RESPONSE TO THE EBA'S CONSULTATION PAPER ON THE DRAFT GUIDELINES ON THE LIMITED NETWORK EXCLUSION UNDER PSD2

EBA/CP/2021/2

14/10/2021

We welcome the opportunity to express our views regarding the draft guidelines on the limited network exclusion under PSD2[1].

Please find below our general observations and comments followed by our responses to the specific questions listed in the consultation.

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[1] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market.

GENERAL OBSERVATIONS AND COMMENTS

For the sake of clarity, we would like to underline that we are not directly concerned by the draft guidelines on the limited network exclusion under PSD2 given that, as far as we are concerned, we do not provide any payment or electronic money services within the meaning of PSD2 or EMD2. Therefore, our services are out of the scope of regulated payment services and are not at stake when it comes to discussions on the exclusion regimes under the PSD2 or EMD2, such as the limited network exclusion. Our participation to the current consultation aims at supporting our industry sector and making sure that its interests as whole are being taken into consideration.

As a preliminary comment, we would like to share our general observations on the transitional provisions for the implementation of the final guidelines (**1.**) and the possibility for entities benefiting from the limited network exclusion set out in Article 3(k) of PSD2 (the ***LNE***) to provide payment instruments that involve the provision of credit (**2.**).

1. Transitional provisions

The draft guidelines indicate that competent authorities should request from service providers which already benefit from the LNE to resubmit a notification taking into account the content of the guidelines.

In the Member States where a significant number of service providers already benefit from the LNE – such as France – this systematic resubmission process will represent important work for both competent authorities and the service providers concerned.

In certain Member States, the competent authorities already assess the LNE using criteria and indicators that are similar to those set out in the draft guidelines. When this is the case, it would be unnecessary to re-analyse all existing notifications in light of the guidelines.

We believe that competent authorities should have the possibility to determine on a case-by-case basis the existing notifications that they wish to review, without having to re-assess all existing notifications.

Regarding service providers already benefitting from the LNE, competent authorities should be able to determine, on a case-by-case basis, the notifications that they wish to review, without having to re-analyse all existing notifications in light of the final guidelines.

If the EBA decided to maintain its current approach, competent authorities could request service providers benefitting from the LNE to resubmit notifications as from the date of application of the final guidelines (currently expected on 1st October 2022).

These service providers will therefore have only three months (between the date of publication of the final guidelines and their date of application) to analyse the content of the final guidelines and determine whether they need to implement changes to their activities to comply with the new criteria and indicators introduced by the guidelines. Some service providers may need to modify their existing business models and implement important operational changes.

Accordingly, the three-month period may turn out to be too short for certain service providers.

We believe that the EBA should give more time to service providers to implement the final guidelines.

If the EBA decided to maintain its approach and to request competent authorities to re-analyse all existing notifications, service providers benefitting from the LNE should be given at least six months from the date of publication of the final guidelines to resubmit a notification to their competent authorities.

In addition, the draft guidelines do not specify the level of information which may be requested by competent authorities to re-assess these applications in light of the new criteria and indicators introduced by the guidelines. From our experience, some competent authorities request a simple notification, while others request a detailed filing with supporting documents, client agreements and a description of payment flows.

The EBA should clarify the level of information which may requested by competent authorities from service providers already benefitting from the LNE as part of the re-assessment of their notifications.

2. **Possibility to offer exempted payment instruments that involve the provision of credit**

We welcome the clarification by the EBA that the use of credit should not be a factor to be taken into account by competent authorities in deciding whether an instrument may benefit from the LNE.

That being said, the consultation paper also provides that:

> *"The EBA acknowledges that credit may be provided in relation to transactions carried out with instruments excluded under the limited network exclusion,* ***but it will be subject to relevant national legal requirements*** *related to the provision of the credit".*

This may be interpreted to mean that an entity exempted under the LNE may grant credit in connection with its exempted activity only if the proposed credit complies with local banking regulations.

