

EBA/GL/2022/02

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24 February 2022

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# Final Report

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Guidelines

on the limited network exclusion under PSD2

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# 1. Executive summary

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Article 3(k) of Directive (EU) 2015/2366 on payment services in the internal market (PSD2) introduced an exclusion from the scope of application of the Directive for services based on specific payment instruments that can be used only in a limited way. These specific instruments that fall within the scope of the so-called limited network exclusion (LNE) can be cards that can only be used in a particular chain of stores or a particular shopping centre, fuel cards, membership cards, public transport cards, parking ticketing, meal vouchers and others.

In addition, Article 37(2) of PSD2, set a threshold of EUR 1 million for the value of payment transactions, which, if being exceeded, would require the issuers excluded under Article 3(k)(i) or (ii) of PSD2 to notify the respective competent authority (CA). CAs, in turn, shall assess whether the activity qualifies as a limited network or whether it requires authorisation as a payment or electronic money institution.

Since the publication date of PSD2, the EBA and the European Commission have received a number of queries on the application of the LNE and the related notification requirements. The EBA assessed these queries and arrived at the view that the implementation and application of the requirements diverges significantly between Member States, thus impeding the single market for payment services in the EU and creating opportunities for regulatory arbitrage. The EBA also considered that consumers carrying out transactions with the excluded payment instruments are sometimes not aware that they do not benefit from the protection envisaged under PSD2.

In line with its statutory objective of contributing to the convergence of supervisory practices and to ensure the safety of consumers, the EBA arrived at the view that it should issue Guidelines aimed at bringing about convergence on a number of aspects in relation to the application of the LNE. These include, inter alia, the use of payment instruments within a limited network, the criteria and indicators to qualify a limited network of service providers or a limited range of goods and services as such, the application of the LNE by regulated entities, the notification requirements and others.

The EBA published a Consultation Paper (CP) with its proposals for a consultation period that ran from 15 July to 15 October 2021. The EBA received 48 responses to the CP raising 124 distinct concerns. The EBA assessed these concerns to decide what, if any, changes should be made to the Guidelines. In the light of the comments received, the EBA agreed with some of the proposals and their underlying arguments and has introduced changes to the Guidelines. The most substantive change relates to the assessment of the functional connection between goods and services, which is now based on a specific category of goods and services with a common purpose as identified by the issuer of the excluded instrument, rather than a leading good or service as proposed in the CP. The EBA also clarified the nature of the assessment indicators, that all of them are mandatory for the assessment by the CA and that each can be used as a reason to reject granting the exclusion.

## Next steps

The Guidelines will be translated into the official EU languages and published on the EBA website. The deadline for competent authorities to report whether they comply with the Guidelines will be two months after the publication of the translations. The Guidelines will apply from 1 June 2022.

## 2. Abbreviations

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<b>CA</b>	Competent authority
<b>CP</b>	Consultation paper
<b>EBA</b>	European Banking Authority
<b>EMD2</b>	Electronic Money Directive 2009/110/EC
<b>EU</b>	European Union
<b>LNE</b>	Limited network exclusion
<b>PSD2</b>	Payment Services Directive (EU) 2015/2366
<b>PSP</b>	Payment service provider

## 3. Background and rationale

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### 3.1 Background

1. Following the publication of PSD2 in November 2015, the EBA and the European Commission received a number of queries on the application of the ‘exclusion’ under Article 3(k) of PSD2 (Limited network exclusion, or LNE), the related notification requirements articulated in Article 37 of PSD2 and the meaning of Recitals 13 and 14 in PSD2.
2. More specifically, the queries related to the following text in the Directive:
  - Article 3(k) of PSD2, which specifies that the Directive does not apply to:
    - ‘services based on specific payment instruments that can be used only in a limited way, that meet one of the following conditions:*
    - (i) instruments allowing the holder to acquire goods or services only in the premises of the issuer or within a limited network of service providers under direct commercial agreement with a professional issuer;*
    - (ii) instruments which can be used only to acquire a very limited range of goods or services;*
    - (iii) instruments valid only in a single Member State provided at the request of an undertaking or a public sector entity and regulated by a national or regional public authority for specific social or tax purposes to acquire specific goods or services from suppliers having a commercial agreement with the issuer’*
  - Recitals 13 and 14 of PSD2, which provide further explanation of the purpose and intent behind the exclusion under Article 3(k) of PSD2.
  - Article 37(2), (4) and (5) of PSD2, which prescribe that:
    - ‘2. Member States shall require that service providers carrying out either of the activities referred to in points (i) and (ii) of point (k) of Article 3 or carrying out both activities, for which the total value of payment transactions executed over the preceding 12 months exceeds the amount of EUR 1 million, send a notification to competent authorities containing a description of the services offered, specifying under which exclusion referred to in point (k)(i) and (ii) of Article 3 the activity is considered to be carried out.*
    - On the basis of that notification, the competent authority shall take a duly motivated decision on the basis of criteria referred to in point (k) of Article 3 where the activity does not qualify as a limited network, and inform the service provider accordingly.*



*4. Notwithstanding paragraph 1, competent authorities shall inform EBA of the services notified pursuant to paragraphs 2 and 3, stating under which exclusion the activity is carried out.*

*5. The description of the activity notified under paragraphs 2 and 3 of this Article shall be made publicly available in the registers provided for in Articles 14 and 15.'*

3. In addition, Article 1(4) of EMD2 provides that the Directive does not apply to monetary value stored on instruments excluded under Article 3(k) of PSD2.
4. Payment instruments covered by the limited network exclusion could include store cards, fuel cards, membership cards, public transport cards, parking ticketing, meal vouchers and others. While the use of these instruments is limited to the purchase of specific goods and services or within specific distribution channels, thus reducing the risk to customers, it should be noted that users carrying out transactions with these payment instrument do not benefit from the protection envisaged under PSD2.
5. The EBA assessed these queries and arrived at the view that the implementation and application of these requirements diverges significantly between Member States, thus impeding the single market for payment services in the EU and creating opportunities for regulatory arbitrage. In line with its statutory objective of contributing to the convergence of supervisory practices, the EBA therefore arrived at the view that it should issue Guidelines aimed at bringing about convergence on a number of issues, explained in detail in the CP that was published on 15 July 2021. It should, however, be noted that legally the EBA was not able to address with these Guidelines issues that are related to the interpretation of definitions set out in PSD2 or provisions that the Directive may have left intentionally open.
6. The public consultation closed on 15 October 2021, at which point the EBA had received 48 responses raising 124 distinct concerns. The EBA assessed these concerns to decide what, if any, changes should be made to the Guidelines. The feedback table in Chapter 5 provides an exhaustive list of all the distinct concerns raised by the respondents and their respective analysis by the EBA. The Rationale section below, in turn, summarises some of the more relevant concerns and changes made to the Guidelines as a result.

## 3.2 Rationale

7. The key concerns raised and requests for clarification made by respondents to the public consultation that led to changes to the Guidelines relate to:
  - Clarification on the functional connection between goods and/or services; and
  - The nature of the indicators set out in Guidelines 2.2 and 4.4.
8. In the subsections below, this Final Report explains in detail these two changes, the two new Guidelines that the EBA has introduced as a result of the concerns raised in the responses to



the public consultation, and also some of the concerns raised by participants that the EBA has not taken on board.

9. Finally, the EBA has introduced other editorial amendments that were not very substantial or impactful to elaborate in this section. Therefore, these have been covered and explained in detail in the Feedback table at the end of the Final Report.

### **3.2.1 Clarification on the functional connection between goods and/or services**

10. A large minority of the respondents were of the view that the term ‘functional connection’ between the goods and/or services can be clarified further since it raises a risk of different interpretation between various market participants. These respondents expressed explicit concerns about the approach where the assessment of the functional connection would be based on a ‘leading good/service’ and its link with ancillary connected goods and/or services.
11. Several of these respondents shared the view that the criterion ‘leading good/service’ is too subjective and that it will lead to divergent interpretation and practices by CAs. Some expressed concerns that there is a lack of clarity on how CAs should assess business models against this criterion and the level of detail of the information that needs to be provided. Others elaborated further that some of the functionally connected goods and services currently excluded from the scope of PSD2 under Article 3(k) may not have a leading good/service and that thus the assessment by CAs should be carried out horizontally, and not in a hierarchical vertical manner.
12. Several of the respondents also expressed concerns that the use of a leading good/service depends on the customers’ behaviour and choice or that it may be subject to change over time.
13. Several respondents were of the view that an approach based on a leading good/service is too narrow and restrictive. A few of the respondents were of the view that the terms ‘functional connection’ and ‘leading good and/or service’ are not provided by PSD2 and thus should not be used in the Guidelines since they will contradict level 1, with one of them viewing the hierarchical ranking as an additional requirement not envisaged in PSD2.
14. Finally, as an alternative, some of the above respondents proposed to focus Guideline 4.2 on the ‘purpose’ of use of the instrument, the ‘scope of use’, a common ‘theme’ of the goods and/or services or a category of goods/services.
15. The EBA, after assessing the merits of the concerns expressed by the respondents, has arrived at the view that the approach proposed in the CP should be reconsidered. In line with some of the suggestions proposed by respondents, the EBA has, therefore, decided to amend Guideline 4.2 by focusing the assessment of the functional connection between goods and/or services on a specific category of goods and/or services with a common purpose. By doing so, the provision will not be too restrictive and will allow for greater flexibility to accommodate



different services and business models. It will also be agnostic to the development of the business or the choices of the customers.

16. Finally, the provision will be more focused on the functionality and purpose of the use of the respective goods, thus allowing for more flexibility in the choice of the issuer who will be responsible for justifying the rationale for the proposed category of goods/services. By doing so, the EBA expects to reduce the likelihood of divergent interpretations and contribute to bringing about greater harmonisation of practices.

### **3.2.2 The nature of the indicators set out in Guidelines 2.2 and 4.4**

17. Several respondents were of the view that the complementary indicators in Guidelines 2.2 and 4.4 need to be clarified further in order to achieve legal certainty and bring about consistency and harmonisation to the application of the legal requirements. In their view, these indicators were not precise enough and lacked tangible metrics for CAs to assess them against.
18. Moreover, some of these respondents sought clarity on whether the additional indicators are optional or mandatory and whether all of them should be submitted to and assessed by CAs cumulatively. Several respondents were of the view that Guidelines 2.2 and 4.4 should provide more clarity on how these indicators should be weighted and how they correlate to Guideline 2.1 and Guidelines 4.1 and 4.2 respectively. In their view, this will increase transparency and legal certainty.
19. Some respondents suggested that the indicators should take into account the specificities of the national market and the specificity of the proposed business model of the respective payment instrument, as well as the goods and services provided.
20. A few of the respondents expressed preference for these indicators to be non-binding points of reference and not a list of reasons that can be used by CAs to reject business models notified to them under Article 37(2) of PSD2.
21. In addition, several respondents sought clarification on whether the thresholds of the indicators under Guidelines 2.2 and 4.4 will be set out by the national CAs.
22. Having assessed these concerns, the EBA has arrived at the view that the indicators complement the assessment by CAs and bring about consistency and harmonisation in the information provided to and assessed by CAs. Therefore, the EBA has decided to retain them in the Guidelines. At the same time, the way most of the indicators are set out in the Guidelines allows CAs to accommodate different business models for the provision of excluded services.
23. However, in the light of the feedback received from the public consultation, the EBA has agreed that more clarity about the use and purpose of the indicators will be needed to contribute to a harmonised and consistent application of the LNE across the EU. The EBA has, therefore, reconsidered the positioning of the indicators and has amended the Guidelines to make it clear that these indicators are mandatory for all business cases and that the indicators





are equally important and have the same weight in the assessment by CAs. CAs should, therefore, always assess the notification under Article 37(2) of PSD2 against all these indicators. CAs should be able to take a duly motivated decision on whether the activity qualifies as provided within a limited network or not on the basis of each individual indicator.

24. The EBA has also amended Guidelines 2.2 and 4.4 to clarify that, in line with the requirements of Article 37(2) of PSD2 and Guidelines 2 and 4, the thresholds of these indicators need to be set out, not by the CA, but by each issuer.
25. In addition, since the EBA has amended the approach that had been proposed in the CP by making all indicators mandatory, and in the light of the specific concerns raised by respondents that two of the indicators ('The categories of customers being targeted' and 'Whether the management of the network is centralised') were too subjective and of a questionable legal basis, the EBA has deleted these indicators.
26. Finally, the EBA has agreed with the proposal that the indicators should take into account the specificities of the national markets, which at times have a different structure and size. This is so because the LNE is provided for each Member State. The EBA has, therefore, clarified that all the thresholds under Guidelines 2.2 and 4.4 should be assessed taking into account the size and specificities of the national market.

### 3.2.3 New Guidelines

27. One respondent sought clarity on whether the issuer must necessarily be a third party or whether it is possible for it to be a provider of goods and/or services or an acceptor who accepts the payment transaction in the limited network comprising at least one other provider of goods and/or services or acceptor.
28. After assessing the case at hand, the EBA has arrived at the view that the issuer itself may also be a provider of goods and/or services or an acceptor in the limited network and the LNE should include, inter alia, transactions accepted by the issuer itself when the transaction is carried out within that network. The EBA has introduced a new Guideline 1.13 to clarify this aspect.
29. Separately, a few respondents were of the view that the notifications under Article 37(2) of PSD2 should not be submitted for preventive purposes but only when the threshold set out in said Article has been exceeded.
30. The EBA would like to clarify that PSD2 does not prevent issuers from submitting notifications to CAs when the threshold under Article 37(2) of PSD2 has not been exceeded. Therefore, it is for CAs to decide whether to assess these notifications or not.
31. However, in the cases where the threshold under Article 37(2) of PSD2 is exceeded, issuers are required to submit a notification to the CAs. In that regard, the EBA has introduced a new Guideline 6.2 specifying that issuers should submit the notification at the moment when the

threshold is exceeded and should not wait for the 12 months referred to in Article 37(2) of PSD2 to pass.

### 3.2.4 Comments that were not incorporated

32. As indicated in paragraph 6 above, the respondents to the public consultation raised 124 distinct points, many of which the EBA has not taken on board due to the unconvincing argumentation provided. The EBA has summarised below two more important concerns that had been raised by several respondents. These relate to the technical restrictions set out in Guidelines 1.4 and 1.5 and a suggestion to introduce specific metrics for the indicators set out in Guidelines 2.2 and 4.4.

#### a. Technical restrictions

33. Several respondents were of the view that the term ‘technical restrictions’ is a very broad concept, which is subject to interpretation. The respondents also suggested that there is no legal basis under PSD2 for the imposition of technical restrictions. They also viewed technical restrictions as unfeasible, impractical and that they will lead to an excessive burden and cost for issuers since they will require changes in/adaptations of terminals and cash register systems.

34. A few respondents suggested deleting the requirements for technical restrictions from the Guidelines. Other respondents requested the EBA to clarify that a contract between the service provider and the payee (merchant) can be considered a technical restriction.

