

Future of Financial Services Week

Pushing the perimeter -

Retailers and retail platforms: payments tips for the uninitiated

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Meet the team



Clare Burman
Legal Director
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Clare advises Fintechs, platforms, private equity firms and other regulated and unregulated businesses on UK financial services regulatory matters. She specialises in regulatory change in control advice and payments and e-money perimeter advice.

Financial services regulation impacts on an ever-widening range of the services and products that we all use. Clare is committed to demystifying regulation for her clients, particularly FinTechs and those first entering the regulated space.

Increasingly, FinTechs, platform businesses and retailers are looking to integrate payment functionality into their models and websites. Clare regularly helps clients who are outside the regulated sector to devise and launch products and services which comply with UK payments and e-money regulations. For those who want to take the next step, Clare advises on the process and consequences of becoming FCA authorised. She also regularly advises retailers on their agreements with merchant acquirers to facilitate the acceptance of card payments.

With a background in acquisitions and banking, Clare also leads a team advising on FCA, PRA, SRA and ICAEW change in control applications, and on the contractual protections needed where regulated businesses are being bought or sold. Clare has successfully guided a range of clients through the process, including major investment firms, private equity houses, international retailers, family offices, consumer finance providers, and several technology businesses.



Becky Morrison
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Becky is a Senior Associate in the Financial Institutions Group, with a particular focus on payment services, e-money and FinTech.

She regularly advises a range of clients including payment service providers, payment and e-money institutions, large financial institutions and other actors in the payments chain on legal and regulatory matters. She also advises platforms and marketplaces on the regulatory perimeter.

Her recent experience includes advising on compliance with the detailed and technical requirements of strong customer authentication and reliance on exemptions, and assisting with programme manager arrangements.

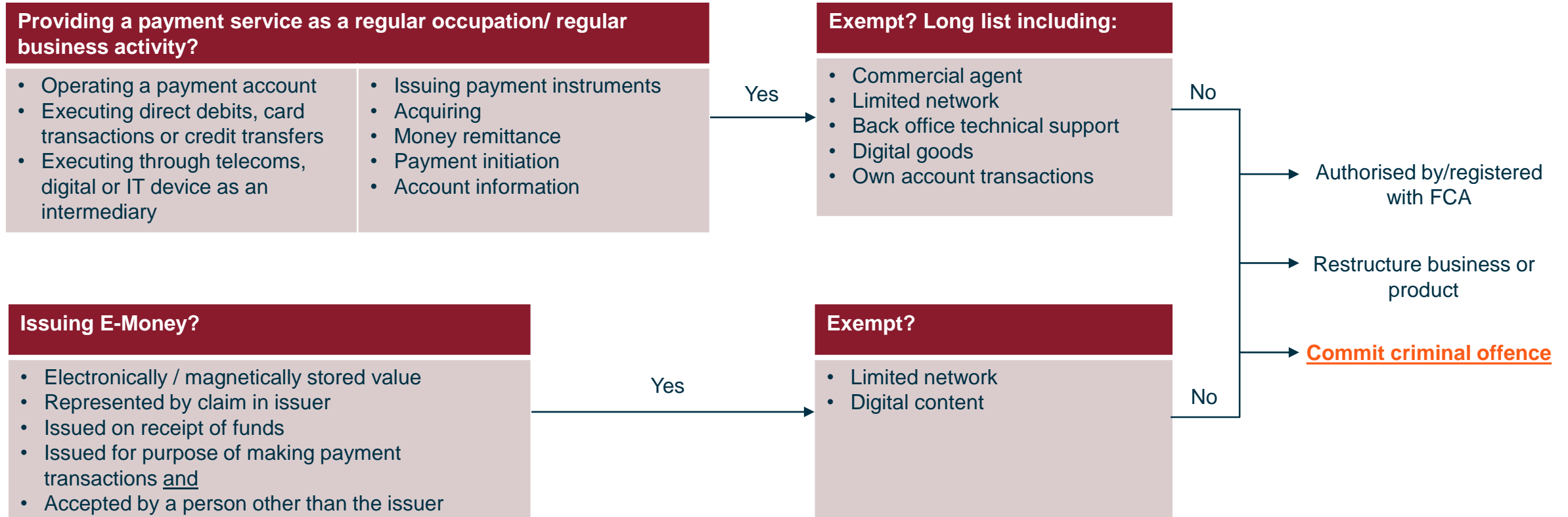
Becky joined Osborne Clarke as a trainee in September 2013 and qualified in September 2015.

