



**Electronic Money Association**

Crescent House  
5 The Crescent  
Surbiton  
Surrey  
KT6 4BN  
United Kingdom  
Telephone: +44 (0) 20 8399 2066  
Facsimile: +44 (0) 870 762 5063  
[www.e-ma.org](http://www.e-ma.org)

José Manuel Campa  
Chairman  
European Banking Authority  
EUROPLAZA  
20 Avenue André Prothin  
92927 Paris La Défense  
France

15 October, 2021

Dear José,

**Re: EBA draft Guidelines providing clarity on the application of the limited network exclusion requirements, which certain payment instruments might benefit from, as laid down in the revised Payment Services Directive (PSD2).**

The [Electronic Money Association](#) is the trade body for electronic money issuers and innovative payment service providers. Our members include leading payments and e-commerce businesses worldwide, representing online payments, card-based products, vouchers, and those employing mobile channels of payment. Several EMA members provide products that benefit from the LNE exemption. Please find full list of our members attached to this letter.

Kind regards

Thaer Sabri  
Chief Executive Officer  
Electronic Money Association

## **EMA Comments on draft EBA Guidelines on the limited network exclusion under PSD2**

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

### **Guideline I: Specific payment instruments under Article 3(k) of PSD2**

I.1. Competent authorities should take into account that the specific payment instruments that can be used only in a limited way under Article 3(k) of PSD2 are payment instruments as defined in Article 4(14) of PSD2. Competent authorities should allow all different types of payment instruments under PSD2 to be used for the purpose of Article 3(k) of PSD2.

**[EMA: Article 3(k) of PSD2 provides for: “services based on specific payment instruments that can be used only in a limited way.”]**

**Article 14(4) in turn defines ‘payment instrument’ as “a personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used in order to initiate a payment order”.**

**We understand that Guideline I.1 is therefore seeking clarify that the LNE applies to all ‘payment instruments’ as defined in Article 14(4). We would be grateful if the EBA can confirm our understanding.]**

I.2. Competent authorities should take into account that the specific payment instruments can be used for acquiring both physical and digital goods and services.

**[EMA: this is a helpful clarification]**

I.3. Competent authorities should not impose any restrictions on the means of transferring funds to the payment instrument, which can be done through execution of payment services and/or through the issuance of electronic money. Competent authorities should take into account that, in the cases where funds are transferred to the payment instrument by using an intermediary other than the issuer, the transfer of funds should be considered as a separate payment service that does not fall within the scope of the service excluded under Article 3(k) of PSD2.

**[EMA: we would be grateful for clarification of the reference to e-money, is this simply means by which the card is funded?]**

I.4. Competent authorities should check when assessing the information provided by service providers, which provide services based on a payment instrument falling under the scope of Article 3(k) of PSD2 within their jurisdiction, whether these service providers apply

technical and contractual restrictions limiting the use of the payment instrument. Competent authorities should not consider a contract between the service provider and the user of the instrument as a technical restriction.

**[EMA: given the emphasis placed on technical and contractual restrictions, examples of such restrictions would be a welcome addition]**

1.5. The specific technical restrictions should at least apply to:

- a) the providers of goods and services where the payment instrument can be used, applicable for the exclusion under Article 3(k)(i) of PSD2; or
- b) the range of goods and services that can be purchased with the instrument, applicable for the exclusion under Article 3(k)(ii) of PSD2; or
- c) the geographical location for acquiring goods or services from specific suppliers for specific social or tax purposes, applicable for the exclusion under Article 3(k)(iii) of PSD2.

**[EMA: we would again be grateful if the EBA were to provide examples of the application of restrictions, without impacting the scope of interpretation.]**

1.6. Competent authorities should take into account that a single card-based means of payment can accommodate simultaneously more than one specific payment instrument within the scope of Article 3(k) of PSD2. Competent authorities should ensure that the technical and contractual restrictions specified in Guidelines 1.4 and 1.5 apply to each specific payment instrument.

**[EMA: this is a helpful clarification; the guidelines should make it clear that card-on-file or tokenised “wallets” are not “single card-based means of payment” and so are not affected by this guideline 1.6]**

1.7. 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.

**[EMA: the guidelines should make it clear that card-on-file or tokenised “wallets” are not “single card-based means of payment” and so are not affected by this guideline 1.7. Furthermore, and significantly, there are numerous instances where users may wish to use a combination of regulated and unregulated payment products in the same transaction or to receive rewards onto one or the other. We suggest that the risk of consumer confusion should be balanced against consumer benefit from making use of multiple types of payment instrument. We are happy to address the EBA further on this matter]**

1.8. Competent authorities should take into account that service providers can issue more than one specific payment instrument under Article 3(k) of PSD2, provided that each instrument fulfils the requirements set out in these Guidelines.