35. Individual respondents also raised concerns in relation to the following:

- Contractual restrictions should suffice in ensuring limitation of the use of the instrument.
- Controls carried out by cashiers should suffice in ensuring the limited use of the instrument.
- Difficulties issuers will face in managing the expanding range of goods and services, which will require technical changes frequently.
- Need to link the merchandise management systems with the respective payment instruments used, which would require a contractual agreement between the issuer and the merchants.
- The requirement favours international card schemes, which have introduced merchant category codes.

36. The EBA has arrived at the view that the reference to technical restrictions is sufficiently clear. These restrictions should contribute to preventing an instrument from being used outside the limited network (e.g. network of service providers or the range of goods and services that can



be purchased) and thus developing into a general-purpose instrument. It is for each issuer to decide on the specific technical restrictions to be used based on their respective business model.

37. Moreover, the EBA has arrived at the view that it is not possible to specify or narrow down the term since it needs to cover a wide range of business models and specificities of the issuer, as well as the size and complexity of the respective market. Therefore, the term will require a case-by-case assessment by CAs. In addition, to maintain technological neutrality, the EBA has decided to refrain from setting out specific technological solutions.
38. While contractual restrictions restrict the use of the instrument, they alone will not be sufficient to prevent an instrument from being used outside the limited network and thus developing into a general-purpose instrument. Therefore, having both technical and contractual restrictions is necessary to limit the use of a payment instrument in accordance with Article 3(k) of PSD2 and in line with the legal basis under PSD2.
39. The EBA has also arrived at the view that issuers and providers of goods and/or services are not prohibited from incorporating additional measures to limit the use of the excluded instrument, such as operational restrictions like controls by cashiers. However, the EBA notes that these can also be part of the contractual restrictions between the issuer and the provider of goods and services (merchant) but will not lift the obligation for incorporating technical restrictions.
40. Finally, the EBA has arrived at the view that the requirement does not favour particular market participants since the technical restrictions of use should be possible to be introduced by all issuers.
41. In relation to the above, the EBA has not found compelling arguments to remove the technical restrictions as referred to in Guidelines 1.4 and 1.5. The EBA has, therefore, not introduced any changes to the Guidelines.

#### **b. Specific metrics**

42. Several respondents were of the view that the EBA should set out specific metrics in relation to the proposed criterion 'envisaged maximum number of providers of goods and services operating within the limited network before submitting the notification under Article 37(2) of PSD2' under Guideline 2.1(b) and the proposed indicators under Guidelines 2.2 and 4.4, in particular those related to 'the volume and value of payment transactions to be carried out with the payment instruments', 'the maximum amount to be credited to the payment instruments', 'the maximum number of users of the payment instrument'. In their view, this will avoid different interpretations of the requirements and contribute to bringing about harmonisation of the practices in the assessment of the notifications for exclusion under Article 3(k) of PSD2.



43. A few respondents also indicated that these indicators will be difficult to forecast. Others were of the view that setting out such indicators will be detrimental to the growth of the network.
44. The EBA would like to reiterate that the criterion under Guideline 2.1(b) and the indicators under Guidelines 2.2 and 4.4 have been set out in a high-level and open manner to be able to accommodate a broad range of industries comprising different business models and different types of markets. In relation to this, it is not practically possible to provide precise metrics accommodating all of these for the purpose of the assessment of business models by CAs. Therefore, the assessment should be carried out on a case-by-case basis.
45. Moreover, issuers should be in a position to forecast the thresholds of these indicators based on their business plans for the development of the activities.
46. In that regard, the EBA has not found compelling arguments to change the approach proposed in the CP and has not amended the Guidelines. On the contrary, the EBA has arrived at the view that some of the arguments (e.g. that these indicators will restrict the growth of the networks) are in line with the rationale behind the proposal of the EBA, which had been to prevent the exponential growth of the limited networks without proper overview by the CA. In addition, these indicators are important because they complement the assessment of CAs and bring about consistency in and harmonisation of the information provided to and assessed by CAs.



## 4. Guidelines

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EBA/GL/2022/02

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24 February 2022

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## Guidelines

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# on the limited network exclusion under PSD2

# 1. Compliance and reporting obligations

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## Status of these guidelines

1. This document contains guidelines issued pursuant to Article 16 of Regulation (EU) No 1093/2010<sup>1</sup>. In accordance with Article 16(3) of Regulation (EU) No 1093/2010, competent authorities and financial institutions must make every effort to comply with the guidelines.
2. Guidelines set the EBA view of appropriate supervisory practices within the European System of Financial Supervision or of how Union law should be applied in a particular area. Competent authorities as defined in Article 4(2) of Regulation (EU) No 1093/2010 to whom guidelines apply should comply by incorporating them into their practices as appropriate (e.g. by amending their legal framework or their supervisory processes), including where guidelines are directed primarily at institutions.

## Reporting requirements

3. According to Article 16(3) of Regulation (EU) No 1093/2010, competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or otherwise with reasons for non-compliance, by [dd.mm.yyyy]. In the absence of any notification by this deadline, competent authorities will be considered by the EBA to be non-compliant. Notifications should be sent by submitting the form available on the EBA website with the reference 'EBA/GL/2022/02'. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities. Any change in the status of compliance must also be reported to EBA.
4. Notifications will be published on the EBA website, in line with Article 16(3).

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<sup>1</sup> Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, (OJ L 331, 15.12.2010, p.12).

## 2. Subject matter, scope and definitions

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### Subject matter

5. These Guidelines specify the application of the exclusion under Article 3(k) of Directive (EU) 2015/2366 on payment services in the internal market (PSD2)<sup>2</sup>.
6. In addition, these Guidelines specify details on the notification process under Article 37(2) of PSD2 and on the description of the activity made publicly available under Article 37(5) of PSD2.

### Scope of application

7. These Guidelines apply in relation to the services based on specific payment instruments that can be used only in a limited way as specified under Article 3(k) of PSD2 that are excluded from the scope of application of PSD2. In particular, the Guidelines set out criteria and factors to be taken into account by competent authorities in the assessment of whether the activities should fall under the Article 3(k) exclusions.
8. These Guidelines also apply to the notification process under Article 37(2) of PSD2, including the calculation of the threshold and the information to be contained in the notification submitted to competent authorities by issuers.
9. In addition, these Guidelines apply to the information to be made publicly available on the national register of competent authorities and the central register of EBA in accordance with Article 37 (5) of PSD2.
10. Finally, parts of these Guidelines apply to services under Article 3(k) of PSD2 that are provided by regulated payment service providers and electronic money issuers.

### Addressees

11. These Guidelines are addressed to competent authorities as defined in point (2)(vi) of Article 4 of Regulation (EU) No 1093/2010.

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<sup>2</sup> It is further noted that, in accordance with Article 1(4) of Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions (EMD2) the Directive does not apply to monetary value stored on instruments excluded under Article 3(k) of PSD2.



## 3. Implementation

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### Date of application

12. These Guidelines apply from 1 June 2022.

### Transitional provisions

13. These Guidelines are subject to the following transitional arrangements:

- a) Competent authorities should request issuers benefitting from the exclusion under Article 3(k)(i) or (ii) of PSD2 and who have already submitted a notification under Article 37(2) of PSD2 to resubmit the notification taking into account the provisions of these Guidelines by 1 September 2022.
- b) Competent authorities should assess the resubmitted notifications under paragraph 13(a) in an expedited manner.

## 4. Guidelines on the limited network exclusion under Directive (EU) 2015/2366

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

- 1.1. Competent authorities should take into account that the specific payment instruments that can be used only in a limited way under Article 3(k) of PSD2 are payment instruments as defined in Article 4(14) of PSD2. Competent authorities should allow all different types of payment instruments under PSD2 to benefit from an exclusion under Article 3(k) of PSD2.
- 1.2. Competent authorities should take into account that the specific payment instruments can be used for acquiring both physical and digital goods and services.
- 1.3. Competent authorities should not impose any restrictions on the means of transferring funds to the payment instrument, which can be done through execution of payment transactions and/or through the issuance of electronic money. Competent authorities should take into account that, in the cases where funds are transferred to the payment instrument by using an intermediary other than the issuer, the transfer of funds should be considered as a separate payment service that does not fall within the scope of the service excluded under Article 3(k) of PSD2.
- 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.
- 1.5. The specific technical restrictions should at least apply to:
  - a) the providers of goods and services where the payment instrument can be used, applicable for the exclusion under Article 3(k)(i) of PSD2; or
  - b) the range of goods and services that can be purchased with the payment instrument, applicable for the exclusion under Article 3(k)(ii) of PSD2; or
  - c) the geographical location for acquiring goods or services from specific suppliers for specific social or tax purposes, applicable for the exclusion under Article 3(k)(iii) of PSD2.



- 1.6. Competent authorities should take into account that a single card-based or other means of payment can accommodate simultaneously more than one specific payment instrument within the scope of Article 3(k) of PSD2. Competent authorities should ensure that the technical and contractual restrictions specified in Guidelines 1.4 and 1.5 apply to each specific payment instrument.
- 1.7. Competent authorities should take into account that a single card-based or other means of payment cannot accommodate simultaneously payment instruments within the scope of PSD2 and specific payment instruments within the scope of Article 3(k) of PSD2.
- 1.8. Competent authorities should take into account that issuers can issue more than one specific payment instrument under Article 3(k) of PSD2, provided that each payment instrument fulfils the requirements set out in these Guidelines.
- 1.9. Competent authorities should not take into account the redeemability of the monetary value stored on the payment instrument in the assessment of whether the payment instrument falls under the scope of Article 3(k) of PSD2.
- 1.10. Competent authorities should take into account that payment instruments falling under the scope of Article 3(k) of PSD2, which store monetary value on the payment instrument, can be either reloadable or for one-off use only.
- 1.11. Competent authorities should take into account that a single payment instrument excluded under Article 3(k) of PSD2 cannot benefit from more than one exclusion from the scope of application of PSD2, including other exclusions under Article 3(k) of PSD2.
- 1.12. The issuer of the specific payment instrument can be established in a Member State different from the Member State of the respective competent authority that has received the notification under Article 37(2) of PSD2.
- 1.13. Competent authorities should take into account that the exclusions under Article 3(k) of PSD2 should include, inter alia, transactions accepted by the issuer itself when the transaction is carried out within a network benefiting from an exclusion under Article 3(k) of PSD2 and the issuer itself is an acceptor in that network.

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

- 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 all of the following criteria in the assessment of the information provided by the issuer with the notification submitted 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, and, where applicable, each acceptor, operating within the limited network;

- b) The envisaged maximum number of providers of goods and services operating within the limited network as set out by the issuer in the notification under Article 37(2) of PSD2; and
- c) The provider offers goods and services under a common brand that characterises the limited network and provides visual manifestation to the user of the payment instrument.

2.2. Complementary to the assessment under Guideline 2.1, competent authorities should take into account, based on the size and specificity of their market, all of the following additional indicators:

- a) The specific geographical area for provision of goods and services, as set out by the issuer;
- b) The volume and value of payment transactions to be carried out with the payment instruments on an annual basis, as envisaged by the issuer;
- c) The maximum amount to be credited to the payment instruments, as envisaged by the issuer;
- d) The maximum number of payment instruments to be issued, as envisaged by the issuer; and
- e) The risks faced by the customer when using the specific payment instrument, as identified by the issuer.

2.3. Competent authorities should take into account that a limited network of service providers can consist of physical stores only, online stores only or a combination of physical and online stores.

2.4. When carrying out the assessment set out in Guidelines 2.1 and 2.2, competent authorities should not make a distinction between the type of stores and should not require the type of goods and services offered in online stores to be dependent on the type of goods and services offered in physical stores or vice versa.

2.5. Competent authorities should not allow the use of the same payment instrument excluded under Article 3(k)(i) of PSD2 across different limited networks of service providers.

2.6. Competent authorities should take into account that either the issuer of the payment instrument or the providers of goods and services can delegate the conclusion of the contractual agreement referred to in Guideline 2.1 to a third party acting on their respective behalf.

- 2.7. Competent authorities should apply Guidelines 2.1 and 2.2. in a restrictive way that does not allow for the possibility for a specific-purpose payment instrument to develop into a general-purpose payment instrument.

### Guideline 3: Instruments used within the premises of the issuer under Article 3(k)(i) of PSD2

- 3.1. Competent authorities should take into account that payment instruments allowing the holder to acquire goods or services only in the premises of the issuer can only be used in physical premises and cannot be used in online stores.

### Guideline 4: Limited range of goods or services under Article 3(k)(ii) of PSD2

- 4.1. Competent authorities should take into account that in order for the use of a specific payment instrument to be considered as limited for acquiring a very limited range of goods or services under Article 3(k)(ii) of PSD2, a functional connection between the goods and/or the services that can be acquired with the payment instrument should exist.
- 4.2. When assessing the functional connection between the goods and/or services, competent authorities should take into account that a specific category of goods and/or services with a common purpose has been identified by the issuer. Competent authorities should check whether the issuer has identified the goods and/or services falling within the specific category and whether it has described the functional connection between them in the notification under Article 37(2) of PSD2.
- 4.3. Competent authorities should take into account that a functional connection can exist between physical and digital goods and/or services.
- 4.4. Complementary to the assessment under Guidelines 4.1 and 4.2, competent authorities should take into account, based on the size and specificity of their market, all of the following additional indicators:
- a) The volume and value of payment transactions to be carried out with the payment instruments on an annual basis, as envisaged by the issuer;
  - b) The maximum amount to be credited to the payment instruments, as envisaged by the issuer;
  - c) The maximum number of payment instruments to be issued, as envisaged by the issuer; and
  - d) The risks faced by the customer when using the specific payment instrument, as identified by the issuer.



- 4.5. Competent authorities should apply Guidelines 4.1, 4.2 and 4.4 in a restrictive way that does not allow for the possibility for a specific-purpose payment instrument to develop into a general-purpose payment instrument.

## Guideline 5: Provision of services under Article 3(k) of PSD2 by regulated entities

- 5.1. Competent authorities should take into account that payment service providers as referred to in Article 1 of PSD2 and electronic money issuers can provide services based on specific payment instruments that can be used only in a limited way, provided that the requirements under Article 3(k) of PSD2 and these Guidelines are met.
- 5.2. Competent authorities should ensure that in the cases where payment service providers or electronic money issuers also provide services under Article 3(k) of PSD2, these entities distinguish the regulated payment services/electronic money from the services excluded under Article 3(k) of PSD2 in a clear and easily recognisable way, including through the provision of a specific visual manifestation.
- 5.3. Competent authorities should ensure that payment service providers and electronic money issuers inform the user of the specific payment instrument in a simple and clear way that the provided services are not regulated and supervised, and that users do not benefit from the protection for payment service users under PSD2.
- 5.4. Where during the assessment of the notification referred to in Article 37(2) of PSD2, the competent authority arrives at the view that
- a) the distinction between the regulated payment services and/or electronic money and the services excluded under Article 3(k) of PSD2 is not sufficiently clear or appropriate, including the transparency of the communication with the users of the specific payment instrument set out in Guidelines 5.2 and 5.3, and/or
  - b) the services excluded under Article 3(k) of PSD2 are likely to impair either the financial soundness of the payment service provider/electronic money issuer or the ability of the competent authority to monitor compliance with the legal requirements in PSD2 and/or EMD2,

the competent authority should take supervisory actions accordingly.

