



UNIVERSITÀ
DEL SALENTO



האוניברסיטה העברית בירושלים
THE HEBREW UNIVERSITY OF JERUSALEM

'I Access Your Data, You Access Mine'.

Requiring Data Reciprocity for Payment Services

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Harmful Online Activity and Private Law
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Hebrew University, 4-5.12.2019

PSD2 | EU Second Payment Directive

January 2018

opened the payment transaction market to new providers

open banking



ox·y·mo·ron

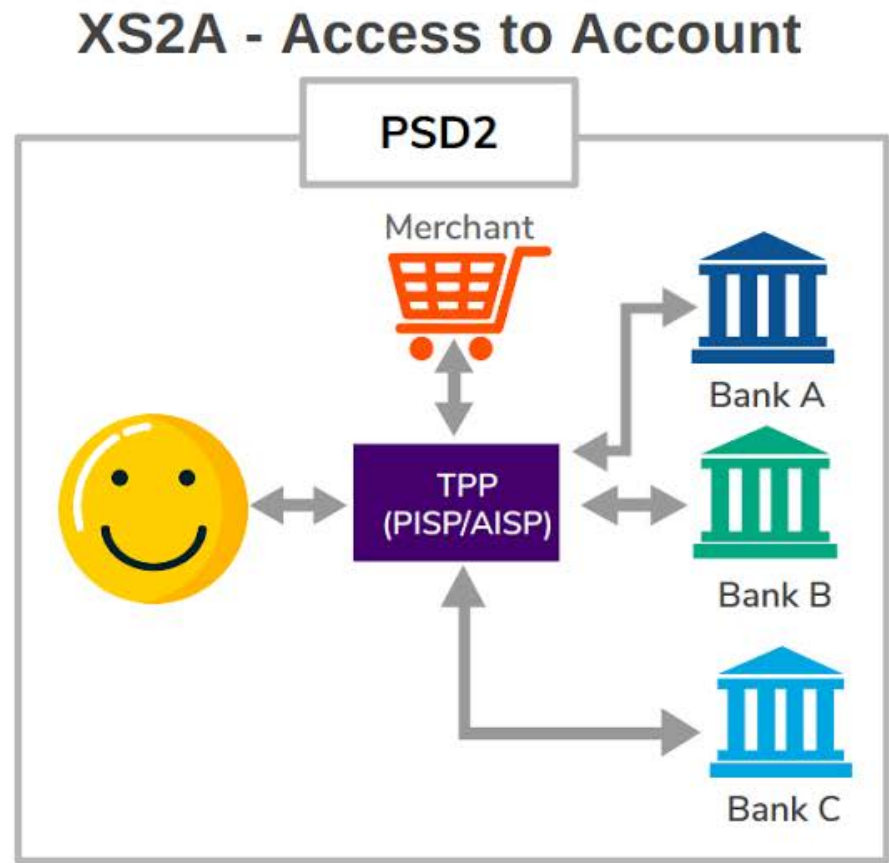
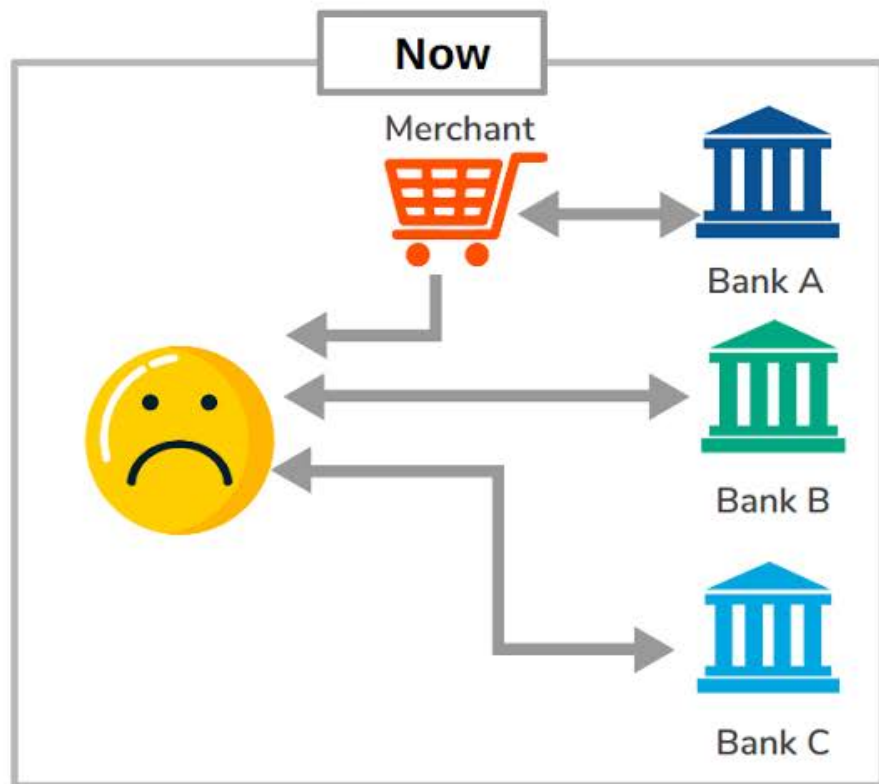
/ˌɒksəˈmɒrən/

