P.R.I.M.E. Finance

Panel of **R**ecognized **I**nternational **M**arket **E**xperts in **F**inance

Emerging Themes in Financial Law

Banks vs PISPs and AISPs under PSD2: an Unlevel Playing Field?

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P.R.I.M.E. Finance Annual Conference 2020
4 February, Peace Palace, The Hague

European legislation payment services (I)

- Until 2009, each EU/EEA Member State had its own rules on payment services

- Payment services providers were effectively blocked from competing and offering their services throughout the EU/EEA

- Both politics and the financial sector strived to harmonise European legislation on payment services with a view to creating a more integrated and efficient European payments market

- Directive 2007/64/EC of 13 November 2007, Payment Services Directive, a.k.a PSD or PSD1, (to be) implemented in national legislation of EU/EEA Member States on 1 November 2009

European legislation payment services (II)

- PSD1 was replaced by Directive 2015/2366/EU of 25 November 2015, Revised Payment Services Directive, a.k.a. PSD2, (to be) implemented in national legislation of EU/EEA Member States on 13 January 2018

- PSD1 was meant to provide the legal foundation for the creation of an EU/EEA-wide single market for payments

- Main objective of PSD1 was to harmonise EU/EEA legislation on payment services and to establish a modern and comprehensive set of rules applicable to all payments services in the EU/EEA

- Secondary aim of PSD1 was to make cross-border payments as easy, efficient and secure as domestic payments within a Member State

European legislation payment services (III)

- PSD2 widens the scope of PSD1 by covering new services provided by so called payment initiation service providers (a.k.a PISPs) and account information service providers (a.k.a AISPs)

- PISPs may - with the explicit consent of the customer - initiate payments from an online payment account of the customer held with an account carrying payment service provider

- AISPs may - with the explicit consent of the customer - access information on online payment accounts of the customer held with one or more account carrying payment service providers

- PISPs and AISPs do not carry payment accounts for customers but make use of the account infrastructure provided by the traditional account carrying payment service providers

European legislation payment services (IV)

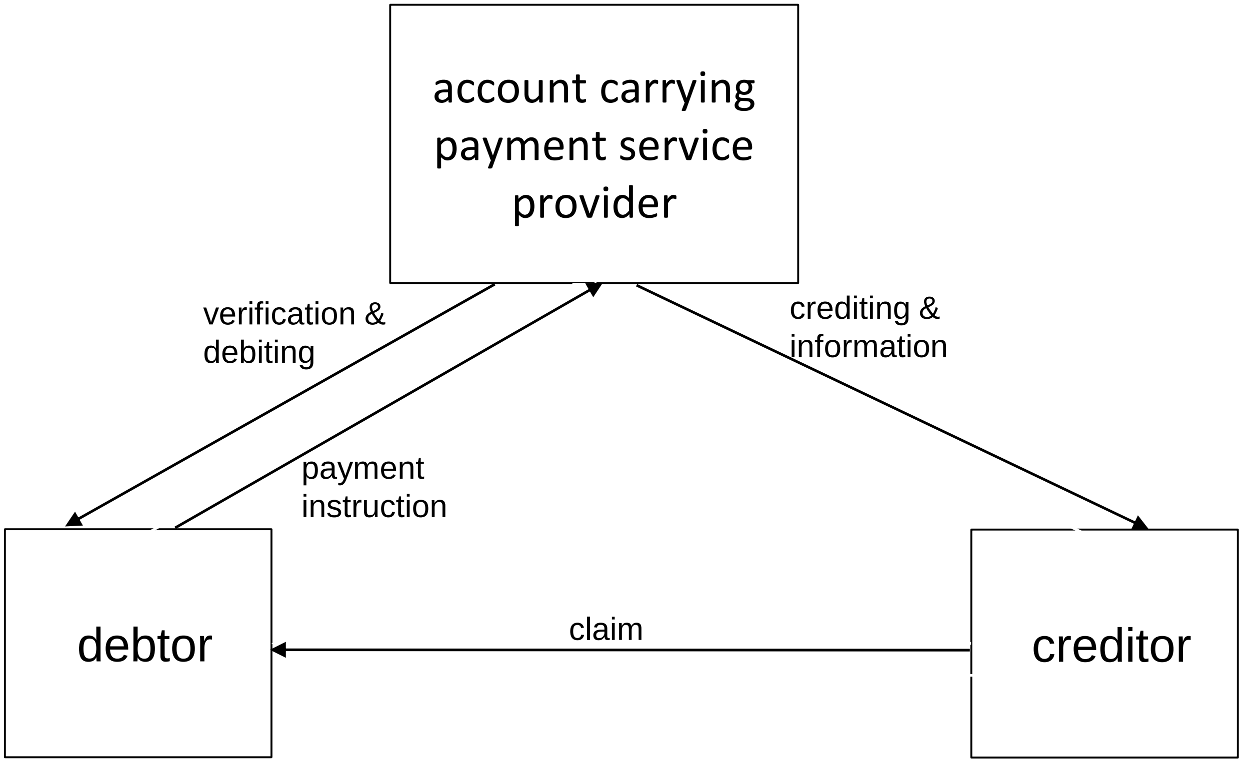
- PSD2 aims at improving customer protection by providing for a more harmonised application of certain generic exemptions laid down in PSD1

