15 October 2021

UPEI Contribution

Consultation on draft Guidelines on the limited network exclusion under PSD2

Guideline 1: Specific payment instruments under Article 3(k) of PSD2

UPEI has comments on the draft guideline 1.

Point 1.1.

UPEI is not against the approach proposed by the EBA, in line with the current wording of PSD2 which already refers to excluded instruments as payment instruments. However, instruments which benefit from the limited network exclusions are not typical payment instruments, which is exactly why they are eligible for the exclusion in the first place. Point 1.1. should not lead to a broader understanding of what a payment instrument is.
Fuel cards, for example, are transaction authorisation cards, i.e. they do not initiate transfer of funds like regular payment cards, but rather initiate the purchase & sale transactions within the supply chain (more information here). In this sense, fuel cards are unique instruments, and should be recognised as such by the legislator. UPEI understands that the classification of such authorisation instruments (like e.g. fuel cards) as payment instruments is currently unclear, hence UPEI calls upon the EBA for analysing applicability of PSD2 on such instruments in the first place and give clear recommendations. If fuel cards (and similar authorisation instruments) are considered as falling in the scope of PSD2, in such case UPEI would propose further comments on the EBA guidelines.

From our point of view, the main purpose of the PSD 2 is the protection of sent funds and their sender. However, in the case of fuel cards, no money transfer takes place, as payments are made on the basis of separately issued invoices.

UPEI supports emphasizing the reference to "specific" payment instruments under point 1.1. UPEI calls for the analysis of authorisation instruments (such as fuel cards) by EBA, checking whether they fall under PSD2 or not, as they do not fulfil the definition of initializing payment transactions.

Point 1.3.

We understand the word "intermediary" as referring to a financial intermediary involved in the processing of payments as a service provider. However, it should be clear that "intermediary" does not refer to an operator or a lessee. In the case of fuel cards, it is common that a lessee operates the service stations and therefore takes payments from the customers on the behalf of the issuer, but it is not acting as a financial service provider therefore he cannot be treated as such.

In order to avoid any confusion or over extensive interpretation of the guideline, we recommend EBA to clarify point 1.3. as follow:

AV. DE LA RENAISSANCE 1
B - 1000 BRUSSELS | BELGIUM
T +32 2 740 20 20
F +32 2 740 20 21
INFO@UPEI.ORG
WWW.UPEI.ORG
@FuelSuppliersEU
upei-europeanassociation
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"Where funds are transferred to the payment instrument by using a *financial* intermediary other than the issuer…"

Point 1.7.

UPEI believes that the proposed guideline unnecessarily restricts business operations. It happens that fuel card issuers propose their customers to have, for convenience, access to both a close loop instrument (for very limited range of products and services) and an open-loop instrument (for other types of products), through the same mobile application for example. Limiting functionalities would restrict innovation and increase the burden for both issuers and customers who would have to manage, in this case, two different apps.
However, UPEI recognises the need to provide clarity and transparency to customers and supports measures to guarantee the clear distinction between payment instruments and specific payment instruments, such as different names and visuals, identification procedures, as well as explicit references to the different level of protection each entails.
UPEI suggests removing point 1.7 and recommending competent authorities to impose measures for transparency.

Guideline 2: Limited network of service providers under Article 3(k)(i) of PSD2

UPEI has comments on the draft guideline 2.

Point 2.1.

We understand the logic of setting limits to make sure that eligible networks are actually limited in their size. However, setting additional conditions and thresholds could contravene free trade and unjustifiably restrict business operations in networks that are deemed to be limited.

- direct contractual relationship: it is important to exclude intragroup relationships.
In the fuel card business, it is common that the mother company issues the fuel card but the daughter company in another country has the direct contractual relationship with the service and good providers, while the network could remain limited to a dozen of service stations distributed in two countries border areas for example.

- envisaged maximum of providers and envisaged geographical area: these elements will necessarily evolve over time, especially as issuers seek to grow their business, which is also in the interest of the customer. The commercial success and expansion of network should not be itself a reason for rejecting the exemption, as other factors come into play.
It would also be difficult for businesses to assess the envisaged maximum of providers and geographical area, and they would certainly not like to be bound to it. In addition, these elements form part of the business strategy which does not need to be reported to competent authorities. Also, if each Member Stated set their own thresholds, beyond the ones set by the PSD2, the internal market would end up more fragmented, which would go against the objective of EBA with these guidelines. However, notifying companies could provide competent authorities with information on their current business.

- common branding: there is neither an obligation of a direct link between the brand and the company ownership under most legal structures, nor it is common practice. In the fuel business in particular, it is common for fuel suppliers to acquire licences for operating retail sites under a different branding. While it is clear that a group comprising several retail chains should not be considered as one retail chain for the purpose of the limited network exclusion, many fuel

AV. DE LA RENAISSANCE 1
B - 1000 BRUSSELS | BELGIUM
T +32 2 740 20 20
F +32 2 740 20 21
INFO@UPEI.ORG
WWW.UPEI.ORG
@FuelSuppliersEU
upei-europeanassociation
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cards issuers are one company operating under different logos. In the specific case of independent fuel suppliers, the customer is not misled because:

- Companies operate in regional markets;
- There is no exponential growth of the retail station networks;
- If a station or two are added to the network, the customer would be informed;
- Unlike with very fast-growing card systems, the customer is unlikely to lose track of the scope;
- Companies typically are family businesses that in many cases have been run for generations and the customer relations have grown historically;
- It is never two networks merging, it is always one company operating two brands.

The implementation of this requirement has created an unnecessary burden for both fuel cards issuers and their customers.