## Guideline 6: Notifications under Article 37(2) of PSD2

- 6.1. Competent authorities should take into account that the notification under Article 37(2) of PSD2 should be submitted by the issuer to the competent authority in each Member State where the users of the payment instrument are located and where the threshold set out in Article 37(2) of PSD2 is exceeded in the particular Member State.

- 6.2. Competent authorities should take into account that the notification under Article 37(2) of PSD2 should be submitted by the issuer for any given period shorter than 12 months when the total value of payment transactions executed exceeds the amount of EUR 1 million for that period.
- 6.3. Competent authorities should take into account that the notification under Article 37(2) of PSD2 should contain information about the type of exclusion under which the activity is carried out and the description of the activity.
- 6.4. The description of the activity referred to in Guideline 6.3 should include information:
- a) on whether the goods and/or services that can be acquired are physical and/or digital;
  - b) about other Member States where the service under Article 3(k) of PSD2 covered by the notification to the competent authority is provided by the same issuer; and
  - c) any other information allowing competent authorities to assess the notification against these Guidelines.
- 6.5. Competent authorities should take into account that the notification under Article 37(2) of PSD2 is to be submitted by the issuer only once. An additional new notification should be submitted to the competent authority when any information related to the same specific payment instrument(s) as provided with the initial notification has changed substantially.
- 6.6. Competent authorities should take into account that the substantial changes referred to in Guideline 6.5 can include but are not limited to situations where:
- a) the provision of the excluded services has terminated;
  - b) the issuer intends to increase the number of providers of goods and/or services under Guideline 2.1(b);
  - c) the issuer intends to expand the specific geographical area for the provision of goods and/or services under Guideline 2.2(a); or
  - d) the issuer intends to offer services under Article 3(k)(i) or (ii) of PSD2 based on an instrument not covered in the original notification; or
  - e) the previously notified specific category of goods and/or services with a common purpose referred to in Guideline 4.2 is intended to be changed.
- 6.7. In any case, competent authorities can request issuers to submit a new notification with updated information if they consider this necessary to establish whether or not the information the issuer had provided with the initial notification has changed.



- 6.8. Competent authorities should take into account that the calculation of the threshold under Article 37(2) of PSD2 is to be carried out at the level of each issuer. Where a single issuer provides services based on more than one specific payment instrument under Article 3(k)(i) and/or (ii) of PSD2, the calculation of the threshold should be carried out by combining all payment transactions executed in the respective Member State with all specific payment instruments offered by the same issuer.
- 6.9. Competent authorities should include the issuer in their national register under Article 14 of PSD2 and the central register of the EBA under Article 15 of PSD2 only once and reflect in a concise manner the description of the activities carried out with each specific payment instrument under Article 3(k)(i) and/or (ii) of PSD2. Competent authorities should also include in the description of activities in the registers the information about other Member States where the same issuer provides services under Article 3(k)(i) and/or (ii) of PSD2.
- 6.10. Competent authorities should ensure that the information provided by an issuer with the notification under Article 37(2) of PSD2 allows them to assess whether the activity falls under the scope of Article 3(k)(i) and/or (ii) of PSD2 or whether it will require authorisation as a payment service provider or an issuer of electronic money. In case the information provided with the notification is incomplete, vague or ambiguous, the competent authority should request from the issuer additional information or clarification to the information already provided in order to take the decision.

## Guideline 7: Limited network under Article 3(k)(iii) of PSD2

- 7.1. Competent authorities should not require the payment instruments falling within the scope of Article 3(k)(iii) of PSD2 to fulfil the requirements applicable to the instruments excluded under Article 3(k)(i) and (ii) of PSD2.



## 5. Accompanying documents

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### 5.1 Draft cost-benefit analysis/impact assessment

This document contains guidelines issued pursuant to Article 16 of Regulation (EU) No 1093/2010 (EBA regulation). Article 16(2) of the EBA regulation provides that the EBA should carry out an analysis of ‘the potential related costs and benefits’ of any guidelines it develops. This analysis should provide an overview of the findings regarding the problem to be dealt with, the solutions proposed and the potential impact of these options. The following section provides the impact assessment for the final Guidelines on the limited network exclusion.

#### A. Problem identification

The revised Payment Services Directive (PSD2) aims to address shortcomings that were identified in the regulation of limited networks (Article 3(k) of the Payment Services Directive). In order to address those shortcomings, the European Commission (EC) introduced the provision that networks shall notify their activities to competent authorities (CAs) when their activities reach a certain value to assess whether or not the network shall apply for a license as a payment institution (Article 37(2) of PSD2). In addition, the revised directive provided more clarity in relation to limited network exclusions (Recitals 13 and 14).

However, following the application of PSD2 and the feedback received by the EBA and the EC in relation to the notification and application of the limited network exclusion, it was concluded that the implementation and application of these requirements still diverge significantly between Member States. The different transposition and application across Member States lead to regulatory arbitrage and legal uncertainty and may ultimately result in impaired consumer protection and competitive distortions.

#### B. Policy objectives

In general, the Guidelines contribute to the EBA’s objective of enhancing the security of payment services, protecting consumers and fostering competition in the payments market. To achieve these objectives, the Guidelines aim to enhance the consistent application and implementation of the revised PSD2 and thereby contribute to the EBA’s regulatory and supervisory convergence work in the area of retail payment services<sup>3</sup>.

At a technical level, the Guidelines identify the topics for which market participants showed the highest uncertainty about the application and implementation of the requirements under Article 3(k) and Article 37(2) of PSD2 – with the aim at providing more clarity on those topics. The

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<sup>3</sup> EBA (2021): *EBA Annual Work Programme 2022*.



Guidelines therefore provide criteria, indicators and specifications relating to payment instruments; networks of service providers; the approach to assess ‘functionally connected’ goods and services and LNE of regulated payment issuers. In addition, the Guidelines specify details on the notification process under Article 37(2) of PSD2.

The clarifications provided aim to limit the risks that payment activities covered by the LNE may comprise significant payment volumes and values and thereby help to contain the risks those transactions may pose for consumers. Furthermore, the Guidelines help to ensure the convergence of supervisory practices and to address in a more efficient way the consumer protection needed in the context of payments.

### C. Baseline scenario

While additional clarifications on the LNE were introduced in the revised PSD2, the current EU legislative framework still leaves too much room for interpretation. Without further specification on the application and implementation of the requirements under Article 3(k) and Article 37(2) of PSD2, the divergence between Member States will persist. Furthermore, the potential disadvantage of regulated market actors in comparison to issuers applying the LNE may remain.

On the notification process under Article 37(2), the feedback received from market participants shows that, without clarity on the threshold to provide notification, the objectives of this process may not be achieved.

### D. Options considered

#### Specific payment instruments under Article 3(k) of PSD2

The proposed draft Guidelines aim to address various issues related to payment instruments. When considering different options, the EBA balances the trade-off between supporting the objectives with clear specifications and being too restrictive in the proposed interpretations. One of the topics discussed, where such a trade-off was considered, relates to the possibility to accommodate more than one specific payment instrument in a single card-based or other means of payment:

**Option 1.1:** A single card-based or other means of payment cannot accommodate more than one payment instrument within the scope of Article 3(k) of PSD2.

**Option 1.2:** A single card-based or other means of payment can accommodate more than one payment instrument. The different payment instruments can be within the scope of PSD2 and excluded under Article 3(k) of PSD2.

**Option 1.3:** A single card-based or other means of payment can accommodate more than one payment instrument. The different payment instruments cannot be within the scope of PSD2 but could only be excluded under Article 3(k) of PSD2.



Option 1.1 provides the most restrictive specification on payment instruments, stipulating that a single-based or other means of payment may only accommodate one payment instrument. Such an approach would provide a very clear and simple specification; however, it inherits the disadvantage that the convenience of customers may be disrupted since they will be required to rely on multiple means of payment. This might create a disadvantage for certain issuers and would go against the objective to provide a harmonised application of Article 3(k) of PSD2.

Option 1.2 and Option 1.3, on the other hand, allow single card-based or other means of payments to include more than one payment instrument. Under Option 1.2, the combination of regulated and non-regulated payment instruments in a single card-based or other means of payment may make it difficult for the users of the instrument to differentiate between the two and to understand which instrument they will be using. Such a situation would result in reduced consumer protection and transparency and would go against the objective of these Guidelines.

Option 1.3 is the preferred option as it allows a broad-range of single card-based or other means of payments to be considered for the LNE, while at the same time ensuring its sound application.

### Limited range of goods or services under Article 3(k)(ii) of PSD2

Recital 13 of PSD2 provides clarification that the limited range of goods or services under Article 3(k)(ii) of PSD2 should be ‘functionally connected’, which in turn raised a question on the definition of ‘functionally connected’ goods or services. The EBA considered different potential approaches NCAs may apply for identifying ‘functionally connected goods and services’:

**Option 2.1:** Focus on a functional connection between various goods and services within a sector.

**Option 2.2:** Focus on a functional connection between a leading product and/or service and connected products and/or services.

**Option 2.3:** Focus on a functional connection between goods and services based on a case-by-case assessment.

**Option 2.4:** Focus on a functional connection between a specific category of goods and services with a common purpose.

**Option 2.5:** Introduce a list of broad categories of functionally connected goods and services.

**Option 2.6:** Set a threshold of the number of goods and services that is considered to be limited.

Option 2.1 to Option 2.4 focus on the identification of the relationship between product and services, while Option 2.5 and Option 2.6 provide pre-defined categories and a numerical threshold to identify the ‘limited range of functionally connected goods and services’. The later options have the advantage that they offer CAs (and issuers) a simple approach, which facilitates the application

for them and, in turn, would reduce their operational burden. However, without a guarantee that these approaches cover all services irrespective of the business model applied and the specificities of the national market (including structure and size), Option 2.5 and Option 2.6 risk an uneven treatment of services and risk significantly the narrowing down or broadening (depending on the specific case at hand) of the Article 3(k) exclusion beyond what was intended under PSD2. It would have also been difficult to set up in a methodologically robust way thresholds that fit all business models (Option 2.5) or mutually exclusive categories (Option 2.6). The potential costs therefore outweigh the benefits of these options.

Option 2.1 to Option 2.4 allow CAs to accommodate different business models and specificities of national markets. Option 2.3 has the advantage that it gives CAs (and issuers) the highest flexibility to identify the limited range of goods and services. However, this approach is expected to be the most time and resource consuming, as each individual case needs to be evaluated individually. In addition, Option 2.3 may leave room for a broad use of the instrument and subsequently may increase the risk for customers stemming from such instrument. Finally, it poses the risk for inconsistent and non-harmonised application of the Article 3(k) exclusion.

Compared to Option 2.3, Option 2.1 further restricts the approach to limit the functional connection to goods or services within a sector, however, still leaves room for a broad use of instruments across entire sectors.

Option 2.2 that was proposed in the CP is more prescriptive than Options 2.1 and 2.3 and further narrowed the approach to limit the functional connection. However, following the feedback received during the public consultation, still does not provide sufficient clarity since it is viewed as too subjective, thus potentially leading to different interpretations of what is a 'leading good/service' and what the connection with other goods and/or services could be. Option 2.2 can also be viewed as too narrow and restrictive, thus excluding some business models from the scope of application of the LNE. Finally, the determination of a leading product and service could further be influenced by external factors (e.g. choice of customers), which would hamper the harmonisation of defining 'functionally connected goods and services' across issuers.

Instead, a new option arose based on the responses received during the public consultation, namely Option 2.4. Said option proposes to functionally connect goods and services in specific categories that serve a common purpose. This option allows for greater flexibility to accommodate different services and business models and provides greater harmonisation by reducing different interpretations. It will also be to a great extent agnostic to external factors, such as the development of the business or the choices of customers. Considering the feedback received, this option seems to be in line with categorisation currently used by some market participants and thereby may reduce implementation costs. Option 2.4 is the preferred option.

### Provision of services under Article 3(k) of PSD2 by regulated entities

The revised PSD2 does not specify the possibility for regulated payment issuers and electronic money issuers to provide services under the LNE. The EBA therefore considers the following options for the Guidelines:



**Option 3.1:** Regulated entities should be able to provide services under the LNE.

**Option 3.2:** Regulated entities should not be able to provide services under the LNE.

Under Option 3.2, regulated entities do not enjoy the same benefits as unregulated entities, creating a potential situation of regulatory arbitrage. On the other hand, the provision of both – services that are supervised under PSD2 and services that are not supervised under PSD2 – by the same issuer may decrease transparency for consumers, which protection applies to the instrument they use, and for supervisors, giving rise to potential circumventions of the requirements of PSD2. Under Option 3.2, the EBA also considered that the objective of the exclusion was to allow the provision of services without a license and not to incentivise the provision of non-regulated services by regulated firms. In addition, such an approach may not be allowed under current national practices.

Option 3.1 creates a level playing field for regulated and non-regulated entities and is more closely aligned with the provisions of PSD2, which do not explicitly forbid regulated entities to provide excluded services. On the contrary, Article 18(1)(c) of PSD2 explicitly envisages that regulated payment institutions can engage in business activities other than the provision of payment services. However, Option 3.1 may create uncertainty for consumers about the protection applying to their transaction. Such risks are mitigated by introducing expectations in the Guidelines that CAs and consumers should be clearly informed by issuers whether the service provided is regulated or not. In addition, the CAs may apply further restrictions on the application of the LNE for regulated entities. Under such specification, the benefits under Option 3.1 outweigh potential costs. Option 3.1 is the preferred option.

### Notifications under Article 37(2) of PSD2

The proposed Guidelines acknowledge that services based on instruments excluded under Article 3(k)(i) or (ii) of PSD2 can be provided across borders. However, taking into account that the providers of excluded services cannot benefit from passporting rights across Member States, this raises the question of whether the thresholds set out in Article 37(2) of PSD2 should be calculated at the level of individual Member States or the EU as a whole. The EBA considered the following options:

**Option 4.1:** The threshold calculation set out in Article 37(2) should be based on all payment transactions executed within the EU.

**Option 4.2:** The threshold calculation set out in Article 37(2) should be based on payment transactions within a particular EU jurisdiction.

The approach proposed in Option 4.1 would help ensure the consistent application of the requirements and a level playing field in the EU. However, Option 4.1 would require major cooperation and coordination within the issuer and across Member States. It is expected that such an approach would therefore strongly increase the administrative burden for CAs and issuers. In addition, without the ability to passport, an additional impediment may exist and the process may



have a negative impact on the current internal processes for the assessment of the notifications and on the potential authorisation procedures applied by CAs. Furthermore, Article 37(2) provides that notification should be sent to one Member State, guiding the interpretation of the threshold calculation.

Under Option 4.2, the calculation is more in line with the wording of Article 37(2) of PSD2. In comparison to Option 4.1, this option is expected also to have a lower administrative burden for CAs and issuers. Option 4.2 is the preferred option.

After deciding that the threshold calculation set out in Article 37(2) should be based on payment transactions within a particular EU jurisdiction, the question that arose was how should the thresholds be calculated. EBA considered the following three options.

**Option 4.2.1** An issuer should notify the CA of the Member State in which it is established and only when the threshold set out in Article 37(2) of PSD2 is exceeded in this particular jurisdiction.

