. OBL welcomes the opportunity to contribute to the design of both the Interim and Future Entities and is happy to engage with JROC to assist with this.

Separation of the OBL and the Interim Entity allows for greater focus on the respective objectives for each organisation. We appreciate this separation is necessary to allow for the Interim Entity's liabilities to be ring fenced from those of OBL as much as possible. However, because OBL is the parent of the Interim Entity, the OBL Board necessarily has to retain some governance oversight over its subsidiary, and we have made suggestions which will allow for these to be discharged whilst still allowing for the Interim Entity to operate with a significant degree of autonomy and independence.

As we move forward with the two entities, the people implications are key. OBL has a highly skilled, committed and engaged workforce, which has been critical to the success of open banking to date. This should be maintained so that future initiatives (e.g. commercial VRPs) can be successfully delivered, and the Order can be protected. Retaining and evolving the team and culture will be a critical focus for OBL's management. As part of this, to the extent that the skills and capabilities of OBL's people match those needed by the Future Entity, we expect they will transfer to the Future Entity when it is established.

Effective cooperation and interactions between the two organisations will be critical for both to meet their respective missions and core objectives. As we have articulated above, central to this will be the development and execution of the intercompany services agreement between OBL and the Interim Entity for the provision of services to the Interim Entity by OBL on an arms-length basis. Constructive ongoing cooperation between the senior management of both entities will also be important to the success of both organisations and to avoid the potential for risk of confusion and duplication that could result from separate management structures for the two organisations.

Maintaining the current momentum of the JROC workstreams (especially VRP and TRI pilot) is important. We would therefore encourage a pragmatic approach to establishing the Interim Entity and the appointment of the Board.

With this in mind, we propose that OBL continues to run the JROC workstreams whilst the Interim Entity is being established. This allows the existing delivery momentum to be sustained, which is key to convincing stakeholders to secure funding in future rounds and delivering the enhancements for the benefit of the wider stakeholders. We acknowledge the concerns of some stakeholders of this approach and hence we propose that OBL progresses the following to address these concerns:

- Create a new division within OBL focused on JROC delivery
- Implement measures to ring-fence the funding for the non-Order work
- Put in place new governance measures to provide transparency on delivery and input

We believe these measures will address the 'ring-fencing' concerns and give all stakeholders the input and insight they require.

The quick establishment of the Future Entity will be critical. This will minimise the period of OBL and Interim Entity dual running and provide the single body which can drive the wider open banking/finance and aspects of the Smart Data agenda. We encourage JROC to review ways of expediting the creation of the Future Entity as we see this body as being crucial to delivering the open banking/Smart Data benefits to the wider ecosystem and the UK economy as a whole.

We would like to thank JROC for the opportunity to provide input into the consultation on the design of the Interim and Future Entities. We are keen to make the new approach a success to allow for the continued development of the open banking system for the benefit of the wider ecosystem. We believe the recommended approach, subject to the enhancements we have recommended in our response, will allow for the ecosystem to build on the solid foundations of what has been achieved under the CMA Order and ensure the UK's continuing leadership in open banking.

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