EBA GUIDELINES ON THE LIMITED NETWORK EXCLUSION UNDER PSD2

CONSULTATION RESPONSE

INTRODUCTORY REMARKS

Fleet Cards Europe (FCE) is a not-for-profit association (ASBL) established in Belgium in 2021 with the aim of representing the independent fleet/fuel card sector in Europe.

FCE welcomes the opportunity to respond to the EBA's Consultation Paper on the Draft Guidelines on the Limited Network Exclusion (LNE) under PSD2.

FCE strongly supports the EBA's aim to contribute to the convergence of supervisory practices in relation to the application of LNE under PSD2. All of our members are active in the fuel cards segment, and have gathered extensive experience on how the application of Article 3(k)(ii) on the limited range of goods or services is assessed across a wide range of EU Member States.

As outlined in our responses below, we support most of the EBA's suggestions as an effective proposal to enhance the functioning of the LNE provisions. At the same time, we believe that the Guidelines could be further enhanced by taking into account targeted suggestions, which are addressed in detail below.

FCE stands ready to engage with policymakers and regulators to further explain the business models of its members, focusing also on the mechanics of the functioning of the card or any alternative device used for the identification of the user of the services. We would like to present in the near future further arguments to deepen the dialogue with policymakers and regulators about the characteristics of the instruments used and their regulatory treatment within the legislative framework.

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Q1. DO YOU HAVE COMMENTS ON GUIDELINE 1 ON THE SPECIFIC PAYMENT INSTRUMENTS UNDER ARTICLE 3(k) OF PSD2?

1.1 FCE welcomes the EBA's assessment of neither distinguishing between the types nor formats of instruments that are available for the purpose of LNE. While currently most fuel cards are issued in physical format, we see a market trend towards digital solutions (e.g. digital wallets). It is critical that these technological developments are also considered in the context of the LNE.

1.3 We also support the EBA's assessment that Competent Authorities should refrain from imposing any restrictions on the means of transferring funds to the payment instrument, i.e., that the way the funds are transferred to the payment instrument is irrelevant to the assessment on whether the instrument would fall under LNE. This would ensure that a wide range of existing funding practices is captured under the LNE exclusion.

1.4 In addition, we welcome that Competent Authorities should assess both contractual and technical restrictions limiting the use of excluded payment instruments. Our members apply a range of technical restrictions in order to ensure compliance with the limited range of goods and services under Article 3(k)(ii). Examples of technical restrictions include: i) the whitelisting of ISOs/BINs/IINs on the equipment of specific sites/site groups as long as a contract for acceptance is in place; ii) the central authorisation of all transactions via a live server. It is worth noting that fuel cards are never packaged by default at any location that has card-accepting equipment, totally independent agreements are made and authorisation & settlement routes are agreed and implemented before any card is allowed to draw fuel.

1.7 FCE members note that several Competent Authorities currently allow for the combination of a regulated and a non-regulated payment instrument in a single card-based means of payment. We believe that the combination of these instruments has significantly improved consumer experience and decreased costs. In addition, a ban of hybrid cards would impact the development of innovative and consumer-friendly digital solutions.

We understand and agree with the EBA's ultimate aim of ensuring consumer protection with this provision. Nonetheless, we believe that a ban of hybrid cards is not a proportional measure given that there are other, less restrictive, avenues to ensure that a clear user understanding exists with respect to the character of the payment application used and the level of regulatory protection. Technical solutions could achieve the same objective as the physical differentiation proposed by the EBA. Such technical solutions include, but are not

limited to: i) differentiation of payment instruments within one digital app, which can be achieved by selecting or swiping, ii) differentiation at the point of sale (POS).

1.8 Finally, we also welcome the EBA's assessment that service providers can issue more than one specific payment instrument under Article 3(k) PSD2. We believe that this provision can prove particularly helpful in enabling the development of future digital instruments based on the LNE.

Q2. DO YOU HAVE COMMENTS ON GUIDELINE 2 ON THE LIMITED NETWORK OF SERVICE PROVIDERS UNDER ARTICLE 3(k)(i) OF PSD2?

2.1 FCE members believe that criterion 2.1(d) on the common brand that characterises the limited network requires further clarification. It is critical that the definition of brand is not interpreted in a narrow way by Competent Authorities in order to ensure that the current market practice of card issuers working in close cooperation with acceptance partners continues to be allowed.

Q4. DO YOU HAVE COMMENTS ON GUIDELINE 4 ON THE LIMITED RANGE OF GOODS OR SERVICES UNDER ARTICLE 3(k)(ii) OF PSD2?

4.1 FCE members agree with the need to define a direct functional connection between the goods and services that can be acquired with the payment instrument under Article 3(k)(ii).

