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Zalando SE - Comments on EBA Draft Guidelines on the Limited Network Exclusion under PSD2

Zalando SE, based in Berlin, Germany, has become an important European online fashion platform. We deliver to customers in 23 countries. In our fashion store, they can find a wide assortment from more than 4,500 brands. We strive to have an extensive assortment of fashion and beauty products, that we present in a homogenous way for easy search by the consumer. We want to offer a seamless convenience to our customers and a tailored digital experience that includes not only the purchase but also fashion advice and shopping services. By opening our platform to smaller sellers, we want to enable producers and sellers of fashion and beauty products to present and market their goods to a wide European audience.

Gift cards are an important part of our business because they are very popular gifts and allow Zalando as an online-only merchant to have a footprint in the offline world.

We welcome the opportunity to share our point of view with regard to Draft Guidelines on the limited network exclusion under PSD2 for consideration by the EBA.

General Remark

We appreciate that there is no right to passport the exemptions under Article 3k of PSD2. At the same time, there is a valid interest - especially among those merchants operating in more than one jurisdiction - to have a reliable and at the same time coherent legal framework that prevents competitive distortion and regulatory forum shopping. Against

1

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this background, the EBA should encourage the CAs to issue clearance certificates that, subject to material concerns, are accepted by other CAs.

Responses to EBA's questions:

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

We agree with the EBA that the term payment instrument should be interpreted in the same way for regulated as well as excluded payment instruments. We would further like the EBA to clarify that stored value cards that can only be used to purchase goods from one merchant do not fall within the definition at all because a payment instrument requires that it is agreed between a payment service user and a payment service provider (cf. Art. 4(14) PSD2). However, where a merchant accepts payment for its goods or services, it does not provide a payment service to the user, the merchant only accepts payment on its own behalf. We have found that in some member states the mere fact that a gift card is involved, this card is deemed a payment instrument and thus the merchant providing a payment service, which goes against a harmonized interpretation of PSD2.

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

We believe that Guideline 2 should be amended with regard to the following aspects:

1. The **rationale of the limited network exemption** remains rather unclear. Does the law tolerate the LNE because

- (a) they pose a limited AML risk, or
- (b) due to the limited scope CAs do not need not supervise the issuers of the products, or
- (c) the users of those products need less protection?

We think that a well defined rationale will enable better decisions on whether the LNE applies or not.

2. We believe that the Guideline 2 requires further clarification regarding the specific situation of online stores in particular **online platforms**.

We welcome that the EBA has clarified that a limited network may consist also of online sellers and that the goods and services offered do not have to be dependent on the ones offered in physical stores (cf. 2.4).

We highly appreciate that the EBA is inclined to level the playing field between online and physical stores (cf. 2.4).

We believe, however, that there should be more specific guidance regarding the particular situation of online platforms. For online sales, the size of the geographical area for the provision of goods and services cannot be a determining factor, rather this requirement would undermine the freedom to provide goods and services as a fundamental right of the European Union. Further, we note that internet platforms often have a very large network of sellers that – if limited to a certain number – would lose its purpose and attractiveness. The main reasons for the success of internet platforms and their part in the economy are twofold:

- (1) they allow the consumer to find the products she/he is looking for in an easy and searchable way, by ensuring state of the art website design, presentation, and searchability; and
- (2) they also enable small sellers with no or limited online presence to reach a wide customer-base that otherwise they would not be able to cater to, thereby enhancing competition.

Especially on marketplaces that enforce homogenous terms and conditions for consumers across all sellers, consumers often do neither realize nor care that they are buying from various sellers and not only from one shop. The EBA has alluded to this in Recital 29 but appears to be limiting it to corporate groups or franchises.

We thus believe that the limited network exemption should also be available to internet platforms, which otherwise risk being excluded by the factors set out in 2.1 and 2.2. The EBA should give due regard to a level-playing field for large retailers and small shops who may only sell online via internet platforms.

From our perspective, subject to the above recommended specification of the rationale of LNE, the size of the geographical area for provision of goods and services as set out in 2.2(a) seems to be a move into the wrong direction, since it limits the freedom to provide goods and services without providing protection to the safeguarded interest. If the LNE's intention was to tolerate limited risks to the users of these payment instruments then a limit on the amount of instruments a consumer may acquire and their maximum value, would serve the purpose of consumer protection in a better way. Such a limit would also not significantly discriminate against online retailers whose business is based on overcoming geographical barriers in contrast to their competitors with physical stores. It appears not to be commensurate to apply the geographical test that heavily impacts on

3

the freedom of goods and services instead of opting for other solutions that also fulfil the purpose of protecting the customer. Further, we believe this is conflicting with the intention implied in 2.3 that LNE should be agnostic to the distribution channels.