- PSD2 enhances the rights of customers in the event of unauthorized debits and incorrect processing of payment orders

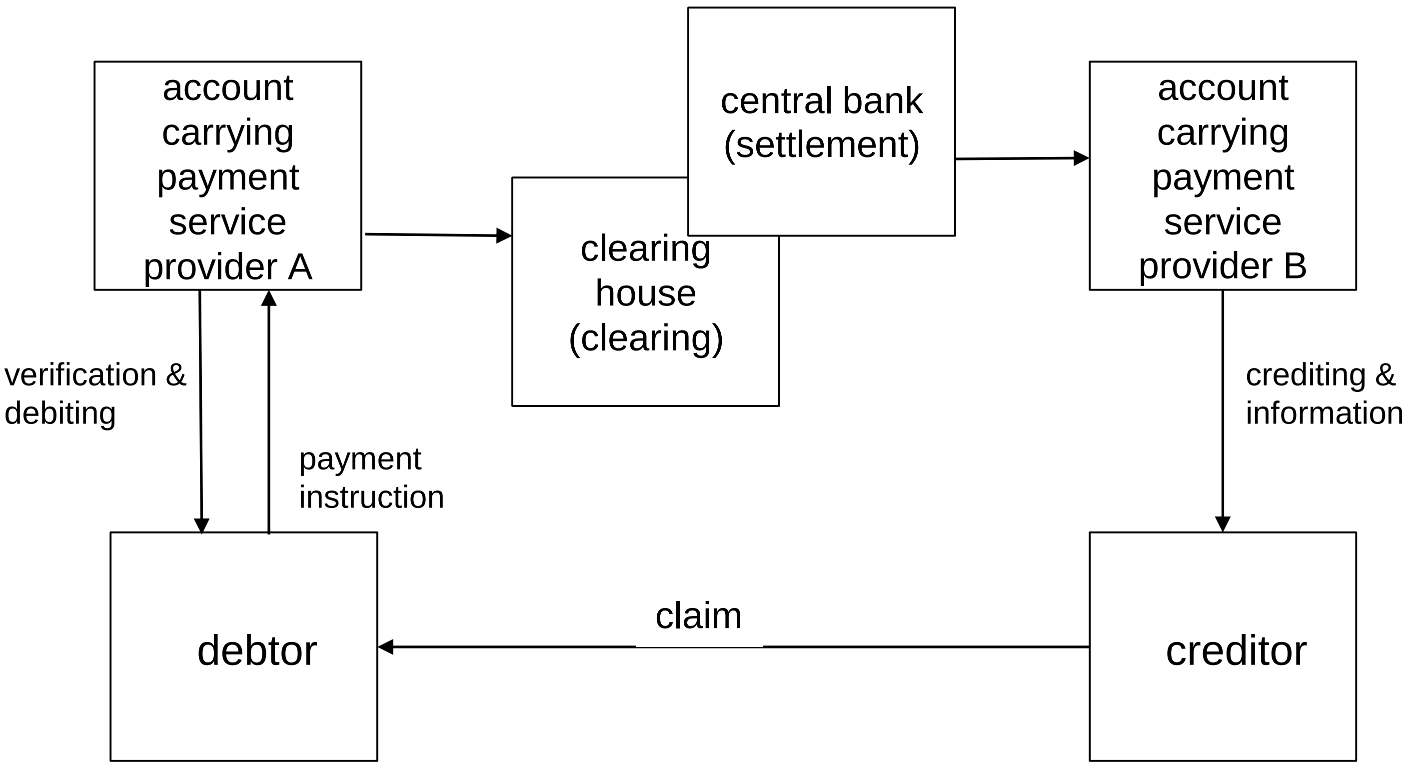
- PSD2 introduces strict security requirements for the initiation and processing of electronic payments (Delegated Regulation (EU) 2018/389 of 27 November 2017: RTS on Strong Customer Authentication, SCA, entry into force 31 December 2020)