noun

a figure of speech in which apparently contradictory terms appear in conjunction

PSD2 | EU Second Payment Directive

How?



XS2A Rule



- banks must disclose
- customer account data
- with their consent
- to third party providers or TPPs (PISPs and AISPs)
- free of charge
- no contract (bank-TPPs)



Liberty Leading the People, Delacroix, 1830

PSD2 | EU Second Payment Directive

Ex Ante **Hard** Regulation

PSD2 | EU Second Payment Directive

Why?

1. promote **innovation** & Fintech
2. improve **customer** experience with new Fintech
3. promote **competition** by ensuring a competitive level playing field

PSD2 | EU Second Payment Directive

How?

Rationale 1: Fostering innovation

not really!



- e-payment, e-wallet services spurring despite XS2A rule (eg. Paypal)
- Fintech innovate disruptively
- Fintech use spaces left free by regulation (they spur where regulation does not exist!)



Rationale 2: privacy concerns

There was
no other
possibility to
access
personal
account data,
for privacy
reasons

Demary&Rusche 2018

not really!

GDPR grants
consumers with
portability right
(art. 20)



GDPR Data Portability



No access to
database

not
really!



Database directive
(9/96/CE) (art. 8)

- Sui generis right to access database
- For commercial purposes

Paid

Contract

Rationale 3: lack of competition

PSD2 | EU Second Payment Directive

So, What is **Rationale**?

No clear justification for XS2A rule

Goal: seems to be increasing amount of data circulating from banks to Fintech in **easy** and **economic** ways

PSD2 | EU Second Payment Directive

Who are the Fintech firms seeking access to account data?