We think that in the case of online shops, the limiting factors of LNE could be derived from the following:

- The internet platform has its own brand that customers associate with a certain level of service, the type of products, and the reliability that they would not expect from another online shop. In other words, the customer should know that when buying from the website with the brand name “Z” they get a uniform service, the same T&Cs apply to all sales, they have uniform return rights, and a customer service, irrespective of the sales contract being concluded with different sellers via the “Z” platform. This would exclude marketplaces and classified sites that neither curate the goods and service nor harmonize the conditions under which the sellers sell via the platform.
- The platform ensures that customers are taken well care of and that the risks of online shopping are minimized, e.g., by offering a centralized payment system, by offering pay-back guarantees or extended return rights. Further, the platform ensures that products are described accurately and in a non-misleading manner and allow for customer feedback.
- The payment instrument may only be used on the platform but not in any of the other online or offline shops of the sellers selling via the platform.

If these criteria are met, the customer experiences a transaction as a transaction with the brand, not the individual merchant. The limiting factor of the LNE is the brand environment with its uniform T&Cs and a marketplace acting as a guardian.

To reflect this, we suggest amending Guideline 2 by inserting after 2.4 for the following new 2.5:

Sellers who sell via an online platform may be viewed as a limited network if such online platform is centrally managed and meets the following requirements:

- *The online platform has its own brand,*
- *The online platform has a uniform check-out experience for all sales,*
- *Sales and return conditions are the same for all sales irrespective of the seller;*
- *The online platform has uniform standards regarding the presentation of products and services, and administers these effectively;*

4

- *The online platform offers a customer service for all sales;*
- *The payment instrument may only be used on the online platform but not in other online or offline shops of the sellers selling via the platform.*

Q3. Do you have comments on Guideline 3 on the instruments used within premises of the issuer under Article 3(k)(i) of PSD2?

Differentiating between the online and offline sales of an issuer of an exempted payment instrument does not take into account the customers' view. Customers often buy online and pick-up offline or vice versa. Some points-of-sales are designed to showcase only a few items in the actual shop but customers essentially order online in the shop. By not including online sales, this disregards the reality of today's shopping environment.

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

1. The rationale of the limited range exemption remains rather unclear. Does the law tolerate the LRE because they pose a limited AML risk, or the issuers require less regulatory supervision, or the users of those products need less protection? We think that a well-defined rationale will enable better decisions on whether the LRE applies or not.

The chosen approach to determine the functional connection of a limited range of goods and services not by a functionally connected purpose (e.g. everything that dresses a person) but by one (leading) product only leads to a uniform interpretation if it is clarified that the leading product can be a product category and not only a single product. For instance, if the leading products are sweatshirts, would trousers be ancillary (because then the person is dressed from head to toe) or t-shirts (because they may be worn beneath a sweatshirt)? If the common denominator is chosen as a category (e.g. clothing), it will be much easier to come to a uniform interpretation across all member states.

2. 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 considerable concerns on the inclusion of the proposed additional indicator *d) (the envisaged maximum number of users of the payment instrument)*. Article 3(k)(ii) allows for exemptions that limit the objects of transactions, not the parties of these transactions (such limitation is the subject of Article 3(k)(i)). Marketplaces seek to continually grow

their acceptance networks as well as the number of their customers. This makes it incredibly difficult to forecast an envisaged maximum number of transactions or users.

We are afraid that this additional indicator will in practice cap the growth of the online marketplaces, although growth in size does not translate into risks that cross the safe harbor of the limited range exemption.

Therefore, we believe that not so much the number of users or the payment volume should be taken into account but the risk of AML in that industry and the protection awarded to customers. For instance, if the limited range of goods and services carries only a low risk with respect to AML, then this should be a stronger indicator than the payment volume. Also, if the customer is provided with sufficient protection (expiry date of unregulated payment instrument no shorter than statutory period of limitation) and effective customer complaint processes, then this should be an indicator for allowing such a payment instrument as an unregulated product.

3. With regards to Guideline 4.2 last sentence, we welcome that the competent authorities are encouraged to validate the registered LRE products. This will level the playing field in the European Community. We recommend asking the competent CAs to re-assess their existing LRE products. We propose to extend this Guideline to the LNE.

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

We welcome that also regulated entities may provide an unregulated payment instrument. We would like the EBA to clarify, though, that for a level-playing field this should also mean that with regard to unregulated payment instruments, the regulated entity is not subject to AML obligations otherwise, Guideline 5 would be a moot point.

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

In Guideline 6.1 it is set out that the “service provider providing excluded goods and/or services” is to submit the notification. However, we believe this should be the professional issuer of the payment instrument as otherwise it is not clear if all or only one service provider of a limited network is obliged to submit the notification.

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