



EBA/CP/2021/28

15 July 2021

Consultation Paper

Draft Guidelines

on the limited network exclusion under PSD2

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1. Responding to this consultation

The EBA invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in 5.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page by 15 October 2021. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA's rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA's Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EU) 1725/2018 of the European Parliament and of the Council of 23 October 2018. Further information on data protection can be found under the Legal notice section of the EBA website.



2. Executive Summary

Article 3(k) of Directive (EU) 2015/2366 on payment services in the internal market (PSD2), introduced an exclusion from the scope of application of the Directive for services based on specific payment instruments that can be used only in a limited way. Article 37(2) of PSD2, in turn, set a threshold of EUR 1 million for the value of payment transactions, which if being exceeded, would require the providers of the activities excluded under Article 3(k)(i) or (ii) of PSD2 to notify the respective competent authority (CA). CAs, in turn, shall assess whether the activity qualifies as a limited network or whether it requires authorization as a payment or electronic money institution.

Payment instruments covered by the 'exclusion' under Article 3(k) of PSD2 (Limited network exclusion, or LNE) could include store cards, fuel cards, membership cards, public transport cards, parking ticketing, meal vouchers and others.

Since the publication date of PSD2, which was in November 2015, the EBA and the European Commission (EC) have received a number of queries on the interpretation and application of the LNE 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.

In line with its statutory objective of contributing to the convergence of supervisory practices and to ensure the safety of consumers, the EBA therefore 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. The Guidelines also cover 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, as well as the application of the notifications to CAs.

Next steps

The consultation period will run from 15.07.2021 to 15.10.2021. The final Guidelines will be published after the end of the consultation period.

3. Abbreviations

CA	Competent authority
CP	Consultation paper
EBA	European Banking Authority
EC	European Commission
EMD2	Electronic Money Directive 2009/110/EC
EU	European Union
LNE	Limited network exclusion
PSD2	Payment Services Directive (EU) 2015/2366
PSP	Payment service provider

4. Background and rationale

4.1 Background

1. Following the publication of PSD2 in November 2015, the EBA and the EC received a number of queries on the interpretation and application of the ‘exclusion’ under Article 3(k) of PSD2 (Limited network exclusion, or LNE), the related requirements articulated in Article 37 of PSD2, and the related recitals in PSD2.

2. More specifically, the queries have related to the following text in the Directive:

- Article 3(k) of Directive (EU) 2015/2366 on payment services in the internal market (PSD2), which specifies that the Directive does not apply to:

‘services based on specific payment instruments that can be used only in a limited way, that meet one of the following conditions:

(i) instruments allowing the holder to acquire goods or services only in the premises of the issuer or within a limited network of service providers under direct commercial agreement with a professional issuer;

(ii) instruments which can be used only to acquire a very limited range of goods or services;

(iii) instruments valid only in a single Member State provided at the request of an undertaking or a public sector entity and regulated by a national or regional public authority for specific social or tax purposes to acquire specific goods or services from suppliers having a commercial agreement with the issuer’

- Recitals 13 and 14 of PSD2, which provide further explanation of the purpose and intent behind the exclusion under Article 3(k) of PSD2 (Limited network exclusion, or LNE).

- Article 37(2), (4) and (5) of PSD2, which prescribe that:

“2. Member States shall require that service providers carrying out either of the activities referred to in points (i) and (ii) of point (k) of Article 3 or carrying out both activities, for which the total value of payment transactions executed over the preceding 12 months exceeds the amount of EUR 1 million, send a notification to competent authorities containing a description of the services offered, specifying under which exclusion referred to in point (k)(i) and (ii) of Article 3 the activity is considered to be carried out.

On the basis of that notification, the competent authority shall take a duly motivated decision on the basis of criteria referred to in point (k) of Article 3 where the activity does not qualify as a limited network, and inform the service provider accordingly.



4. Notwithstanding paragraph 1, competent authorities shall inform EBA of the services notified pursuant to paragraphs 2 and 3, stating under which exclusion the activity is carried out.

5. The description of the activity notified under paragraphs 2 and 3 of this Article shall be made publicly available in the registers provided for in Articles 14 and 15.”

3. In addition, Article 1(4) of the Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions (EMD2) provides that the Directive does not apply to monetary value stored on instruments excluded under Article 3(k) of PSD2.
4. Payment instruments covered by the limited network exclusion could include store cards, fuel cards, membership cards, public transport cards, parking ticketing, meal vouchers and others. While the use of these instruments is limited to the purchase of specific goods and services or within specific distribution channels, thus reducing the risk to customers, it should be noted that users carrying out transactions with these payment instrument do not benefit from the protection envisaged under PSD2.
5. The EBA assessed these queries and arrived at the view that the implementation and application of these requirements diverges significantly between Member States, thus impeding the single market for payment services in the EU and creating opportunities for regulatory arbitrage. In line with its statutory objective of contributing to the convergence of supervisory practices, the EBA therefore arrived at the view that it should issue Guidelines aimed at bringing about convergence on a number of issues, as explained in detail in the rationale section below. It should, however, be noted that legally the EBA will not be able to address with these Guidelines issues that are related to interpretation of definitions set out in PSD2 or provisions that the Directive may have left intentionally open.

4.2 Rationale

6. This section explains the reasoning behind the Guidelines being proposed in this Consultation (CP), including the options, policy choices and specific business cases that were considered in the process. In so doing, the structure of the rationale section mirrors the structure of the Guidelines. When this consultation paper uses technical terms that are defined in PSD2, the definitions of the PSD2 apply.

4.2.1 Specific payment instruments under Article 3(k) of PSD2

7. One of the specific issues raised by stakeholders was on the reference to a payment instrument in Article 3(k) of PSD2 and whether it should be understood the same way as regulated payment instruments under PSD2. The EBA is of the view that there should not be a distinction between the interpretation of the term regulated and excluded services. The EBA, therefore, proposes in Guideline 1.1 that competent authorities should take into account that the PSD2 definition of a ‘payment instrument’ applies also to the instruments under Article 3(k) of PSD2,



which means that there should not be any difference in the interpretation of the term between regulated and excluded services.

