Subject: EMA response to OBIE Variable Recurring Payments (VRP) & Sweeping Consultations
4 December 2020

EMA Response

Responses to VRP Consultation Questions

General Comments

The EMA very much welcomes the development of the VRP proposition, and the OBIE standards to support it, as the functionality will unlock the potential for a great many payments use cases. The proposal to mandate VRP as a solution for the 'Sweeping' requirements of the CMA Order will go some way to drive market adoption of VRP. However, we note that the attractiveness of the VRP solution for payees will be limited until a critical mass of PCA/BCA are reachable for VRP beyond the sweeping application.

As it currently stands the definition and description of VRP set out in the consultation paper relies on a number of assumptions which we think may not deliver the VRP proposition and end-user experience as OBIE describe. This is particularly the case with regards to the fundamental assumption that because an SCA exemption <u>could be</u> applied to a transaction, that it <u>always will be</u> applied for every VRP transaction initiated under the 'SCA-exempt' model. We consider that this may not be the case when 'regulated non-contractual' access model is applied (as presented in the access models Section 6).

We also note that the consultation paper describes the proposition from the perspective of direct relationships between the 3-parties PSU, PISP, and ASPSP whereas payment chains can often be significantly more complex, and could involve multiple PSPs. A simple example is an e-commerce use case where a PISP could provide services to the payee and collect funds on the payee's behalf (if they have additional permissions under the PSRs), or the PISP could be initiating payments to a 'collecting PSP' who then subsequently disburses funds to the payee. Complex payment chains may have practical implications on how the VRP consent parameters are applied, and the information presented to the PSU. Hence, we would encourage OBIE to include the analysis of more complex models so that all the requirements can surface.

We recognise that it was not within the scope of Revised Roadmap item A2(b)(i) for OBIE to develop the VRP API Access models, but we do not think that development of the VRP API standards can be entirely divorced from the discussion on how they will eventually be governed and implemented. Therefore, we urge OBIE to further analyse the impact of the VRP access models on the proposition, and share their legal assessment, so that the ecosystem can fully evaluate the implementation and access models. Without the complete analysis, the drive to adopt the VRP standards may become very limited and fragmented.

Under the New Payments Architecture (NPA) programme, Pay.UK are enabling a number of 'overlay' services and updates to Faster Payments/BACS; in particular Request to Pay, and Direct Request (replacement for DD) which have bearing on the VRP solution. Whilst some of the NPA

functionality is still in the design stage, we'd urge the OBIE to link up with Pay.UK and ensure that the commonalities with VRP and the planned changes to the underlying payments architecture are aligned.

We would also welcome sight of the FCA Sandbox Report on VRP to understand the outcomes and FCA's views on the propositions tested.

1. To what extent do you agree with the definition of VRP? Please give reasons for your answer.

We believe that as it is currently set out, the VRP definition does not fully consider all the requirements of the RTS on SCA & CSC, and align with the transaction flow proposed in the draft OBIE API Standards for VRP.

VRP Consent Set-Up

Section 3.1a. currently states that the PSU gives their consent to the VRP "*via Strong Customer Authentication ("SCA") at their ASPSP*" however, in this step the PSU is authenticating and authorising the series of VRP transactions within the bounds of the agreed parameters in the ASPSP's domain.

Section 3.1 would benefit from a more concise description of the various stages of the VRP Set-Up to align with the flow of the VRP API specifications, such as:

- the PSU gives the PISP their permission (<u>consent</u>) to initiate a series of recurring transactions under the agreed parameters;

- the PSU <u>authenticates</u> (via SCA) with their ASPSP, and <u>authorises</u> the series of recurring transactions with the agreed consent parameters;

- the ASPSP issues the authorised 'VRP consent' and VRP Set-Up is complete.

Thereafter, the PISP can initiate transactions within the limits of the VRP consent using Single Immediate Payments (SIP) via Faster Payments.