In other words, if the conditions for benefitting from the LNE are met but the service provider is not authorised to provide credit and cannot benefit from a separate exemption to provide credit (in relation to the instrument exempted under the LNE) in the relevant jurisdiction, it will not be able to offer the exempted instrument to its clients.

We would like to highlight the fact that the concept of "credit" is not construed in the same manner in all EU jurisdictions, and that the licensing requirements (and the exemptions) applicable to the provision of credit are not the same across the EU.

Therefore, competent authorities may adopt different approaches as to whether a particular instrument involves the provision of credit and whether the entity issuing that instrument must be authorised to provide credit or may benefit from an exemption.

This raises concern regarding the need for harmonisation and fair regulatory playing field in the EU.

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RESPONSES TO QUESTIONS RAISED IN THE CONSULTATION PAPER

Guideline 1

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

Paragraph 1.7 of Guideline 1 provides that:

> "*Competent authorities should also ensure that a single card-based means of payment cannot accommodate simultaneously payment instruments within the scope of PSD2 and specific payment instruments within the scope of Article 3(k) of PSD2*".

Section 5 D. of the Consultation paper indicates that this prohibition aims to ensure a better protection of consumers:

> "*The combination of regulated and non-regulated payment instruments in a single card-based mean of payment may make it difficult for the users of the instrument to differentiate between the two and to understand which instrument they will be using. Such a situation would result in reduced* ***consumer protection*** *and would go against the objective of these guidelines*" (see page 35).

We agree with the EBA that it may be difficult for consumers (*i.e.*, natural persons acting for purposes which are outside their trade, business or profession) to delineate between a regulated and a non-regulated payment instrument when both instruments are combined into a single card.

However, we do not think that this holds true in the case of professional clients (*i.e.*, legal entities and natural persons not qualifying as consumers).

In fact, certain corporate cards combining regulated and non-regulated instruments are adapted to the specific needs of professional clients.

Therefore, in our view, paragraph 1.7 of Guideline 1 should only apply to payment instruments provided to consumers. It should not apply to payment instruments which are provided to professional clients.

We believe that the approach we suggest is consistent with the provisions of PSD2 (**1.**) and is necessary so as to maintain existing business practices which address the needs of professional customers (**2.**).

1. Different treatment of consumers and of professional clients under PSD2

PSD2 clearly indicates that undertakings do not need the same level of protection as consumers.

Recital 53 of PSD2 provides that:

> "***As consumers and undertakings are not in the same position, they do not need the same level of protection***. *While it is important to guarantee consumer rights by provisions from which it is not possible to derogate by contract****, it is reasonable to let undertakings and organisations agree otherwise when they are not dealing with consumers*** […]".

As a result, where the payment service user is not a consumer, the parties may contractually agree to disapply certain provisions (*e.g.* information requirements, liability rules, etc. – see Articles 38 and 61 of PSD2).

Accordingly, while consumer protection considerations are an important aspect of PSD2, the directive also allows for flexibility when the payment service user is a professional customer.

This is because professional clients have a better knowledge of the services that are offered to them and a better ability to assess the benefits, drawbacks and risks of those services.

In our view, the same reasoning should apply in respect of cards combining regulated and unregulated payment instruments: while we acknowledge that this type of cards may not always be suited for consumers, we take the view that consumer protection considerations are not relevant in the case of corporate cards offered to professional clients.

If the EBA is concerned that certain professional clients may not have all the information needed to assess the risks of the service offered to them, the EBA could introduce a new paragraph in the guidelines requiring service providers to provide clear information to their professional clients regarding the cases where the use of the card is subject to PSD2 and the cases where it is not.

2. Client needs and business considerations

It is important to note that products aimed at professional clients that combine (i) payment instruments within the scope of the PSD2 and (ii) exempted payment instruments within the scope of the LNE are already in the market – in France in particular, for the benefit and to the satisfaction of the professional clients who currently use them.