8. Furthermore, the EBA took into account that Article 3(k) of PSD2 distinguishes neither between different types of instruments (card-based or others), nor the format of the instrument (physical or digital). The EBA, therefore, proposes in Guideline 1.1 that service providers should be able to use all payment instruments under PSD2 for the purpose of the LNE.
9. With regard to the types of goods and services that can be purchased within an LNE, the EBA assessed various business models based on the provision of physical and/or digital goods and services that are currently present in markets across the EU. The EBA did not find any specific concerns related to the provision of either type (physical and digital) of goods or services and therefore proposes in Guideline 1.2 that both physical and digital goods and services can be purchased within networks benefiting from the LNE.
10. Another question raised by stakeholders was whether the specific way of how funds are transferred to the payment instrument would affect the decision on whether the instrument can be considered as falling under the scope of the LNE. To address this, the EBA reviewed the existing practices of funding instruments in the scope of the LNE and observed that a variety of methods exist in practice, such as those based on direct debits, credit transfers, placing cash, money remittance and card-based payment transactions through a point of sale terminal. The EBA therefore proposes in Guideline 1.3 that the way how funds are transferred to the payment instrument is irrelevant to the assessment on whether the instrument would fall under the LNE. The EBA further clarifies in the same Guideline that, in order for the service to be considered as falling under the scope of the LNE, it should be directly related to the purchase of goods and/or services, otherwise the activity would constitute a provision of payment services or electronic money and thus would require authorisation under PSD2 or EMD2 respectively.
11. Relatedly, the EBA considered whether the use of credit should be a factor to be taken into account by CAs in the decision whether an instrument would fall under the scope of the LNE. The EBA arrived at the view that it is not. The EBA acknowledges that credit may be provided in relation to transactions carried out with instruments excluded under the LNE, but it will be subject to relevant national legal requirements related to the provision of the credit.
12. The EBA also considered how to ensure the delineation between general-purpose instruments and instruments for specific use that fall under the LNE. The EBA assessed different practices in the markets across the EU, including those where market participants argued that specific provisions in the terms and conditions of the use of the excluded instruments should suffice to ensure limiting the use of the instrument. The EBA did not consider the latter practices in line with the intention of the exclusion and its narrow scope. The EBA therefore proposes in Guideline 1.4 that both technical and contractual restrictions in the use of the payment instrument should apply and that both of these restrictions should be proven to the respective competent authority. The EBA further provided in Guideline 1.5 a minimum set of technical



restrictions that should be taken into account by competent authorities for the various exclusions under Article 3(k) of PSD2.

13. Another topic considered by the EBA was on the possibility of accommodating more than one specific payment instrument under the LNE in a single card-based means of payment. The EBA viewed this practice in line with the PSD2 requirements and the currently available practices on the market and has specified this accordingly in Guideline 1.6. Said practice should not be understood as implying that a single payment instrument can fall within the scope of more than one LNE, which is a clarification that is explained in more detail in paragraphs 20 and 21 below and articulated in Guideline 1.11.
14. The EBA, however, was of the view that combining regulated and non-regulated payment instruments in a single card-based means of payment would make it difficult for the users of the instrument to delineate between the two and understand which instrument they will be using. This, in turn, may potentially lead to situations where users of the payment instrument carry out transactions having the impression that they benefit from the protection envisaged under PSD2 when they actually do not. The above is addressed in Guideline 1.7. The practices observed in some Member States where service providers allow part of a transaction to fall under the LNE and another part to be a regulated service will no longer be permitted, as proposed in Guideline 1.7 in particular.
15. Another topic considered by the EBA was whether Article 3(k) of PSD applies to the services provided based on specific instruments or to the service providers offering those services. The EBA arrived at the view that the application of the exclusion should apply to the services provided based on a specific payment instrument, which is in line with the wording of Article 3(k) of PSD2. The EBA has reflected this in the scope section of the Guidelines.
16. Relatedly, the EBA viewed that the provisions of PSD2 do not prevent a single service provider to offer more than one instrument falling within the scope of LNE, provided that the respective provisions of these Guidelines are met. The EBA has reflected this in Guideline 1.8.
17. Another topic considered by the EBA was on the redeemability of the monetary value stored on the payment instrument and whether competent authorities should take this into account in their assessment. The EBA arrived at the view that redeemability should not be a factor in the assessment because it is not a defining feature of the provision of the services under the scope of the LNE. Moreover, since these services are outside the scope of EMD2, the respective requirements for redeemability set out in the Directive would not apply. The EBA has addressed this in Guideline 1.9.
18. When it comes to the recurrent use of the payment instruments under the scope of the LNE, the EBA observed that there are different types of instruments offered on the market: instruments that can be credited with funds only once (at times for one-off use only within a certain deadline) and reloadable instruments. Given that the provisions of PSD2 do not impose



any restrictions, the EBA arrived at the view that both types of instruments should be allowed. The EBA has addressed this point in Guideline 1.10.

19. With regard to the physical location of the issuer of the specific payment instrument referred to in Article 3(k) of PSD2, the EBA did not consider that any geographical limitations should apply and has, therefore, specified in Guideline 1.12 that the issuer of the payment instrument can be established in a Member State different from that of the jurisdiction where services are being provided.
20. The EBA assessed various business models for the provision of excluded services and identified that at times some services based on specific instruments may qualify for more than one of the exclusions under Article 3(k) of PSD2. The EBA is of the view that these exclusions are mutually exclusive and cannot be applied together since this may lead to a situation where the scope of the exclusion(s) and the potential use of the respective instrument are broadened. This in line with the wording of Article 3(k) of PSD2, which refers to “services based on specific payment instruments that can be used only in a limited way, that meet one of the following conditions”.
21. It should therefore be for the service provider offering the excluded service to decide, based on its business model, which exclusion under Article 3(k) of PSD2 is the leading one and, where applicable, to notify the competent authority under Article 37(2) of PSD2, provided that the thresholds set out therein are exceeded. The EBA has addressed this point in Guideline 1.11 where it is specified that exclusions under Article 3(k) of PSD2 cannot be combined at payment instrument level. The same principle that more than one exclusion cannot be applied to the same instrument also applies more broadly to the other exclusions under Article 3 of PSD2, as specified in the same Guideline.