VRP Payments with an SCA exemption

The definition in Section 3.1.a also contains the assumption that "*..the VRP Consent does not require SCA of the PSU by the ASPSP*". The basic SCA principle of the RTS on SCA and CSC is that the ASPSP is always able to request/apply SCA to any payment account interaction when its risk assessment prompts such an action[1]. Therefore, under the 'regulated non-contractual' access model, a PISP **cannot rely** on the fact that an SCA may not be requested by the ASPSP – even if a given transaction would normally benefit from an SCA exemption.   In the VRP model this could result in a scenario whereby the PISP has established a VRP consent with the PSU and successfully initiated a series of transactions under that consent, but initiates the next transaction in the series

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[1] Art 18 of RTS on SCA (CDR 2018/389)

and the ASPSP's fraud monitoring, or risk assessment, of the transaction triggers a request for the PSU to undertake SCA. Thus adding friction into the PSU experience and significantly reducing the viability of the model described under section 3.1.1 *VRP Payments with an SCA exemption.*

As the PISP cannot assume that an SCA exemption will <u>always</u> be applied to a VRP transaction, we encourage OBIE to revise the model described under Section 3.1.1. In particular, in light of the assumption that this model will be used to achieve 'sweeping' functionality. In the case of sweeping (as defined in the CMA Order), it can be envisaged that ASPSPs would have to apply an SCA exemption to all VRP transaction which are flagged as 'sweeping' (VRP_Type 'sweeping') by the PISP (see also our response to Q5 in the Sweeping Evaluation consultation).

We also note that if the VRP transaction is being made to a Trusted Beneficiary[2] (TB) and the basis for SCA exemption applied in this model, then additions to the PSU's trusted beneficiary list would have to be **available consistently** to the PSU in the authentication/authorisation interaction with the ASPSP. Otherwise, the PSU may establish a VRP consent and the subsequent VRP transactions may not be able to benefit from this SCA exemption as the TB doesn't exist or requires amendment.

VRP Consent Parameters

Section 3.2 *How VRP Consent Parameters Work* suggests some examples of consent parameters which could be applied to VRP (and a standard data set is also proposed in Requirement #2 of Section 8) and which PISPs would '*tailor*' to mitigate their risk exposure. We support a risk-based approach for applying the consent parameters and their possible values, and we would encourage OBIE to develop this approach further in the proposition. We also recognise that a minimum set of parameters may be necessary to drive consistency throughout the ecosystem, however, this data set must be considered carefully so as not to constrain potential use cases for VRP.

The definition of VRP in Section 3.1.b states that the consent parameters are ''..*enforced by the ASPSP*''. However, we note in Section 3.2 that it references both the ASPSP and PISP '*enforcing*' the constraints of the VRP parameters. It is important that the definition is clear on which party will enforce the parameter constraints and at which stage of a VRP transaction, because there are implementation implications, and liability issues for both ASPSPs and PISPs when VRP transactions are initiated outside the agreed parameters.

We would also welcome further discussion on the lifecycle of the VRP consent in the final proposition so that the operational implications can be fully understood by the ecosystem and reflected in the VRP consent standards. For instance, at the moment the model indicates that if any changes are required to the consent parameters, such as when a PSU (payer or payee) changes their payment account, then the VRP consent should be cancelled and a new one created. This may have an impact on some of the intended use cases for VRP and in particular where a chain of PSPs might be involved in delivering the payment service.

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[2] Art 13 of RTS on SCA (CDR 2018/389)

2. To what extent do you agree with the interpretation of the regulatory treatment of VRP? Please give reasons for your answer.

We urge OBIE to share the legal assessment that has been relied on to prepare Section 4 of the consultation and would welcome any views from the FCA and the analysis conducted during the Regulatory Sandbox on the regulatory treatment of VRP. This will allow all stakeholders to undertake their own evaluation of VRP in light of their regulatory permissions, products/services, and legal advice. We noted several areas in the consultation paper where further legal clarity would be desirable as follows:

- **SCA and consent**

  As discussed under Q1, we believe the description in Section 4.1 *VRP classification as PIS activity* requires clarification that conducting an SCA confirms that it is a given PSU instructing the PSP, but does not confer the PSU's authorisation for the execution of the transactions, which is undertaken after authentication as a separate action.

- **Art 69 PSRs – PISP ability to change transaction details**

  Section 4.2.1 of the consultation states "*PSRs, Reg 69(3)(h) states that a PISP is not permitted to "change the amount, the payee or any other feature of a transaction notified to it by the payer". In the context of VRP, the 'amount' referred to should **be treated as the cap or range** agreed to by the payer in the original VRP Consent.*" We would welcome further insight into OBIE's legal interpretation and the FCA's opinion on this point.