For example, TotalEnergies France, a separate legal entity, established in France, has launched a dual card (called "Mobility Corporate") which includes both:

- a payment instrument exempted under the LNE[2], which can be used by professional clients to pay for a limited range of products and services (*e.g.* fuel, electric charge, parking, tolls) in a "private network" composed of TotalEnergies' service stations and partners (*e.g.* toll operators); and

- a Mastercard branded payment instrument subject to the PSD2, that can be used to pay for other business expenses (hotels, restaurants, car rentals, taxis, etc.) at merchants in the Mastercard network.

Such dual products meet the specific needs of professional clients because they provide in the same package:

- the benefits of a "closed-loop" payment instrument (exempted under the LNE) enabling professional clients to access value-added services that are not offered in connection with universal payment cards, such as services facilitating the management of business expenses and VAT reclaims or the setting up of the parameters of each card (categories of accepted expenses, geographical perimeter, etc.), reports on the use of the cards or discounts on the products/services bought with the card; and

[2] See EUCLID - Register (europa.eu).

- for other expenses, the benefits of a universal means of payment (subject to the PSD2) which is accepted within a broader network of merchants and for broader range of goods or services. This feature of the dual card enables employees and representatives of professional clients to pay for professional expenses of various kinds and in various countries (according to the parameters set by the professional client), thus leveraging domestic and international payment schemes infrastructures and systems.

From a business standpoint, such dual products are the best way to accommodate the needs of professional clients, as they are looking for both (i) the benefits associated with exempted instruments and (ii) a broad acceptance network that only global card networks such as Visa or Mastercard can offer.

Entities already benefiting from the LNE should be allowed to maintain this approach and to continue satisfying their professional clients' needs by offering them cards combining regulated and non-regulated payment instruments, insofar as professional and corporate clients are already familiar with them and understand the difference between the status of the payment instruments embedded in them.

In light of the above, we propose amending paragraph 1.7 of Guideline 1 as follows:

> *"**Competent authorities should also ensure that a single card-based means of payment that is provided to a consumer (i.e., a natural person acting for purposes outside their trade, business or profession) cannot accommodate simultaneously payment instruments within the scope of PSD2 and specific payment instruments within the scope of Article 3(k) of PSD2. Such prohibition should not apply in situations where the clients are not consumers.**"*

Guideline 2

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

We do not have any comments on Guideline 2.

Guideline 3

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?

We do not have any comments on Guideline 3.

Guideline 4

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

Paragraphs 4.1 and 4.2 of Guideline 4 indicate that:

> "*4.1 Competent authorities should take into account that in order for the use of a specific payment instrument to be considered as limited for acquiring a very limited range of goods or services under Article 3(k)(ii) of PSD2,* ***a direct functional connection between the goods and/or the services that can be acquired with the payment instrument should exist****.*
>
> *4.2 When assessing the functional connection between the goods and/or services, competent authorities should take into account that a leading good or service is established. Competent authorities should check whether the service provider has identified the leading good or service and the ancillary goods and/or services and has described the functional connection between them in the notification under Article 37(2) of PSD2*".

In our view, this approach is too restrictive and is not in line with the PSD2.

We understand that the concept of "functional connection" used by the EBA stems from Recital (13) of PSD2, which indicates that:

> "[…] *A payment instrument should be considered to be used within such a limited network if it can be used only in the following circumstances: first, for the purchase of goods and services in a specific retailer or specific retail chain* […]; ***second, for the purchase of a very limited range of goods or services, such as where the scope of use is effectively limited to a closed number of functionally connected goods or services regardless of the geographical location of the point of sale*** […]".

The terms "such as" clearly indicate that the situation described in Recital (13) is only an example of a case where the LNE may apply. It does not mean that the LNE should apply solely in this situation.

We also note that Article 3(k) of PSD2 does not refer to this "functional connection" criterion, which underpins the idea that a reference to functionally connected goods and services is a mere example and not the only criterion to be put in place.

Therefore, from a legal standpoint, the EBA's recommendation does not reflect the aforementioned approach.