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

4.2.2 Limited network of service providers under Article 3(k)(i) of PSD2

22. One of the most controversial issues raised with the EBA has been on how to qualify a ‘network of service providers’ as being limited given the absence of such a definition in PSD2. The EBA considered that the most effective way to provide clarity on the application of the exclusion on the limited network of service providers under Article 3(k)(i) of PSD2 is to set out criteria allowing CAs to determine which networks should be considered to be limited. In order to do so, the EBA assessed the pros and cons of a long list of potential criteria, including:
 - a) the geographical area;
 - b) the use of the instrument in the physical premises of the issuer/merchant and online;
 - c) the specific number of service providers;



- d) the list with type of providers of goods and services, with a possibility to introduce a taxonomy of typical networks with categories of service providers;
- e) specific restrictions on the use of the instruments within a LNE to limit the growth of the networks, such as caps on the number of providers or goods and services offered;
- f) whether a contractual agreement exists between the issuer and the merchants for the acceptance of the excluded instrument;
- g) whether a common brand is used that characterises the limited network;
- h) whether service providers share the same market profile and business concept,
- i) whether service providers share the same category of users;
- j) whether the network has a centralised management;
- k) the volume and value of transactions;
- l) the amounts typically loaded on the instruments; and
- m) the risks arising for users (in particular consumers) of the payment instrument.

Chosen criteria for determining a limited network of service providers

- 23. The EBA arrived at the view that the criteria under a), e), f) and g) are suitable to be used as defining criteria for network or service providers that can be considered limited under PSD2.
- 24. On the geographical area in a) above, the EBA, after discussing with the European Commission, understands that there is no geographical limitation to the provision of these services, even though Article 3(k)(i) of PSD2 allows the CA's assessment to take into account a possible geographical limitation of the given instrument. The EBA, therefore, considered it useful to include the geographical area among the criteria for determining a limited network of service providers. The EBA considers this a flexible approach as it leaves it to the provider of an excluded service to decide on the specific geographical area for provision of goods and services and then to indicate and justify it in the description of the activity provided with the notification under Article 37(2) of PSD2.
- 25. When considering different examples of existing limited networks, the EBA arrived at the view that the following use cases may potentially be considered as limited networks, provided that they meet the requirements of the Guidelines:
 - A single shopping center containing different stores;
 - Different providers belonging to the same group;
 - Different providers working under the same franchise system;
 - A specific region with local producers of goods and services; and
 - Stores within a town, which are registered in the local town chamber of commerce.



26. On the specific restrictions on continuously growing networks under criterion e) in the long list above, the EBA arrived at the view that it will not be possible to introduce in the Guidelines a specific cap of the growth of the network because it will be challenging to come up with a specific threshold that would be well-balanced between the different Member States and throughout the various business cases. However, the EBA considered possible for service providers to set out and communicate to the competent authorities the envisaged maximum number of providers of goods and service operating within the limited network. In case the limited network expands over time beyond the envisaged number, a new notification with updated information would need to be submitted.
27. The EBA discarded the possibility to request a detailed business plan to be included in the notification under Article 37(2) of PSD2 since it would have caused excessive administrative burden for service providers to develop and for competent authorities to assess and check compliance with it after submission.
28. On the presence of a contractual agreement between the professional issuer and the merchant under criterion f) in the long list above, the EBA took into account that the criterion is in line with the provision articulated in Article 3(k)(i) of PSD2 and should therefore be used as a criterion. The EBA is, however, of the view that, in order for the criterion to be met, the direct contractual agreement will have to be concluded between the professional issuer and each individual merchant within the limited network. This is without prejudice to the possibility of delegating the conclusion of the contract to a third party acting on behalf of either the professional issuer or the individual merchants, as specified in Guideline 2.6 and explained in paragraph 40 below.
29. On the use of a common brand under criterion g) in the long list above, the EBA arrived at the view that in order to ensure customer (consumer) protection, it should be clear to the customer that the service providers operate under a certain brand, preferably by having some visual manifestation. It should be noted, however, that in the case of a group comprising several retail chains where each chain uses a separate brand, the use of the instrument of one of the retail chains in the other retail chains would not fall under the scope of the LNE as it would entail using the same instrument to make payment transactions to acquire goods and services within more than one limited network. It should also be highlighted that the Guidelines refer to “brand” and not to “payment brand”, which has a different and specific meaning under PSD2.
30. All of the above has been reflected in Guideline 2.1.

Discarded options for criteria for determining a limited network of service providers

31. The EBA also assessed the merits of criteria b), c), d), h), i), j), k), l) and m) in the long list above, but arrived at the view that they cannot be used as defining criteria, for the following reasons.
32. On the delineation between the use of the instrument in the physical premises of the issuer/merchant and online (item b), the EBA took into account that some of the limited



networks may comprise or contain online stores and therefore arrived at the view that it is not suitable as a defining criterion.

33. The EBA also discarded the other options as potential defining criteria because they are too specific and, therefore, would not apply to all existing different business models. The potential criteria 'c', 'd', 'i' and 'j', in particular, would be difficult to introduce in a well-balanced manner that would apply equally to the different types and sizes of markets across all Member States.
34. However, the EBA considered that some of the discarded potential criteria can be complementary optional indicators to be taken into account by competent authorities in their assessment since they are related to specific business models (contrary to the defining criteria, which apply to all business models). These are:
 - The volume and value of payment transactions envisaged to be carried out with the payment instruments on annual basis;
 - The envisaged maximum amount to be credited on the payment instruments;
 - The envisaged maximum number of users of the payment instrument;
 - The categories of customers being targeted;
 - The risks which consumers may be exposed to; and
 - Whether the management of the network is centralised.

35. All of the above in this sub-section has been reflected in Guideline 2.2.

Miscellaneous aspects

36. With regard to the types of stores comprising a LNE where goods and services can be purchased within an LNE, the EBA, based on the specific use cases assessed, is proposing to specify in Guideline 2.3 that limited network of service providers can consist of physical stores only, online stores only, or a combination of physical and online stores. To ensure a level-playing field, Guideline 2.4, in turn, specifies that the same criteria should apply to the different types of stores and that there should not be any dependency between physical and online stores on the type of goods and services offered.
37. In line with Recital 13 of PSD2, which clarifies that *'it should not be possible to use the same instrument to make payment transactions to acquire goods and services within more than one limited network'*, the EBA proposes to specify in Guideline 2.5 that payment instruments under the LNE can only be used within a single limited network.
38. The EBA also specifies in Guideline 2.6 how the contractual agreement between the issuer of the payment instrument and each provider of goods and services operating within the limited



network can be concluded, including cases where the conclusion of the contract is delegated to a third party.

39. Finally, while acknowledging that by default all exclusions under PSD2 should be applied in a restrictive manner, the EBA proposes to specify in Guideline 2.7 that competent authorities should apply the criteria and indicators under Guidelines 2.1 and 2.2 in a restrictive way, i.e. that does not allow for the possibility of a specific-purpose instrument to develop into a general-purpose instrument. This is to avoid potential interpretations that the restrictive application of the LNE will be fulfilled by any information provided under these criteria and indicators. The same approach was applied in Guideline 4.5 in relation to the limited range of goods or services exclusion, as covered in chapter 3.2.4 below.

