



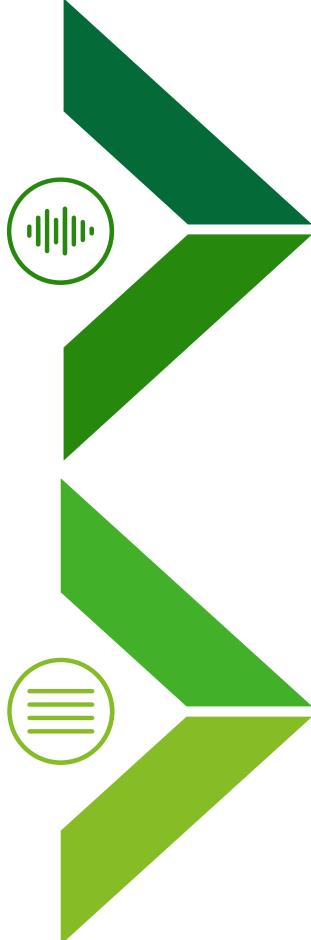
Banking as a Service – What an Odd Creature

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Banking as a Service: What is it?

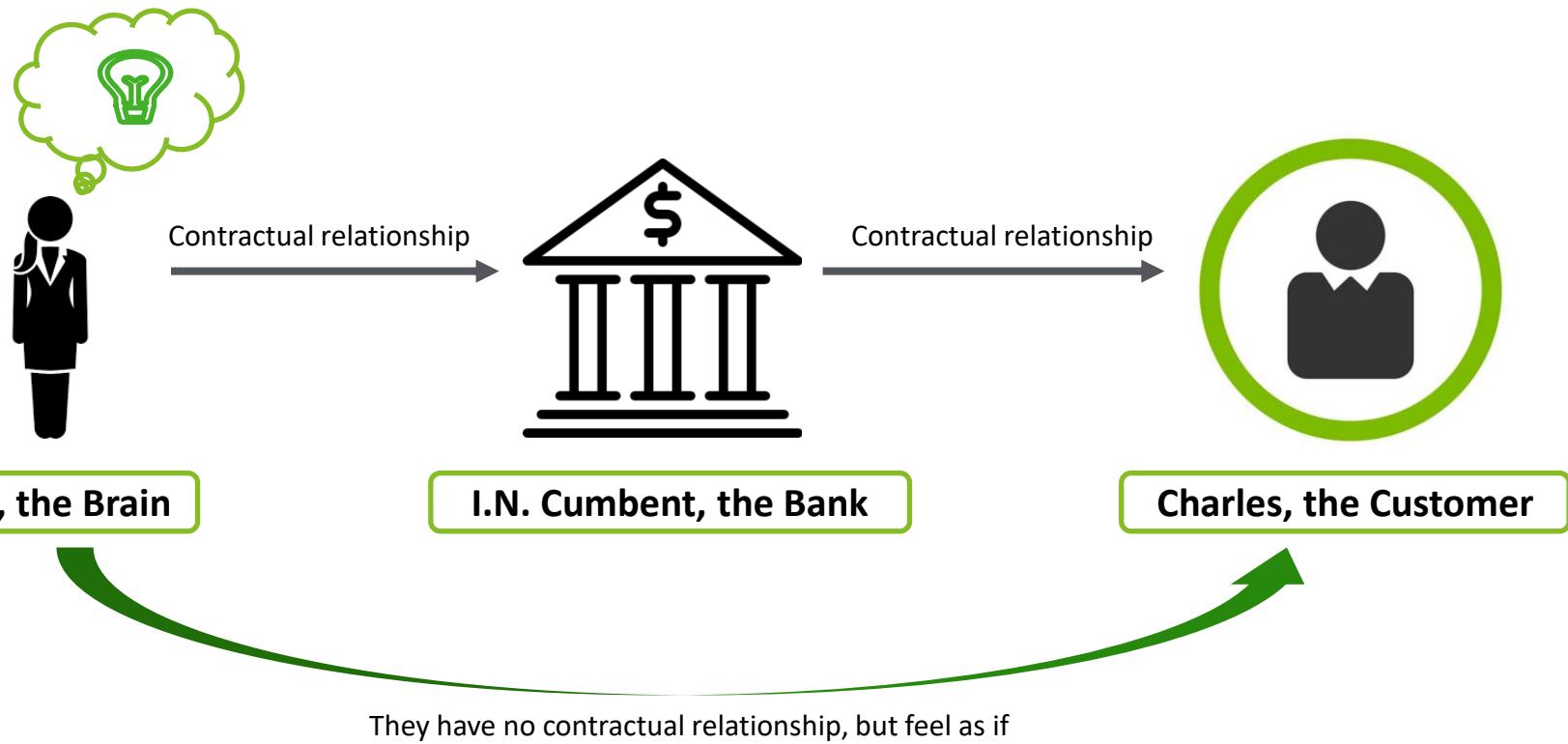


Buzzword or legal term?