In addition, the notions of "*connected goods and/ or services*", "*leading product and/or service"* or "*functional connection"* are not defined in the PSD2. These terms are vague and may be interpreted differently by competent authorities. For example, the guidelines do not indicate which factor(s) should be considered to identify the "*most important /leading product and/or service"*: should competent authorities take into account sales volume, the products and/or services' turnover, the service provider's marketing strategy, etc.? Similarly, it is uncertain how competent authorities should determine if a product/service is "*associated or related in some respect"* or "*connected"* to a leading product and/or service.

In our view, the approach proposed by the EBA would result in diverging supervisory practices among national competent authorities, while the purpose of the draft guidelines is to harmonise the interpretation of the LNE across the EU.

Finally, the approach proposed by the EBA may not be suited to all business sectors. For certain instruments, it may not be possible to identify a leading good or service that is functionally connected to ancillary goods (*e.g.* a gift card sold by a hardware store).

In our view, the approach adopted by the *Autorité de contrôle prudentiel et de résolution* (ACPR) in France allows for more flexibility. The ACPR considers that a "limited range of goods or services" may be characterised if the goods or services that can be acquired with the instrument[3]:

- are "functionally connected" (*i.e.*, the goods/services are related or complementary); **or**
- belong to a **"theme"** that is sufficiently well defined/precise so that the instrument may not be confused with a general-purpose payment instrument.

In light of the above, we propose amending Guideline 4 to provide that a "limited range of goods or services" may also be characterised if the goods or services that can be acquired with the instrument belong to a "theme" that is sufficiently well defined/precise so that the instrument may not be confused with a "universal" means of payment.

If the EBA decides to maintain its current approach, in order to harmonize national practices it is necessary to provide guidance on the criteria/factors to be taken into account to identify the "leading product and/or service" and to characterise the "functional connection" between this leading product/service and the other goods/services that can be acquired with the exempted instrument.

Guideline 5

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

We do not have any comments on Guideline 5.

Guideline 6

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

1. Notification requirements

Paragraph 6.1 of Guideline 6 provides that:

> "*6.1. Competent authorities should take into account that the notification under Article 37(2) of PSD2 should be submitted by the service provider providing excluded goods and/or services under Article 3(k)(i) and (ii) of PSD2 in different Member States to the competent authority in each jurisdiction where the goods and/or services are provided and where the thresholds set out in Article 37(2) of PSD2 are breached in the particular jurisdiction"*.

We welcome the clarification by the EBA that an entity may benefit from the LNE while providing services in several EU Member States, including on a cross-border basis.

[3] See ACPR Position P-2017-01.

However, the terms "*in each jurisdiction where the goods and/or services are provided*" are not clear and do not seem to accurately reflect the approach retained by the EBA.

These terms suggest that a notification must be submitted in each EU Member State where the exempted instrument is accepted (by merchants/payees), while we understand that the EBA's view is rather that a notification should be made in each EU Member State where the exempted instrument is provided to clients.

The drafting of paragraph 6.1 does not seem consistent with:

- paragraph 57 of Section 4 of the consultation paper, which indicates that "*the respective payment instrument should be notified to and assessed by the respective national competent authority* ***where the services are provided individually*** *and where the thresholds set out in Article 37(2) of PSD2 have been exceeded*";

- paragraph 6.3 of Guideline 6, which indicates that, in the notification submitted to a competent authority, the description of the activity should include information "*b) about other Member States* ***where the service under Article 3(k) of PSD2 covered by the notification to the competent authority is provided*** *by the same service provider*".

We believe the EBA should clarify paragraph 6.1 of Guideline 6, otherwise this may lead to the uneven implementation of this paragraph by competent authorities.

The EBA should clarify in paragraph 6.1 that the notification must be submitted in each EU Member State where the payment instrument is provided to the clients (and not in each EU Member State where the exempted instrument is accepted).

2. Notification template

Guideline 6 also indicates that the notification should contain specific information such as the description of the activity.

In practice, notification templates may differ significantly between competent authorities.

We believe it would be simpler if the EBA provided a template form for the notification.

The EBA should provide a template notification form.

Guideline 7

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

We do not have any comments on Guideline 7.

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