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

4.2.3 Instruments used within the premises of the issuer under Article 3(k)(i) of PSD2

40. The EBA observed that there are market participants that argue that the exclusion under Article 3(k)(i) of PSD2 on the instruments used within the premises of the issuer could apply to purchases made online. However, the EBA is of the view that the reference to “premises” clearly sets out a geographical restriction to physical location(s). This means that payment instruments benefitting from this particular exclusion can only be used for purchases within physical locations and cannot be used for purchases in online stores. Therefore, the EBA introduced Guideline 3 in order to clarify this point.
41. The EBA would also like to highlight that the reference to “premises” should be understood as a reference to one or more physical locations where the holder of the payment instrument can acquire goods and/or services, as opposed to a single location.
42. While instruments that can be used for purchases within the physical premises of the issuer under Article 3(k)(i) of PSD2 cannot be used for online purchases, service providers that intend to offer goods and/or services online are not prevented from benefitting instead from a different exclusion under Article 3(k) of PSD2, such as the limited range of goods and services under Article 3(k)(ii) of PSD2, provided that the provisions of Article 3(k) of PSD2 and these Guidelines are being met.

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?

4.2.4 Limited range of goods or services under Article 3(k)(ii) of PSD2



43. Another area where clarification has been sought by market participants is on the limited range of goods or services set out under Article 3(k)(ii) of PSD2, in particular on what constitutes 'functionally connected' goods and services as referred to in Recital 13 of PSD2. When assessing this question, the EBA, based on current practices across the Member States, considered three potential approaches for identifying what should be considered as 'very limited range of goods and services'. The first approach was to focus on the identification of a relationship between a leading product/service and connected goods and/or services. The second approach was to introduce a list of functionally connected goods and services and to introduce them in broad categories. The third approach was to set a threshold of the number of goods and services that is considered to be limited.
44. When it comes to the second approach, the EBA arrived at the view that it would be very challenging to set different exhaustive categories with various goods and services that would be appropriate for all Member States and all business models, present and future. The EBA, therefore, discarded this option.
45. On the third approach, the EBA, based on approaches taken by some competent authorities, considered that if a threshold for the number of goods and/or services are to be introduced, it should, based on existing approaches taken by CAs, be set to a number between 3 and 10 so that the range could be considered limited. However, the EBA arrived at the view that setting a specific number that could cover all different business models and to be proportionate for all Member States would be difficult and for some business models may be too restrictive. The EBA, therefore, discarded this approach as well.
46. When assessing the first approach on focusing the assessment on the functional connection justified by a leading product or service, the EBA arrived at the view that this would be the most suitable approach because it would:
- restrict the use of the instrument;
 - limit potential risks to consumers;
 - limit potential disadvantages to regulated firms;
 - accommodate different business models;
 - be more specific on the relationship between the various goods and services;
 - provide flexibility to service providers to set-out the range of goods and services; and
 - facilitate the assessment by competent authorities.
47. The EBA reflected the above in Guidelines 4.1 and 4.2 and also specified in Guideline 4.3 that a functional connection can exist between physical and digital goods and/or services.



48. To be consistent with the approach taken in the assessment of limited network of service providers, the EBA also introduced in Guideline 4.4 complementary indicators that can be taken into account by competent authorities when assessing if the use of a specific payment instrument can be considered as limited for acquiring a very limited range of goods or services under Article 3(k)(ii) of PSD2
49. Finally, it should be noted that the requirements of Guideline 4, should be applied by competent authorities in a restrictive way that does not allow for the possibility a specific-purpose instrument to develop into a general-purpose instrument and thus falling outside the scope of the LNE.

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

4.2.5 Provision of services under Article 3(k) of PSD2 by regulated entities

50. The EBA considered the possibility for regulated payment service providers and electronic money issuers, too, to provide services under the LNE. The EBA arrived at the view that such regulated entities should be able to provide services under the LNE for the following reasons:
- There are no legal requirements in PSD2 that restrict it;
 - Article 18(1)(c) of PSD2 (applicable to payment institutions and electronic money institutions, or PIs and EMIs) refers to other business activities that can be provided by PIs/EMIs that are not payment services, which would cover services under the LNE;
 - The excluded services provided within a limited network are similar to the activity for which these regulated entities have been authorised; and
 - If regulated entities are not allowed to provide services under the LNE, it will exacerbate any potential disadvantage they may face compared to non-regulated entities.
51. The EBA reflected this in the Scope section of the Guidelines and in Guideline 5.1. However, potential concerns exist that the provision of services under the LNE together with the provision of regulated services may not be transparent
- for supervisors, thus giving rise to potential concerns on circumvention of the requirements of PSD2, and
 - for users of the payment instrument, in particular consumers, who may not be aware that they do not benefit from the protection PSD2 provides to regulated service,



52. In order to address these concerns, the EBA introduced specific requirements in Guideline 5 to ensure a proper delineation between regulated and non-regulated services. In particular, Guideline 5.2 specifies that the delineation between regulated and non-regulated services should be carried out in an easily recognisable way, including through the use of different brands. To address the risks for users of the payment instrument, Guideline 5.3 further specifies that users of the excluded instruments provided by regulated entities, should be informed that said instruments are not regulated and supervised and that they do not benefit from the protection of PSD2.
53. Finally, the EBA also specified in Guideline 5.4 that competent authorities should take supervisory actions, including requesting the establishment of a separate legal entity for the provision of the excluded services, if the delineation between the regulated and non-regulated services is not clear or not in line with the other requirements of these Guidelines.

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

4.2.6 Notifications under Article 37(2) of PSD2

54. A number of market participants have raised concerns about the interpretation of Article 37(2) of PSD2. They queried whether each of services under Article 3(k)(i) and (ii) of PSD2 can be provided in different Member States, how the thresholds set out in Article 37(2) of PSD2 should be calculated, which competent authority should be notified, the level of detail of the description of the activity to be notified to competent authorities, the frequency of the submission of notifications and others.
55. When it comes to the cross-border provision of services under Article 3(k)(i) and (ii) of PSD2, the EBA, after discussing with the European Commission, understands that there is no geographical limitation to the provision of these services, even though Article 3(k)(i) of PSD2 allows for an assessment whereby the competent authority takes into account a possible geographical limitation of the given instrument. Therefore, there are no regulatory obstacles to prohibit the cross-border provision of services based on an instrument excluded under Article 3(k)(i) or (ii) of PSD2. However, since these are services excluded from the application of PSD2, the service providers cannot benefit from passporting rights and subsequently cannot be passported in another Member States based on an assessment carried out by the national competent authority of the 'home' Member State (where the provider is carries out its activity).
56. As regards the question whether the thresholds under Article 37(2) of PSD2 should be calculated at Member State level or at an aggregated EU level, taking into account that service providers cannot benefit from passporting rights, the EBA arrived at the view that the thresholds should be calculated at Member State level.