4.2 However, we are of the view that in some instances it can be difficult to establish a functional connection on the basis of a leading product or service. Instead, the basis should be a mutual and functionally connected "purpose". The principle of a functionally connected "purpose" has been adopted by the German regulator and has proved to be an effective mechanism to establish exemptions on the basis of a limited range of goods or services.

For example, in relation to mobility service cards, the functionally connected purpose could be "vehicle-related goods or services", thus allowing the exemption to cover, for example, conventional and alternative fuel, roadside assistance, toll charges, security services, parking and ferry fees. The exemption would prohibit the purchase of food or drinks in fuel stations as these are not vehicle-related.

In contrast, the establishment of a functional connection based on a leading good or service may lack sufficient clarity. For example, if the leading good was defined as “conventional and alternative fuel”, it might be more difficult to establish a functional connection between these and ancillary goods and services of roadside assistance, toll charges, security services, parking and ferry fees.

In addition, the understanding of what constitutes the “leading” good or service might be problematic as it may well depend on the individual user perspective. For example, some customers do predominantly use an exempted mobility card for the acquisition of toll charges instead of fuel.

Therefore, we would suggest the following alternative drafting: *"When assessing the functional connection between the goods and/or services, competent authorities should take into account that a leading purpose is established. […]”*

4.4 We welcome the introduction of complementary assessment criteria that can be taken into account by Competent Authorities when assessing if the use of a payment instrument can be considered in line with Article 3(k)(ii).

However, we do have significant concerns on the inclusion of two specific indicators: *a) the volume and value of payment transactions envisaged to be carried out with the payment instruments on annual basis;* and *c) the envisaged maximum number of users of the payment instrument.*

We believe that the restrictive nature of the exemption is ensured once the means of payment can only be used for a very limited range of goods or services. As long as this limited scope of use is not changed, a successful development of the business and thus an increase in volumes, transactions, credited amount or number of users does not substantially affect the way business is conducted nor should it constitute a justification to request a new notification.

In addition, we fear that the abovementioned indicators are extremely volatile in nature, deliver only limited added information to Competent Authorities and do not relate to the risk profile of companies making use of the exemption. We see several practical difficulties with the inclusion of these indicators:

- The inclusion of the envisaged volume and value of payment transactions as well as the envisaged maximum number of users is a volatile indicator that also depends to a large extent on exogenous factors like the state of the economy.

- The inclusion of these indicators runs contrary to the business rationale of providing fuel card users easy access to a stable and reliable network. Companies operating trucks and fleets rely on fuel card issuers to provide access to a widespread network of fuel stations and recharging points which offer an array of different fuel types to meet their energy needs. As a result, fuel card issuers seek to offer strong acceptance networks. This makes it incredibly difficult to forecast an envisaged maximum number of transactions or users.

- We would question whether the envisaged volume and value of payment transactions or number of users will deliver valuable information to Competent Authorities to determine whether a network is to be considered as limited. FCE members have both contractual and technical limitations in place to ensure that only a very limited range of goods is offered in accordance with Article 3(k)(ii).

- Furthermore, we have additional concerns when assessing these indicators in conjunction with the notification requirements under Guideline 6. Guideline 6 states that an additional new notification should be submitted to the Competent Authority when any information provided with the initial notification has changed substantially. Bearing in mind that the initial notification must state the envisaged volume and value of payment transactions and the envisaged maximum number of users, this could lead to a de facto situation where Competent Authorities may ask service providers to resubmit applications based on non-substantial information. This clearly contradicts the principle of a one-off notification.

- We fear that the introduction of such envisaged maximum thresholds as complementary indicators could also lead to a situation where Competent Authorities may feel the need to potentially prohibit the use of the exemption. This will create legal uncertainty for service providers with a genuine business model which are run successfully.

- Overall, we believe that any metric that caps or targets the number of customers or retailers will be detrimental for the growth of the network. Growth in size does not equate to new exponential risks. The LNE should capture the relevant qualifying business types but should not be restrictive to genuine expansion.

Q5. DO YOU HAVE COMMENTS ON GUIDELINE 5 ON THE PROVISION OF SERVICES UNDER ARTICLE 3(k) OF PSD2 BY REGULATED ENTITIES?

5.2 FCE believes that the notion "different brand" in Guideline 5.2 would benefit from further clarification. In our view, the brand would typically be the name of the company in order to create a recognisable product for users and with a view to achieve the most effective marketing. Therefore, it should be clarified what exactly is meant by "different" brands as an issuer will and must label both of its products, i.e. the regulated means of payment and the unregulated means of payment, using its company name. It must be possible for the company name to be used for both products as long as the different type of service is recognisable, for example "XY BRAND payment means regulated" and "XY BRAND payment means unregulated".

