

Hilversum, 15 October 2021

RE: BVCNL – response to EBA consultation on draft guidelines with respect to the limited network exemption under PSD2

1. BVCNL is the industry organization representing the interests of the gift card industry in the Netherlands. Since 2017 the BVCNL represents the Dutch key players in a €1.5 billion gift card market. With over 40 members including retailers, issuers, suppliers, service providers and card manufacturers we provide a platform and infrastructure for members to collaborate, share best practice and keep up to date with a fast growing and dynamic industry. We actively promote the collective interests of our members and therefore use the opportunity to respond to the EBA consultation on the draft guidelines with respect to the limited network exemption under PSD2.
2. As a first comment we would like to express our appreciation for the consultation document. Especially the detailed elaboration of criteria and EBA's considerations with respect to the applicability are very informative and helpful. We recommend to keep this detailed description in the final guidelines.
3. As a second comment of a more general nature we welcome the explanation of the actual scope of the exemption, including its applicability with respect to cross border activities.
4. A third comment is that we strongly promote a level playing field throughout the EU, which in our view would benefit from harmonization of the application and interpretation of the 'limited use'-exemption by the national competent authorities. We therefore welcome EBA's initiative to issue guidelines and would also welcome implementation of a 'comply or explain'-approach to further harmonization and consistent interpretation by the national competent authorities in this context. Also, we are of the opinion that gift cards by their nature are instruments with a specific-purpose and do not develop into a general-purpose instrument. Therefore, we underline that the Guidelines should not result in extending the scope of the PSD2 regulation any further and thereby restricting the freedom to issue gift cards with a specific purpose.
5. A final comment relates to the use of qualitative criteria. We understand that the application of qualitative criteria would fit best from a legal perspective with the rules as laid down in the revised payment services directive. However, this approach also means that in a lot of cases it remains uncertain for market parties whether or not they can make use of the exemption. Implementing quantitative criteria where possible would help to prevent the persistence of these uncertainties in our view. Using quantitative criteria and working with a 'de minimis'-rule would establish a clear distinction between regulated and unregulated activities. In addition to the qualitative criteria a threshold could be introduced for a 'limited network', whereby any network up to a specific number of participants (e.g. 100) is by definition considered to be a limited network. Should EBA decide not give room to this approach, then we would favor accepting the 'functional connection' as a key element for the determination whether or not a network qualifies as a limited network or not.
6. With respect to our response to several of the questions (numbers 1, 2, 4, 6) as formulated in the consultation document, please be informed as follows:

Question 1

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

EBA notes that no geographical restrictions should be imposed on the use of the limited network exclusion. Guideline 1.12 is introduced in this context (exclusion and cross border activities) and we welcome this interpretation, which in our view is consistent with PSD2.

Question 2

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

We would like to emphasize that for market parties the most relevant aspect of the guidelines is that more clarity is provided regarding the question whether a network qualifies as a 'limited network'. The qualitative (and restrictive) interpretation at present leaves a lot of room for interpretation for the national competent authorities and – although the draft guidelines give further clarification – it remains to be seen whether there will be an actual convergence in the interpretation by these authorities. To provide for more clarity and protect the smaller networks of becoming regulated, we strongly recommend to introduce a number of connected service providers (e.g. a threshold of 100 participants) which in any event would qualify as a 'limited network'. Such a threshold would not impact the use of quantitative criteria for the assessment of larger networks, whereas the smaller networks would benefit from clear guidance and an unambiguous rule.

With respect to the criterion of 'use of a common brand' we are of the opinion that there are numerous options of parties cooperating and reaching out to the public under one brand. In the draft guidelines reference is made to 'different providers working under the same franchise system'. We support the use of this criterion and are of the view that also other structures focusing on a close cooperation and using one brand or quality mark should be able to use the 'limited network'-exemption. Therefore, we recommend not to restrict this criterion to participants in a franchise formula, but also facilitate that other types of 'brand users' can benefit from the exemption.

Question 4

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

We are of the opinion that with respect to the 'limited range of goods and services' the focus on a functional connection between goods and services is key. Regarding this topic qualitative criteria and case-by-case assessments by the national competent authorities are required to weigh the functional relationship between a range of goods and services. And to establish convergence as regards to the assessment by these authorities we feel that transparency regarding the output and conclusions of such assessments is required. This may result from providing explanatory information on the websites of the national competent authorities and/or a brief motivation of the considerations with respect to exempt entities who are registered in the registers of the national competent authorities. To channel the room for interpretation by the national competent authorities to a certain extent we would like to request EBA to consider taking up several examples of such products and/or service groups, as reference cases.

Question 6

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

We have a strong opinion on guideline 6.7 that refers to the calculation regarding the thresholds referred to in article 37 (2) PSD2 and stipulates that at the level of each service level provider, all payment transactions must be combined when the service provider provides more than one specific payment instrument. We think this conflicts with the approach that the use of the exemption depends on meeting specific criteria. There is no 'spill over'-effect in case an entity issues more than one payment instrument (e.g. a gift card), whereby the use of each instrument is restricted and fulfils the criteria applicable. We would kindly like to request EBA to change the approach in this respect and explain that each instrument should be calculated on its own merits and that the application of the criteria (together with the EUR 1 million threshold) is the decisive element to determine whether or not a notification should be made.

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