57. In relation to the above, 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. The EBA has specified this in Guideline 6.1.
58. With regard to the information to be contained in the notification under Article 37(2) of PSD2, the EBA assessed what information would be needed for the purpose of carrying out the assessment on whether the activity would qualify as a limited network or not. Said information should, *inter alia*, include the type of exclusion under which the activity is carried out, the type of goods and/or services being offered (whether they are physical and/or digital), the Member States where excluded services are being provided and all other information relevant for the assessment under these Guidelines. The EBA has specified this in Guidelines 6.2 and 6.3.
59. The EBA considered whether the information about excluded services provided on a cross-border basis should be exchanged between competent authorities in order to ensure a level-playing field across the EU. The EBA, however, arrived at the view that such a process would not be desirable since it will introduce an administrative burden for competent authorities and delay the assessment of the notifications under Article 37(2) of PSD2.
60. The EBA, however, considers that it would be helpful for competent authorities to be aware about the provision of excluded services by the same service provider in other Member States. The EBA has, therefore, decided to request from competent authorities to include this information in the description of the activity that should be covered in the national and EBA register as specified under Article 37(5) of PSD2. This should be reflected in the respective fields that already exist in both registers.
61. When it comes to the calculation of the thresholds under Article 37(2) of PSD2, EBA is of the view that the calculation should be carried out at the level of each service provider. This means that the thresholds should be calculated based on the transactions carried out by all instruments that benefit from the exclusion under Article 3(k)(i) and (ii) of PSD2 that are offered by the same service provider. The EBA viewed this approach in line with the requirement of Article 37(2) of PSD2, which refers to payment service providers carrying out either or both of the services excluded under Article 3(k)(i) and (ii) of PSD2.
62. Such an approach would allow to capture payment instruments that may fall under the scope of PSD2 even though the transactions carried out with them individually do not necessarily exceed the thresholds set out in Article 37(2) of PSD2. This would be particularly relevant if a single service provider, with the intention to circumvent the requirements of PSD2, issues a large number of payment instruments not breaching the thresholds but at the same time generating a very high amount of transactions. The EBA has reflected this in Guidelines 6.7 and 6.8, with the latter focusing on the inclusion of the service provider in the national register under Article 14 of PSD2 and the central register of the EBA under Article 15 of PSD2.



63. With regard to the frequency of submission of notification, the EBA considered two options – one-off submission and annual resubmission. The EBA discarded the latter option since it would pose significant administrative burden to service providers benefitting from an exclusion and competent authorities. The EBA, subsequently, chose the approach with one-off submission of information.
64. However, to address concerns that the model of provision of services may change and that the business under the scope of the LNE may grow significantly over time, the EBA introduced an expectation that, in the cases where the information provided with the notification changes substantially, the service provider should update it and submit it to the competent authority with a new notification. This has been reflected in Guidelines 6.4. In line with the requirements of Articles 14, 15 and 37 of PSD2, competent authorities should update the description of the activity on the national and EBA registers accordingly.
65. Furthermore, to avoid the situation where the service provider does not proactively submit the notification, which would not allow the respective competent authority to carry out an assessment of the evolution of the business of said service provider, the EBA specified in Guideline 6.6 that the competent authority can request from service providers to submit another notification with updated information.
66. To provide more clarity to the market participants, the EBA also specified in Guideline 6.5 what can be considered as a substantial change of the information.
67. The EBA also viewed that, in the cases where the information notified to the competent authority under Article 37(2) of PSD2 is incomplete, vague or ambiguous, there should be a mechanism allowing competent authorities to request additional clarification on said information. This will allow the respective competent authority to assess whether the activity falls under the scope of Article 3(k) of PSD2 or whether it will require authorisation under PSD2 or EMD2. The EBA, therefore, introduced in Guideline 6.9 said mechanism specifying that competent authority should request from the service provider additional information or clarification to the information already provided in order to take the decision.

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

4.2.7 Limited network under Article 3(k)(iii) of PSD2

68. In line with paragraph 23 above and Guideline 1.11, the EBA is of the view that the exclusions under Article 3(k) of PSD2 are standalone exclusions that should not be combined or mixed in. This means that the exclusion under Article 3(k)(iii) of PSD2, which is based on specific national legislation or requirements of national tax or social administrations, should not be treated as dependent on any of the other LNEs. The EBA therefore proposes to specify in Guideline 7 that the requirements and conditions applicable to the exclusions under Article



3(k)(i) and (ii) of PSD2 set out in Guidelines 2 and 4 do not apply to the exclusion under Guideline 3(k)(iii) of PSD2.

69. The EBA did not find merit in providing more clarity on the exclusion under Article 3(k)(iii) of PSD2, since the specific aspects on the use of the instrument, including its funding, are specified in the respective national social or tax law.

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



5. Guidelines



EBA/GL/20XX/XX

DD Month YYYY

Draft Guidelines

on the limited network exclusion under PSD2

1. Compliance and reporting obligations

Status of these guidelines

1. This document contains guidelines issued pursuant to Article 16 of Regulation (EU) No 1093/2010¹. In accordance with Article 16(3) of Regulation (EU) No 1093/2010, competent authorities and financial institutions must make every effort to comply with the guidelines.
2. Guidelines set the EBA view of appropriate supervisory practices within the European System of Financial Supervision or of how Union law should be applied in a particular area. Competent authorities as defined in Article 4(2) of Regulation (EU) No 1093/2010 to whom guidelines apply should comply by incorporating them into their practices as appropriate (e.g. by amending their legal framework or their supervisory processes), including where guidelines are directed primarily at institutions.

Reporting requirements

3. According to Article 16(3) of Regulation (EU) No 1093/2010, competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or otherwise with reasons for non-compliance, by ([dd.mm.yyyy]). In the absence of any notification by this deadline, competent authorities will be considered by the EBA to be non-compliant. Notifications should be sent by submitting the form available on the EBA website with the reference 'EBA/GL/202x/xx'. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities. Any change in the status of compliance must also be reported to EBA.
4. Notifications will be published on the EBA website, in line with Article 16(3).