Agenda

- Introduction to payments regulation
- Merchant acquiring
- Particular issues for merchants
 - In store: Contactless
 - Online:
 - Own products –v– marketplaces and platforms
 - Strong Customer Authentication ("**SCA**")
 - Behavioural biometrics
 - Subscription payments
 - Alternative payment methods
 - AIS, PIS and open banking
 - BNPL
 - Generally:
 - Product add-ons
 - Brexit and fees

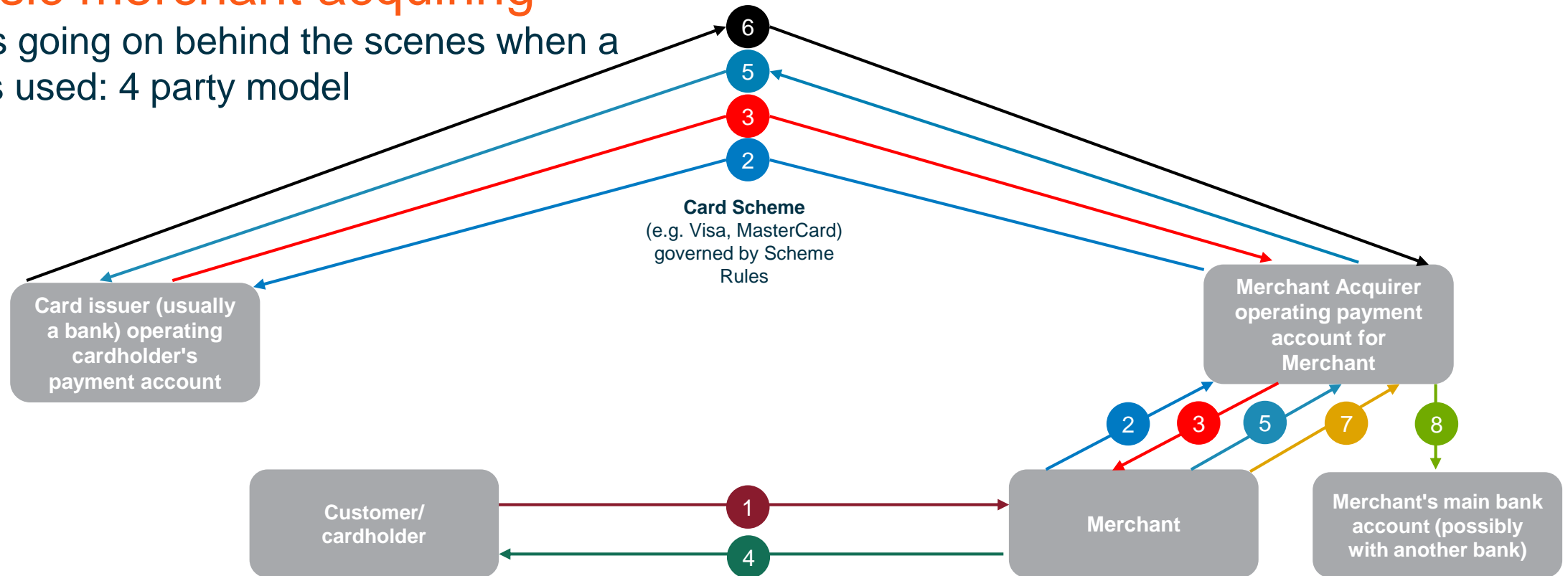


Payments – the basic rule



Classic merchant acquiring

What's going on behind the scenes when a card is used: 4 party model



- 1) Customer offers card for payment: can be in-store, online/mobile or remote transaction
- 2) Merchant seeks authorisation from issuer (where required): sends details of cardholder, payment amount and transaction. Two separate flows: authorisation and authentication
- 3) Issuer authorises payment (where required): confirmation sufficient funds are available → authorisation message on point of sale device
- 4) Merchant provides goods or services to customer
- 5) Merchant requests Acquirer to transmit payment order (regulation 86: within time limits agreed between the payee and his PSP') – Acquirer requests settlement on behalf of Merchant through card scheme
- 6) Issuer makes payment to Merchant Acquirer through card scheme (funds held by Merchant Acquirer in payment account in name of Merchant): interchange fees deducted by Issuer and network fees deducted by Card Scheme
- 7) Merchant requests payment from Acquirer to his main account [may be standing instruction – at agreed frequency]
- 8) Transfer from Merchant Acquirer to Merchant's main account in accordance with contractual agreement: margin deducted by Merchant Acquirer

