

Joint statement of bcsd, HDE and PVD on the EBA Guidelines LNE

Consultation on draft Guidelines on the limited network exclusion under PSD2 form

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

To 1.4 and 1.5 (additional technical restrictions)

Initial situation:

The wording of Guideline 1.4 indicates that the EBA imposes the condition that compliance with the applicable restrictions must also be ensured technically ("technical restrictions") for the application of the exclusion. Such a requirement does not follow from Art. 3(k) and would in practice in most cases not be feasible or not feasible with reasonable effort. As a result, this could mean that the application of the exclusions is no longer possible in practice.

Comment and problem:

- In the case of **limited networks** (Art. 3 (k)(i)), a technical limitation of the usability of proprietary payment instruments at certain branches of the accepting merchants (e.g. in the area of a city card) would generally only be possible if the software of all POS terminals or cash register systems is adapted accordingly and the accepting branches of a merchant are activated online for acceptance via a network of the issuer. In many cases, the effort for technical security would not be in proportion to the economic benefit of corresponding payment instruments for the retail trade. We therefore assume that if a technical limitation of usability were to be imposed without exception, numerous (especially smaller and thus local) products would face extinction.
- The technical limitation in the "**limited range**" case (according to Art. 3 (k)(ii)) would require a linking of the respective merchandise management systems with the respective payment instruments used. According to our assessment, this technical link is only possible in the specific market segment of the petrol industry and, if necessary, only for the so-called fuel cards. In other market segments, if "limited range" payment instruments were to be accepted across all merchants, the programming of all merchandise management systems would have to be constantly adapted on the basis of the specifications of the respective issuers of the LNE payment instruments (e.g. in order to allocate new products within the limited product range to the permitted category or to the category to be excluded). This willingness is often not given on the merchant side, so that the acceptance of numerous "limited range" payment instruments would decline if a technical limitation of usability were prescribed without exception. Provided that the existing categorisation of merchant groups by means of "merchant category codes" of the international card schemes (e.g. textile merchants or booksellers) correspond to the respective permissible product groups of the "limited range" (e.g. textile products or books), the obligatory technical limitation would favour card products of the worldwide card schemes (e.g. Mastercard, Visa) at the expense of domestic or local schemes.

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- For the technical limitation of **payment instruments for fiscal and social purposes** (Art. 3 (k)(iii)), this would also require a linking of the respective merchandise management systems with the respective payment instruments used. As a concrete example, voucher cards for granting meals can be listed here. According to the German tax regulations (R 8.1 to Art. 7 of the Income Tax Guidelines "LStR"), only meals and food for immediate consumption and no alcohol or tobacco may be provided when the voucher cards are redeemed. In practice, this can only be controlled by contractual agreements between the issuer and the point of acceptance (e.g. supermarket, restaurant or snack bar) and corresponding controls by the cashier. A mandatory technical restriction would put voucher cards for employee catering at risk. Similar problems arise for payment instruments for company health measures. Contractual restrictions are indispensable for payment instruments for fiscal and social purposes and their use for the intended purpose cannot be ensured by purely technical measures.
- The EBA draft does not contain a justification for a mandatory technical safeguarding of the restriction of the scope of use of payment instruments. According to Background 12, the EBA has examined in various markets within Europe how the demarcation between payment instruments with specific use and general-purpose instruments can be ensured. In this context, the EBA reports on the view of market participants "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". In response, the EBA is of the opinion that "the EBA did not consider the latter practices in line with the intention of the exclusion and its narrow scope". There is no justification for this conclusion. The view of the market participants shall be verified by the EBA by means of market observations. If necessary, relevant practical examples should be used to prove that the limitation by corresponding regulations in the T&C between issuer and holder of the payment instrument and between acquirer and acceptance point is not sufficient in practice. If this proof cannot be provided, the demand for a technical limitation is superfluous and disproportionate regarding the serious consequences.
- Conclusion: In addition to the contractually anchored limitation, the Guidelines additionally require the technical implementation of the limitation of LNE payment instruments. The EBA refrains from providing a justification based on facts. The requirement would not ensure the legal limitations for most current LNE payment instruments, which are already regulated or guaranteed by the contracts. Furthermore, it would lead to additional costs, which would make the business case no longer valid in many cases.

Suggestion:

Against this background, we advocate that it should be left to the market participants to decide how they ensure that a payment instrument can only be used to a limited extent. Beyond technical and contractual restrictions, operational restriction measures should also play a more important role (e.g.