¹ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, (OJ L 331, 15.12.2010, p.12).



2. Subject matter, scope and definitions

Subject matter

5. These guidelines specify the application of the exclusion under Article 3(k) of the Directive (EU) 2015/2366 on payment services in the internal market (PSD2)².
6. In addition, these guidelines specify details on the notification process under Article 37(2) of PSD2 and on the description of the activity made publicly available under Article 37(5) of PSD2.

Scope of application

7. These guidelines apply in relation to the services based on specific payment instruments that can be used only in a limited way as specified under Article 3(k) of Directive (EU) 2015/2366 that are excluded from the scope of application of PSD2. In particular, the guidelines set out criteria and factors to be taken into account by competent authorities in the assessment on whether the activities should fall under the Article 3(k) exclusions.
8. These guidelines also apply to the notification process under Article 37(2) of PSD2, including on the calculation of the thresholds and on the information to be contained in the notification submitted to competent authorities by service providers.
9. In addition, these guidelines apply to the information to be made publicly available on the national register and the central register of EBA in accordance with Article 37 (5) of PSD2.
10. Finally, parts of these guidelines apply to services under Article 3(k) of PSD2 that are provided by regulated payment service providers and electronic money issuers.

Addressees

11. These guidelines are addressed to competent authorities as defined in point (2)(vi) of Article 4 of Regulation (EU) No 1093/2010.

² It is further noted that, in accordance with Article 1(4) of the Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions (EMD2) provides, that the Directive does not apply to monetary value stored on instruments excluded under Article 3(k) of PSD2.

3. Implementation

Date of application

12. These guidelines apply from 01 October 2022 (3 months after the envisaged publication date of the final guidelines).

Transitional provisions

13. These guidelines are subject to the following transitional arrangements: competent authorities should request from service providers benefitting from the exclusion under Article 3(k)(i) or (ii) of PSD2 and who have submitted a notification under Article 37(2) of PSD2, to resubmit the notification taking into account the provisions of these Guidelines.

4. Guidelines on the limited network exclusion under Directive (EU) 2015/2366

Guideline 1: Specific payment instruments under Article 3(k) of PSD2

- 1.1. 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.
- 1.2. Competent authorities should take into account that the specific payment instruments can be used for acquiring both physical and digital goods and services.
- 1.3. 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.
- 1.4. 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.
- 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.



- 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.
- 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.
- 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.
- 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.
- 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.
- 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.
- 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.

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:
 - 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;
 - 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;



- c) The envisaged specific geographical area for provision of goods and services before submitting the notification under Article 37(2) of PSD2; and
 - 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.
- 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:
- a) The size of the geographical area for provision of goods and services;
 - b) The volume and value of payment transactions envisaged to be carried out with the payment instruments on annual basis;
 - c) The envisaged maximum amount to be credited to the payment instruments;
 - d) The envisaged maximum number of users of the payment instrument;
 - e) The categories of customers being targeted;
 - f) The risks which consumers may be exposed to; and
 - g) Whether the management of the network is centralised.
- 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.
- 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.
- 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.
- 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.



- 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.

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.

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.
- 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.
- 4.3. Competent authorities should take into account that a functional connection can exist between physical and digital goods and/or services.
- 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:
- a) The volume and value of payment transactions envisaged to be carried out with the payment instruments on annual basis;
 - b) The envisaged maximum amount to be credited to the payment instruments;
 - c) The envisaged maximum number of users of the payment instrument;
 - d) The categories of customers being targeted;
 - e) The risks which consumers may be exposed to; and
 - f) Whether the management of the network is centralised.



- 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.

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.
- 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.
- 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.
- 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.

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.



- 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.
- 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;
 - 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
 - c) any other information allowing competent authorities to assess the notification against these Guidelines.
- 6.4. Competent authorities should take into account that the notification under Article 37(2) of PSD2 is to be submitted by the service provider only once. An additional new notification should be submitted to the competent authority when any information related to the same specific payment instrument(s) as provided with the initial notification has changed substantially or another specific payment instrument is envisaged to be provided under the Article 3(k)(i) or (ii) of PSD2.
- 6.5. Competent authorities should take into account that the substantial changes referred to in Guideline 6.4 can include but are not limited to the situations where:
- a) the provision of the excluded services has terminated;
 - b) the service provider envisages to increase the number of providers of goods and/or services under Guideline 2.1(b) is intended to be increased;
 - c) the envisaged specific geographical area for the provision of goods and/or services under Guideline 2.1 (c) is intended to be changed;
 - d) the service provider intends offering services under Article 3(k)(i) or (ii) of PSD2 based on an instrument not covered in the original notification; or
 - e) the previously notified leading good or service or the ancillary goods and/or services referred to in Guidelines 4.2 are intended to be changed.
- 6.6. In any case, competent authorities can request from service providers to submit a new notification with updated information if they consider this necessary to ensure that the information provided with the initial notification has changed.
- 6.7. Competent authorities should take into account that the calculation of the thresholds under Article 37(2) of PSD2 is to be carried out at the level of each service provider. Where a single



service provider provides services based on more than one specific payment instrument under Article 3(k) of PSD2, the calculation of the thresholds should be carried out by combining all payment transactions executed in the respective Member State with all specific payment instruments offered by the same service provider.

- 6.8. Competent authorities should include the service provider in their national register under Article 14 of PSD2 and the central register of the EBA under Article 15 of PSD2 only once and reflect the description of the activities carried out with each specific payment instrument under Article 3(k) of PSD2. Competent authorities should also include in the description of activities in the registers, information about other Member States where the same service provider provides service under Article 3(k) of PSD2.
- 6.9. Competent authorities should ensure that the information provided by a service provider with the notification under Article 37(2) of PSD2 allows them to assess whether the activity falls under the scope of Article 3(k) of PSD2 or whether it will require authorisation under PSD2 or EMD2. In case the information provided with the notification is incomplete, vague or ambiguous, the competent authority should request from the service provider additional information or clarification to the information already provided in order to take the decision.

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.

5. Accompanying documents

5.1 Draft cost-benefit analysis / impact assessment

This document contains guidelines issued pursuant to Article 16 of Regulation (EU) No 1093/2010 (EBA regulation). Article 16(2) of the EBA regulation provides that the EBA should carry out an analysis of ‘the potential related costs and benefits’ of any guidelines it develops. This analysis should provide an overview of the findings regarding the problem to be dealt with, the solutions proposed and the potential impact of these options. The following section provides the impact assessment for the Consultation Paper on the draft guidelines on limited network exclusion.

