

September 2023

## PSD2 review – General observations and feedback

### Introduction and status quo

Fleet Cards Europe (“FCE”) welcomes the European Commission’s review of the PSD2 framework. Since the beginning of the review process, FCE has proactively liaised with the EU policymakers to achieve mutually beneficial outcomes concerning PSD3 and the PSR. Principally, we have engaged with the European Commission and Member States in the Council.

Fuel card companies have a very specific status within the PSD2 framework, given their particular nature as niche instruments. Unlike payment instruments, fuel cards can only be used in a limited way; specifically, they do not initiate any transfer of funds, but rather initiate chain purchase transactions.<sup>1</sup>

The unique nature of the business model has led to contrasting views among Member States, with some concluding that fuel cards are not payments instruments and should be completely out of scope of PSD2.<sup>2</sup> In other cases, Member States have opted for a wider interpretation which deems fuel cards to be payment instruments which fall under the Limited Network Exclusion (LNE) provisions, currently established in Article 3 (k) (ii) of PSD2. In this regard, we note the EBA view expressed in the response to the Commission’s request for comments on the PSD framework review.<sup>3</sup>

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<sup>1</sup> Further details on fuel card model [available here](#).

<sup>2</sup> After notifying LNE in several Member States following the 2022 EBA [guidelines](#) on the LNE, some Member States (Luxembourg, Poland, Romania, Denmark, Hungary and Sweden) concluded that fuel cards are not payment service instruments and as such should be completely out of scope of PSD2. The use of a fuel card does not result in the initiation of a payment order; it simply allows the user access to a very limited range of goods and/or services. Such goods and/or services are sold by the fuel card company’s suppliers to the fuel card company, the latter selling them ultimately to the end users. This and the fact that no contractual relationship exists between the fuel card company’s supplier and the end user has led to several Member States’ competent authorities to consider that fuel cards do not fall within the scope of PSD2 at all. Other Member States are still assessing these facts, and, as far as we know, have not made any conclusion yet.

<sup>3</sup> In the EBA’s [response](#) to the Commission’s request for comments on the review of the Payment Services Directive (EBA/REP/2022/14) of 23 June 2022, Section 1, Question 3, No. 3.3., page 25 et seq. (recitals 92 and 93), the EBA has clarified that where fuel card issuers act as resellers, effectively and legally acting as merchants responsible for the goods and/or services provided to the cardholder and bearing the risk of such activity, these card issuers should not fall within the scope of PSD2 as no intermediation services are provided.

The key statement in recital 93 is as follows: “On the other hand, however, the assessment of some of the models should be carried out with caution because these re-sellers may actually and legally act in their capacity as



Despite the introduction of the EBA Guidelines on the LNE in February 2022, the notification requirements under Article 3 (k) (ii) have placed an undue administrative burden on fuel card companies and created additional hurdles which are not aligned with the principles and objectives of the EU internal market. Consequently, FCE members **strongly agree** that one of the priorities of the review is to **improve**, amongst other things, **the implementation and harmonisation of the PSD framework across Member States**.

## **FCE initial observations related to the EC proposals**

### ***Article 2***

FCE members welcome that the proposed Payment Services Regulation **maintains the LNE status in Article 2 (1), point (j)**. **In this regard, we note that the intention might have been to refer to Article 2 (2) point (j) instead**. We also note that, as per recital 13, **fuel cards are specific-purpose instruments**, which reaffirms their specific legal nature.

Similarly, FCE members welcome the European Commission's proposal to detail the conditions for the exemptions under the LNE status by mandating the **EBA to develop draft Regulatory Technical Standards (RTS)** using the EBA Guidelines of 24 February 2022 as a basis. FCE members actively engaged with the EBA in 2021 in relation to these Guidelines and believe that harmonisation between Member States on the application of the LNE notification procedures can only be achieved through further collaboration with industry players.

However, FCE members note with **concern** the references in the proposed text related to specific-purpose instruments that **involve substantial payment volumes**<sup>4</sup>. We believe that, due to the nature of the fuel card business model and its inherent safeguards, it would be inappropriate to introduce a transaction volume threshold for LNE eligibility, for the following reasons:

- Fuel cards operate via a closed loop/limited network which only allows for a very restricted range of vehicle related goods and services to be acquired, thus providing a high level of security. Growth in "payment transaction volumes" therefore does not equate to new risks

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merchants that are responsible for the goods and/or services being provided and that bear the risk of the activity, thus falling outside the scope of the Directive since no intermediary services are provided."