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control by cashiers in the retail sector). Cashiers already carry out numerous control functions (e.g. age checks, counterfeit money checks), so from our point of view it would be an appropriate measure to limit the scope of use of payment instruments if a check were carried out by appropriately trained cashiers at the shop checkout.

To 1.6. and 1.7. (a single card-based means of payment)

Initial situation:

Art. 1.6 and 1.7 of the Guidelines use the term "a single card-based means of payment". Art. 1.6. states that "a single card-based means of payment" can simultaneously accommodate several LNE payment instruments. Article 1.7 stipulates that "a single card-based means of payment" cannot simultaneously accommodate a PSD2-regulated and an LNE-payment instrument.

Comment and problem:

The term "single card-based means of payment" is unclear and so are the requirements under Art. 1.6. and 1.7. The Guidelines do not provide a definition.

- The term is not familiar to other directives and regulations. PSD2 only recognises "card-based payment instruments" or "card-based transactions". The adjective "card-based" in PSD2 should be understood in the sense of the definition of the European Interchange Fee Regulation (Regulation (EU) 2015/751-IFR). However, payment instruments in the area of the LNE do not, by definition, fall under card-based payment instruments in the sense of the IFR. Accordingly, the term "card-based" cannot be meant in the sense of PSD2 and the IFR.
- It is possible that the EBA understands the term "card-based means of payment" to mean a plastic card as a physical carrier (device) and payment instrument. The card as a carrier can include several payment applications (e.g. in the chip). In this case, other carriers (e.g. apps in a mobile phone) would not be "card-based means of payment".
- In this case, the plastic card would be discriminated as a carrier medium of a payment instrument for no apparent reason. Other carriers (e.g. mobile phone, PC or wearable), on the other hand, are allowed to include several payment applications (excluded & regulated).
- In contrast, GL 1.6. would possibly disadvantage other carriers compared to plastic cards, because GL 1.6. only allows the combination of several LNE-payment instruments on a card, not on another type of carrier (e.g. app).
- This interpretation contradicts the technological neutrality assumed under Art. 1.1 of the Guidelines in conjunction with Background No. 14.
- The reason for these technologically non-neutral special regulations for "payment instruments" (in the sense of payment applications) (regulated or excluded) based on the

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payment instrument "card" is presumably the assumption that the cardholder would not be able to differentiate between the regulated and excluded payment applications (see impact assessment p. 35). This assumption is in contradiction to the interchange fee regulation, which explicitly assumes that a cardholder can differentiate between the different payment applications of his physical card (see Art. 8 (6) of the IFR).

Suggestion:

We argue that Art. 1.6. should be formulated in a technology-neutral way and therefore refer to all data carriers and devices of payment applications. Art. 1.7 should be deleted without replacement.

Second interpretation:

Due to the unclear terminology, it is conceivable that the Guidelines would like to avoid another case by means of Art. 1.7. Background No. 14 of the Guidelines mentions the case in which two payment instruments are used to execute a single payment transaction. In this case, which is not linked to a specific carrier medium, part of the payment transaction is executed using "payment instrument" A (not excluded) and another part using "payment instrument" B (excluded): *"service providers allow part of a transaction to fall under the LNE and another part to be a regulated service"*.

Provided that the payer is informed that he is using two differently regulated payment instruments to carry out a transaction, there are no reasons why such a transaction should not be possible. Such a provision would unnecessarily limit the freedom of the consumer and prevent innovative solutions in the market. With this interpretation of Art. 1.7, we also advocate deleting the article without replacement.

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

To 2.1. and 2.2. (criteria of a geographical area)

Initial situation:

In Background No. 25, the Guidelines mention two criteria in relation to limited networks that relate to geographical limitation:

- *“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”*.

Comment and problem:

Both criteria are unspecific for several reasons and can lead to completely different results in practice:

- The term "region" is not defined and therefore, in our opinion, not suitable for a uniformly applied geographical delimitation.
- The term "local producers" is not compatible with the term "region". If one were to use the term "region" as a criterion, the producers would at least also have to be "regional" and not "local".
- Only in a few cases, producers are at the same time merchants who offer (their own) goods or services. The term "local producers" should therefore be "regional merchants or sellers".
- It should be clarified that the term "regional merchant" refers to the geographical point of sale and not to the legal seat of the respective company.
- The term "town" is also unclear and can be either a metropolis with millions of inhabitants or a village. It is logically incomprehensible why both cases fall under the same criterion.
- The geographical spread and thus the jurisdiction of the Chambers of Commerce is regulated differently per member state, such as regionally or only in larger cities. Not in all Member States a legal obligation for companies to be member is existing. For these reasons, the criterion "registered in the local chamber of commerce" is not practicable or superfluous.