Background:

Your friend has a fantastic business idea for a stunning financial product. But – what a mess – they don't have the required regulatory authorization for this. What can we think of, beyond setting up a regulated entity?

Banking-as-a-Service: What is it?



Banking-as-a-Service: What is it?

- Could it qualify as outsourcing?
- What is outsourcing?
- i** Cum grano salis, Cf. EBA/GL/2019/02 – Guidelines on outsourcing arrangements - 25 February 2019

“An arrangement of any form between a regulated entity and a service provider, by which that service provider performs a process, a service or an activity that would otherwise be undertaken by the regulated entity.”

- Why doesn't this fit exactly?

Banking-as-a-Service: What is it?

-  In the case of “BaaS”, the service provider requests the services of the regulated entity and not – as in incumbent outsourcing – the other way round.
-  EBA’s approach – from my understanding – instead considers the regulated entity to be the initiator of the co-operation
-  Let us to call it “reverse outsourcing” as a working assumption.

Why do you
see this dog on
the picture?



Banking-as-a-Service: Καιρός



- Brexit and COVID-19 as Accelerators
- Platformication as a Mega Trend

Banking-as-a-Service: Legal Basis in EEA - Europe



CRD, MiFID, PSD and AIFMD as the current legal framework for the sub-sectors



What about the Digital Operational Resilience Act (DORA)? Possibly a connecting link?



Banking-as-a-Service: Legal Basis in EEA – Europe - CRD

- CRD - An Invisible Law Maker – Outsourcing as a “Fall back”
- The CRD does not provide for a specific provision expressly dealing with outsourcing.
- The EBA, in its Guidelines on outsourcing, refers to
 - Art. 74 (Governance),
 - Art. 76 (Requirements for the involvement of the management body in risk management) and
 - Art. 88 (Responsibilities of the management body regarding governance arrangements)
- to set the stage for the legal sources of outsourcing.

Banking-as-a-Service: Legal Basis in EEA – Europe - MiFID

-  The MiFID does not provide for specific provisions expressly dealing with outsourcing, but makes it clear that

“Outsourcing of important operational functions may not be undertaken in such a way as to impair materially the quality of its internal control and the ability of the supervisor to monitor the firm’s compliance with all obligations”,

Art. 16 par. 5 sentence 2.

-  Additionally, the MiFID – expressly mentions and permits “Tied Agents” in Art. 4 par. 29, which may qualify as a legal predecessor or rough equivalent to “BaaS”.

Banking-as-a-Service: Legal Basis in EEA – Europe - PSD

-  The PSD provides for a more specific set of rules for outsourcing in Art. 19 par. 6
-  Additionally, the PSD expressly mentions and permits "Agents" in Art. 4 no. 38 who may "*act on behalf of a payment institution in providing payment services*". This figure, similar to the concept of "tied agents" may also qualify as a variation of "BaaS".

Banking-as-a-Service: Legal Basis in EEA – Europe - AIFMD

-  The AIFMD provides for the most specific set of rules for outsourcing (or, in the terminology of legislation, “delegation”) in Art. 20. Art. 75 to 82 of the AIFMD Level 2 Regulation provide for a more detailed specification.
-  The AIFMD allows the delegation of core activities of the fund manager, i.e. portfolio management and risk management.
-  The ESMA, in connection with Brexit, brought about the first agencies’ thought on “White Labelling” in the “OPINION to support supervisory convergence in the area of investment management in the context of the United Kingdom withdrawing from the European Union”.
-  However, it’s all about governance at the level of the regulated entity.

Banking-as-a-Service: Legal Basis in EEA – Europe - DORA



What about DORA?



The new regulation will concentrate on ICT risks and will not provide a connecting link for the “BaaS” activities.



Banking-as-a-Service: Legal Landscape in EEA - Europe



We don't see a harmonised legal framework for "Banking as a Service" in the EEA.



The outsourcing and delegation provisions may serve as a legal basis for "BaaS".



For a harmonised European approach, EBA and ESMA could think of a joint approach.