- **Revocation of payments orders**

  The proposition paper doesn't discuss the implications for VRP of the irrevocability of payments orders requirements as set out in Art 83 PSR which prohibit payers from revoking a transaction initiated by a PISP after given their consent (with exemptions). Art 81(5) PSR would seem to allow for the revocation when a payment order schedule has been agreed with the payer, but we would welcome further explanation of OBIE's legal interpretation on this as it could have practical implications and may impact the requirements of the VRP standards.

Liability model of PSD2 in relation to VRP

It would be useful to fully explore the liability model for VRP in light of the different VRP Access models (as discussed in Section 6.5). If OBIE could publish their analysis of all aspects of the VRP liability model including the FCA 's assessment, it would clarify that the PSD2 liability model is appropriate for all VRP actors. This analysis will, in turn, inform the types of 'API access' model which are feasible for the ecosystem to drive VRP adoption. We do not think that the discussion about standards, liability, and access models can be handled entirely separately if VRP is to achieve its potential.

It will become a market-entry barrier for PISPs if they have to establish bespoke liability frameworks with each ASPSP which they want to access to offer VRP services.

3. To what extent do you agree with the analysis of risks and mitigations, including the consumer protection framework? Please give reasons for your answer.

The risk analysis does not yet contain an ecosystem wide risk assessment – identifying all of the risk factors and mitigating controls at all levels of the framework. As a result, there are risk areas which have not been fully considered. Identifying new fraud vectors and risks are of particular importance given the immediate and unconditional availability of funds transferred to the payee under a VRP.

We would encourage OBIE to conduct a full risk assessment exercise for the VRP proposition, analysing risks and controls from the perspective of all the different parties in the ecosystem including end users, their PSPs, the Fast Payment scheme, and the settling institution.

Following our response to Question 1, if a VRP transaction is perceived to be high risk (by the ASPSP, or by the PISP in delegated SCA model) then the PSU must perform SCA before the transaction can go ahead. Therefore, the distinction between "PSU in Session" and "PSU not in session" is not the only criteria for transaction risk analysis as indicated in Section 6.3.1. Whether the PSU is in session (with the PISP) is a risk factor that the PISP will consider when a VRP transaction is initiated, but it is not the only deciding factor.

We note that Section 6.4.7 states that the PISP can 'attest' to the nature of a payment and assume that the "VRP_Type" data element and 'Risk' data block in the VRP Consent and VRP payment API would be used by the PISP to indicate the possible nature of the payment. However, these are rudimentary controls and it is unclear how the PISP is "attesting" to the nature of the payment using this data, nor the impact on the liability for transactions which turn out to be out-with the stated 'nature of the payment' (see also comments under Q4 on the Standards Requirement #9, below).

Consumer Protection Framework

We fully agree that as regulated Payment Institutions, PISPs must have appropriate risk controls in place for the activities they engage in, including consumer protection controls for VRP services. However, this is only part of the consumer protection landscape for VRP; many of the inherent consumer risks stem from the underlying credit transfer payment instrument. We therefore urge OBIE to join up with the consumer protection work that Pay.UK are currently undertaking to ensure that the VRP transaction model is considered in the wider context of the Faster Payment Scheme consumer protection framework.

4. To what extent do you agree with the requirements for the VRP standard? Please give reasons for your answer.

We have not recreated every requirement in the consultation document below; only the ones where we noted a question or comment.

- Requirement #2 - We are not clear what 'must optionally' means in this requirement

- Requirement #7 & 8 - Is the assumption that the ASPSP will use the in/out session indicator as part of their risk analysis and therefore influence whether to apply SCA? Why are these particular flags a regulatory requirement?

- Requirement #9 - Customer attestation or PISP attestation as per Section 6.4? This will have implications for the PISP's liability and PISP terms with the PSU.

- Requirement #11 - The status of payment order API is currently optional, and not all ASPSPs can return the "AcceptedCreditSettlementCompleted". Is this a proposed change to the SIP payments standards?