A. Problem identification

The revised Payment Services Directive (PSD2) aims to address shortcomings, which were identified on the regulation of limited networks (Article 3(k) of the Payment Services Directive). In order to address those shortcomings, the European Commission (EC) introduced the provision that networks shall notify their activities to competent authorities (CAs) when their activities reach a certain value to assess whether or not the network shall apply for a license as a payment institution (Article 37(2) of the PSD2). In addition, the revised directive provided more clarity in relation to limited network exclusions (recital 13 and 14).

However, following the application of the PSD2 and the feedback received by the EBA and the EC in relation to the notification and application of the limited network exclusion, it was concluded that the implementation and application of these requirements still diverge significantly between Member States. The different transposition and application across Member States lead to regulatory arbitrage and legal uncertainty and may ultimately result in impaired consumer protection and competitive distortions.

B. Policy objectives

In general, the draft guidelines introduced in this consultation paper contribute to the EBA’s objective of enhancing the security of payment services, protecting consumers and fostering competition in the payments market. To achieve these objectives, the proposed guidelines aim to enhance the consistent application and implementation of the revised PSD2 and thereby contribute to EBA’s regulatory and supervisory convergence work in the area of retail payment services.³

At the technical level, the proposed guidelines identify the topics for which market participants showed the highest uncertainty about the application and implementation of the requirements under Article 3(k) and Article 37(2) of the PSD2 - with the aim to provide more clarity on those

³ EBA (2020): *EBA Annual Report 2020*.



topics. The proposed guidelines therefore provide criteria, indicators and specifications relating to payment instruments; networks of service providers; the approach to assess 'functionally connected' goods and services and LNE of regulated payment service providers. In addition, the proposed guidelines specify details on the notification process under Article 37(2) of PSD2.

The provided clarifications aim to limit the risks that payment activities covered by the LNE may comprise significant payment volumes and values and thereby help to contain the risks those transactions may pose for consumers. Further, the proposed guidelines help to ensure the convergence of supervisory practices and to address in a more efficient way the consumer protection needed in the context of payments.

C. Baseline scenario

While additional clarifications on LNE were introduced in the revised PSD2, the current EU legislative framework leaves still too much room for interpretation. Without further specification on the application and implementation of the requirements under Article 3(k) and Article 37(2) of the PSD2, the divergence between Member States will persist. Further, the potential disadvantage of regulated market actors in comparison to service providers applying the LNE may remain.

On the notification process under Article 37(2), the feedback received from market participants shows that without clarity on the threshold to provide notification, the objectives of this process may not be achieved.

D. Options considered, cost-benefit analysis and preferred option

Specific payment instruments under Article 3(k) of PSD2

The proposed draft guidelines aim to address various issues related to payment instruments. When considering different options, the EBA balances the trade-off between supporting the objectives with clear specifications and being too restrictive in the proposed interpretations. One of the discussed topics, where such a trade-off was considered, relate to the possibility to accommodate more than one specific payment instrument in a single card-based means of payment:

Option 1.1: A single card-based means of payment cannot accommodate more than one payment instrument within the scope of Article 3(k) of PSD2.

Option 1.2: A single card-based means of payment can accommodate more than one payment instrument. The different payment instruments can be within the scope of the PSD2 and within the scope of Article 3(k) of PSD2.

Option 1.3: A single card-based means of payment can accommodate more than one payment instrument. The different payment instruments cannot be within the scope of the PSD2 and within the scope of Article 3(k) of PSD2.



Option 1.1 provides the most restrictive specification on payment instruments, stipulating that a single-based means of payment may only accommodate one payment instrument. Such an approach would provide a very clear and simple specification, however, it inherits the disadvantage that a large amount of single card-based means of payment will be excluded from the potential application of the LNE. This might create a disadvantage for certain service providers and would go against the objective to provide a harmonised application of Article 3(k) of PSD2.

Option 1.2 and option 1.3, on the other hand, allow single card-based means of payments to include more than one payment instrument. Under option 1.2, 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.

Option 1.3 is the preferred option as it allows a broad-range of single card-based means of payments to be considered for the LNE, while at the same time ensuring its sound application.

Limited range of goods or services under Article 3(k)(ii) of PSD2

Recital 13 of the PSD2 provides clarification that the the limited range of goods or services under Article 3(k)(ii) of PSD2 should be ‘functionally connected’, which in turn raised question on the definition of ‘functionally connected’ goods or services. The EBA considered different potential approaches NCAs may apply for identifying ‘functionally connected goods and services’:

Option 2.1: Focus on a functional connection between various goods and services within a sector.

Option 2.2: Focus on a functional connection between a leading product and/or service and connected products and/or services.

Option 2.3: Focus on a functional connection between goods and services based on a case-by-case assessment.

Option 2.4: Introduce a list of broad categories of functionally connected goods and services.

Option 2.5: Set a threshold of the number of goods and services that is considered to be limited.

Option 2.1 to Option 2.3 focus on the identification of the relationship between product and services, while Option 2.4 and Option 2.5 provide pre-defined categories and a numerical threshold to identify the ‘limited range of functionally connected goods and services’. The later options have the advantage that they offer CAs with a simple approach, which facilitates the application for them and, in turn, would reduce their operational burden. However, without a guarantee that these approaches cover all services irrespective of the business model applied and the specificities of the



national market (including structure and size), Option 2.4 and Option 2.5 risk an uneven treatment of services and risk narrowing down significantly the Article 3(k) exclusion beyond what was intended under PSD2. It would have also been difficult to set up in a methodologically robust way thresholds that fit all business models (Option 2.4) or mutually exclusive categories (Option 2.5). The potential costs therefore outweigh the benefits of these options.

Option 2.1 to Option 2.3 allow CAs to accommodate different business models and national specification. Option 2.3 has the advantage that it gives CAs and service providers the highest flexibility to identify the limited range of goods and services. However, this approach is expected to be the most time and resource consuming, as each individual case needs to be evaluated individually. In addition, Option 2.3 may leave room for a broad use of the instrument and subsequently may increase the risk for customers stemming from such instrument.

Compared to Option 2.3, Option 2.1 further restricts the approach to limit the functional connection to goods or services within a sector, however, still leaves room for a broad use of instruments. Moreover, these options are closely aligned with Article 3(k) of PSD2 and Recitals 13 and 14. Option 2.2 provides the most prescriptive approach and thereby is to provide the highest protection for consumer, to accommodate different business models, while facilitating the assessment for CAs and not introducing additional burden to service providers. Option 2.2 is the preferred option.

