

POSITION PAPER



ESBG response to the EBA Consultation Paper on the draft Guidelines on the limited network exclusion under PSD2

ESBG (European Savings and Retail Banking Group)

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ESBG Response to the European Banking Authority Consultation Paper on the draft Guidelines on limited network exclusion under PSD2

The European Savings and Retail Banking Group (ESBG) welcomes the opportunity to respond to this public consultation from the European Banking Authority on the draft Guidelines on limited network exclusion under PSD2.

ESBG and its Members welcome the EBA initiative to provide more clarity on the provision set forth in Article 3(k) PSD2. ESBG and its members are generally positive to the implementation of the draft Guidelines aiming to harmonize the application of the Limited Network Exclusion (LNE) under PSD2.

ESBG and its members acknowledge that a fragmented application of the LNE rule in Europe leads to an unlevel playing field. There is also a big difference in cost to offer a service exempted from PSD2 in relation to services in scope, so a harmonized interpretation is also vital in terms of competition reasons. Further, we believe that a transparent and clear application is relevant from a consumer protection perspective. Indeed, when paying with a card that is issued under the LNE, consumers cannot benefit from the protection rules that apply under PSD2.

On a general level we also see the need to clarify whether or not internet-based platforms with business models based on continuous growing lists of connected service providers could qualify for the limited network exemption. There are currently disturbing examples of internet platforms that have successfully notified exclusions under Article 3(k)(i) in several member states.

Finally, the principle 'same activity, same rules' would imply that the same rules apply to both regulated and non-regulated entities when providing services under the LNE.



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

GL 1.12 states that the issuer of a payment instrument under Article 3(k) can be established in a Member State different from the Member State whose competent authority has received the notification under Article 37(2) which it is assumed that EBA means is also the Member State where the payment service users are residing. It is our understanding that this does not necessarily imply that one and the same payment instrument issued under Article 3(k) can be used in several different Member States. If so – it should be clarified if EBA is of the opinion that cross border functionality is consistent with the purpose of the exclusion.

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

GL 2.1

Networks of service providers which are growing continuously should not be eligible for the limited network exemption. This should be suggested as a disqualifying factor in the guidelines or at least a factor that heavily weighs against an exclusion. Could one fuel card be exempted although it can be used for all existing gas stations within the EEA?

GL 2.1.c), GL 2.2.a) and para 24

Although the European Commission indicates their view that there is no geographical limitation to the provision of services under Article 3(k)(i), while at the same time PSD2 allows Competent Authorities to take geographical limitation into account when assessing the applicability of the use of the exemption, the EBA suggests leaving this question open – calling it a flexible approach. We do not view the so-called flexible approach as being helpful for Competent Authorities nor other industry participants since the “flexible approach” opens up for arbitrary and incoherent decisions that would threaten to further distort competition on the payment instrument market. As of today, some countries accept a limited network exempted card to be used cross border and some countries do not. We suggest that a geographical limitation limiting the use of excluded payment instruments to individual member states should be viewed as the main rule with exceptions only in cases that are especially motivated due to e.g., cross border areas that are commercially highly integrated.

Para 25

On the topic of different examples of existing limited networks, we suggest not adding the following proposed potential requirements to the background and rationale section of the proposed guidelines due to being far too extensive as well as impractical to assess:

- A specific region with local producers of foods and services.



- Stores within a town, which are registered in the local town chamber of commerce.

GL 2.1.b)

We suggest adding to this criterion whether the envisaged maximum number could be expected to increase over time.

Para 26

We suggest not adding this paragraph in the background and rational section of the proposed guidelines as it could be perceived as proposing a manner to circumvent the limitations set to contain the use of the exemption. The proposed set up could be assumed to create paperwork without the added value that should be provided by the explained rational for regulatory guidelines.

GL 2.2.g)

Whereas the network is centralised or decentralised would need to be elaborated in terms of added risk. If this is not done, we suggest removing this indicator as it does not guide the regulator when assessing the applicability of the exclusion.

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?

No comment.

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

As a general comment we suggest including examples indicating what goods or services that cannot be assessed as having a functional connection between them. Could for example a range of goods mixing fuel and victuals be corralled in the concept of “limited range of goods or services”? Given that today’s supermarkets typically offer hundreds of thousands of goods of various categories we see a strong need to reach a common definition of the concept of limited range of goods or services.

4.4.f)

Same comment as concerning GL 2.2.g) above. Whereas the network is centralised or decentralised would need to be elaborated in terms of added risk. If this is not done, we suggest removing this indicator as it does not guide the regulator when assessing the applicability of the exclusion.



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

In general, we would like to emphasise that regulated entities are allowed to provide services under Article 3(k) PSD2. Article 18(1)(c) PSD2 explicitly states that payment institutions are allowed to engage in business activities other than the provision of payment services. There is no legal basis for imposing any restrictions for regulated entities providing such services other than those explicitly stated in Article 3 (k) PSD2. In addition, a level-playing field between regulated and non-regulated entities in the provision of services under Article 3 (k) PSD2 must be ensured.

Guideline 5.2.

We agree that it is important to distinguish regulated payment services from services provided under Article 3(k) PSD2. This can however be achieved by clearly communicating the usability of instruments issued under Article 3(k) PSD2 and the limitations of their usability (such as limited network acceptance, no cash-out etc.). This information is typically already provided in the terms and conditions of these instruments and ensures that the customers are aware of the limited usability of such services. However, we do not see a legal basis for requiring regulated entities **to use a different brand name or separate legal entities** when providing services under Article 3(k) PSD2. Such restriction would create a competitive disadvantage for regulated entities and could obstruct regulated entities from providing such services. A level-playing field between regulated and non-regulated entities in the provision of services under Article 3(k) PSD2 must be ensured. Furthermore, the legal right of payment institutions to use their usual brand must remain unaffected. To ensure a clear distinction between regulated payment services and services under Article 3(k) PSD2 it would be sufficient to use **different product names** when providing services under Article 3(k) PSD2. In addition, the standardised terminology of payment services introduced by the Payment Accounts Directive 2014/92/EU already ensures that the most representative services linked to a payment account are clearly distinguished from other services.

Guideline 5.3.

We agree that it is important to distinguish regulated payment services from services provided under Article 3(k) PSD2. This can however be achieved by clearly communicating the usability of instruments issued under Article 3(k) PSD2 and the limitations of their usability (such as limited network acceptance, no cash-out etc.). This information is typically already provided in the terms and conditions of these instruments and ensures that the customers are aware of the limited usability and protection of such services. As a consequence, there is no need to further inform customers that they do not benefit from the protection for payment services users under PSD2. In addition, introducing such a requirement only for regulated entities would create a competitive disadvantage for regulated entities. A level-playing field between regulated and non-regulated entities in the provision of services under Article 3(k) PSD2 must be ensured.



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

No comment.

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

No comment.



About ESBG (European Savings and Retail Banking Group)

ESBG is an association that represents the locally focused European banking sector, helping savings and retail banks in 18 European countries strengthen their unique approach that focuses on providing service to local communities and boosting SMEs. An advocate for a proportionate approach to banking rules, ESBG unites at EU level some 885 banks, which together employ 656,000 people driven to innovate at 48,900 outlets. ESBG members have total assets of €5.3 trillion, provide €1 trillion billion in corporate loans, including SMEs, and serve 150 million Europeans seeking retail banking services. ESBG members are committed to further unleash the promise of sustainable, responsible 21st century banking.



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