Suggestion:

A geographical delimitation should generally only refer to the geographical use of the payment instrument without further criteria for the type of participating merchants.

In our view, criteria should be chosen for a geographical delimitation that clearly limit a region in the respective member state and are comprehensible for the market participants and the CA. In Germany, the CA (BaFin) uses the criterion of the postal code (ZIP code), which allows a region to be precisely delimited. In our opinion, this criterion has proven itself. We therefore advocate using this criterion as the decisive criterion.

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To 2.1. and 2.3 (criteria of a common brand in online stores)

Initial situation:

According to the Guidelines Art. 2.1. and 2.3., payment instruments that are only used in "online stores" under the use of a "common brand" can fall under the LNE.

Comment and problem:

It is unclear whether payment instruments that are offered on so-called "online marketplaces" by the respective "platform providers" under a certain brand and can be used at all or a large number of merchants are also covered by the LNE. The guidelines lack criteria for the limitation.

Suggestion:

If "online marketplaces" fulfil the criteria of the LNE, it should be clarified that at least the payment instruments offered by the so-called "gatekeepers" according to Art. 2(1) of the Digital Markets Act (COM(2020) 842 final) of 15.12.2020 proposed by the European Commission as "providers of core platform services" do not fall under the LNE.

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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?

Initial situation:

Background No. 42 suggests that the online provision of goods and services is only possible within the area exception under Art. 3(k)(ii):

“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.”

Comment and problem:

There is no clarification that goods and services can also be purchased online with LNE instruments in the exclusion under Art. 3(k)(i) for the case of the "limited network of service providers" (see Guidelines 2.3.).

Suggestion:

We advocate the following text addition (highlighted in yellow):

*“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 network of service providers under Article 3(k)(i)** and 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.”*

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

To 4.2. (leading product)

Initial situation:

According to Art. 4.2, the service provider for the use of the LNE "limited range" shall, in addition to the functional connection of the respective goods and services, also name a "leading product or service" or "ancillary goods and/or services" towards the CA.

The EBA cites as justification for this change, among other things, reasons to facilitate the supervisory practice of the CA and allegedly better consumer protection:

"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."

Comment and problem:

- Recital 14 of PSD2 only mentions the criterion "functionally connected goods or services". The proposed approach of a "leading product or services" (option 2.2; page 35) leads to an additionally required ranking of the already functionally connected products and services, which cannot be derived from the PSD2.
- The new approach does not offer any relief for the CA, as in both approaches the respective "functional connection" must be presented by the service providers and checked by the CA responsible. It is also not plausible why the introduction of a "leading product or service" would offer greater consumer protection. Nor does the new criterion lead to any better harmonisation of the application of the LNE.
- The introduction of the additional criterion "leading product or service" does not bring any advantages compared to today's PSD2-compliant approach and would lead to significant changes for several LNE payment instruments in practice. For example, the product range of fuel cards, which today fall under the LNE, includes not only the tank filling but also spare parts for the vehicle (functional link). When applying the new criterion, the tank filling would be the "leading product" where a spare part may not qualify as an "ancillary product".
- Practice in Germany has shown that the public listing of a number of market-relevant practical examples of functionally linked products and services by the CA (BaFin) has led to more transparency and to considerable facilitation.

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Suggestion:

Only the criterion "functional connection", which is exclusively mentioned by PSD2, should be applied. The additional definition of a "leading product or service" should be abandoned.

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

To 5.2. (different brands)

Initial situation:

If authorised PSPs offer both regulated and LNE payment instruments, both types should be clearly identified and recognisable to the user, inter alia, using "different brands".

Comment and problem:

- The aim of the "different brands" between LNE payment instruments and regulated payment instruments issued by the same issuer is to enable the user to clearly distinguish between them.
- This differentiation is likely to be given by the different name of the payment instrument, e.g. "lunch card" (LNE) and "debit card" (regulated).
- The respective cards can still be equipped with the same payment brand (e.g. Mastercard).