- Requirement #15 - The PISP is most likely not in the flow of funds and the ASPSP would refund the PSU for any disputed transactions. Perhaps this requirement could be further explored to ensure the appropriate data is exchanged when a transaction is disputed.

- Requirement # 16 & 17 - The proposition doesn't discuss the treatment of revocation in terms of PSD2 Art 80 and hence the timing (within the bounds of the VRP consent) which a PSU could revoke consent or access.

Responses to Sweeping Evaluation Consultation Questions

1. To what extent do you agree with the proposed definition of sweeping? Please give reasons for your answer.

We note several elements of the proposed Sweeping proposition which appear to constrain the variety of use cases which may develop and could restrict competition and innovation in the market, as follows:

- **Limiting the definition to 'sweeps' between accounts in different institutions** will prevent PISPs from competing with ASPSP's own 'sweeping' propositions; ASPSPs would be able to provide 'sweeping' to all relevant accounts that a PSU may want to use in participating institutions, PISPs would be restricted to accounts in different institutions.

- **Sufficient level of automation** - Our response to Question 1 of the VRP consultation has bearing here; the definition of VRP sweeping cannot assume that "*the VRP Consent does not require SCA of the PSU by the ASPSP*" as the ASPSP can require an SCA is applied for a subsequent VRP transaction if their risk assessment determines its necessary. Hence, the current definition of VRP for Sweeping would appear to only become feasible if it can be guaranteed that SCA won't be applied (and the PSU's presence is not required) at the time of sweeping transactions.

- **Both accounts are in the name of the same PSU** – we understand that OBIE intend this to include joint accounts where the VRP consent is authorised within the requirements of the PCA/BCA terms and conditions. We agree that joint accounts should be in scope for Sweeping, however, further analysis is required as to how this will be practically enabled, the impact on the liability model, and the potential risks of unauthorised or fraudulent transactions are mitigated.

- **Limiting to PCA and BCA** – we recognise the requirements of the CMA Order require the scope to be limited to PCA/BCA, however, in order for the potential of sweeping use cases to be fully realised we urge the OBIE to consider the impact of not including a wider set of accounts to achieve the aims of the CMA Order. For instance, by not including ISA, savings accounts, or pension accounts the universe of possible 'Savings Solutions' use cases immediately contracts and excludes a range of PSU's from taking full advantage of those solutions.

5 To what extent do you agree that Variable Recurring Payments (VRPs) could provide a viable payment mechanism to support sweeping as defined by the CMA order? Please give reasons for your answers.

We agree that VRP is the preferred option for delivering the sweeping functionality as envisaged in the CMA Order and supporting a broad range of sweeping use cases. Nonetheless, as discussed in our response to Question 1, the current definition of VRP for Sweeping may be constrained if it cannot be guaranteed that SCA won't be applied (and the PSU's presence is not required) at the time of sweeping transactions. If a guarantee that SCA will not be applied for VRP transactions can be assured, via appropriate arrangements, then this issue is removed.

This would, of course, have implications for the type of VRP API Access model which can be applied for Sweeping use cases ('regulated non-contractual' access may not be sufficient). Which in turn, may affect the cost to PISPs of using VRP as the solution for providing sweeping services.

We do not think these points detract from the OBIE's analysis and conclusions regarding the unsuitability of other payment types for delivering sweeping. The other payment types would not enable PISPs to deliver viable, immediate funds transfer, within a user friendly experience.

We therefore, urge OBIE to work through their evaluation of VRP in more detail so that the impact of using VRP for Sweeping on all ecosystem participants can be fully explored.

8   To what extent do you agree that requiring the Sweeping Service Provider (SSP) to attest that a transaction is sweeping provides an appropriate level of assurance of the use of Sweeping Access? Please give reasons for your answer.

Section 6.1 of the Sweeping Evaluation paper states "*The SSP is required in the standard to attest that the transaction is Sweeping* ". We understand this to mean that the SSP will set the 'VRP_Type' data attribute in the VRP consent request to 'Sweeping'. Setting this data flag alone may not provide ASPSPs with sufficient assurance to provide Sweeping Access to accounts.

The definition of 'sweeping', how it should be applied by SSPs, and oversight of how the 'sweeping' definition is being applied in the market, requires further analysis and definition.

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