

EPIF response to EBA Guidelines on the limited network exclusion under the revised Payment Services Directive (PSD2).

15th October 2021

Introduction

On 15 July 2021, the EBA launched a public consultation on draft guidelines on the limited network exclusion requirements under PSD2. The guidelines aim at clarifying specific aspects of the LNE's application.

EPIF welcomes the opportunity to reply to this consultation. We strongly support the limited network exclusion (LNE) and agree that there is a need for clearer guidance regarding the scope of the LNE. The wording of the LNE as drafted in PSD2 has, understandably, caused confusion across EU regulators and businesses, resulting in parties making legitimate but diverse interpretations of its scope. The LNE under PSD2 creates an important distinction between regulated payment activities and activities that are rightly excluded from certain requirements. It is vital for regulators, the industry, firms and consumers that the rules continue to draw this distinction appropriately.

While we support some of the proposed guidelines, we believe that the EBA should reconsider its approach in relation to certain Guidelines to ensure (i) a **level playing field** across issuers that operate physical locations and those that operate online; (ii) **legal certainty and consistent application** of the guidelines across the EEA to promote harmonization while supporting innovation; (iii) **appropriate customer protection**.

EPIF Response:

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

Guideline 1.7 states 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”. According to the EBA, 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, understand which instrument they

will be using and what protection is offered by each payment instrument. However, the EBA guidelines do not consider the possibility of mandating enhancements to customer disclosures to ensure customers better understand the protections being offered by each payment instrument. In addition, they do not make any distinction in the case of a single card-based means of payment combining regulated and unregulated payment instruments where the regulated and unregulated legs of the transaction are clearly distinct and differentiated (in substance and in terms of the information provided to users). The EBA's proposal is not a proportionate means of securing appropriate consumer protection. The EBA should consider the different structures that single card-based means of payment may incorporate and provide relevant guidance to firms. Otherwise, such a guideline will likely stifle innovation in this space.

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

Guideline 2.2 grants Competent Authorities the ability to consider “*complementary optional indicators*” as to whether a payment instrument is only being used within a “*limited network of service providers*.” These optional indicators include “*the volume and value of payment transactions envisaged to be carried out with the payment instruments on an annual basis*”, the “*envisaged maximum amount to be credited on the payment instruments*” and “*the envisaged maximum number of users of the payment instruments*”. While we welcome the EBA's view that a common brand is an important criterion in determining whether a network should be considered limited, we believe that including “*additional indicators*” regarding the volume and value of payment transactions, the maximum number of users and the maximum amount to be credited to the payment instrument may lead to inconsistent standards across the EEA, stifling innovation and creating an uneven playing field and legal uncertainty. If an issuer qualifies for the LNE because the instrument may only be used within a limited network of service providers, it does not follow that the LNE should cease to apply purely because the instrument proves popular with consumers. This restriction would penalise growth per se, which is economically counterproductive.

3. 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 limits the meaning of “*premises*” to physical locations. Restricting the meaning of “*premises*” in this way is regressive and does not acknowledge the prevalence and necessity to consumers of online stores. This interpretation, has the potential to create a (unjustified) discrimination between brick-and-mortar and online stores. In paragraph 42, the EBA states that 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. However, there does not seem to be any valid reason to afford ecommerce merchants fewer opportunities to qualify for the LNE than brick-and-mortar businesses (such as large supermarkets).

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

The rationale of the limited range exemption remains rather unclear. Does the law tolerate the LRE because they pose a limited AML risk, or the issues require less regulatory supervision, or the users of those products need less protection? We think that a well-defined rationale will enable better decisions on whether the LRE applies or not. The chosen approach to determine the functional connection of a limited range of goods and services not by their functionality (e.g. everything that dresses a person) but by one (leading) product only leads to a uniform interpretation if it is clarified that the leading product can be a product category and not only a single product. For instance, if the leading products are sweatshirts, would trousers be ancillary (because then the person is dressed from head to toe) or t-shirts (because they may be worn beneath a sweatshirt)? If the common denominator is chosen as a category (e.g. clothing), it will be much easier to come to a uniform interpretation across all member states.

Further, we believe that it should also be taken into account not so much the number of user or the payment volume but the risk of AML in that industry and the protection awarded to customers. For instance, if the limited range of goods and services carries only a low risk with respect to AML, then this should be a stronger indicator than the payment volume. Also, if the customer is provided with sufficient protection (expiry date of unregulated payment instrument no shorter than statutory period of limitation) and effective customer complaint processes, then this should be an indicator for allowing such a payment instrument as an unregulated product.

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

Guideline 7 suggests that payments instruments for tax and social purposes should not be required to fulfil the requirements applying to limited networks or limited range products. This might impact payment instruments issued as “tax-exempt benefits in kind” (also so-called “44-euro exemption” in Germany).

The German Federal Ministry of Finance actually indicate that only products issued in a limited network or as limited-range products are to be recognized as tax-exempt benefits in kind. It is unclear how this reconciled with the EBA’s draft Guideline 7. Member states have tax sovereignty with regard to income tax. However, the legislator has referred to the ZAG exemption in Section 8 Para. 1 sentence 3 of the German Income Tax Act. It would be appropriate to clarify the point to prevent any conflicting application of this requirement and reconcile supervisory application and tax law terms.

ABOUT EPIF (EUROPEAN PAYMENT INSTITUTIONS FEDERATION)

EPIF, founded in 2011, represents the interests of the non-bank payment sector at the European level. We currently have over 190 authorised payment institutions and other non-bank payment providers as our members offering services in every part of Europe. **EPIF** thus represents roughly one third of all authorized Payment Institutions (“PI”) in Europe. All of our members operate online. Our diverse membership includes a broad range of business models, including:

- Three-party Card Network Schemes
- E-Money Providers
- E-Payment Service Providers and Gateways
- Money Transfer Operators
- Acquirers
- Digital Wallets
- FX Payment Providers and Operators
- Payment Processing Services
- Card Issuers
- Independent Card Processors
- Third Party Providers
- Payment Collectors

EPIF seeks to represent the voice of the PI industry and the non-bank payment sector with EU institutions, policy-makers and stakeholders. We aim to play a constructive role in shaping and developing market conditions for payments in a modern and constantly evolving environment. It is our desire to promote a single EU payments market via the removal of excessive regulatory obstacles.

We wish to be seen as a provider for efficient payments in that single market and it is our aim to increase payment product diversification and innovation tailored to the needs of payment users (e.g. via mobile and internet).