Not all Fintechs are created equal

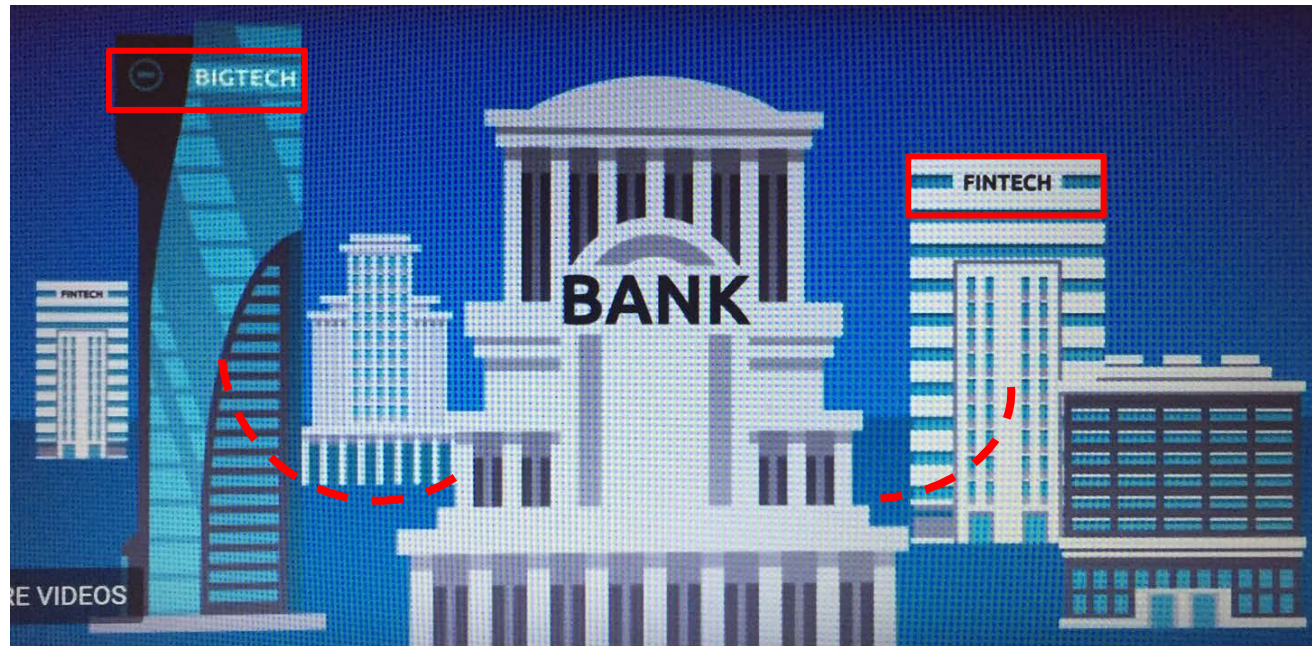
Big Tech (or Digital conglomerates).

Info on accounts adds to ‘other’ behavioral data, which are highly profiled and granular.

Fintech Startups (like Moneyfarm or Satispay).

Arts. 66(3)(g) and 67(2)(f) PSD2

Highly innovative. May lack data infrastructure to start operate



Under PSD2, Fintech startups and BigTech are not prevented from ‘using, storing and accessing’ any account data they access to, provided that they use it to ameliorate the payment service (PIS or AIS) → they can run analytics, further profiling

PSD2 | EU Second Payment Directive

Is XS2A well suited for both Fintech startups and Big Tech?

Is proportionality met?

Proposal | Requiring Data Reciprocity /1

What? 1. Access to account sought by the big techs should be allowed **under reciprocity**

Why? 1. Big Debate: Big Tech disrupting banking
2. Marginalization of banks, loss consumer welfare

Proposal | Requiring Data Reciprocity /2

How?

1. Making XS2A remunarated according to ‘pay by data’ scheme
2. Banks access to same customers’ behavioral data, defined by their **explicit consent**
3. Under condition that data be only used to enhance payment service
4. Fintech startups exempted from reciprocity (unless acquired by or scale to big tech)

Proposal | Requiring Data Reciprocity /3

*What
for?*

1. Make online payment industry grow faster
2. Better services for consumers; lower prices
3. Re-proportionate XS2A rule, anytime its application provides its beneficiary a disproportionate competitive advantage

Proposed **Formulation** of the Reciprocity Clause

After lit. (g), Art. 66(3), PSD2, a new lit. (i) could state:

(i) the payment initiation service provider with an initial capital of €XXX or above *[or with an annual capital equal or above €XXX, or with more than XXX active personal clients]* shall, immediately after confirmation by the account servicing payment service provider that its payment order was received, provide or make available to the account servicing payment service provider all information regarding the payment service user in its possession. Such information shall only be used in conformity with Articles XXX

Make similar amendment to Art. 67 for AISP

Conclusion | Pros & Cons

Pros? Increased choice for consumers; lower prices

Cons? Lost opacity for consumers (easier to detect black sheeps)

In a Future of AI, Empowering Consumers means to me
meeting the challenge of integrating Law with the
operating capacity of Algorithms

Thank You