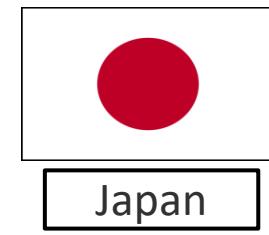


It may take a while to create a common ground here. However, it's worth thinking about it more depth.

Banking-as-a-Service: Some Results from EEA Patchwork



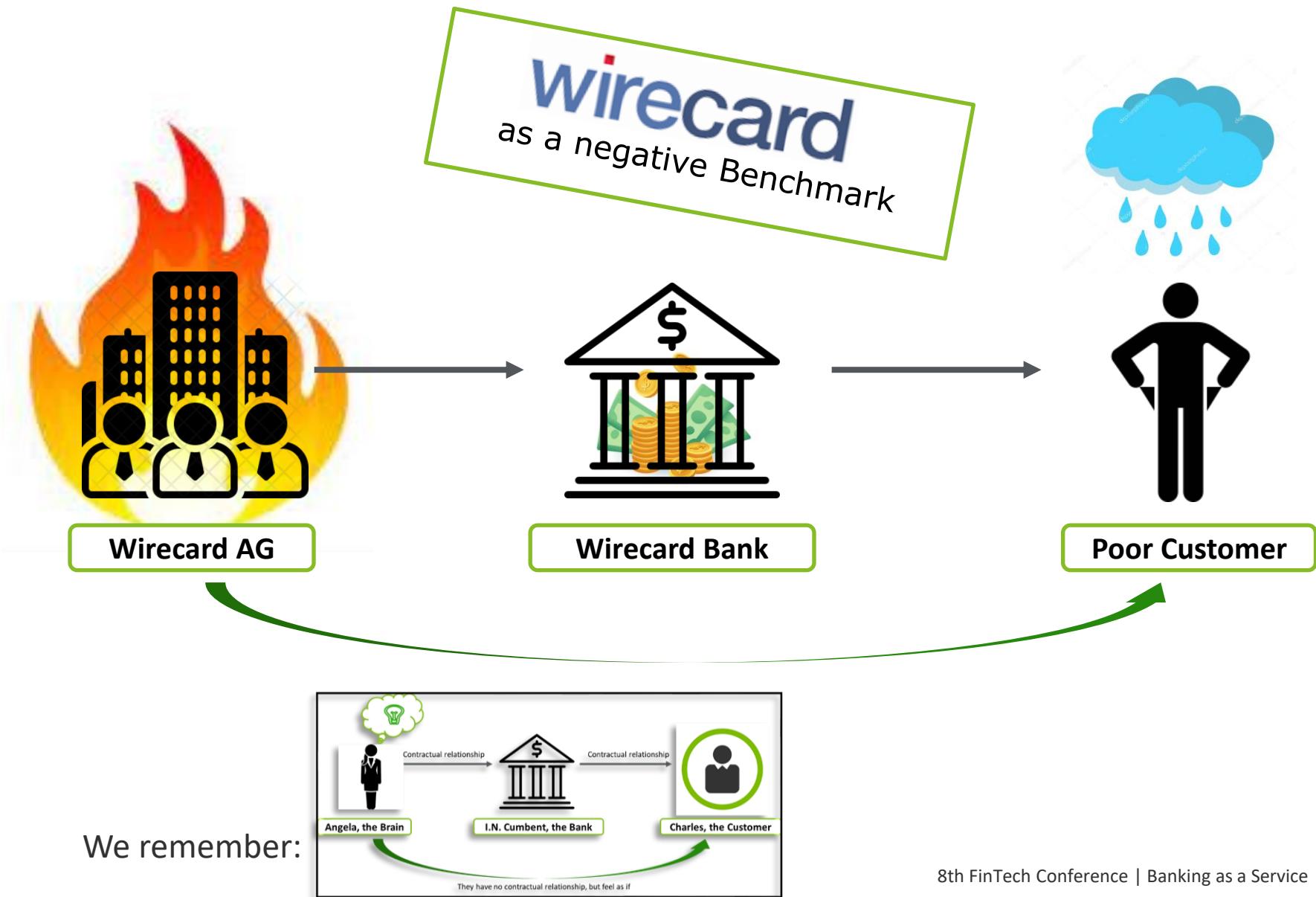
Banking-as-a-Service: Other Regions ?



Banking-as-a-Service: There are Risks of Regulatory Arbitrage and Additional Legal Risk

-  Due diligence to find the right service bank
-  Remuneration arbitrage
-  Harmonized supervision of the service bank
-  Capital requirements for the service bank
-  Migration problems

Banking-as-a-Service: The German Trauma



Get in touch



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