**Option 4.2.2:** An issuer should notify the CA of the Member State in which the users of the instrument are located and only when the threshold is exceeded in this particular jurisdiction.

**Option 4.2.3:** An issuer should notify the CA of the Member State in which the service is provided and only when the threshold is exceeded in this particular jurisdiction.

Under Option 4.2.1, the location of the issuer's registered office captures a maximum of one location in which the issuer executes services. This location may also not be the place where the significant part of its business is carried out.

It is expected that under Option 4.2.3, CAs will have the highest proximity to the transactions executed by the issuers within their jurisdiction, allowing them to receive sufficient information to carry out their supervisory obligations without facing an increased compliance burden to collect relevant information. However, the responses received during the public consultation highlighted that further clarity is needed on how to identify the place where goods and/or services are provided. Therefore, Option 4.2.3 may hamper the harmonisation and lead to the inconsistent application of the Guidelines. Moreover, the place of provision of services online is a topic that is to be addressed at EU level and goes beyond the provisions of PSD2.

Following the consultation, Option 4.2.2 has been amended so that its scope was extended from holders of the instrument to all users of the payment instrument, including providers of goods and/or services (merchants). This option should allow for easy identification of users by their physical location (place of establishment) in a particular jurisdiction or through their URL/IP address in case of online provision of services. The option is expected to bring harmonisation and consistency of the application of the notification process under Article 37(2) of PSD2. Option 4.2.2 is the preferred one.



The information received from Member States shows that the frequency of submissions of the notification under Article 37(2) of PSD2 is applied differently across Member States and emphasises the need for further harmonisation. The EBA considered the following options:

**Option 5.1:** Issuer needs to submit notification under Article 37(2) of PSD2 annually.

**Option 5.2:** Issuer needs to submit notification under Article 37(2) of PSD2 once at the time the thresholds are exceeded. Any additional notification should only need to be submitted when any information related to the same specific payment instrument(s) has changed substantially or another specific payment instrument is envisaged to be provided.

**Option 5.3:** Issuer needs to submit notification under Article 37(2) of PSD2 once at the time the thresholds are exceeded. Any additional notification should only need to be submitted when any information related to the same specific payment instrument(s) has changed substantially or another specific payment instrument is envisaged to be provided. In addition, notification may need to be submitted following CA's request.

The options considered aim to provide a balance between the administrative burden of CAs and issuers and the information required to perform the supervisory tasks taking into account current national practices. Under Option 5.1, issuers are requested to provide notification annually as long as the payment instrument in question breaches the threshold under Article 37(2) of PSD2. This approach has the advantage that the CA will be able to track whether the threshold is further exceeded and whether the volume and value of the instrument is in line with the decision taken on the LNE and that the excluded instrument has not developed into a general-purpose instrument. On the other hand, this option is expected to pose an additional administrative burden to CAs and issuers.

In comparison to Option 5.1, Option 5.2 and Option 5.3 require issuers to submit notification only once. This would reduce the additional administrative burden imposed on CAs and issuers. In addition, those options require issuers to submit only significant changes or when a new instrument might be provided, limiting the amount of notifications to the most relevant ones. However, Option 5.2 poses the risk that issuers choose to underreport relevant developments of their business by not updating the information initially provided, which denies CAs the possibility to monitor whether the excluded instrument has developed into a general-purpose instrument. In addition, it might conflict with the current national practices applied. Therefore, Option 5.3 is the preferred option as it gives CAs the flexibility to request additional information without imposing additional obligations on them and provides them with the necessary provision to conduct additional monitoring.

## 5.2 Feedback on the public consultation

The EBA publicly consulted on a draft proposal of these Guidelines.

The consultation period lasted for three months and ended on 15 October 2021. 48 responses were received, of which 31 were published on the EBA website.

This paper presents a summary of the key points and other comments arising from the consultation, the analysis and discussion triggered by these comments and the actions taken to address them if deemed necessary.

In many cases, several industry bodies made similar comments or the same body repeated its comments in the response to different questions. In such cases, the comments, and EBA analysis are included in the section of this paper where EBA considers them most appropriate.

Changes to the draft Guidelines have been incorporated as a result of the responses received during the public consultation.





## Summary of responses to the consultation and the EBA's analysis

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<b>General comments</b>	<p>Some respondents suggested that the Guidelines should make a clearer stance on cross-border activity and on whether a limited network can cover multiple Member States.</p> <p>A few respondents were of the view that restricting limited networks to domestic networks is not consistent with the establishment of an internal market and undermines the freedom of goods and services as a fundamental right of the EU. One respondent suggested that the passport notification regime should apply to the LNE to avoid duplicative submissions of notifications.</p> <p>Another set of respondents shared the opposite view that a geographical limitation restricting 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.</p>	<p>The EBA would like to reiterate that in relation to the cross-border provision of services under Article 3(k)(i) and (ii) of PSD2, the EBA, after discussing with the European Commission, understands that there is no geographical limitation to the provision of these services, even though Article 3(k)(i) of PSD2 allows for an assessment whereby the CA takes into account a possible geographical limitation of the given instrument.</p> <p>The European Commission further clarified in Q&amp;A 4604 that <i>'Recital 13 PSD2 specifies that in respect of an instrument that can be used only for the purchase of a very limited range of goods and services (Article 3, point (k), indent (ii), PSD2) the geographical location of the point of sale is irrelevant. It follows (argumentum a contrario) that the geographical location of the point of sale could be taken into account by a national competent authority when assessing whether an instrument can be used only within a limited network in accordance with the second alternative in Article 3, point (k), indent (i), PSD2.'</i></p> <p>Therefore, there are no regulatory obstacles to prohibit the cross-border provision of services based</p>	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
2	<p>One respondent was of the view that the EBA should consider cross-border activities as an aggravating factor in the assessment of whether a network is limited or not.</p>	<p>on an instrument excluded under Article 3(k)(i) or (ii) of PSD2. However, in case the threshold under Article 37(2) of PSD2 is exceeded in different Member States, a notification should be submitted by the issuer to each CA in those jurisdictions.</p> <p>The EBA also reiterates that the passporting rights envisaged under PSD2 apply only to regulated entities and do not extend to service providers excluded from the scope of PSD2.</p> <p>As highlighted in the analysis in the row above, the EBA understands that there is no geographical limitation to the provision of the excluded services.</p> <p>In addition, as set out in the Guidelines and clarified in a number of places in the CP and this Final Report, the EBA has arrived at the view that the exclusion applies in a single Member State, therefore, it will not be proportionate and in line with PSD2 and the Guidelines if the cross-border provision of services is an aggravating factor in the assessment of whether the network is limited or not.</p> <p>Moreover, it should be noted that Guideline 2.2 already envisages the specific geographical area for the provision of goods and services as one of the indicators to be taken into account in the assessment by CAs of limited networks of service providers.</p> <p>Finally, the Guidelines have not introduced a hierarchy between the various criteria and indicators to be taken into account in the assessment by CAs. The EBA reiterates that CAs are able to take a duly</p>	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		<p>motivated decision on the basis of a single criterion or indicator on whether the activity qualifies or not as a limited network.</p> <p>The EBA has, therefore, not amended the Guidelines.</p>	
3	<p>A few respondents requested clarification on the transitional provisions.</p> <p>One respondent suggested a transitional period of 36 months with already excluded providers to continue operating.</p> <p>Another respondent suggested introducing grandfathering arrangements to the already excluded providers with a second one proposing for CAs to decide on a case-by-case basis whether they will require additional information.</p> <p>A third respondent was of the view that service providers would require 6 months after the publication of the final Guidelines to reflect these in the documents and submit their revised notification to CAs.</p>	<p>The EBA agrees that further clarity on the transitional arrangements can be provided.</p> <p>With regard to the suggestion to introduce grandfathering arrangements, the EBA has arrived at the view that an approach where a new and revised notification is submitted to CAs is the preferred approach since it will facilitate compliance with the Guidelines and the update of the information on the national registers.</p> <p>With regard to the duration of the transitional period, the CP already envisaged 6 months of transitional period after the envisaged publication of the final Guidelines (3 months after the application date of the Guidelines).</p> <p>After assessing the feedback from all respondents, the EBA does not see compelling reasons to prolong the initially envisaged transitional timeline for issuers to submit new and revised notifications to the CAs in line with the provisions of these Guidelines. However, the EBA clarified that issuers that have already been excluded under Article 3(k) of PSD2 will have 3 months after the application date of the Guidelines to submit their notification to the respective CA. In practice, this means 6-7 months after the publication date of these Guidelines.</p>	<p><i>Date of application</i></p> <p><i>These Guidelines apply from 1 <del>October</del> <u>June</u> 2022.</i></p> <p><i>Transitional provisions</i></p> <p><i>These guidelines are subject to the following transitional arrangements:</i></p> <p><i>a) <u>Competent authorities should request from service providers issuers</u> benefitting from the exclusion under Article 3(k)(i) or (ii) of PSD2 and who have <u>already</u> submitted a notification under Article 37(2) of PSD2</i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		<p>Finally, due to the significant differences in the number of notifications received in each Member State, ranging from 0/1 in some jurisdictions to hundreds, if not a thousand, in others, the EBA has not introduced a specific transitional period for CAs to assess the revised notifications from the issuers that already benefit from a LNE. Instead, the EBA has clarified in the transitional provisions that CAs should assess the resubmitted notifications in an expedited manner.</p>	<p><i>to resubmit the notification taking into account the provisions of these Guidelines by 1 September 2022.</i></p> <p><i><u>b) Competent authorities should assess the resubmitted notifications under paragraph 13(a) in an expedited manner.</u></i></p>
4	<p>One respondent was of the view that CAs should reassess the existing exclusions provided under Article 3(k)(ii) of PSD2 in the light of these Guidelines. In their view, this will ensure a level playing field.</p>	<p>The EBA agrees with the respondent and confirms that this was the intention behind the proposed transitional arrangements – to require issuers who have already submitted a notification under Article 37(2) of PSD2 to resubmit their notification. By doing so, the EBA aims to ensure a harmonised and consistent application of the requirements and a level playing field between all actors.</p>	<p>None.</p>
5	<p>One respondent was of the view that there is merit in the EBA providing more clarity on the rationale behind the limited range of goods and services exclusion, in particular whether it is due to low anti-money laundering risk, lower risk for customers or others.</p>	<p>The EBA has arrived at the view that the Guidelines are not intended to explain the rationale behind provisions of level-1 text, in particular by elaborating further on the text of recitals of the respective legal act.</p> <p>The Guidelines aim to contribute to the consistent and harmonised application of the exclusion under</p>	<p>None.</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		<p>Article 3(k) of PSD2 and to specify the details on the notification process under Article 37(2) of PSD2 and on the description of the activity made publicly available under Article 37(5) of PSD2.</p> <p>Therefore, the EBA has not amended the text of the Guidelines.</p>	
6	<p>One respondent was of the view that the regulatory framework should take into account proportionality and risk. They suggested adjusting the exemptions from the application of strong customer authentication to reflect the applicable risks and the specific market needs, mainly in relation to mobility payments, smart mobility, fuel cards.</p>	<p>The EBA cannot amend with these Guidelines the requirements set out in PSD2.</p> <p>Furthermore, the EBA would like to clarify that these Guidelines are solely related to the application of the exclusion from the scope of application of PSD2 under Article 3(k) of PSD2 and are not, as a consequence, subject to the requirements in relation to the application of strong customer authentication under PSD2, the specific details of which are set out in the Commission Delegated Regulation (EU) 2018/389.</p>	None.
7	<p>Several respondents suggested that the Guidelines should clarify whether payment instruments offered within the so-called 'online marketplace' (also referred to as e-commerce platforms or digital platforms) under a certain brand and involving a large number of merchants can benefit from the exclusion under Article 3(k) of PSD2.</p> <p>Two respondents highlighted explicitly that the exclusion should apply to online marketplaces operating under a certain brand and suggested that the Guidelines should address specifically such networks.</p>	<p>The EBA would like to clarify that these Guidelines do not distinguish between different business models. This is also to maintain business model and technological neutrality, as well as a level playing field.</p> <p>Accordingly, online marketplaces could potentially benefit from the LNE, provided that they meet the requirements of Article 3(k) of PSD2 and the provisions of these Guidelines.</p> <p>However, the EBA acknowledges that, in line with the views expressed by some of the respondents to the public consultation, online marketplaces tend to continuously grow their acceptance network and the</p>	None.



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	<p>Two respondents suggested that in the cases where online marketplaces fulfil the criteria and indicators for a LNE, the Guidelines should clarify that the payment instruments offered by the so-called 'gatekeepers' within the meaning of the EC proposal for a Digital Markets Act should not fall under the exclusion.</p> <p>A few respondents suggested that online marketplaces should be treated as shopping centres or franchise systems due to the similarities of their business models and interaction with the end users.</p> <p>One respondent was of the view that a payment instrument may only be used on an online marketplace but not in other online or offline shops of the merchants selling via the platform.</p>	<p>goods and services provided over time. Therefore, CAs should, in line with the requirements of Guidelines 2.7 and 4.5, treat these business models with caution due to the possibility for some of the specific instruments to develop into general-purpose instruments. This is coherent with the clarification provided in Recital 14 of PSD2 that <i>'instruments which can be used for purchases in stores of listed merchants should not be excluded from the scope of this Directive as such instruments are typically designed for a network of service providers which is continuously growing.'</i></p> <p>Finally, the EBA has arrived at the view that the assessment of specific types of online marketplaces and issuers of instruments within these marketplaces should be assessed by CAs.</p>	
8	<p>A few respondents suggested for the EBA to introduce additional criteria applicable exclusively to online marketplaces, such as a common brand, customer accountability, a uniform check-out experience for all sales, uniform conditions for the sales and return policies, uniform standards regarding the presentation of products and services, common customer service for all sales, consumer protection standards above the legal minimum required for online sales.</p>	<p>The EBA would like to clarify that the Guidelines do not distinguish between different business models. This is also to maintain business model and technological neutrality, as well as a level playing field. Therefore, the EBA has not introduced specific criteria for online marketplaces, which should be subject to the same requirements as other limited networks.</p>	None.
<p><b>Responses to questions in Consultation Paper EBA/CP/2021/28</b></p>			
<p><b>Question 1. Do you have comments on Guideline 1 on the specific payment instruments under Article 3(k) of PSD2?</b></p>			



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
9	One respondent suggested that the clarification provided in the rationale section of the CP that credit may be provided in relation to transactions carried out with instruments excluded under the LNE should be introduced in the Guidelines themselves to ensure legal certainty and a harmonised approach.	<p>The objective of these Guidelines is to provide clarity on the assessment of whether an instrument falls under the scope of the LNE and on the notification requirements under Article 37 of PSD2.</p> <p>The EBA already acknowledged in the CP that credit may be provided in relation to transactions carried out with instruments excluded under the LNE but since credit may be subject to national or EU requirements and is not directly related to Articles 3(k) and 37 of PSD2, the EBA cannot reflect this in the Guidelines.</p> <p>In relation to the above, the EBA would like to highlight again that the provision of credit is not directly related to the assessment of whether an instrument falls in the LNE. Accordingly, the EBA has not introduced any changes to the Guidelines.</p>	None.
10	One respondent asked for confirmation that the LNE applies to all 'payment instruments' as defined in Article 14(4) of PSD2.	PSD2 does not apply to services based on specific payment instruments under Article 3(k) of PSD2 that can be used only in a limited way and that meet certain conditions. The EBA had clearly articulated in Guideline 1.1 of the CP that the specific payment instruments that can be used only in a limited way under Article 3(k) of PSD2 are payment instruments as defined in Article 4(14) of PSD2 and that all different types of payment instruments under PSD2 can be used for the purpose of Article 3(k) of PSD2.	None.
11	Two respondents sought clarification on whether non-personalised means of payment, such as gift cards, are to be considered payment instruments	The EBA has arrived at the view that the question is related to interpretation of the definition of a payment instrument under Article 4(14) of PSD2. The	None.