- PSD1 and PSD2 form part of a master plan of the financial sector to turn the fragmented national markets for euro payments into a single domestic market: SEPA, the Single Euro Payments Area

Credit transfer; one account carrying payment service provider



Credit transfer; two account carrying payment service providers



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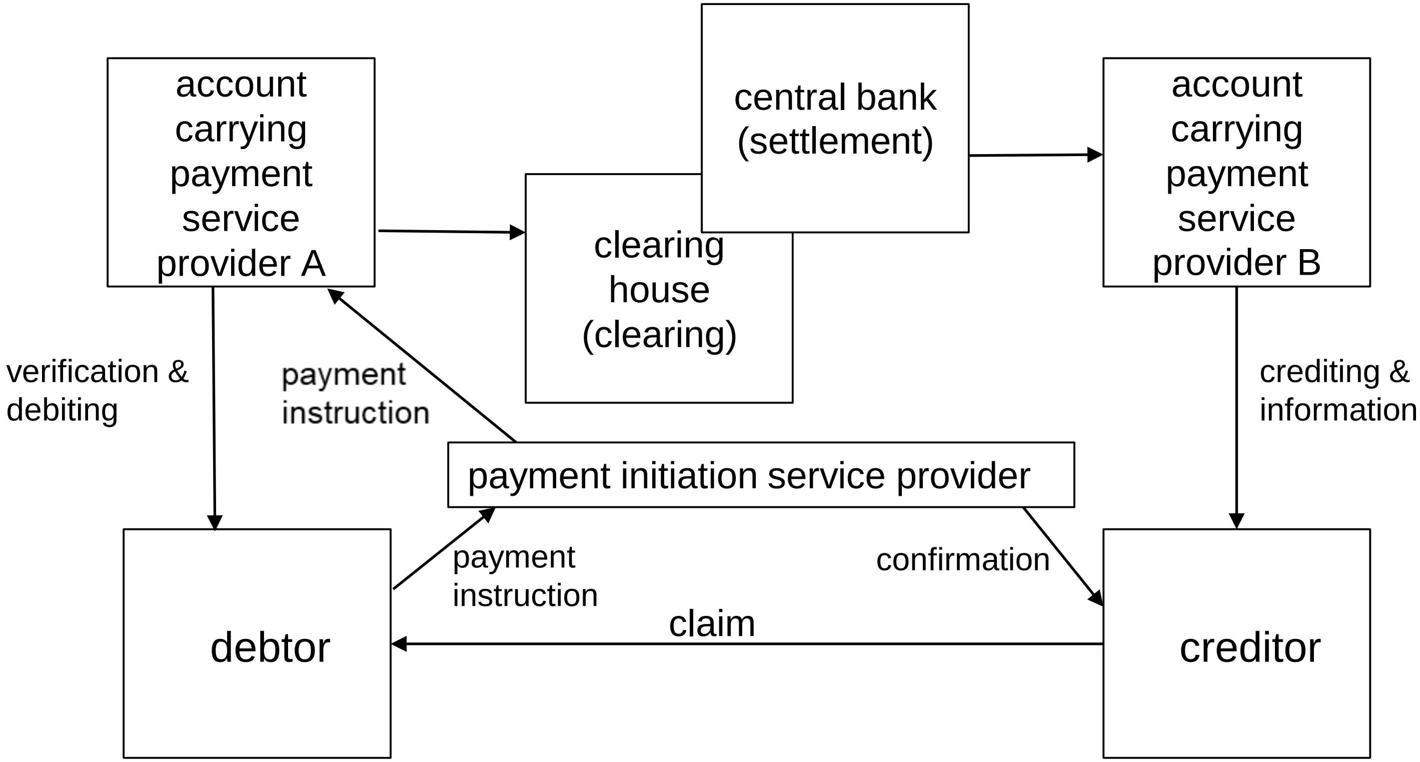
Credit transfer; two account carrying payment service providers and one payment initiation service provider