**[EMA: this is a helpful clarification]**

1.9. NCAs should not take into account the redeemability of the monetary value stored in the payment instrument in the assessment of whether the payment instrument falls under the scope of Article 3(k) of PSD2.

**[EMA: we understand this does not suggest an redemption obligation, given that LNE products have no such obligation]**

1.10. Competent authorities should take into account that payment instruments falling under the scope of Article 3(k) of PSD2, which store monetary value in the payment instrument, can be either reloadable or for one-off use only.

**[EMA: this is a helpful clarification]**

1.11. Competent authorities should take into account that the exclusions based on Article 3(k) of PSD2 cannot be combined at payment instrument level with another exclusion from the scope of application of PSD2, including other exclusions under Article 3(k) of PSD2.

**[EMA: no comment]**

1.12. Competent authorities should take into account that the issuer of the payment instrument can be established in a Member State different from the Member State of the respective competent authority, which has received the notification under Article 37(2) of PSD2.

**[EMA: this is a helpful clarification]**

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

### **Guideline 2: Limited network of service providers under Article 3(k)(i) of PSD2**

2.1. When assessing whether the use of a specific payment instrument is limited within a limited network of service providers, competent authorities should take into account the following criteria in the assessment of the information provided with the notification under Article 37(2) of PSD2:

**[EMA: it should be made clear to NCAs that the criteria listed below are not a list of reasons to reject business models notified to them under Article 37(2) PSD2 but tools to make reasoned and objective decisions; furthermore, these criteria must be considered in the light of the proposed business model of the relevant LNE payment instrument]**

a) A direct contractual agreement for acceptance of payment transactions is concluded between the issuer of the payment instrument and each provider of goods and services operating within the limited network;

**[EMA: no comment]**

b) The envisaged maximum number of providers of goods and services operating within the limited network before submitting the notification under Article 37(2) of PSD2;

**[EMA: we assume that the NCA will have discretion on the maximum number; we would be grateful for clarification]**

c) The envisaged specific geographical area for provision of goods and services before submitting the notification under Article 37(2) of PSD2; and

**[EMA: are NCAs expected to specify such limits, enabling notification? Do NCAs have discretion in this respect?]**

d) The service provider offers goods and services under a common brand that characterises the limited network and provides visual manifestation to the user of the payment instrument.

**[EMA: we would like to ensure that this restriction does not impact the exclusion under limb (ii) for instruments which can be used only to acquire a very limited range of goods or services. We would be grateful if this limb can be distinguished in this regard]**

2.2. Complementary to the assessment under Guideline 2.1, and depending on the specific business model for provision of services and the size and specificity of the market within the respective Member State, competent authorities should take into account the following additional indicators:

**[EMA: it should be made clear that complementary means optional in line with explanation made clear in the consultation document and NCAs must not apply all these additional indicators in all cases irrespective of the business model**

**Separately, it would be helpful if some examples were provided to reduce NCA divergence in interpreting the provisions]**

- a) The size of the geographical area for provision of goods and services;

**[EMA: no comment]**

- b) The volume and value of payment transactions envisaged to be carried out with the payment instruments on annual basis;

**[EMA: in the light of Recital 13 the volume and value may not be significant but this should be determined in the context of the payments services sector as a whole in the relevant MS (or as some sort of weighted average of all the MSs) not a number arbitrarily determined by the relevant NCA; as an exception to this approach (if a weighted average approach is not taken), there should be some allowance for MSs with less developed payment sectors so that a notified LNE payment instrument is not artificially significant due to structural limitations of the relevant MS]**

- c) The envisaged maximum amount to be credited to the payment instruments;

**[EMA: in the light of Recital 13 the maximum amount may not be significant but this should be determined in the context of the business model (e.g. the price of the goods/services bought) not a number arbitrarily determined by the relevant NCA]**

- d) The envisaged maximum number of users of the payment instrument;

**[EMA: in the light of Recital 13 there is an implication that maximum numbers of users should not be such that the volume and value are significant but this should be determined of the payments services sector as a whole in the relevant MS and in the context of the volume and value of the excluded payment transactions not a number arbitrarily determined by the relevant NCA]**

- e) The categories of customers being targeted;

**[EMA: this should not be an additional indicator – there is no legal basis for this in the recitals or articles of PSD2 unless the only distinction is between consumers and non-consumers, and the NCAs accept that in principle all**

**categories of customers can use LNE payment instruments subject to the nature of the relevant payment instrument]**

f) The risks which consumers may be exposed to; and

**[EMA: it should be made clear that limiting risk is in exercise managing risk in the context of the use of the excluded payment instrument and not the exclusion of all (or nearly all) risk; furthermore, when looking at risk mitigating factors / steps must also be taken into consideration]**

g) Whether the management of the network is centralised.