Classic merchant acquiring

There are many acquirers and aggregators in the UK



Particular issues for merchants in-store – Contactless

In-person: Contactless

- Limit for contactless card payments in the UK went up on 15 October 2021:
 - Single transaction: £45 → £100
 - Multiple transactions since last PIN (not exceeding 5 transactions): £130 → £300
- Follows successful change in April 2020 (driven by the COVID pandemic): £30 → £45 (the original limits were set by EU at €50 and €150, respectively)
- No real customer demand for further increase – driven by HMT
- Some banks letting customers set personalised contactless limits (e.g. Lloyds, Starling)

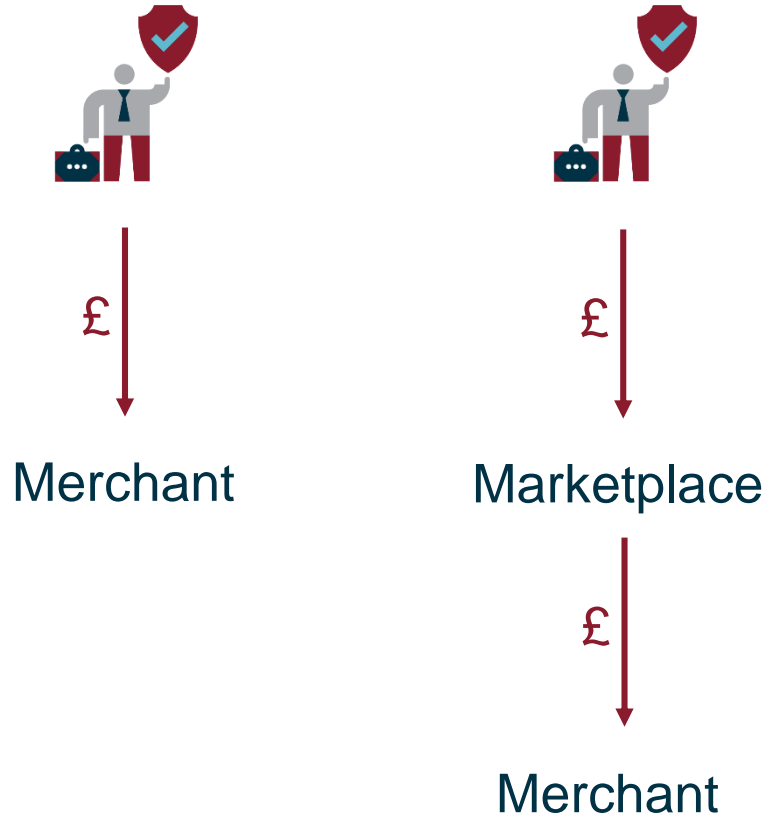
In 2020, contactless card payments accounted for **27%** of all UK payments, up from 7% in 2016.*



*Source: [UK Finance UK Payment Markets Summary 2021](#).

Particular issues for online merchants

Own products -v- marketplace and platforms



Analysis

- Payment service of money remittance?
- Regular occupation or business?
- Exemption available?

Risk mitigation

- T&Cs
- Business practices



Particular issues for online merchants

Own products -v- marketplace and platforms (contd)

- Is there money remittance? 4 elements to definition
 - Transmission of money (or any representation of monetary value)....
 - No payment accounts being created in the name of the payer or payee....
 - Funds received from the payer....
 - For the sole purpose of transferring a corresponding amount to a payee or to the payee's payment services provider
- Is the service being offered as a "*regular occupation or business activity*"?
 - FCA guidance: *"In our view this means that the services must be provided as a regular occupation or business activity in their own right and not merely as ancillary to another business activity. The fact that a service is provided as part of a package with other services does not, however, necessarily make it ancillary to those services – the question is whether that service is, on the facts, itself carried on as a regular occupation or business activity."*
 - Grey area and need to assess each case individually

Particular issues for online merchants

Own products -v- marketplace and platforms (contd)

- Does an exemption apply?