Most importantly, relationships in the fuel card area typically are business-2-business, therefore both the issuers and the customer act as commercial entities, hence any agreement they get into is a relationship between businesses, in which risks are well known from both parties. When it comes to customer protection, one should distinguish B2C to B2B configurations.

We therefore call for the clarification of the draft guideline to allow for example fuel card issuers to provide fuel cards that can be used at differently flagged retail stations (bearing two logos/colours), while operating a single payment brand as per the requirements of the PSD2. If they want to limit this possibility, Member States could impose strict conditions. These conditions could for example include effective customer communication and information of a possible network extension, in addition to restricting it to single companies using two logos (as opposed to two networks of two different companies merging).

Overall, we believe that each of the criteria proposed by EBA should be taken into account by competent authorities when assessing requests for exclusions, but they should not be considered as cumulative criteria to be interpreted strictly for defining eligibility for the limited network exclusion. In other words, a limited network not complying with one of these criteria should not be automatically discarded for the exclusion.

We suggest the draft guideline to be modified as follow:

2.1. When assessing whether the use of a specific payment instrument is limited within a limited network of service providers, competent authorities should take into account *several of* the following criteria in the assessment of the information provided with the notification under Article 37(2) of PSD2:
a) A direct contractual agreement for acceptance of payment transactions is concluded between the issuer of the payment instrument and each provider of goods and services operating within the limited network *(excluding intragroup relationships)*;
b) The ~~envisaged maximum~~ number of providers of goods and services operating within the limited network *when* submitting the notification under Article 37(2) of PSD2;
c) The ~~envisaged~~ specific geographical area for provision of goods and services *when* submitting the notification under Article 37(2) of PSD2; and
d) *One single* service provider offers goods and services under a common *payment* brand that characterises the limited network and provides visual manifestation to the user of the payment instrument, *which is clearly informed*.
e) The relationship between the issuer of the payment instrument and the user is business-to-business.

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Guideline 3

UPEI supports the draft guideline 3 and has no further comment.

Guideline 4

Overall, UPEI supports the draft guideline 4 as it is in line with independent fuel suppliers' views on the "very limited range of goods or services" exemption. Indeed, we believe that for fuel cards to be excluded they should only allow the purchase of vehicle-related goods and services such as fuels, lubricants, additives, accessories, tyres, cleaning services, vehicle repairs as well as tolls and parking fees, to allow mobility on the road combined with train or ferries ("goods for the vehicle, not for the driver"). More information here.

Point 4.4
As raised under point 2.1., UPEI considers that requesting issuers to provide information on envisaged volume and value of payment transactions, envisaged maximum amount to be credited, envisaged maximum number of users, is neither practical nor appropriate.

Guideline 5

UPEI supports the draft guideline 5 and has no further comment.

Guideline 6

Overall, UPEI supports the draft guideline 6.

Point 6.1.

We would welcome the clarification of the location where the goods and/or services are provided, as some discrepancy in the interpretation among Member States has led to confusion in the fuel cards area. For example, in the fictitious case of a German truck refueling in Poland with a fuel card, the goods are provided in Poland, but the service related to the use of the fuel card, which is the billing to the company, is provided in Germany where the truck company is located. It is therefore unclear in which jurisdiction this transaction should be notified.

We suggest EBA clarifying by adding the following sentence:
"The relevant jurisdiction and authority to be notified should be the one of the country where the transaction takes place."

Guideline 7

n/a

Final remark

A wide range of companies issue fuel cards, from large organisations to small, independent and family-own fuel suppliers. UPEI counts within its membership a significant proportion of fuel card issuers operating only a handful of retail stations, typically on a regional level. Due to its extensive requirements, the latter cannot afford to go through a full authorisation under the provisions of PSD2. The possibility of exclusions is therefore essential for small and medium

AV. DE LA RENAISSANCE 1
B - 1000 BRUSSELS | BELGIUM | T +32 2 740 20 20
F +32 2 740 20 21 | INFO@UPEI.ORG
WWW.UPEI.ORG | @FuelSuppliersEU
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businesses to remain competitive, keeping the measures proportional with the objectives of PSD2.

Most UPEI members business models would be seriously jeopardised should the exclusions cease to exist. This would in turn negatively affect the competition in the market. Smaller hauliers would partly loose competitiveness as they usually get less advantageous price offers from big petrol stations chains and independent petrol stations would not be able to service them without the support from fuel card issuers. Also, they would face an increased administrative burden, as fuel card issuers usually handle VAT returns for them.

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Contact: Cécile Nourigat | Secretary General | info@upei.org | +32 2 740 2020 | www.upei.org

UPEI represents nearly 2,000 European importers and wholesale/retail distributors of energy for the transport and heating sectors, supplying Europe's customers independently of the major energy producers. They are the interface between producers and consumers, using their own infrastructure and flexibility to supply existing demand for conventional and renewable liquid fuels, as well as non-liquid alternatives as part of the energy transition. They cover more than a third of Europe's current demand. The organisation brings together national associations and suppliers across Europe.

Independent fuel suppliers bring competition to Europe's energy market and are able to respond rapidly to changes affecting supply, contributing to security on a local, national and regional level. They have developed and maintain a comprehensive infrastructure for the sourcing, storage and distribution of transport and heating fuels, with a commitment to delivering a high-quality service to all consumers, including those in remote areas.

Since 1962 UPEI has been advocating for a level playing field and fair competition to ensure an affordable, sustainable, and secure energy supply for Europe's consumers. Today, in the context of the transition to a low carbon economy, UPEI and its members are also addressing the challenges of adapting the product range and meeting consumer demand through market-oriented solutions.

With its strong track record in pioneering the supply of renewable fuels in the EU, UPEI's members remain committed to delivering and embracing new, cost effective solutions which further promote energy efficiency and reduce pollutants and emissions.

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