**[EMA: this should not be an additional indicator – there is no legal basis for this in the Recital 13 or Article 3(k)(i) of PSD2]**

2.3. Competent authorities should take into account that limited network of service providers can consist of physical stores only, online stores only or a combination of physical and online stores.

**[EMA: this is a helpful clarification]**

2.4. When carrying out the assessment set out in Guidelines 2.1 and 2.2, competent authorities should not make a distinction between the type of stores and should not require the type of goods and services offered in online stores to be dependent on the type of goods and services offered in physical stores or vice versa.

**[EMA: this is a helpful clarification]**

2.5. Competent authorities should not allow service providers to use the same payment instrument excluded under Article 3(k)(i) of PSD2 across different limited networks of service providers.

**[EMA: no comment]**

2.6. Competent authorities should take into account that either the issuer of the payment instrument or the providers of goods and services can delegate the conclusion of the contractual agreement referred to in Guideline 2.1 to a third party acting on their respective behalf.

**[EMA: this is a helpful clarification]**

2.7. Competent authorities should apply Guidelines 2.1 and 2.2. in a restrictive way that does not allow for the possibility a specific-purpose instrument to develop into a general-purpose instrument.

**[EMA: no comment]**

**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?**

**Guideline 3: Instruments used within the premises of the issuer under Article 3(k)(i) of PSD2**

3.1. Competent authorities should take into account that instruments allowing the holder to acquire goods or services only in the premises of the issuer can only be used in physical premises and cannot be used in online stores.

**[EMA: we disagree with the interpretation that “premises” clearly mean physical locations because quite simply the European legislator could have explicitly stated that; furthermore, in the light of the repeated lockdowns caused by the COVID-19 pandemic which forced a lot of economic activity online this would have a disproportionately negative effect on issuers forced online without any benefits to users. The ongoing migration of business online needs to be reflected in the interpretation associated with this provision.**

**Furthermore, this is contrary to Guideline 2.3 which provides that “Competent authorities should take into account that limited network of service providers can consist of physical stores only, online stores only or a combination of physical and online stores.” We encourage the EBA to broaden the scope of interpretation to address evolving business and consumer practice]**

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

**Guideline 4: Limited range of goods or services under Article 3(k)(ii) of PSD2**

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.

**[EMA: the reference to a ‘direct functional connection’ is unclear, and may have the effect of restricting the provisions of level I text. We would be grateful for clarification]**

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.

**[EMA: some examples clarifying the nature of leading and ancillary products or services would be welcome]**

4.3. Competent authorities should take into account that a functional connection can exist between physical and digital goods and/or services.

**[EMA: examples of what is referred to as a functional connection would be helpful]**

4.4. Complementary to the assessment under Guideline 4.1 and 4.2 and depending on the specific business model for provision of services and the size and specificity of the market within the respective Member State, competent authority should take into account the following additional indicators:

**[EMA: it should be made clear that complementary means optional in line with explanation made clear in the consultation document and NCAs must not apply all these additional indicators in all cases irrespective of the business model. Practical examples may help reduce NCA divergence and reduce uncertainty]**

- a) The volume and value of payment transactions envisaged to be carried out with the payment instruments on annual basis;

**[EMA: in the light of Recital 13 the volume and value may not be significant but this should be determined in the context of the payments services sector as a whole in the relevant MS (or as some sort of weighted average of all the MSs) not a number arbitrarily determined by the relevant NCA; as an exception to this approach (if a weighted average approach is not taken), there should be some allowance for MSs with less developed payment sectors so that a notified LNE payment instrument is not artificially significant due to structural deficiencies of the relevant MS]**

b) The envisaged maximum amount to be credited to the payment instruments;

**[EMA: in the light of Recital 13 the maximum amount may not be significant but this should be determined in the context of the business model (e.g. the price of the goods/services bought) not a number arbitrarily determined by the relevant NCA]**

c) The envisaged maximum number of users of the payment instrument;

**[EMA: in the light of Recital 13 there is an implication that maximum numbers of users should not be such that the volume and value are significant but this should be determined of the payments services sector as a whole in the relevant MS and in the context of the volume and value of the excluded payment transactions not a number arbitrarily determined by the relevant NCA]**

d) The categories of customers being targeted;

**[EMA: this should not be an additional indicator – there is no legal basis for this in the recitals or articles of PSD2 unless the only distinction is between consumers and non-consumers, and the NCAs accept that in principle all categories of customers can use LNE payment instruments subject to the nature of the relevant payment instrument]**

e) The risks which consumers may be exposed to; and

**[EMA: it should be made clear that limiting risk is in exercise managing risk in the context of the use of the excluded payment instrument and not the exclusion of all (or nearly all) risk; furthermore, when looking at risk mitigating factors / steps must also be taken into consideration]**

f) Whether the management of the network is centralised.