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	<p>under Article 4(14) of PSD2. In the view of one of the respondents, these instruments are not payment instruments because no payment service is provided to the customer and accordingly the requirements of the Guidelines on the LNE should not apply to these products.</p>	<p>EBA would like to highlight that it is legally not able to address with these Guidelines issues that are related to the interpretation of definitions of the Directive.</p> <p>Nevertheless, the EBA would like to clarify that, based on the approach taken by national CAs across Member States, the EBA observed a number of business models using non-personalised payment instruments that fall within the LNE, as well as others that require an authorisation under PSD2 and EMD2.</p> <p>The EBA has arrived at the view that personalisation of the instrument can be carried out differently and not necessarily limited to absence of a reference to the name of the user of the instrument as is the case with some gift cards.</p> <p>In relation to the above, the EBA has not introduced any changes to the Guidelines.</p>	
12	<p>One respondent sought clarification on the reference to ‘the issuance of electronic money’ in Guideline 1.3, in particular on whether it relates to the means of funding the payment card.</p>	<p>The EBA confirms that the reference to ‘issuance of electronic money’ is provided as a means of funding the instrument.</p> <p>The EBA would like to highlight that payment instruments as defined in PSD2 are used to initiate payment orders which result in the transfer of funds. Funds, in turn, are defined in Article 4(25) of PSD2 as ‘banknotes and coins, scriptural money or electronic money’.</p>	None.
13	<p>Several respondents suggested for the EBA to consider clarifying in Guideline 1.3 that certain third parties within a limited network that accept the specific payment instrument under Article 3(k)</p>	<p>The EBA has arrived at the view that the services to be excluded under the LNE should only be the ones that are directly based on the specific payment instrument excluded under Article 3(k) of PSD2. For</p>	<p><i>Guideline 2.1(a)</i> <i>A direct contractual agreement for</i></p>





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	<p>PSD2 fall within the LNE, even if they are not the issuer. In their view, these acceptors have agreed to accept the instrument as a means of payment. In practice, the money is often collected by such third parties (e.g. for the issuance of a gift card) within a limited network and then transferred to the issuer. Following the wording of Guideline 1.3, the third parties (franchisee, affiliate) which are not the issuer would be considered as intermediaries even though they are part of the limited network.</p>	<p>instance, the funding of the instrument should not be excluded from PSD2. Guideline 1.3 aims to ensure that by specifying that the funding of the payment instrument can constitute a separate payment service if it is done via a third party other than the issuer (unless the issuer uses a third party acting on its behalf). Therefore, in the cases where funds are transferred to the payment instrument by using an intermediary other than the issuer, the transfer of funds is a separate payment service that does not fall within the scope of the services excluded under Article 3(k) of PSD2. While the transfer of funds to the payment instrument may be a prerequisite for the use of the payment instrument, the funding of the payment instrument is neither based on the payment instrument nor is it directly related to the purchase of goods and/or services. It is a separate payment transaction. Furthermore, it should be noted that the transfer of funds through a third party is not mandatory.</p> <p>Accordingly, the funding of the instrument should take place directly between the issuer of the payment instrument and its user (the holder of the instrument/payer).</p> <p>On the point as to whether acceptors, which are not the issuer and which have a direct commercial agreement with the issuer to accept payments with the excluded instrument (irrespective of whether they are authorised payment service providers or not) and are thus operating within a limited network, could also benefit from the exclusion under Article</p>	<p><i>acceptance of payment transactions is concluded between the issuer of the payment instrument and each provider of goods and services, and, where applicable, each acceptor, operating within the limited network;</i></p>



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		<p>3(k) of PSD2 since they provide services based on the excluded payment instrument. The EBA has introduced changes in Guideline 2.1(a) to clarify this.</p> <p>Finally, it should be noted that the responsibility for submitting the notification under Article 37(2) of PSD2 lies with the issuer, as set out in Guideline 6.1.</p>	
14	<p>One respondent sought clarification on the reference to 'user' in Guideline 1.4, in particular if it does not refer to the merchant.</p>	<p>The EBA would like to highlight that the term 'user' is intended to refer to the person acquiring goods and/or services, not the merchant, and that agreement with terms and conditions should not suffice to limit the use of the instrument.</p> <p>The EBA has, therefore, clarified in Guideline 1.4 that it refers to the holder of the instrument/the payer.</p>	<p><i>Guideline 1.4</i>  <i>[...] Competent authorities should not consider <u>the mere presence of a contract between the <del>service provider issuer</del> and the <del>user holder</del> of the <u>payment instrument</u> as a technical restriction.</u></i></p>
15	<p>A few respondents suggested for the EBA to provide examples of and guidance on the technical and contractual restrictions envisaged in Guidelines 1.4 and 1.5.</p>	<p>The EBA has arrived at the view that it is the responsibility of the respective issuer to demonstrate that the use of the excluded instrument is limited, both in the contract with the user (including terms and conditions) and from a technical perspective.</p> <p>The EBA already provided in points (a) and (b) of Guideline 1.5 minimum requirements in relation to the technical restrictions, which include the providers of goods and services where the payment instrument can be used and the range of goods and services that can be purchased with the instrument.</p>	None.



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16	A few respondents requested the EBA to clarify that a contract between the service provider and the payee (merchant) can be considered a technical restriction. In the view of the respondent, a different approach would put an excessive burden on the service provider.	<p>The EBA does not see the need to introduce examples or additional provisions to Guideline 1.5.</p> <p>The EBA would like to clarify that a contract between an excluded issuer and a merchant may be considered as part of the technical restrictions but cannot by itself justify compliance with Guideline 1.4.</p> <p>See the row above that provides clarification on the technical restrictions that may be applied.</p>	None.
17	<p>Several respondents were of the view that the term ‘technical restrictions’ is a very broad concept, with a few of them suggesting deleting it from Guideline 1.4. The respondents also suggested that there is no legal basis under PSD2 for the imposition of technical restrictions. They also viewed it as unfeasible, impractical and that it will lead to an excessive burden for issuers (e.g. based on changes in/adaptations of terminals and cash register systems, as well as the usability of payment instruments at certain branches of the accepting merchants).</p> <p>One respondent was of the view that the changes are only possible in a straight-forward manner in specific market segments. The same respondent viewed it as difficult to manage for an expanding range of goods and services, which will require technical changes frequently.</p> <p>One respondent viewed this requirement as favouring international card schemes that have introduced merchant category codes.</p>	<p>The EBA has arrived at the view that the reference to technical restrictions is sufficiently clear. These restrictions should prevent the use of an instrument outside the limited network (e.g. network of service providers or the range of goods and services that can be purchased) and it thus developing into a general-purpose instrument. Another purpose of the technical restrictions is to prevent the use of the payment instrument even if the cashier does not remember to check or intentionally allows for the transaction to go through.</p> <p>Moreover, the EBA has arrived at the view that it is not possible to provide specific examples or to narrow down/specify further the term since it needs to cover a wide range of business models and specificities of the issuer, as well as the size and complexity of the national market. Therefore, the term will require a case-by-case assessment by CAs. In addition, to maintain technological neutrality, the EBA has decided to refrain from setting out specific technological solutions.</p>	None.



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	<p>One respondent was of the view that the technical limitation of payment instruments for fiscal and social purposes would require linking the respective merchandise management systems with the respective payment instruments used. In their view, in practice, this can only be controlled by contractual agreements between the issuer and the point of acceptance (e.g. supermarket, restaurant or snack bar) and corresponding controls by the cashier.</p>	<p>The EBA does not find compelling arguments to remove the reference to technical restrictions from Guideline 1.4.</p> <p>In addition, the EBA does not see the requirement as favouring particular market participants since the technical restrictions of use should be possible to be introduced by all issuers.</p> <p>Finally, the technical and contractual restrictions are necessary to limit the use of a payment instrument in accordance with Article 3(k). They are derived from the legal requirements and, therefore, deemed in line with the legal basis.</p> <p>In relation to the above, the EBA has not introduced any changes to the Guidelines.</p>	
18	<p>One respondent disagreed with the proposed Guideline 1.4 since, in their view, contractual restrictions should suffice in ensuring limitation of the use of the instrument. Moreover, in their view, such a requirement would introduce additional costs for providers, putting the viability of the business model at risk.</p> <p>The respondent was of the view that the EBA did not provide sufficient clarification on the justification for introducing the Guideline.</p>	<p>The EBA would like to highlight that Guideline 1.4 intends to ensure a delineation between general-purpose instruments and instruments for specific use that fall under the LNE. While contractual restrictions facilitate ensuring some level of restriction of use, they alone will not be sufficient to prevent an instrument from being used outside the limited network and thus developing into a general-purpose instrument. Therefore, having a technical restriction preventing that is needed.</p> <p>Contractual and technical restrictions will, therefore, not allow services that may require authorisation under PSD2 to be provided under the LNE.</p>	None.



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19	<p>One respondent was of the view that it should be left out to market participants to decide on how to ensure that the use of a payment instrument is limited. The respondent suggested that beyond technical and contractual restrictions under Guideline 1.4, operational restriction measures should also play a more important role, such as controls by cashiers in the retail sector. In their view, cashiers already carry out numerous control functions, such as age checks, counterfeit money checks, etc.</p>	<p>Finally, the respondent did not provide evidence in support of their statement that the Guideline will introduce additional costs for some market participants. The EBA therefore cannot consider this as a strong argument to take into account and has, therefore, not introduced changes to the Guidelines.</p> <p>The EBA understands the respondent is supportive of the contractual and technical restrictions but suggests that other measures may be implemented by issuers and providers of goods and services.</p> <p>The EBA has arrived at the view that the technical and contractual restrictions are in line with the requirements of Article 3(k) of PSD2 focusing on limitation of service providers (issuers) and range of goods and services within a limited network.</p> <p>The EBA is also of the view that issuers and providers of goods and services are not prohibited from incorporating additional measures to ensure that the use of the excluded instrument is limited, such as the operational restrictions mentioned by the respondent. The EBA notes that these can also be reflected as part of the contractual restrictions between the issuer and the provider of goods and services (merchant).</p> <p>The EBA has, therefore, not introduced any changes to the Guidelines.</p>	None.
20	<p>One respondent queried whether the implementation of technical restrictions would allow a single card-based instrument to</p>	<p>The EBA would like to highlight that Guideline 1.6 has introduced the possibility for a single card-based or</p>	None.



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	accommodate simultaneously more than one payment instrument excluded under Article 3(k) of PSD2.	other means of payment to accommodate more than one payment instrument.	
21	One respondent sought clarification on how detailed and granular the technical controls under Guideline 1.5 are expected to be.	The EBA would like to clarify that the detail and level of granularity on the technical restrictions applied depends on the respective business model and service provided by the issuer. In general, these restrictions should prevent the excluded instrument from being used more broadly than the envisaged use within the limited network and/or prevent the instrument from developing into a general-purpose instrument.	None
22	One respondent sought clarification on the size or type of geographical location that would apply to the limited network exemption referred to in Guideline 1.5.	The EBA would like to highlight that the technical restrictions related to the geographical location for acquiring goods or services from specific suppliers for specific social or tax purposes are provided as a minimum requirement applicable to the exclusion under Article 3(k)(iii) of PSD2 only. Therefore, any such restriction depends and is based on potential restrictions in the national social or tax legislation.	None.
23	<p>A few respondents were of the view that the term ‘single card-based means of payment’ is unclear since it has not been used in other EU legislative acts.</p> <p>The respondent highlighted that PSD2 only recognises ‘card-based payment instruments’ or ‘card-based transactions’. In addition, the respondents were of the view that excluded payment instruments do not fall under the</p>	The EBA agrees that the term ‘card-based means of payment’ is not defined in its entirety, however each of its elements is either defined (card-based) or used without a definition (means of payment) in level one. Therefore, the EBA has arrived at the view that no further clarification is required. This also takes into account that the other respondents to the public consultation, as seen from the summary of the issue in the left column, understood the intention of the term.	<p><i>Guideline 1.6</i></p> <p><i>Competent authorities should take into account that a single card-based <u>or other</u> means of payment [...]</i></p>



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	<p>definition of card-based payment instruments in the sense of the IFR.</p> <p>A few respondents also suggested formulating the term in a technologically neutral way and therefore referring to devices or payment applications. In the view of these respondents, the plastic card would be discriminated against as a medium of payment instrument for no apparent reason, while others, such as mobile phones, computers, wearables, on the other hand, would be allowed to include several payment instruments.</p> <p>Therefore, in the view of these respondents, the Guidelines would create an inconsistent approach between card-based and non-card-based instruments.</p>	<p>The EBA, however, agrees that the Guideline was too narrow with a focus on card-based means of payment only. Therefore, to maintain technological neutrality and a level playing field, the EBA has amended Guidelines 1.6 and 1.7 to also cover 'other' means of payment.</p>	<p><i>Guideline 1.7</i></p> <p><i>Competent authorities should <del>also ensure</del> take into account that a single card-based or other means of payment [...]</i></p>
24	<p>One respondent sought clarification on whether 'cards-on-file' or tokenised 'wallets' are not 'single card-based means of payment' and would, therefore, not be affected by these Guidelines.</p>	<p>The EBA would like to highlight that the purpose of the public consultation is not to provide bespoke advice on particular business models or services. The assessment on whether a particular instrument falls within the scope of the LNE is within the responsibility of CAs and will depend on the implementation of the solution and the specificity of the business model.</p> <p>The EBA, however, can clarify that particular examples of 'cards-on-file' and tokenised 'wallets' were taken into consideration when developing Guidelines 1.6 and 1.7 of the CP.</p>	<p>None.</p>
25	<p>A few respondents were of the view that the technology device with which the instrument is used is not a criterion of exclusion envisaged under</p>	<p>The EBA has arrived at the view that the usage of the payment instrument has a central role in the assessment of whether an instrument benefits from</p>	<p>None.</p>



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	<p>PSD2 and should, therefore, not be used in the Guidelines. These respondents suggested deleting Guideline 1.7.</p>	<p>the LNE or not. Enhancing consumer protection is one of the objectives of PSD2 and it is, therefore, in line with the Directive to disallow the combination of regulated and unregulated instruments on one means of payment.</p>	
26	<p>A few respondents were of the view that the assumption that the cardholder would not be able to differentiate between the regulated and excluded payment applications is in contradiction to the IFR, which explicitly prescribes that a cardholder can differentiate between the different payment applications of their physical card.</p> <p>The Guidelines do not consider the possibility of mandating enhancements to customer disclosures to ensure customers better understand the protections being offered by each payment instrument. In their view, consumer protection can be ensured well with compliance with Guidelines 5.2, 5.3 and 5.4 and the differentiation in branding.</p> <p>The respondents suggested that if the payer is informed that they are using two differently regulated payment instruments to carry out transactions, there are no reasons for such delineation. They also said that such a provision would unnecessarily limit the choice of consumers (e.g. for using a single smartphone, plastic card or a single computer) and prevent innovative solutions in the market. They also argued this would lead to the inconvenience of unnecessarily carrying several physical cards for their in-person purchases.</p>	<p>The IFR is addressed to regulated entities while issuers of the excluded instruments are not within the scope of PSD2 or the IFR. Therefore, the provisions of the IFR cannot apply to non-regulated entities.</p> <p>The Guidelines cannot introduce requirements to non-regulated entities or provisions in areas different than those under Articles 3(k) and 37(2) of PSD2, which the Guidelines aim at clarifying further.</p> <p>With regard to the suggestion that the Guidelines already envisage a large set of measures delineating between regulated and non-regulated instruments and disclosure of information to consumers, the EBA has arrived at the view that further transparency about the level of customer protection is not needed and, therefore, has retained the Guideline unchanged.</p>	None.





