

Email: enquiries@fs-cp.org.uk

Open banking policy
Financial Conduct Authority
12 Endeavour Square
London E20 1JN

20 May 2024

Submitted by email: jroc@fca.org.uk

Dear Sir / Madam,

Financial Services Consumer Panel response to JROC's proposals for the design of the Future Entity for UK Open Banking

We welcome the opportunity to respond to JROC's proposals for the future governance arrangements for open banking. We recognise that open banking has the potential to be a force for good, giving consumers and SMEs greater access to their own financial data and making firms more competitive in their product and service offering, to the benefit of consumers and SMEs.

However, the Panel is concerned that there is a high risk potential for consumer harm – particularly for those in vulnerable circumstances - if open banking is not designed, delivered and managed in an inclusive and responsible way. We identify the following key risks to consumers:

- Lenders may use open banking data to take repayments in an aggressive and/or inconsiderate way, leaving consumers without the funds they need to meet essential living costs (similar to how many payday lenders misused Continuous Payment Authorities before the FCA intervened¹).
- Open banking data gives rich insights into consumer behaviour patterns, which firms could misuse by targeting unsuitable products at consumers, especially when combined with other data firms hold. We have recently raised concerns about the combination of financial and non-financial data in our response to the FCA's call for input on the expansion of BigTech into financial services².
- Open banking data is highly valuable to criminals, and therefore consumers are exposed to significant harm if firms do not protect their

¹ <https://www.fca.org.uk/news/press-releases/fca-reminds-banks-their-obligations-when-cancelling-continuous-payment>

² <https://www.fca.org.uk/panels/consumer-panel/publication/20240122-final-fscp-response-to-fca-consultation-in-bigtech-data-asymmetry.pdf>

data securely. Open banking vastly increases the types of personal data, volume of data, and number of data pathways, therefore increasing the likelihood of data theft or loss.

The design of the governance and oversight arrangements for open banking provides important opportunity to facilitate delivery of the aims and objectives of open banking, whilst building in the necessary guardrails to protect consumers from harm and ensure meaningful benefits are delivered. With this in mind, we have the following comments on JROC's proposals:

- **Protection before competition** - The objective or purpose of the Interim and Future Entities ("the entities") needs to be made clear and should explicitly include consumer protection. The aim of the Interim Entity is described as "to promote competition and improve/promote innovation to the benefit of consumers and businesses". The Panel believes that benefits to the wider UK economy should be ancillary and secondary to this aim. References in the proposals to the entities' Board(s) making decisions "for the benefit of the entire open banking ecosystem" risk diluting and/or overriding the purpose of promoting competition and promoting or facilitating innovation for the benefit of consumers and businesses. Nor is it clear what is meant by "the open banking ecosystem". The Panel would prefer to see specific aims or objectives around ensuring the integrity, effectiveness and efficiency of particular systems and processes - in keeping with the principles outlined at the beginning of the document: to achieve an open banking system that is "efficient, safe, secure and commercially viable and which provides a trusted means of making payments and sharing financial data".
- **Consumer stakeholder representation** - It is essential that end users (consumers and SMEs) are adequately represented at all levels of governance and decision-making. Currently, there is an imbalance between industry and consumer stakeholders and we would like to see consumer and SME representation strengthened so that is at least equal to that of industry. It is only with adequate consumer input into open banking that potential risks can be fully understood and mitigated, so that the 'ecosystem' can deliver real benefits for consumers and SMEs. The proposals as drafted give consumers and SMEs (combined) half the representation of industry on the Appointment Committees, which will have a direct impact on the balance of interests on the Boards those Committees appoint. This is exacerbated by the proposal that the Boards have an unspecified quantity of NEDs to represent "relevant aspects of the open banking ecosystem, including consumers and businesses". We believe JROC must explicitly set out that the needs of consumers and SMEs be represented separately, rather than allowing for a single NED to represent both sets of interests.
- We believe consumer engagement and representation should extend beyond the Board, and be properly resourced and paid for. Consumers and SMEs have a diverse and complex set of needs and so it is

unrealistic to expect Board representatives to be able to provide detailed input on this without being resourced to do so. We therefore support the establishment of dedicated stakeholder arrangements (rather than ad hoc arrangements) to ensure ongoing, consistent and effective consumer input to the entities, to complement and support director representation on the Board.