Unlevel playing field? (I)

- PSD2 seeks to improve competition in payment services by opening up payment markets to new market entrants – FinTechs, young start-ups – thus fostering greater efficiency and cost reduction

- The question is whether PSD2 maintains a proper balance between the (interests of the) traditional, account carrying payment service providers – the banks – and (those of) these new market entrants

- This question is of importance because the profitability of the traditional, account carrying payment service providers – the banks – is under pressure and the sustainability of their business model is being questioned

- New market entrants are not only FinTechs in the form of young start-ups but the world's largest companies, such as Google and Apple, so it is BigTech against the traditional banks

Unlevel playing field? (II)

- Elements of PSD2 that clearly enhance the position of PISPs and AISPs:

  – Account carrying payment service providers are obliged to grant PISPs and AISPs access to customer accounts if the customer has given its explicit consent thereto

  – Provision of payment initiation services and account information services may not be dependent on the existence of a contract between the PISP or the AISP and the account carrying payment service provider

- On the other hand: PISPs and AISPs may only access customer accounts via a specific software environment – a digital gateway, an API – designated for that purpose by the account carrying payment service provider

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Unlevel playing field? (III)

- The allocation of liability under PSD2 adds to an unbalance to the detriment of the traditional, account carrying service providers:

- In case of an unauthorised payment or incorrect processing – f.i. the account was debited for the wrong amount or was debited twice –, the customer shall be entitled to rectification and refund only if it notifies the payment service provider as soon as possible and no later than 13 months after the debit date

- Rectification and refund are to be obtained from the account carrying payment service provider, also in the event of involvement of a PISP

- The account carrying payment service provider is first and exclusive point of contact, this with a view accommodating the customers

Unlevel playing field? (IV)

- If the customer challenges a payment transaction, the burden of proof of proper authentication or correct processing is on the account carrying payment service provider or the payment initiation service provide; this is also with a view to accommodating the customer

- If liability is imputable or attributable to the payment initiation service provider, the account carrying payment service provider shall have recourse against the payment initiation service provider

- This entails that the counterparty credit risk is in principle on the account carrying payment service provider

- Rules on refund rights mandatory in relation to consumers; deviation to the adverse of corporate customers allowed when explicitly stated

Conclusion

- PSD2 obliges traditional banks to grant PISPs and AISPs access to customer accounts and to reimburse the customer in the event of unauthorised payments, also in the event of involvement of a PISP

- PSD2 offers greater efficiency and cost reduction for customers and new business opportunities for FinTechs, including BigTechs, but poses serious threats to the position of traditional banks on the payment markets

- Driving out the traditional banks is not what the EU legislature had in mind when it was decided to improve competition in payment services by opening up the market to new market entrants

- It is a challenge for the traditional banks whether they will be able to maintain their position as the overall spider in the payments web