Exclusion	Brief description
Commercial Agent	<i>"Payment transactions between the payer and the payee through a commercial agent <u>authorised in an agreement to negotiate or conclude</u> the sale or purchase of goods or services on behalf of <u>either the payer or the payee but not both</u> the payer and the payee"</i>
Limited Network	<i>"Services based on specific payment instruments that can be used only in a limited way.... (i) allow the holder to acquire goods or services only in the issuer's premises; (ii) (ii) are issued by a professional issuer and allow the holder to acquire goods or services <u>only within a limited network of service providers which have direct commercial agreements with the issuer</u>; [or] (iii) (iii) may be used to acquire a <u>very limited range of goods or services</u>"</i>
Intragroup	Payment transactions and related services by a parent company for its subsidiary, etc.

- Full list in Part 2 of Schedule 1 to the Payment Services Regulations 2017

Particular issues for online merchants

Strong Customer Authentication ("SCA")

Required when:

- Payer accesses account online
- Payer initiates an electronic payment
- Payer carries out any action through a remote channel which may imply a risk of payment fraud or other abuse

Requires two or more of:



Knowledge:
Something only the user knows



Possession:
Something only the user possesses



Inherence:
Something the user is

Must be mutually independent

Breach of one must not compromise the other

Plus...



An extra element for remote transactions (e.g. for internet and mobile)

Dynamic Linking

A unique authentication code which dynamically links the transaction to a specific amount and payee (dynamic linking)

Limited Exemptions

Access to payment account information (Articles 10 and 10A)

Contactless payments at point of sale (Article 11)

Unattended transport and parking fees (Article 12)

Trusted beneficiaries (Article 13)

Recurring transactions (Article 14)

Credit transfers to self (Article 15)

Low value transactions (Article 16)

Secure corporate payments (Article 17)

Transaction Risk Analysis (Article 18)

Particular issues for online merchants

Strong Customer Authentication ("SCA")

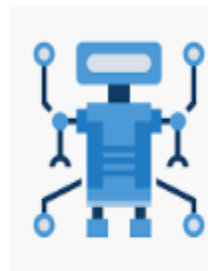
- SCA required to be applied to all e-commerce transactions, unless an exemption applies or out of scope.
- Additional layers of security to payment transactions – consumers at the centre of this.
- Proof of identity with factors that are:
 - inherence based (e.g. fingerprint or voice);
 - knowledge based (e.g. PIN or password); or
 - possession based (e.g. mobile device with one-time password).



Particular issues for online merchants

SCA – paths to compliance and use of behavioural biometrics

- **Inherence = something the user is**
- Includes: fingerprint; face or voice recognition, certain behavioural biometrics – keystroke dynamics, device handling
- **Behavioural biometrics** is a key solution to satisfy these SCA requirements, so reducing fraud, while ensuring a frictionless customer journey
- Issuers use many other data points as part of their fraud management tools to be confident that the user is who it should be – "**profiling**":
 - Spending pattern
 - Payer's device/software access
 - Payer's location
- Increasingly sophisticated (AI) behind the scenes



Particular issues for online merchants

Subscription payments

- Payee or merchant initiated transactions (MITs): transactions which are initiated by the payee or merchant only, without the involvement of the customer
- Out of scope of SCA requirement; no need to rely on exemption
- However, if mandate is electronic and given remotely, SCA may be required:
 - ✓ **Valid authority** given by customer
 - ✓ **SCA applied** at time of authority/any amendments
 - ✓ Future payments within **original scope of mandate or agreement** - advance notice of date / amount

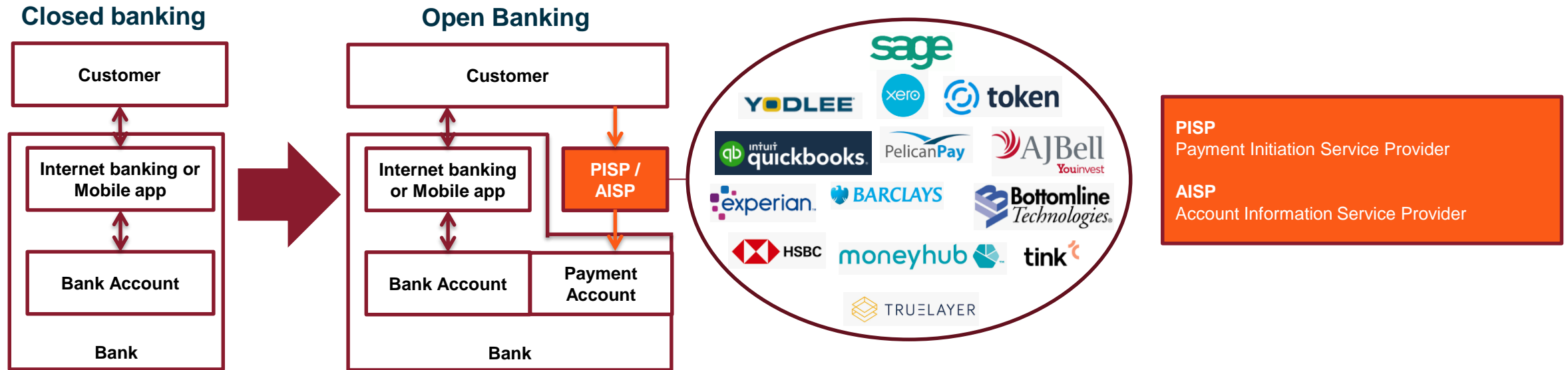
Typical examples:

- subscription services e.g. content streaming
- monthly mobile phone bill
- additional amounts charged by hotel or car rental merchants



Particular issues for online merchants

Alternative payment methods - Open Banking



Account Information Services - Use cases

- Account aggregation (dashboards)
- Account analysis, expenditure, budgeting, etc.
- Alerts (e.g. if limit reached)
- Income and expenditure analysis (affordability, credit worthiness assessments, loan eligibility)
- Price comparison
- Product identification
- Promotional activities

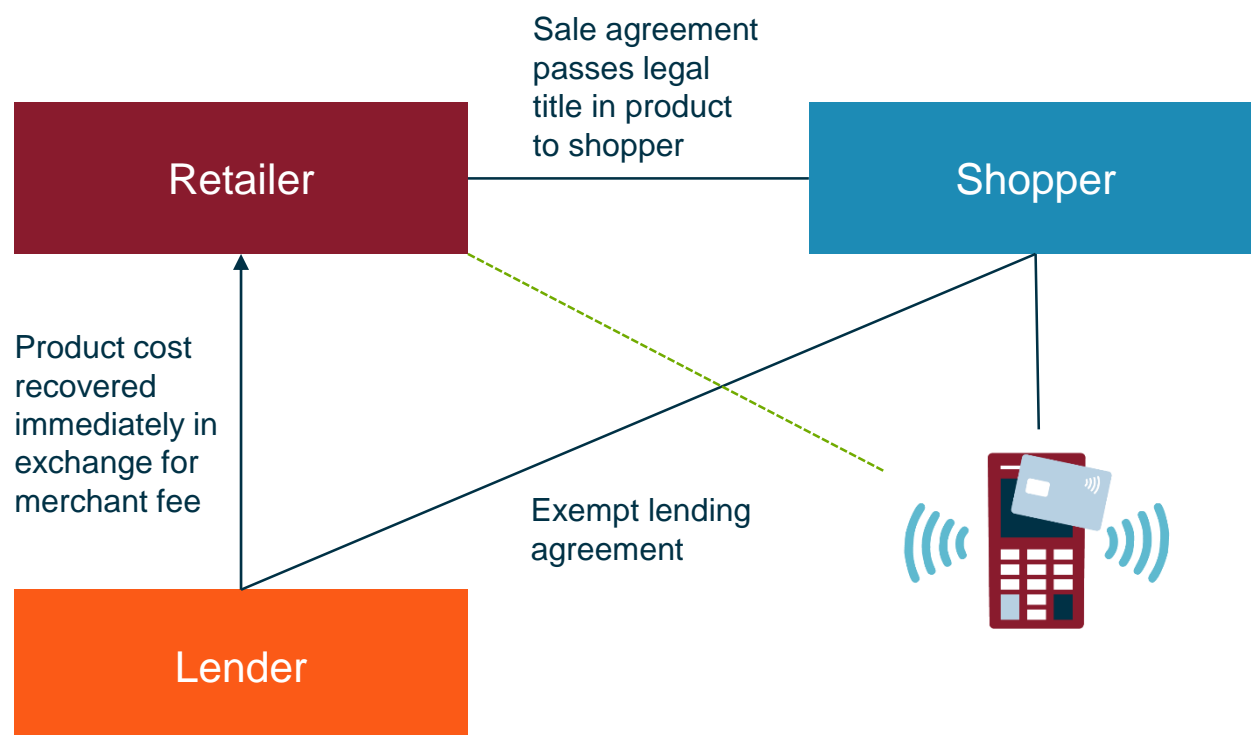
Payment Initiation Services - Use cases

- Alternative for e-commerce to card payments
- Payments resulting from analysis, etc. (e.g. payroll, VAT, etc.)
- Automated invoice payments