Provision of services under Article 3(k) of PSD2 from regulated entities

The revised PSD2 does not specify the possibility for regulated payment service providers and electronic money issuers to provide services under the LNE. The EBA therefore considers following option for the proposed guidelines:

Option 3.1: Regulated entities should be able to provide services under the LNE.

Option 3.2: Regulated entities should not be able to provide services under the LNE.

Under option 3.2, regulated entities do not enjoy the same benefits as unregulated entities creating a potential situation of regulatory arbitrage. On the other hand, the provision of both - services which are supervised under PSD2 and services, which are not supervised under PSD2 - by the same service provider may decrease the transparency for consumers, which protection applies to the instrument they use, and for supervisors, giving rise to potential circumventions of the requirements of PSD2. Under Option 3.2 the EBA also considered that the objective of the exclusion was to allow provision of services without a license and not incentivising the provision of non-regulated services by regulated firms. In addition, such an approach may not be allowed under current national practices.

Option 3.1 creates a level playing field for regulated and non-regulated entities and is more closely aligned with the provisions of PSD2, which do not explicitly forbid regulated entities to provide excluded services. To the contrary, Article 18(1)(c) of PSD2 explicitly envisages that regulated payment institutions can engage in business activities other than the provision of payment services.



However, option 3.1 may create uncertainty for consumer about the protection applying to their transaction. Such risks are mitigated by introducing expectations in the Guidelines that CAs and consumers should be clearly informed by service providers whether the provided service is regulated or not. In addition, the CAs may apply further restrictions on the application of the LNE for regulated entities. Under such specification, the benefits under option 1.3 outweigh potential costs. Option 3.1 is the preferred option.

Notifications under Article 37(2) of PSD2

The proposed guidelines acknowledge that services based on instruments excluded under Article 3(k)(i) or (ii) of PSD2 to be provided across borders. However, taking into account that the providers of excluded services cannot benefit from passporting rights across Member States, this raises the question on whether the thresholds set out in Article 37(2) of PSD2 should be calculated at the level of individual Member States or the EU as a whole. The EBA considered following options:

Option 4.1: The threshold calculation set in Article 37(2) should be based on all payment transaction executed within the EU.

Option 4.2: The threshold calculation set in Article 37(2) should be based on payment transaction within a particular EU jurisdiction.

The approach proposed option 4.1 would help ensure consistent application of the requirements and level-playing field in the EU. However, option 4.1 would require major cooperation and coordination within the service provider and across member states. It is expected that such an approach would therefore strongly increase the administrative burden for CAs and service provider. In addition, without the ability to passport additional impediment may exist and the process may have a negative impact on the current internal processes for the assessment of the notifications and on the potential authorisation procedures applied by CAs. Further, Article 37(2) provides that notification should be send to one member state guiding the interpretation of the threshold calculation.

Under option 4.2, the calculation is more in line with the wording of Article 37(2) of the PSD2. In comparison to option 4.1, this options is expected to have also lower administrative burden for CAs and service providers. Option 4.2 is the preferred option.

After deciding that the threshold calculation set in Article 37(2) should be based on payment transaction within a particular EU jurisdiction, the question that arose was how should the thresholds be calculated. EBA considered the following three Options.

Option 4.2.1 A service provider should notify the CA of the Member State, in which it is established and only when the thresholds set in Article 37(2) of PSD2 are is breached in this particular jurisdiction.



Option 4.2.2: A service provider should notify the CA of the Member State, in which the service provider's customers are located and only when the threshold is breached in this particular jurisdiction.

Option 4.2.3: A service provider should notify the CA of the Member State, in which the service is provided and only when the threshold is breached in this particular jurisdiction.

Under option 4.2.1, the location of the service provider's registered office captures a maximum of one location, in which the service provider executes services. This location may also not be the place where the significant part of its business is carried out. Under option 4.2.2, the location of the payment service user may not be possible to be identified, especially in the context of provision of digital goods and services, which may include customers from outside of the jurisdiction for which the threshold calculation applies. Both options may hinder the collection and identification of the relevant information and lead to disproportionate application of the exclusion.

It is expected that under option 4.2.3, CAs will have the highest proximity to the transaction executed by the service providers within their jurisdiction, allowing them to receive sufficient information to carry out their supervisory obligations without facing increased compliance burden to collect relevant information. Option 4.3.3 is the preferred option.

The information received from Member States show that the frequency of submissions of the notification under Article 37(2) of PSD2 is applied differently across Member States and emphasises the need for further harmonisation. The EBA considered following options:

Option 5.1: Service provider need to submit notification under Article 37(2) of PSD2 annually.

Option 5.2: Service provider need to submit notification under Article 37(2) of PSD2 once. Any additional notification should only be submitted when any information related to the same specific payment instrument(s) has changed substantially or another specific payment instrument is envisaged to be provided.

Option 5.3: Service provider need to submit notification under Article 37(2) of PSD2 once. Any additional notification should only be submitted when any information related to the same specific payment instrument(s) has changed substantially or another specific payment instrument is envisaged to be provided. In addition, notification may need to be submitted following CA's request.

The considered options aim to provide a balance between the administrative burden of CAs and service providers and the information required to perform the supervisory tasks taking into account current national practices. Under option 5.1, service providers are requested to provide notification annually as long as the payment instrument in question breaches the threshold under Article 37(2) of the PSD2. This approach has the advantage that the CA will be able to track whether the threshold is further exceeded and whether the volume and value of the instrument is in line with the decision taken on the LNE and that the excluded instrument has not developed into a general-



purpose instrument. On the other hand, this option is expected to pose additional administrative burden to CAs and service providers.

In comparison to option 5.1, option 5.2 and option 5.3 require service provider to submit notification only once. This would reduce the additional administrative burden imposed on CAs and service providers. In addition, those options require service providers to update CAs only on significant changes or when a new instrument might be provided, limiting the amount of notification to the most relevant ones. However, option 5.2 poses the risks that service providers chose to underreport relevant developments of their business by not updating the information initially provided, which denies CAs from the possibility to monitor whether the excluded instrument has not developed into a general-purpose instrument. In addition, it might be opposing the current national practices applied. Therefore, option 5.3 is the preferred option as it gives CAs the flexibility to request additional information without imposing additional obligations to them and provide them with the necessary provision to conduct additional monitoring.



5.2 Overview of questions for consultation

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

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

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?

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

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

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

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