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27	<p>Finally, they suggested that it should be for the relevant CAs to assess through the delineation methods adopted through the assessment of the notifications.</p> <p>One respondent was of the view that Guidelines 1.6 and 1.11 contradict each other. It was suggested to clarify how the combination of two excluded instruments in a single card-based or other means of payment is different than the provision of Guideline 1.11.</p> <p>The respondent suggested that Guideline 1.11 will lead to confusion amongst CAs in interpreting the requirements and thus lead to inconsistent application at EU level.</p>	<p>The EBA would like to clarify that Guidelines 1.6. and 1.11 address different cases and are not contradictory. The scope of Guideline 1.6. covers two or more unregulated payment instruments that can be accommodated on a single card-based or other means of payment. Guideline 1.11, in turn, states that a single payment instrument cannot fall within the scope of more than one exclusion from the scope of application of PSD2.</p> <p>Therefore, the EBA does not see a likelihood of misinterpretation and misapplication of the provisions by CAs.</p> <p>Nevertheless, to introduce more clarity, the EBA has slightly simplified the wording of Guideline 1.11.</p>	<p><i>Guideline 1.11</i></p> <p><i>Competent authorities should take into account that <del>the exclusions based on Article 3(k) of PSD2 cannot be combined at payment instrument level with another a single payment instrument excluded under Article 3(k) of PSD2 cannot benefit from more than one exclusion from the scope of application of PSD2, including other exclusions under Article 3(k) of PSD2.</del></i></p>
28	<p>One respondent requested guidance on how the multiple (payment) instruments can be accommodated on a single card-based means of payment.</p>	<p>The EBA would like to highlight that the purpose of the public consultation is not to provide bespoke advice or guidance on particular business models or services and their implementation. The EBA intended to address business models and services assessed</p>	None.



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		<p>during the development of the Guidelines, which were deemed incompliant with the LNE.</p> <p>Since there is not any request for clarification on the legal basis, the EBA has not introduced any changes to the Guidelines.</p>	
29	<p>One respondent was of the view that the possibility to provide several exempted payment instruments on one single plastic card may lead to a situation where the card can basically function in the same way as a general-purpose instrument. The respondent expressed concerns that this could lead to circumvention of legal requirements and detriment to consumers.</p>	<p>The EBA would like to clarify that after having assessed this risk during the development of the CP, the EBA concluded that combining more than one excluded instrument on a single card-based or other means of payment will not lead to circumvention of the legal requirements since the restrictions of the use of each instrument are required by the other provisions of the Guidelines.</p> <p>Moreover, customers will be aware that they do not benefit from the protection envisaged under PSD2.</p> <p>In relation to the above, the EBA has not introduced any changes to the Guidelines.</p>	None.
30	<p>Several respondents were of the view that Guideline 1.7 should be deleted.</p> <p>Two respondents were of the view that disallowing mixing regulated and non-regulated instruments in a single means of payment would bring confusion to the users who may be seeking explicitly such a service and have a negative impact on customer experience.</p> <p>One respondent was of the view that compliance with this Guideline will incur additional costs to some providers.</p>	<p>The EBA has arrived at the view that the arguments provided by the respondents do not outweigh the consumer protection and transparency objectives of the Guideline.</p> <p>While accommodating regulated and non-regulated payment instruments on the same means of payment can have a positive effect on the customer experience, it should not come at the expense of protection and transparency for consumers.</p> <p>On the point of innovation, the EBA does not find the argument compelling. The instruments are excluded</p>	None.



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	<p>One respondent was of the view that such an approach will have a negative impact on innovation, which is contrary to the objective of PSD2.</p> <p>A few respondents were of the view that implementing technical solutions may lead to the same outcome of delineating between regulated and non-regulated instruments.</p> <p>One respondent was of the view that combining instruments within the scope of Article 3(k) and ‘regulated’ instruments in the same means of payment has the effect that the non-regulated instruments benefit from the regulatory requirements that must be met by regulated instruments.</p>	<p>from the scope of PSD2 because of their limited use. The objective of PSD2 to promote innovative payment solutions is intended for the regulated payment instruments within the scope of the Directive.</p> <p>With regard to the proposed alternative to introduce technical solutions to delineate between regulated and non-regulated payment instruments, the EBA has arrived at the view that this will not ensure sufficient transparency and protection for consumers. Moreover, the potential technical solutions may not be equally effective for the different payment instruments.</p> <p>With regard to the alleged positive effect of regulated instruments on non-regulated ones in case these are accommodated in the same means of payment, the EBA disagrees and did not find compelling arguments in support of such an interpretation.</p> <p>In relation to the above, the EBA has not introduced any changes to Guideline 1.7.</p>	
31	<p>One respondent was of the view that Guideline 1.7 should ensure a level playing field between the different payment instruments and ensure technological neutrality. Therefore, they suggested that all payment instruments should fall within the scope of the Guideline and not only ‘card-based’.</p>	<p>While the EBA has not come across specific business models that involve payment instruments other than those based on payment cards, the EBA agrees that a level playing field should be ensured between the various players on the market.</p> <p>The EBA has, therefore, amended the Guideline to reflect that by adding the reference to ‘or other’ to ‘means of payment’.</p>	<p><i>Guideline 1.7</i></p> <p><i>Competent authorities should <del>also ensure take into account</del> that a single card-based or other means of payment cannot</i></p>



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32	<p>One respondent described a specific use case where a purchase of a good or a service can be covered at the same time by a regulated service and an excluded service under Article 3(k)(iii) of PSD2. They explained that in the case where the holder of the instrument pays for a good or a service with their excluded instrument and the amount of the transaction exceeds the legal limit, the remaining amount is debited from a regulated payment card issued by a regulated PSP, which is linked to the excluded instrument. To ensure that, the information about the remaining amount to be paid from the regulated instrument is provided by the merchant to the issuer of the regulated instrument.</p> <p>The respondent explained that, in their view, these are two separate transactions and sought clarification on whether the specific use case falls within the scope of the provision of Guideline 1.7.</p> <p>Excluded instruments under 3(k)(iii) of PSD2 allowing ‘additional payment’ do not</p>	<p>The EBA has arrived at the view that the case described by the respondent falls within the scope of PSD2 and Guideline 1.7 and is not in line with the requirements of the latter because the means of payment accommodates both an instrument under Article 3 (k)(iii) and a regulated instrument simultaneously. Guideline 1.7 explicitly forbids just that. Moreover, allowing for a single payment instrument to be used for transactions where only parts of them fall in the scope of the LNE will not be in line with PSD2 either.</p> <p>The case described by the submitter raises transparency and customer protection concerns since it will not allow delineation between the two instruments and which part of the transaction is actually covered by the protection of PSD2. Moreover, referring to two separate transactions gives rise to concerns related to compliance with the requirements of PSD2, inter alia on the initiation of the payment transaction(s) and traceability of the funds.</p>	<p><i>accommodate simultaneously payment instruments within the scope of PSD2 and specific payment instruments within the scope of Article 3(k) of PSD2.</i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>'accommodate simultaneously' an excluded instrument and a regulated instrument but only allow a regulated third party to be instructed to initiate a payment transaction via regulated services or a regulated instrument.</p> <p>Another respondent provided a similar example with 'local complementary currency systems' that are excluded under the LNE but that can be accommodated in the same payment card, payment app or digital wallet.</p>	<p>In relation to the above, the EBA has not introduced any changes to Guideline 1.7.</p>	
33	<p>One respondent was of the view that Guideline 1.7 should only apply to excluded payment instruments provided to consumers.</p> <p>In their view, flexibility should be provided for excluded instruments offered to corporate users since PSD2 explicitly differentiates between legal entities and consumers. In addition, the legal entities are aware of the service provided to them and can assess the risks of those services.</p>	<p>The EBA has arrived at the view that in order to bring about consistent and harmonised application of the requirements, as well as a level playing field between the different users of the instruments, Guideline 1.7 should apply to all types of excluded payment instruments. Since these instruments do not fall within the scope of PSD2, the distinction PSD2 allows for certain legal requirements is not applicable.</p>	None.
34	<p>One respondent sought clarification on the application of redeemability under Guideline 1.9 and shared the view that it should not apply to products excluded under the LNE, but it applies to electronic money.</p>	<p>The EBA has arrived at the view that monetary value stored on instruments excluded under the LNE may be redeemable. The EBA would also like to clarify that Guideline 1.9 prescribes that the redeemability is not a defining feature for these excluded instruments. Therefore, while monetary value stored on excluded instruments may be redeemable, it does not have to be.</p>	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		Furthermore, the provisions on redeemability applicable to electronic money under EMD2 do not apply to the instruments under the LNE since the latter are excluded from the scope of application of EMD2.	
35	One respondent was of the view that the existence of limited redeemability for ‘local complementary currencies schemes’ should be included in the assessment of whether an instrument is limited or not.	The EBA would like to clarify that the Guidelines do not distinguish between different business models. This is also to maintain business model and technological neutrality, as well as a level playing field. Therefore, the EBA has not introduced specific criteria for local complementary currencies schemes, which should be subject to the same requirements as other limited networks.	None.
36	One respondent disagreed with Guideline 1.11 and was of the view that more than one exclusion from the scope of application of PSD2 may be applicable to an instrument excluded under Article 3(k) of PSD2, depending on the specificities of the instrument and the business model. CAs, in turn, need to assess the notification and whether or not the criteria for the exclusions are met.	The EBA agrees with the respondent that an instrument may meet the conditions to be exempted from more than one exclusion. However, the EBA disagrees that one instrument can benefit from more than one exclusion and that CAs should assess the instrument against all possible exclusions that the instrument may fall under. The latter will pose an excessive administrative burden for CAs.  Therefore, it should be for each issuer, not for the CA, to decide on the most relevant LNE applicable to the instrument.	None.
37	One respondent was of the view that in the cases where information is provided to the customer on the nature and specificities of the excluded instrument and that the user does not benefit from the protection of PSD2, it should be allowed to	The EBA disagrees with the respondent. Accommodating more than one exclusion on a single payment instrument will facilitate such an instrument to develop into a general-purpose instrument, which	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	combine on a single payment instrument several exclusions under Article 3(k) PSD2 for different purposes.	is against the rationale behind the LNE as envisaged in Recitals 13 and 14 of PSD2.  The EBA has, therefore, not incorporated the proposal.	
38	A few respondents proposed to clarify in the Guidelines that the issuer of the limited payment instrument can also be established in a third country outside the EU. In their view, by doing so, the EBA would prevent interpretations that issuers of excluded instruments can be established only in the EU and allow for a clarification that no geographical limitations apply to service providers in relation to the application of the LNE. In their view, this would ensure a level playing field. The respondents also suggested that the same level of supervision should apply to these service providers.	The EBA acknowledges that issuers established outside the EU may not fall directly within the remit of the CAs under PSD2. Therefore, to bring about compliance with Article 37(1) of PSD2, facilitate compliance with these Guidelines and allow CAs to ensure proper conduct of activities by market participants, the EBA has arrived at the view that all issuers of excluded payment instruments must be established in the EU. The EBA has, therefore, not amended the Guidelines.	None.
39	One respondent suggested that the EBA should more formally acknowledge the right of an issuer to provide cross-border activities without having to establish an entity in each Member State.	The EBA has arrived at the view that Guideline 1.12 clearly articulates this possibility, in particular that the issuer of the payment instrument can be established in a Member State different from the Member State of the respective CA that has received the notification under Article 37(2) of PSD2. Therefore, also in line with Guideline 6, the CA of each Member State where the payment instrument is used and exceeds the threshold under Article 37(2) of PSD2 should receive the notification from the issuer and assess it.  Accordingly, the EBA has not introduced any changes to the Guidelines.	None



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
40	One respondent asked whether the cross-border functionality is consistent with the purpose of the exclusion.	<p>As indicated in the CP and row 1 above, there is no geographical limitation to the provision of these services, even though Article 3(k)(i) of PSD2 allows for an assessment whereby the CA takes into account a possible geographical limitation of the given instrument. Therefore, it should be possible and in line with the rationale for the LNE for an excluded network to operate in different Member States, provided that the requirements of PSD2 and the provisions of these Guidelines are met.</p> <p>The EBA does not see a need for further clarification or amendments and has retained the approach taken in Guideline 1.12 and, more broadly, in Guideline 6.</p>	None.
<b>Question 2. Do you have comments on Guideline 2 on the limited network of service providers under Article 3(k)(i) of PSD2?</b>			
41	<p>Some market participants recommended that continuously growing networks of service providers should not be eligible for the LNE. In this respect, the national CAs could assess whether the ‘envisaged maximum number of service providers’ set out in Guideline 2.2(e) is expected to increase over time.</p> <p>On a related note, two respondents shared the view that the resubmission of the notification in case the network expands over time beyond the envisaged numbers may lead to circumvention of the requirements of the Guidelines and Article 3(k) of PSD2.</p>	<p>The EBA would like to clarify that the criterion ‘maximum number of service providers’ was introduced exactly for the purpose of preventing the continuous growth of limited networks.</p> <p>Moreover, in cases where the envisaged number of service providers increases over time, CAs will be able to assess the new notification against the updated figure and whether the issuer should benefit from the LNE.</p> <p>The EBA did not see compelling arguments in support of the statement that the approach taken in the Guidelines will create legal uncertainties or ways to circumvent the limitations set out in PSD2 as the</p>	None.





Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		<p>reassessment will be based again on the criteria and indicators laid down in the Guidelines.</p>	
42	<p>A few respondents suggested to amend Guidelines 2.1(b) and (c) by referring to the figures as those envisaged when the notification is submitted and not before its submission.</p>	<p>The EBA agrees with these respondents that the wording of Guideline 2.1(b) could be improved and has, therefore, introduced an editorial amendment in the spirit of the proposal of the respondents.</p> <p>As highlighted in row 59 below, Guideline 2.1(c) has been removed.</p>	<p><i>Guideline 2.1(b)</i>  <i>The envisaged maximum number of providers of goods and services operating within the limited network <del>before submitting as set out by the issuer</del> in the notification under Article 37(2) of PSD2.</i></p>
43	<p>Several respondents were of the view that the EBA should set out specific metrics in relation to the criterion ‘envisaged maximum number of providers of goods and services operating within the limited network before submitting the notification under Article 37(2) of PSD2’ under Guideline 2.1(b) and the indicators under Guideline 2.2, in particular those under items b) to d). In their view, this will avoid different interpretations of the requirements and ensure harmonisation of the practices in the assessment of the notifications for exclusion under Article 3(k) of PSD2.</p>	<p>The EBA would like to reiterate that the criterion under Guideline 2.1(b) and the indicators under Guideline 2.2(b), (c) and (d) are set out in a high-level and open manner in order to be able to accommodate a broad range of industries comprising different business models and different types of markets across the Member States. In relation to this, it is not practically possible to provide precise metrics accommodating all of these for the purpose of the assessment of business models by CAs. Therefore, the assessment should be carried out on a case-by-case basis.</p> <p>In that regard, the EBA has not found compelling arguments to change the approach proposed in the CP.</p>	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
44	<p>Several respondents sought clarification on whether the thresholds of the criteria and indicators under Guidelines 2.1 and 2.2 will be set out by the national CAs.</p>	<p>The EBA clarifies that in line with the requirements of Article 37(2) of PSD2 and Guideline 2, the thresholds of these indicators need to be set out, not by the CA, but by the issuer. CAs, in turn, should assess the notification in the light of the information provided by the issuer.</p> <p>The EBA has clarified in Guidelines 2.1 and 2.2 that the CA should take into account the criteria and indicators as provided by the issuer.</p>	<p><i>See the change in row 42 above.</i></p> <p><i>Guideline 2.2 (as set out in the Final Report)</i></p> <p><i>a) <del>The size of the</del> <u>specific geographical area for provision of goods and services, as set out by the issuer;</u></i></p> <p><i>b) <del>The volume and value of payment transactions envisaged to be carried out with the payment instruments on an annual basis, as envisaged by the issuer;</del></i></p> <p><i>c) <del>The envisaged</del> <u>maximum amount to be credited to the payment instruments, as envisaged by the issuer;</u></i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
45	<p>One respondent suggested alternative criteria to ensure that the network is limited instead of the criterion maximum number of service providers, in particular: contractual limitation, limited number of providers offering the product, acceptance of new member being subject to an agreement by all existing participants, historical data evidencing the network has not grown significantly and the applicable risk. In their view, these alternative criteria are significantly more objective compared to the mere application of a mathematical limitation of the number of participants in a network.</p>	<p>The EBA has arrived at the view that the criterion under Guideline 2.1(b) should not be looked at in isolation. It contributes to the overall assessment by CAs taking into account the additional criteria and indicators set out in Guidelines 2.1 and 2.2 respectively.</p> <p>With regard to the alternative proposals for criteria, the EBA has arrived at the view that some of them may be applied at network level but not necessarily in the assessment by CAs (e.g. acceptance of new members by existing ones).</p> <p>In addition, the proposal of limiting the number of providers offering the product is overlapping with the criterion under Guideline 2.1(b).</p>	<p><i>d) The envisaged maximum number of users of the payment instruments to be issued, as envisaged by the issuer; and</i></p> <p><i>e) The risks <del>which consumers may be exposed to</del> faced by the customer when using the <u>specific payment instrument, as identified by the issuer.</u></i></p> <p>None.</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		<p>Moreover, the proposal of contractual limitations and focus on risks are already embedded in Guideline 1 and Guideline 2.2 respectively.</p> <p>Finally, the proposal to use historical data is not forward looking and thus will not be able to limit the growth of the network.</p> <p>In relation to the above, the EBA has not introduced changes to the Guidelines.</p>	
46	<p>A respondent suggested clarifying that service providers that intend to offer goods and/or services online are not prevented from benefiting from the LNE exclusion.</p>	<p>The EBA has arrived at the view that Guidelines 2.3 and 2.4 provide sufficient clarity that the limited network of service providers exclusion also applies to online stores. In particular, Guideline 2.3 provides that the <i>'limited network of service providers can consist of physical stores only, online stores only or a combination of physical and online stores'</i>.</p> <p>Guideline 2.4 provides that <i>'competent authorities should not make a distinction between the type of stores...'</i></p>	None.
47	<p>A few respondents suggested to clarify the nature of the issuer of the payment instrument in Guideline 2.1. One respondent suggested to clarify in Guideline 2.1 that the contractual agreement with providers of goods and services can be concluded with a child company of the issuer.</p> <p>Another respondent sought clarification on whether the professional issuer must necessarily be a third party or whether it is possible for the</p>	<p>In relation to the question of whether a child company of the issuer (or a company within the same group) can conclude the contract with the provider of goods and services, the EBA would like to highlight that Guideline 2.6 prescribes that the issuer of the payment instrument can delegate the conclusion of the contractual agreement referred to in Guideline 2.1 to a third party acting on their respective behalf. This can include any company within the same group of the issuer.</p>	<p><u><i>New Guideline 1.13</i></u>  <u><i>Competent authorities should take into account that the exclusions under Article 3(k) of PSD2 should include, inter alia, transactions accepted by the</i></u></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>professional issuer to be an acceptor in a network comprising at least one other acceptor.</p> <p>One respondent also asked whether the professional issuer may also be an acceptor without further restrictions and without a third party being involved.</p>	<p>With regard to the question of whether the issuer should necessarily be a third party to a network of acceptors, the EBA clarifies that the issuer itself may also be an acceptor in a network of acceptors. In this case, the LNE will apply to all the transactions carried out with the excluded instruments within the network, including those accepted by the issuer itself. These transactions should also be taken into account in the calculation of the threshold under Article 37(2) of PSD2.</p> <p>The EBA would like to highlight that in accordance with Article 3(k)(i) of PSD2, the Directive does not apply to instruments allowing the holder to acquire goods or services ‘within a limited network of service providers under direct commercial agreement with a professional issuer’. Therefore, the acceptors or providers of goods and services operating within the limited network, which are not the issuer itself, must hold a direct contractual arrangement with the professional issuer.</p> <p>However, in line with Guideline 2.6, this is without prejudice to the possibility of delegating the conclusion of the contract to a third party acting on behalf of either the professional issuer or the provider of goods and services.</p> <p>Finally, an issuer who is an acceptor where no third party is involved in the purchase should not fall within the scope of PSD2 and should not be covered by the LNE. In relation to this, please also refer to the analysis in row 13 above.</p>	<p><u>issuer itself when the transaction is carried out within a network benefiting from an exclusion under Article 3(k) of PSD2 and the issuer itself is an acceptor in that network.</u></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
48	One respondent questioned the validity of Guideline 2.6, which prescribes that either the issuer of the payment instrument or the providers of goods and services can delegate the conclusion of the contractual agreement to a third party acting on their respective behalf. In the view of the respondent, this is not in line with the existing regulatory framework.	The respondent did not clarify which regulatory requirements contradict Guideline 2.6.  Nevertheless, each delegation should be assessed on a case-by-case basis by CAs, including whether each party that has delegated the conclusion of the contract bears its respective liabilities.	None.
49	A few of the respondents shared the view that the criterion 'common brand' under Guideline 2.1(d) should be clarified further to avoid different interpretations between CAs. A few respondents suggested deleting the criterion.	The EBA has arrived at the view that the common brand is an important factor for the depiction of the limited network since it allows customers to identify the limited network with certainty based on a visual manifestation used (e.g. a common name, a common logo, symbol or any other feature).  Therefore, the EBA has retained it as a criterion in the assessment under Guideline 2.1.	None.
50	Two respondents were of the view that the criterion 'common brand' under Guideline 2.1(d) should have a broader scope than franchise systems.  One of these suggested that the criterion can also apply to other forms of cooperation (e.g. professional craftsmen united under a certain quality mark, such as vertical markets). This respondent asked for illustrative examples of using the 'brand' criterion.	The EBA would like to clarify that the franchise system was given as an example in the Rationale section of the CP that could potentially be considered as a limited network, provided that it meets the requirements of the Guidelines. It should be highlighted that the scope of the criterion 'common brand' under Guideline 2.1(c) (previously Guideline 2.1(d)) has arrived at a general nature and also covers business models other than those based on franchise arrangements.  The EBA would refrain from providing illustrative examples since the various business models depend	None.



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		on their implementation and attributes. Moreover, it is for CAs to assess these in the light of the Guidelines.	
51	A few respondents were of the view that the criterion 'common brand' under Guideline 2.1(d) should be clarified further in order to ensure that the current market practice of card issuers working in close cooperation with acceptance partners continues to be allowed.	The EBA does not see the need for clarifying and amending Guideline 2.1(c) (previously Guideline 2.1(d)) since the Guideline clearly articulates that the reference to 'common brand' is broad and refers to a limited network where a payment instrument is used, which encompasses the case described by the respondent where the issuer may be part of the acceptance network.	None.
52	A few respondents were of the view that the criterion 'common brand' should be clarified. In particular, they suggest referring to a common brand for the payment instrument and not a common brand under which the participants in the limited network should operate.	<p>The EBA would like to clarify that the criterion common brand characterises the limited network where a payment instrument is used.</p> <p>As elaborated in the Rationale of the CP, in order to enhance customer (consumer) protection, it should be clear to the customer that the service providers operate under a certain brand, preferably by having some visual manifestation.</p> <p>The EBA has also clarified that the Guidelines refer to 'brand' and not to 'payment brand', which has a different and specific meaning under PSD2. In addition, the payment instrument does not necessarily share the same brand within the limited network. Therefore, the brand should be considered as an attribute of the network and not of the payment instrument.</p> <p>In relation to the above, the EBA has not found compelling arguments to change the approach and has not introduced any changes to the Guidelines.</p>	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
53	One respondent proposed to add in Guideline 2.1 a new criterion on whether the relationship between the issuer of the payment instrument and the user is business-to-business.	<p>The EBA has arrived at the view that restricting the exclusion to a business-to-business relationship between the service provider and the user of the instrument will narrow down the scope of the exclusion as envisaged in PSD2.</p> <p>Accordingly, the EBA has not introduced the proposal in the Guidelines.</p>	None.
54	One respondent suggested that Guideline 2.5 should distinguish between instruments used by professionals and instruments used by consumers.	<p>The EBA does not see compelling arguments to distinguish between instruments used by professionals and instruments used by consumers for the purpose of Guideline 2.5.</p> <p>Since PSD2 does not distinguish between these types of users, the EBA has arrived at the view that the proposed approach will be contrary to the requirements of PSD2.</p>	None.
55	<p>Several respondents were of the view that the complementary indicators in Guideline 2.2 need to be clarified further in order to achieve legal certainty and the objective of bringing consistency and harmonisation to the application of the legal requirements. In their view, these indicators are not precise enough and lack tangible metrics for CAs to assess them against.</p> <p>Moreover, some of these respondents sought clarity on whether the additional indicators are optional or mandatory and whether all of them</p>	<p>The EBA has arrived at the view that the indicators complement the assessment under Guideline 2.1 and bring consistency and harmonisation in the information provided to and assessed by CAs, therefore the EBA has decided to retain them in the Guidelines. At the same time, the way the indicators are set out allows the accommodation of different business models for the provision of excluded services and specificities of the market within the Member States.</p> <p>Nevertheless, in the light of the feedback received from the public consultation, the EBA agrees more</p>	<p><i>Guideline 2.2</i></p> <p><i>Complementary to the assessment under Guideline 2.1, and depending on the specific business model for provision of services and the size and specificity of the market within the respective Member State,</i></p>