Particular issues for online merchants

Alternative payment methods - BNPL



- Use of Buy Now Pay Later ("Deferred Payment Credit") products growing rapidly
- Many have been exempt lending products – but not for much longer
- Results of HMT consultation awaited & still questions about how retailers' role will be characterised in the new regulated products

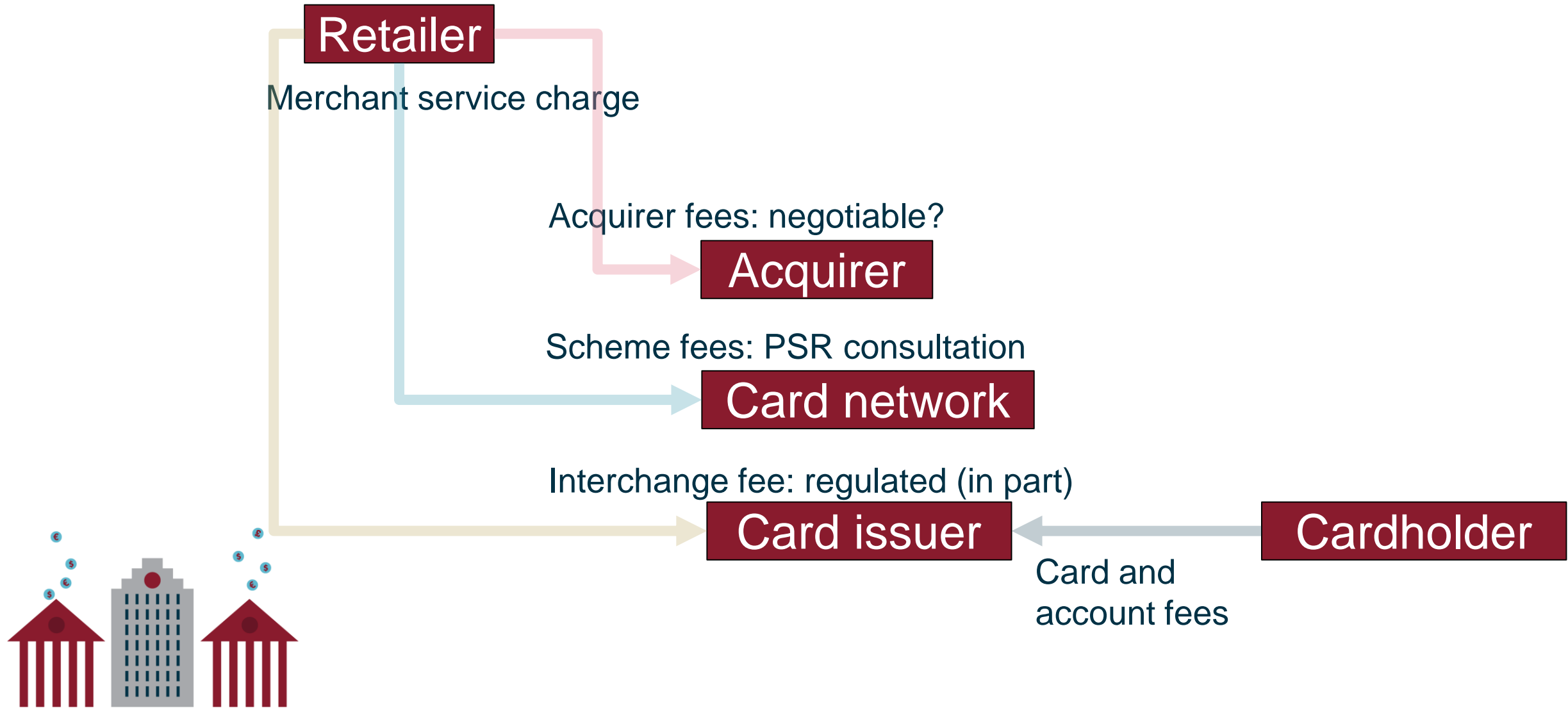
General issues impacting all merchants

Product add-ons

- Careful of marketing!
 - Risk of insurance distribution / credit broking
- Offering buyer 'protection': insurance (regulated) or guarantee (not regulated)?
 - Insurance = primary obligation that exists regardless of what happens between the insured party and any third party. Regulated activity.
 - Guarantee = a secondary obligation. The guarantor must perform the obligations of a third party should the third party fail to perform their obligations to a beneficiary.

General issues impacting all merchants

Fees



Thank you

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