In essence, it should be clarified that the term "brand" shall not be interpreted in a narrow sense, so that the same brand/company name can be used as long as the differentiation and the character of the means of payment is clearly recognisable for the user as regulated and unregulated.

Q6. DO YOU HAVE COMMENTS ON GUIDELINE 6 ON THE NOTIFICATIONS UNDER ARTICLE 37(2) OF PSD2?

6.1 FCE welcomes the EBA's aim to contribute towards the convergence of supervisory practices and greater harmonisation of the notification regime under Article 37(2) PSD2.

In our experience, notification processes and requirements vary widely across the Member States. Changes are visible in terms of timelines, details that service providers are required to provide as part of the activity description, or the frequency of the submission. Application forms vary from short and standardised ones paired with prompt reactions from the responsible Competent Authority to very burdensome ones that require the continuous submission of information over an extended period of time.

We also believe that the Guidelines would benefit from further clarity on the requirements for the exemption to apply in order to ensure that the application of PSD2 is harmonised. For example, issues like the number of functionally connected goods or services that are accepted by a Competent Authority in a given Member State should be harmonised in order to achieve a consistent application of the LNE.

An unharmonised interpretation of the exemption would render it factually impossible for market participants to operate across the EU with an exempted payment instrument and it would also significantly harm the users as they would not know to what extent the instrument can be used in individual EU countries. Imagine a truck driver who relies on his mobility service

card to be used for toll charges or roadside assistance only to find that this is not possible in a certain EU Member State.

We are particularly concerned about Recital 59 of the Guidelines in relation to the information exchange among Competent Authorities. While we appreciate the administrative burden that would potentially be linked to it, we would strongly encourage the EBA to seek further coordination on this matter. In fact, this may be the only way to truly achieve a coordinated approach across the EU. In the absence of further action, the current regime of 27 largely diverging application processes will likely continue to be the norm, even after the implementation of the new Guidelines.

FCE members are concerned about the complications, time effort, costs, administrative burden, business risks and lack of legal clarity caused by a notification requirement in each jurisdiction if the application of the exemption is not sufficiently harmonised across the EU at the same time.

We believe that the information exchange among Competent Authorities is fundamental to ensure a level playing field across the EU. If such an approach is not possible, a streamlined interpretation, supported by very clear EBA guidance is needed to allow for a harmonised application of the exemption in each Member State.

In addition, identical notification procedures with respect to format and scope of information should be implemented by Competent Authorities across the EU. This would be particularly helpful to foster timely decisions for approval or rejection of applications within agreed timeframes.

The convergence of supervisory practices could potentially be improved by attaching an indicative effect to the decision of the home Competent Authority in relation to exemption. Closer information exchange between the home Competent Authority and other Competent Authorities in which the service provider operates could be a step towards further harmonisation.

In addition, we would like to request guidance on the submission of turnover values where the EUR 1m threshold has been exceeded. We note that different interpretations could exist in relation to the reporting basis applicable for measuring transaction volumes. Specifically, guidance would be helpful in relation to which of the below constitutes the reporting basis:

1. The Member State in which the customer is based
2. The Member State(s) of usage
3. The Member State in which the issuing entity, or sub-entity is based.

6.3 Guideline 6.3(c) states that the description of the activity should include any other information allowing Competent Authorities to assess the notification against these Guidelines. We fear that this provision allows for an open-ended list of potential additional requirements to be requested by Competent Authorities. Ultimately, this would run contrary to regulatory convergence as it may lead to Competent Authorities requesting different types or volumes of information.

As indicated in our response to Question 4, we agree with most of the additional indicators to be provided in order for Competent Authorities to make an informed assessment of the compliance of service providers with the LNE regime. In fact, we believe that mandatory reporting on a closed list of thorough indicators would prove to be a decisive step towards the harmonisation of the regime at EU level. Nonetheless, this only holds as long as Competent Authorities do not deviate from standardised information requirements. Therefore, we consider this provision to be opposed to the EBA's aim of harmonising the notification process across the EU.

6.4 FCE members believe that the term "substantial changes" needs to be interpreted in a narrow manner in order to strike the right balance regarding when the resubmission of a notification is justified. We agree in principle that resubmissions are justified when there has been a significant change that affects the way a payment instrument operates and the risks linked to it. However, we caution against an approach whereby indicative data, such as the envisaged maximum number of users or payment volumes, could be interpreted as a trigger for the resubmission of applications.

This concern also extends to the open-ended list of situations that could constitute substantial changes, as described in Guideline 6.5, and to Guideline 6.6 which states that "Competent Authorities can request service providers to submit a new notification with updated information if they consider this necessary […]".