**[EMA: this should not be an additional indicator – there is no legal basis for this in the Recital 13 or Article 3(k)(ii) of PSD2]**

4.5. Competent authorities should apply Guidelines 4.1, 4.2 and 4.4 in a restrictive way that does not allow for the possibility a specific-purpose instrument to develop into a general-purpose instrument.

**[EMA: no comment]**

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

**Guideline 5: Provision of services under Article 3(k) of PSD2 from regulated entities**

5.1. Competent authorities should take into account that authorised payment service providers and electronic money issuers can provide services based on specific payment instruments that can be used only in a limited way, provided that the requirements under Article 3(k) of PSD2 and these Guidelines are met.

**[EMA: this is a helpful clarification]**

5.2. Competent authorities should ensure that in the cases where authorised payment service providers or electronic money issuers provide also services under Article 3(k) of PSD2, the regulated entities distinguish the regulated payment services/electronic money from the services excluded under Article 3(k) of PSD2 in a clear and easily recognisable way, including through the use of different brands.

**[EMA: it should be made clear that the reference to use of different branding is simply an example of distinguishing between regulated services and excluded services – alternative methods are equally acceptable – such as sub-branding and/or marking “regulated” or “excluded”. An umbrella brand should not be precluded from use provided the objectives continue to be met]**

5.3. Competent authorities should ensure that payment service providers and electronic money issuers inform the user of the specific payment instrument in a simple and clear way that the provided services are not regulated and supervised, and that users do not benefit from the protection for payment service users under PSD2.

**[EMA: we assume that the means of communication can vary, and could include user terms and conditions where appropriate]**

5.4. In the cases where during the assessment of the notification referred to in Article 37(2) of PSD2, the competent authority arrives at the view that

- a) the distinction between the regulated payment services and/or electronic money and the services excluded under Article 3(k) of PSD2 is not sufficiently clear or appropriate, including the transparency of the communication with the users of the specific instrument set out in Guidelines 5.2 and 5.3, and/or
- b) the services excluded under Article 3(k) of PSD2 are likely to impair either the financial soundness of the payment service provider/electronic money issuer, or the ability of the competent authority to monitor the compliance with all obligations laid down by PSD2 and EMD2,

the competent authority should take supervisory actions accordingly.

**[EMA: we presume that action would be preceded by dialogue and enquiry as to the rationale adopted by the issuer. It would be helpful if this can be clarified, as communication is likely to better inform subsequent action where this is required.]**

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

**Guideline 6: Notifications under Article 37(2) of PSD2**

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.

**[EMA: this is a helpful clarification, but we wonder if exceeding the limit is necessarily always a breach.]**

6.2. Competent authorities should take into account that the notification under Article 37(2) of PSD2 should contain information about the type of exclusion under which the activity is carried out and the description of the activity.

**[EMA: no comment]**

6.3. The description of the activity referred to in Guideline 6.2 should include information:

- a) on whether the goods and/or services that can be acquired are physical and/or digital;

**[EMA: no comment]**

- 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; and

**[EMA: no comment]**

- c) any other information allowing competent authorities to assess the notification against these Guidelines.

**[EMA: Some NCAs have sought to obtain an overly broad amount of information, sometimes comparable to an authorisation application for a regulated service. This is disproportionate, it requires a skill set that is not always present in firms seeking to obtain exemption and is contrary to the principle of exclusion. We request that the EBA provide explicit guidance that the criteria for exclusion do not extend to an examination of the operational infrastructure of the business, except as required to ensure that the limits of exclusion will be complied with.**

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

**Guideline 7: Limited network under Article 3(k)(iii) of PSD2**

7.1. Competent authorities should not require the instruments falling in the scope of Article 3(k)(iii) of PSD2 to fulfil the requirements of Guidelines 2 and 4 that apply to the limited network of service providers and the limited range of goods and services.

**[EMA: we would be grateful for elaboration of this provision]**

## List of EMA members as of October 2021

[AAVE LIMITED](#)  
[Account Technologies](#)  
[Airbnb Inc](#)  
[Airwallex \(UK\) Limited](#)  
[Allegro Group](#)  
[American Express](#)  
[ArcaPay Ltd](#)  
[Azimo Limited](#)  
[Bitpanda Payments GmbH](#)  
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