

EBA Consultation Paper: Draft Guidelines on the limited network exclusion under PSD2

The EBA Banking Stakeholder Group (**BSG**) welcomes these Guidelines, which represent further progress towards harmonising the implementation of the Directive (EU) 2015/2366 on payment services in the internal market (**PSD2**) across Member States.

The European Banking Authority (**EBA**) has a statutory objective of contributing to the convergence of supervisory practices and to ensure the safety of consumers. Since the publication date of PSD2, in November 2015, the EBA and the European Commission (**EC**) have received a number of queries on the interpretation and application of the limited network exclusion (LNE) stated in Article 3(k) of PSD2 and the related notification requirements articulated in Article 37 of PSD2.

The EBA assessed these queries and arrived at the view that the implementation and application of the requirements diverges significantly between Member States, thus impeding the single market for payment services in the EU and creating opportunities for regulatory arbitrage. The EBA also considered that consumers carrying out transactions with the excluded payment instruments are sometimes not aware that they do not benefit from the protection envisaged under PSD2.

Following this analysis the EBA arrived at the view that it should issue Guidelines aimed at bringing about convergence on a number of aspects in relation to the application of the LNE. In particular, the EBA is proposing in this Consultation paper Guidelines to address:

- Specificities for each type of limited network exclusion envisaged under Article 3(k) of PSD2, including, where relevant, criteria and indicators on how to qualify a limited network of service providers and limited range of goods and services as such;
- EBA's expectations on the use of payment instruments within a limited network;
- The application of the LNE by regulated payment service providers and electronic money issuers; and
- The application of the notifications to CAs.

The BSG welcomes the opportunity to comment on the revised guidelines. The BSG supports the EBA in its ambition to harmonize the application of limited network exclusion. A fragmented application of the rule would lead to an unlevel playing field. A clear and transparent application of the exemption is

also relevant from a consumer protection perspective, since the use of the exclusions implies that consumers cannot benefit from protection under PSD2.

Q1. Do you have comments on Guideline 1 on the specific payment instruments under Article 3(k) of PSD2?

Regarding GL 1.6 Several exempted payment instruments on one single card; Our understanding of point 1.6 GL is that one single plastic card could comprise several exempted payment instrument functions. This approach seems in line with the ECJ judgement C-287/19, but we see a risk that this may lead to a card that can basically function in the same way as a general purpose card, but in fact hosts several exempted payment instruments that are not subject to PSD2 requirements. This could open up for circumvention of consumer protection rules.

On GL 1.7 Not possible to combine unregulated and regulated instruments on one single card. We do not see that this has any support in PSD2 or current jurisdiction. From the ECJ judgement C-287/19 it can rather be derived that it shall be possible to both have a regulated and an exempted functionality on the same card.

Moreover, payment users might be better protected when combining regulated and unregulated instruments in the same means of payment, thus reducing the number of non-regulated players in the market. On the contrary, physical payment instruments such as cards would be left at a competitive disadvantage before electronic payment solutions such as mobile wallets. These electronic payment solutions may allow users to aggregate different payment instruments within one single device despite the provider of the mobile wallet (typically the mobile manufacturer / OS provider) which is not regulated under PSD2.

Q2. Do you have comments on Guideline 2 on the limited network of service providers under Article 3(k)(i) of PSD2?

Considering that PSD2 is all about creating a level playing field for the benefit of all, the BSG's view is that use of exemptions from the common framework must be carefully evaluated and motivated. Exemptions should be just that – exemptions. The BSG notes that there are currently just under 1400 registrations for exempted payment instruments (EUCLID - Register (europa.eu)). Given the common market idea behind PSD2 the BSG sees a need to cap the presence of article 3(k) on payment instruments. One step to achieve this would be for the guideline to provide clarity on cross border issues. Some countries accept a limited network exempted card to be used cross border and some countries do not. A suggestion would be that the EBA should opt for stricter harmonization and lean towards that cross-border capacity should be considered an aggravating factor. This would be in line with the limited network concept as an exemption from the rule.

Networks of service providers which are growing continuously should not be eligible for the limited network exemption. This should be suggested as a disqualifying factor in the guidelines. E.g. there are meal cards offered by employers and these cards typically enable payment at an ever growing range of restaurateurs. Could one fuel card be exempted although it can be used for all existing gas stations within the EEA?

Regarding GL 2.1 b) and c) - "before submitting the notification" should probably rather be "when submitting the notification".

GL 2.1 and 2.2 still seem to be very vague and may still lead to different treatments. For example: What would the limitation of number of providers be for online platforms? Should they be entitled to use this exemption at all?