<sup>4</sup> Recital (12) in the [PSR](#) proposal: "The EBA provided further guidance in its 'Guidelines on the limited network exclusion under PSD2' of 24 February. Despite these attempts to clarify the application of the exclusion related to specific-purpose instruments there are still service providers that provide services which involve substantial payment volumes and a variety of products offered to a large number of customers that seek to make use of that exclusion. In these cases, consumers do not benefit from the necessary safeguards and the services should not benefit from the exclusion for specific-purpose instruments."



due to the nature of the fuel card business. Furthermore, FCE members have both contractual and technical limitations in place, in accordance with Article 3 (k) (ii) <sup>5</sup>.

- Fuel cards are used on a business-to-business basis, so consumer protection is not a warranting consideration.
- The successful development and growth of fuel card businesses and increasing volumes/transactions does not affect the way business is conducted nor should it constitute a justification for the fulfilment of more legal requirements.
- Financial risk related to the settling of fuel card transactions is borne by the fuel card companies who buy and resell the fuel at their own risk and for their own account to the customer.
- An increase in transactions of a given market player can be caused to a large extent by exogenous factors like the state of the economy and does not relate to the risk profile of the companies making use of the LNE.

## **Article 39**

Another point of concern for FCE members is **Article 39 of the proposed Directive**, since it imposes, on top of the current duty to notify National Competent Authorities (NCA), an **obligation on fuel card companies to provide NCAs with an annual audit opinion** to demonstrate that their activities comply with the exemption set out in Article 2 (2), point (j) of the proposed Regulation. We believe this requirement to be unnecessary given the technical safeguards in place, which ensure fuel cards can only be used to acquire a limited range of goods and services, as intended.

In the currently applicable Article 37 (3) of PSD2, the obligation to provide an annual audit opinion is related to the electronic communications networks exclusion, not the LNE. If the intention was to retain this existing obligation, then we believe the reference should be made to Article 2 (2), point (k) rather than Article 2 (2), point (j). If, on the other hand, the intention is to extend the obligation to the LNE and the reference to Article 2 (2) point (j) is correct, this gives rise to the following concerns:

- ‘Open loop’ transactions – meaning those made with “classic” payment instruments like credit or debit cards – typically only make use of level 1 and 2 data. What sets transactions made with fuel cards (which are “closed loop”) apart, is that they also make use of level 3 data, which includes line-item details and product or service codes. It is this level 3 (product) data received by fuel card companies in all authorisation requests and settlement files, which ensures fuel cards are configured to only allow

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<sup>5</sup> As the 2022 [EBA Guidelines](#) state (Guideline 1.4.): “Competent authorities should check, when assessing the information provided by issuers that provide services based on a payment instrument falling under the scope of Article 3(k) of PSD2 within their jurisdiction, whether these issuers apply technical and contractual restrictions limiting the use of the payment instrument. Competent authorities should not consider the mere presence of a contract between the issuer and the holder of the payment instrument as a technical restriction.”



access to a limited range of goods and services, as intended. As a result, **an obligation to provide NCAs with an annual audit opinion would add an administrative burden and costs to the already cumbersome and expensive notification process under the LNE across Member States without providing any additional value** to the NCAs and/or the fuel card companies.

- The contents and procedural details of this audit opinion are unclear. Based on our experience thus far, we fear the EU and EEA Member States could impose a divergent set of audit requirements, which would further hinder the European Commission's efforts in harmonising the PSD/PSR framework. We call for further harmonisation and information exchange among NCAs which will help foster timely decisions regarding LNE applications, which should be as standardised and simple as possible.

## **FCE recommendations**

To conclude, **FCE members recommend the following:**

- Consider whether fuel cards should be outside the scope of PSD regulation entirely.
- Failing this, **maintain the LNE status** in the future PSR/D framework as proposed by the European Commission, but in a way which reflects the specificities of fuel cards.
- Maintain the status of **fuel cards as specific-purpose instruments**.
- Safeguard the possibility for the industry to **interact with the EBA** when drafting the expected RTS on the conditions of exclusion referred to in Art. 2 (2) (j) of the PSR.
- **Avoid** associating **LNE specific-purpose instruments with payment volumes or thresholds**.
- **Clarify the intention in Article 39 of PSD3 and potentially reconsider** the redundant proposal for fuel card companies to provide NCAs with an **annual audit opinion**, which would not provide any additional value to the NCAs and/or the fuel card companies.

## **About FCE**

[Fleet Cards Europe \(FCE\)](#) represents the independent fuel card sector in Europe, which facilitates the access and supply of fuel and other related on-the-road goods and services for millions of commercial users across Europe. FCE members represent a major share of the B2B fuel cards market in Europe and our membership base includes key independent players in this market which are headquartered and operate across the continent. Most European logistics, transportation and other fleet businesses rely on the services (issuing, billing, fuel discounts, etc.) provided by FCE members, helping them to move goods and people efficiently and seamlessly across Europe on a daily basis. For further information, please contact the FCE Secretariat at: [fleetcardseurope@pentagroup.co](mailto:fleetcardseurope@pentagroup.co)