- **Independent chairs** - We support the proposal for the entities to have independent and impartial Chairs. This is vitally important as the Chair will be responsible for setting the tone and strategy for the entities. A truly independent Chair should ensure that discussions and outputs are fairly balanced with equal weighting given to different stakeholder groups (subject to our comments above about those groups having fair representation). JROC should set clear expectations for impartiality of the Chairs and actively supervise this.
- **FCA oversight** - The Panel notes that JROC will not formally supervise the Interim Entity but will engage with the Board to monitor progress, with JROC having silent observer status for all Board meetings. The FCA has demonstrated strong commitment to good consumer outcomes with implementation of the Consumer Duty and the Panel would like to see the FCA continuing this good work by retaining oversight of the entities, via JROC, and being ready to intervene and take swift and robust remedial action should it consider the entities are not meeting their objectives, or if the Board are not sufficiently taking consumer and SME interests into account. To provide regulatory certainty and transparency, we believe it is essential that the scope and remit of the FCA, and other respective regulators, to intervene and set remedial action(s), is clearly defined and shared.
- **Levy funding** - With regard to funding, the Panel believes a system based on levy funding should be considered. This avoids the obvious compromise to independence of the entities under the current proposals for them to be fully funded by open banking practitioners. Governance and funding are intrinsically linked and so to rely on voluntary industry funding creates the wrong balance of power. A levy would also avoid the risk of funding shortfall which, as noted in the JROC report, would significantly slow down the progress of open banking in the UK.
- **Protections and redress** - On minimising risk of harm to consumers: the Panel welcomes the inclusion of an obligation on the Interim Entity to ensure mechanisms are in place (and operating) to protect consumers and businesses should anything go wrong. The Panel would expect a similar obligation to be conferred upon the Future Entity.

The Panel would expect this to cover not only protection of funds in flight and on receipt but also deposit risk, in relation to funds prior to payment: the Panel has long-standing concerns that there should be the same regulatory outcome (FSCS protection) for client funds deposited for transfer under innovative payment arrangements, as for those existing under traditional payment methods.

- The Panel notes the protection obligation is limited to an ex-post obligation; there is no ex-ante obligation to minimise the risk of harm arising in the first place. We believe this is inconsistent with the Consumer Duty (which requires firms to act to deliver good outcomes) and should be addressed via the embedding of consumer protection into the objectives for the entities, as we suggest above. If users are to have the necessary trust and confidence in innovative payment systems and processes, such systems and processes must be established and operated in such a way that they are - and are seen to be - reliable and do not 'go wrong'.
- **OBL and Interim Entity relationship** - On the relationship between Open Banking Limited (OBL) and the Interim Entity, and transfer(s) to the Future Entity, the Panel welcomes that the Interim Entity is to be operated as a not-for-profit organisation.

The Panel would expect JROC to ensure that the intercompany service agreement between OBL and the Interim Entity provides for no more than a cost pass-through of OBL's fair and reasonable costs (with an audit or similar mechanism to check and challenge costs), and with appropriate service level obligations.

Whilst the Panel appreciates the ultimate regulatory framework is yet to be established, it would expect the Future Entity, like the Interim Entity, to be run and operated on not-for-profit principles, and to have underlying principles similar to those set out for the Interim Entity in paragraph 3.37.

We look forward to continuing our conversations with the FCA about the future governance of open banking.

Yours sincerely,

Helen Charlton

Chair of the Financial Services Consumer Panel