Some of the 2.2 points are questionable/difficult to understand and may lead to different interpretations and implementations, e.g.

a) "size of the geographical area". The BSG deems that the size in itself is not relevant eg in Scandinavia a large geographical area might be populated by a very limited number of people while in central Europe the number of people in the area of the same size can be a lot larger.

c) What is meant with "The envisaged amount to be credited to the payment instrument" - only e-money that can be loaded to the payment instrument or also e.g. a spending cap or a credit line?

e) What is meant with "categories of customers"? It could be interpreted as B2C or B2B, but beyond that would be difficult to interpret and apply.

Therefore, the BSG is of the view that GL 2.2 should include some metrics in relation to the indicators in order to guide Competent Authorities and guarantee harmonisation across Europe and a level playing field.

Q3. Do you have comments on Guideline 3 on the instruments used within the premises of the issuer under Article 3(k)(i) of PSD2?

Platforms that do not themselves offer goods or services but instead only facilitate and offer a marketplace for goods or services shall not be viewed as offering premises as worded in PSD2 article 3 (k)(i) which follows by GL 3. Furthermore it should be clarified that internet based platforms with business models based on continuously growing lists of connected service providers shall not qualify for the limited network exemption. Despite this e.g. Facebook Payments International Limited has been registered under the limited network exemption in several member states. (EUCLID - Register (europa.eu)). Furthermore, it is not clear in the registry if Facebook is registering under "premises of the issuer" or under "limited network of service providers" so more clarity should be provided in the register.

Q4. Do you have comments on Guideline 4 on the limited range of goods or services under Article 3(k)(ii) of PSD2?

The guideline could provide even more clarity on what range of goods or services can be corralled in the concept "limited range of goods or services". Some countries consider it acceptable to mix fuel and victuals under the limited range of goods or services exemption as long as they are provided at the same place and some countries do not accept it. Given that today's super markets typically offer hundreds of thousands of goods of various categories there is a need to reach a common definition of the concept of limited range of goods or services. E.g. what motivates GL 4.3?

Also, GL 4.4 – the current phrasing is too vague, and will not lead to the necessary harmonization. Therefore, the BSG is of the view that this guideline should include some metrics in relation to the indicators in order to guide Competent Authorities and guarantee harmonisation across Europe and a level playing field.

Q5. Do you have comments on Guideline 5 on the provision of services under Article 3(k) of PSD2 by regulated entities?

Generally, the BSG does not agree that it is unclear from PSD2 if regulated entities should be able to use the exemption or not. In addition to the reasoning already provided by EBA itself, it is also clear

from the location of both art 3(k) and art 37 that also regulated entities shall be able to use the exemption. Both articles are located in chapters that regulate provisions that apply for all payment service providers.

It is not completely clear what is meant by "different brands" in point GL 5.2. E.g. could it still be a combination of the payment brand (that is used for several products) and a product specific brand or should it only be a product specific brand?

In relation to GL 5.3 - we can see that it can be beneficial for consumers to receive the information that the payment instrument is not protected by the PSD2 provisions. But we do not see why this obligation should only apply to regulated entities - the need would be the same for regulated and unregulated entities. Having this obligation for regulated entities only could give the impression that products from regulated entities are worse and thus give a competitive disadvantage.

In relation to GL 5.4 - also here - the same rules should apply for regulated and unregulated entities. There is no legal basis for having stricter obligations for regulated entities compared to unregulated entities.

General comment: The BSG would find it beneficial if it could be clarified that regulated entities do not have to make use of the exclusion, but instead can treat the card as a regulated card and thus not requiring any notifications or similar

Q6. Do you have comments on Guideline 6 on the notifications under Article 37(2) of PSD2?

Regarding GL 6.1 "where the service is provided" seems not to be a suitable criteria to base the reporting country on given that "where a service provided" is very difficult to determine for cross-border services and no clear guidance exists to our knowledge. The EBA seems to have concluded this itself in its' "Report on potential impediments to the cross-border provision of banking and payment services from October 2019", page 4 and 5 "In particular, digital solutions provide new ways for institutions, including new entrant FinTech firms, to reach consumers in multiple jurisdictions but competent authorities and consumers face difficulties in determining when such activities constitute cross-border business under the freedom to provide services. Although this issue is not limited to financial services, the EBA highlights the need for the European Commission to update its 1997 Communication in order to promote greater convergence of practices in determining when business is to be regarded as being provided cross-border under the freedom to provide services, taking particular account of technological developments.". From a practical perspective, it would seem easier to require notification on HQ and on branch level. This would also be in line with other reporting obligations. That an entity has passported cross-border services to a certain country does not necessarily mean that a service is provided there - an entity may just have chosen to do so for security reasons in case a local authority would deem a service to be provided locally e.g. due to residency of the customer.

Q7. Do you have comments on Guideline 7 on the limited network under Article 3(k)(iii) of PSD2?

The BSG has no comments in relation to this question.