Suggestion:

The specification of the "different brands" refers to the labelling of the payment instruments and not necessarily also to the use of the respective brands on the acceptance side, if a "payment brand" clarifies the acceptance for the user.

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

To 6.7. (cumulation of all LNE payment transactions per issuer as threshold for notification)

Initial situation:

Thresholds under Article 37 (2) of PSD2 is to be carried out at the level of each service provider (cumulation of all payment transactions with all specific LNE payment instruments).

Comment and problem:

- The EBA cites the wording of PSD2 in Art. 37 No.2 as justification for the cumulation of NLE activities per issuer as the basis for the threshold (€1 million) for the reporting obligation:

“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.”

The text of PSD2 quoted above does not clearly indicate the cumulation required by the Guidelines. The second part of the sentence speaks against it, because the notification refers to a single "activity" and not to "each activity". The original wording of the notification requirement in the draft version of the PSD2 (2013) clearly refers to the single activity. If the textual amendments had intended cumulation, the wording of the adopted text would have been clear.

- The logic of PSD2 also speaks against cumulation, because the criteria as to whether there is an authorisation requirement or an LNE is only product-related, irrespective of any volumes. The limit of 1 million euros only serves to avoid the supervisory authorities' examination activities for very small systems. However, an accumulation would lead to the fact that small systems would also have to be examined.
- The EBA suggests that non-cumulation would lead to circumvention attempts:

“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.”

Whether or not an activity is subject to authorisation according to PSD2 is independent of the respective payment volume and therefore independent of cumulation. See also Background No. 4. For this reason, the case described here of preventing circumvention of

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the PSD2 requirements through cumulation does not apply. If, in the case described in the Guidelines, the issuer only issues payment instruments that fall under the LNE, there is no circumvention of PSD2.

Suggestion:

The value limit of €1 million shall continue to refer to the respective payment volume of specific payment instruments per issuer in accordance with the current practice of the CA.

To 6.9. (assessment by CA)

Initial situation:

Regarding the CA's assessment activities, the Guidelines do not specify a response time for the CA. The "transitional provisions" (Chapter 3 Implementation, No. 13) do not contain any "Grandfathering" provisions for the service providers already registered today.

Comment and problem

For some service providers, the application of the Guidelines may mean that the previous requirements for the LNE are no longer met. For the service providers already registered by the time the guidelines come into force, an appropriate transition period should be implemented to protect the investments made.

Suggestion:

Response time: We support the setting of a reasonable time limit for the CA for the period between receipt of the notification and the issuance of an assessment by the CA. In its first draft of PSD2 (2013), the European Commission had proposed a deadline of one month. Due to the additional test criteria (caused by the guidelines), we consider a response time of max. 3 months to be appropriate.

Grandfathering: For all service providers already notified by the time the Guidelines come into force, a transition period of 36 months applies, starting from the time the CA announces the result of the assessment based on the new notification. During this transition period, the LNE can continue to be used, regardless of the result of the assessment.

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

To 7.1. (Limited network under Article 3 (k)(iii) of PSD2)

Initial situation:

The Guidelines do not clarify the exclusion under Article 3(k)(iii) of PSD2.

Comment and problem:

- The Guideline 7.1 states:

“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.”

Article 3 (k)(iii) states:

“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.”

We understand the EBA position not to take a position on the application of the respective national social and tax legislation (Background No. 69). Due to the small number of examples in the recitals of the PSD2, we consider a clarification and the mention of examples of application to be necessary.

- In addition, the criteria for the demarcation of group iii payment instruments from limited network (ii) and limited range (iii) are unclear. If the criteria of groups i and ii may not apply to group iii, the question arises as to which specific criteria result from the definition according to PSD2, for the usage of the instruments ("to acquire specific goods or services").
- The following criteria apply from our point of view:
 - Use of the instrument is limited to the member state,
 - Only goods and services can be purchased with the instrument (no cash or cash surrogates),
 - The issuer has a commercial agreement with the respective points of acceptance.
 - The reach of the usage of the payment instruments of group iii can go beyond the limitation of groups i and ii.
 - The respective national fiscal or social regulation may stipulate a maximum nominal value in a certain period or other restrictions.

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Suggestion:

The guidelines should mention the generally applicable criteria resulting from the definition of the case iii. We also ask for examples from practice. For Germany, for example, voucher cards for meals, voucher cards for company health benefits, as well as so-called non-cash benefit cards within the framework of the Income Tax Act can be mentioned.

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