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	<p>should be submitted to and assessed by CAs cumulatively.</p> <p>A few of the respondents expressed preference for these indicators to be non-binding points of reference and not a list of reasons to reject business models notified to them under Article 37(2) of PSD2</p>	<p>clarity about the use and purpose of the indicators under Guideline 2.2 is needed to bring about a harmonised approach in the application of the LNE across the EU.</p> <p>The EBA, therefore, reconsidered the positioning of the indicators under Guideline 2.2 and would like to clarify that the provision of these indicators is mandatory for all business cases and that CAs should always assess the notification under Article 37(2) of PSD2 against all of these indicators. CAs should be able to take a duly motivated decision also on the basis of the indicators (or even a single indicator) regarding whether the activity qualifies or not as a limited network. The EBA reflected this in the Guidelines.</p> <p>However, in the light of the specific concerns raised in relation to particular indicators, the EBA has clarified the provisions of some of the indicators and has deleted others (see the below rows in relation to Guideline 2).</p>	<p><i>competent authorities should take into account, <u>based on the size and specificity of their market, all of the following additional indicators: [...]</u></i></p>
56	<p>Some respondents were of the view that the indicators should take into account the specificities of the national market and the specificity of the proposed business model of the respective payment instrument, as well as the goods and services provided.</p>	<p>The EBA agrees with the proposal that the indicators should take into account the specificities of the national market since the exclusion is provided for each Member State, and the size and structure of each Member State’s market can at times be different. The EBA has, therefore, clarified that the thresholds under Guidelines 2.2. should be assessed taking into account the specificities of the national market.</p>	<p><i>See the change in row 55 above.</i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
57	Several respondents were of the view that Guideline 2.2 should provide more clarity on how the different indicators should be weighted and how these correlate to Guideline 2.1. In their view, this will increase transparency and legal certainty.	<p>The EBA would like to clarify that there is no weighting on the various indicators under Guideline 2.2 (same applies to the criteria under Guideline 2.1) since all indicators are equally important in informing CAs in their final conclusion on the assessment of the business model. They complement the assessment under Guideline 2.1 and bring consistency and harmonisation in the information provided to and assessed by CAs.</p> <p>As mentioned in row 55 above, the provision of these indicators is mandatory for all business cases and CAs should always assess the notification under Article 37(2) of PSD2 against all these indicators.</p>	See the change in row 55 above.
58	Several respondents suggested clarifying the criterion specific geographical area, in particular the examples provided in the Rationale section of the CP, such as ‘specific region’, ‘local producers’, ‘town’, etc. These respondents viewed the examples as too vague, extensive, impractical and leading to subjective conclusions.	<p>The EBA has arrived at the view that the specific geographical delimitation, amongst other indicators, should be assessed as part of a body of evidence since it provides useful information for determining whether the business model can fall under the LNE or not.</p> <p>The Rationale section of the CP gave some illustrative examples that may potentially be considered as limited networks based on the cases assessed by the EBA. These should, however, meet the requirements of Article 3(k) of PSD2 and these Guidelines.</p> <p>These examples should not be perceived as definitive.</p>	None.
59	One respondent suggested that the EBA should delete the indicator size of the geographical area since it is contrary to the freedom of providing goods and services and at the same time does not	The EBA agrees partly with the respondent that the size of the geographical area should not be taken into account in the assessment by CAs. Nevertheless, the EBA has arrived at the view that the specific	<p><i>Guideline 2.1(c)</i></p> <p><i>The envisaged specific geographical</i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	enhance consumer protection. The respondent suggested that the EBA should refrain from applying geographical restrictions but rather limit the use of the instrument on the end of the customers.	<p>geographical delimitation, amongst other indicators, should be assessed as part of a body of evidence since it provides useful information for determining whether the business model can fall under the LNE or not.</p> <p>The EBA has, therefore, moved the criterion concerning the specific geographical area (Previous Guideline 2.1(c)) as an indicator (current Guideline 2.2(a)) and deleted the indicator size of the geographical area (previous Guideline 2.2(a)).</p>	<p><del>area for provision of goods and services before submitting the notification under Article 37(2) of PSD2; and</del></p> <p><i>Guideline 2.2(a)</i></p> <p><del>The size of the specific geographical area for provision of goods and services, as set out by the issuer;</del></p>
60	A few respondents suggested that postal/zip codes could be used to limit the geographical expansion of a network.	The EBA has arrived at the view that postal/zip codes can be a good indicator of the specific geographical area under Guideline 2.2(a). Nevertheless, to maintain business model neutrality, postal/zip codes cannot be used as the sole indicator for the geographical area since they can either be too restrictive or cover substantial areas inhabited by thousands of people.	None.
61	A few respondents suggested to distinguish between regular payment instruments and instruments for social purposes, such as local currencies instruments, when assessing the indicators under Guideline 2.2.	<p>The EBA does not see the rationale for distinguishing between regular instruments and instruments for social purposes. The LNE is based on the limited use of the instrument and not on the purpose of the instrument.</p> <p>Moreover, such a distinction will leave too much room for interpretation and will make the delineation</p>	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		<p>with the exclusion under Article 3(k)(iii) of PSD2 difficult.</p> <p>In addition, the EBA has arrived at the view that the indicators under Guideline 2.2 do not prevent or constrain the development of social initiatives such as local complementary currencies (e.g. the specific geographical area for provision of goods and services, risks which customers may be exposed to).</p> <p>Finally, it should be noted that such instruments for social purposes may also be assessed under the exclusion in Article 3(k)(iii) of PSD2.</p>	
62	<p>A few respondents suggested to introduce two additional indicators in Guideline 2.2 in order to ensure a more proportionate legal regime for the local and complementary currency systems, namely:</p> <ul style="list-style-type: none"> <li>- whether the purpose of the payment instrument is aimed at a public good, including a description of the public good;</li> <li>- whether the management of the network is a non-profit entity or an entity that has been classified as an entity for the public interest.</li> </ul>	<p>The EBA has arrived at the view that the LNE is based on the limited use of the instrument and not on the purpose of the instrument. The indicators under Guideline 2.2 are aimed at facilitating this assessment.</p> <p>Accordingly, the specific purpose of the service provider is irrelevant in deciding whether the network is limited or not. Moreover, the indicators set out in Guideline 2.2 intend to cover a broad range of business models and should be applicable to all of them, which is not the case with the two indicators proposed by the respondent.</p> <p>In addition, as seen in row 64 below, the EBA has deleted the indicator related to the type of management of the limited network based on the arguments presented by the other respondents.</p>	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
63	Several respondents were of the view that Guideline 2.5 is too restrictive and that an instrument excluded under Article 3(k)(i) of PSD2 should be accepted in more than one network.	<p>Finally, as indicated above, such instruments for social purposes may also be assessed under the exclusion in Article 3(k)(iii) of PSD2.</p> <p>The EBA would like to highlight that Recital 13 of PSD2 clearly specifies that <i>'it should not be possible to use the same instrument to make payment transactions to acquire goods and services within more than one limited network'</i>. Therefore, to bring about consistency with said Recital, the EBA has retained the direction of Guideline 2.5. However, the EBA introduced minor editorial improvements to the provision.</p>	<p>Guideline 2.5</p> <p>Competent authorities should not allow <del>service providers to</del> <u>the use of</u> the same payment instrument excluded under Article 3(k)(i) of PSD2 across different limited networks of service providers.</p>
64	A few respondents were of the view that there is no legal basis in proposing the indicator 'whether the management of the network is centralised' under Article 3(k)(i) of PSD2 and Recital 13 and proposed to delete this indicator as set out in Guideline 2.2(g). They also considered the indicator as too subjective, open for interpretation and does not have added value in the assessment of the exclusion and the respective risks.	The EBA agrees with the rationale provided by the respondents and, taking into account that the information about the indicators under Guideline 2.2 will be required from all issuers, has deleted the indicator 'whether the management of the network is centralised' (as proposed in Guideline 2.2(g) of the CP) from the Guidelines.	<p><del>Guideline 2.2(g)</del></p> <p><del>Whether the management of the network is centralised.</del></p>
65	One respondent suggested introducing the indicator 'whether the management of the network is centralised' under Guideline 2.2(g) as a criterion under Guideline 2.1 and that the remaining	In line with the issue raised in the row above, the EBA has deleted the indicator 'whether the management of the network is centralised' since it was deemed as not facilitating the assessment carried out by CAs.	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	indicators should be submitted for information purposes.	The EBA has clarified the nature of the indicators in the rows above.	
66	One respondent sought clarification on whether CAs will have discretion to decide on the maximum number of users of the payment instrument under Guideline 2.2(d).	<p>The EBA clarifies that in line with the requirements of Article 37(2) of PSD2 and Guideline 2, the thresholds of the indicator maximum number of users of the payment instrument need to be set out, not by the CA, but by the issuer. CAs, in turn, should assess the notification in the light of the information provided by the issuer.</p> <p>Moreover, to provide greater clarity and facilitate the provision of the information by the issuers, the EBA focused the indicator on the number of payment instruments envisaged to be issued rather than the users of the instruments. See also the analysis in row 87 below.</p> <p>The EBA has clarified in Guideline 2.2 that the CA should take into account the indicators as provided by the issuer.</p>	<p><i>Guideline 2.2(d)</i></p> <p><i>The <del>envisaged</del> maximum number of users of the payment instruments to be issued, as envisaged by the issuer;</i></p>
67	<p>Several respondents were of the view that the EBA should set out specific metrics in relation to the indicators in Guideline 2.2, in particular those under items b) to c).</p> <p>In the view of some of these respondents, the volume and value of payment transactions carried out with the excluded instruments, the amounts to be credited to the payment instruments and the number of users of the payment instrument under Guideline 2.2(b), (c) and (d) should be weighted towards the specificities of the national market and</p>	<p>The EBA would like to highlight that these indicators are set out in a high-level manner in order to be able to accommodate a broad range of industries comprising different business models and different types of markets across the Member States. In relation to this, it is not practically possible to provide a precise list of metrics to accommodate all of these for the purpose of the assessment of business models by CAs. Therefore, the assessment should be carried out on a case-by-case basis.</p>	<p><i>Guideline 2.2</i></p> <p><i>Complementary to the assessment under Guideline 2.1, and depending on the specific business model for provision of services and the size and specificity of the market within the respective</i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>take into account the business model and the specificity of the goods and services provided.</p> <p>Finally, a few respondents were of the view that introducing such indicators focusing on the envisaged number and amount of transactions, amounts to be credited on the instruments and number of instruments issued will be detrimental to the growth of the network.</p>	<p>In that regard, the EBA has not found compelling arguments to change the approach proposed in the CP. To the contrary, the EBA views some of the arguments (e.g. that these indicators will restrict the growth of the networks) as in line with the rationale behind the EBA's proposal, which was to prevent the exponential growth of the limited networks without proper overview by the CA.</p> <p>However, the EBA agrees with the proposal that since the exclusion is provided for each Member State, which at times have different structure and size of their market, such specificities should be taken into account. The EBA has, therefore, clarified that the thresholds under Guideline 2.2 should be assessed taking into account the specificities of the national market.</p>	<p><del>Member State, competent authorities should take into account, based on the size and specificity of their market, all of the following additional indicators: [...]</del></p>
68	<p>One respondent was of the view that the 'common brand' criterion under Guideline 2.1(d) should not impact the exclusion under Article 3k(ii) of PSD2 for instruments which can be used only to acquire a very limited range of goods or services.</p>	<p>The EBA clarifies that there is no relation between the criterion 'common brand' under Guideline 2.1(d) and the exclusion under Article 3(k)(ii) of PSD2 and its related Guideline 4.</p>	None.
69	<p>A few respondents were of the view that categories of customers in Guideline 2.2(e) should not be an additional indicator due to a lack of legal basis. Moreover, they considered the indicator too subjective and questioned its added value since the only distinction that could be made in their view is between consumers and non-consumers.</p>	<p>The EBA agrees with the rationale provided by the respondents and, taking into account that the information about the indicators under Guideline 2.2 will be required from all issuers, has deleted the indicator 'categories of customers being targeted' (as proposed in Guideline 2.2(e) of the CP) from the Guidelines.</p>	<p><del>Guideline 2.2(e) The categories of customers being targeted;</del></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>Some of these respondents suggested that, if not deleted, the indicator should at the very least be further clarified.</p>		
70	<p>A few respondents suggested clarifying the reference to the 'risks which consumers may be exposed to'. In their view, the risks should be clearly articulated or removed from the final Guidelines since they may lead to uncertainty in the interpretation.</p> <p>One respondent sought clarification on whether the reference to risks in Guideline 2.2(f) is in the context of the use of the excluded payment instrument or whether it covers all applicable risks.</p>	<p>The EBA would like to clarify that the indicator intends to capture risks related to the use of the instruments by customers. Therefore, the EBA has amended the Guideline accordingly.</p>	<p>Guideline 2.2(f) (current Guideline 2.2(e))</p> <p>The risks <del>which consumers may be exposed to</del> <u>faced by the customer when using the specific payment instrument, as identified by the issuer.</u></p>
71	<p>One respondent sought clarification on why Guideline 2.7 refers to a restrictive application for Guideline 2.1 and 2.2 only.</p>	<p>The EBA understands that the application of all exclusions from the scope of PSD2 should be applied in a restrictive manner. However, since some of the criteria and additional indicators do not rely on tangible metrics as also highlighted by some of the respondents to the public consultation, the EBA was of the view that in order to prevent different interpretations of these criteria and indicators, some further guidance on their application should be provided. That was the reason for introducing Guideline 2.7 in that manner.</p> <p>The EBA has, therefore, not introduced changes to the Guidelines.</p>	<p>None.</p>





Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<b>Question 3. Do you have comments on Guideline 3 on the instruments used within the premises of the issuer under Article 3(k)(i) of PSD2?</b>			
72	<p>A few respondents suggested that the term 'premises' should not be limited to physical locations only and that it should also cover digital premises. In doing so, online/digital stores would fall within the scope of application of the exclusion. Some of these respondents were of the view that the term 'premises' should be interpreted in a flexible manner in the light of the COVID-19 crisis and in order to be future proof.</p>	<p>The EBA reiterates that the reference to 'premises' clearly sets out a geographical restriction to physical location(s). This means that payment instruments benefitting from this particular exclusion can only be used for purchases within physical locations and cannot be used for purchases in online stores.</p> <p>In addition, it should be noted that while instruments that can be used for purchases within the physical premises of the issuer under Article 3(k)(i) of PSD2 cannot be used for online purchases, issuers that intend to offer goods and/or services online can benefit from a different exclusion under Article 3(k) of PSD2, such as the limited network of service providers under Article 3(k)(i) of PSD2 or limited range of goods and services under Article 3(k)(ii) of PSD2.</p> <p>Finally, the EBA has arrived at the view that factors that are not related to whether a network is limited or not, such as the impact of COVID-19, should not be taken into account in the Guidelines.</p>	None.
73	<p>One respondent sought clarification in relation to other exclusions that may be applied in the case of online/digital stores. They suggested that the alternative exclusions that may apply should not be limited to the limited range of goods and services under Article 3(k)(ii) of PSD2 only.</p>	<p>The EBA would like to clarify that, in accordance with Article 3(k) of PSD2 and these Guidelines, all other exclusions under Article 3(k) of PSD2, including the limited network of service providers and the limited range of goods and services, can apply to online/digital stores.</p>	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
74	One respondent sought clarification on how purchases made online but collected at the premises of the provider of goods should be treated.	<p>The EBA has arrived at the view that since the purchase is made online, the instrument cannot be considered as used within the physical premises. Therefore, the exclusion under Article 3(k)(i) of PSD2 that relates to the premises of the issuer cannot apply to these cases.</p> <p>This is without prejudice to the possibility for the instrument to fall within the scope of another exclusion under Guideline 3(k) of PSD2.</p>	None.
75	One respondent sought clarification on how purchases of digital goods and/or services within physical stores should be treated and whether they can fall within the scope of this exclusion.	<p>The EBA has arrived at the view that since the purchase is made in the physical premises, the instrument can be considered used within these premises. As clarified in Guideline 1.2, the specific payment instruments can be used for acquiring both physical and digital goods and services.</p> <p>Therefore, the exclusion under Article 3(k)(i) of PSD2 related to the premises of the issuer may apply. This is also in line with the technological neutrality principle of PSD2.</p>	None.
76	One respondent requested the EBA to define the term 'premises' in order to enhance legal certainty and transparency as well as convergence between CAs.	<p>The EBA would like to clarify that it is not legally able to define general terms or terms left open in level 1.</p> <p>Moreover, the EBA has arrived at the view that Guideline 3 provides sufficient clarity and harmonisation of practices by referring to 'physical premises'.</p> <p>In addition, the EBA reiterates that the exclusion applies to purchases within one or more physical</p>	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		<p>locations and cannot be used for purchases in online stores.</p> <p>Finally, the EBA would like to highlight that Directive 2011/83/EU defined an ‘off-premises contract’. In particular that it is, inter alia, a contract concluded with the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader, for example at the consumer’s home or workplace. Based on that, it can further be deducted that premises relate to physical premises.</p>	
<p><b>Question 4. Do you have comments on Guideline 4 on the limited range of goods or services under Article 3(k)(ii) of PSD2?</b></p>			
77	<p>A large minority of the respondents were of the view that the term ‘functional connection’ between the goods and/or services can be clarified further since it raises a risk of different interpretation between various market participants. These respondents also objected to the approach where the assessment of the functional connection should be based on a ‘leading good/service’ and the link with ancillary connected goods and/or services. Many of these proposed an alternative focus of Guideline 4.2, namely on the ‘purpose’ of use of the instrument or the ‘scope of use’. One respondent proposed to focus the Guideline on the common ‘theme’ of the goods and/or services and another one proposed to focus on a category of goods/services since it will lead to a uniform interpretation at EU level.</p>	<p>The EBA agrees with the concerns expressed by the respondents and to address them has decided to amend the approach taken in Guideline 4.2, namely by focusing the assessment of the functional connection between goods and/or services on a specific category of goods and/or services with a common purpose.</p> <p>By doing so, the approach will not be too restrictive and will allow for greater flexibility to accommodate different services and business models. It will also be agnostic to the development of the business or the choices of the customers. Moreover, it will be more focused on the functionality and purpose of use of the respective goods and services.</p> <p>In addition, it should lead to greater harmonisation since it will eliminate the possibility for different interpretations on what a leading good/service should be.</p>	<p>Guideline 4.2</p> <p>When assessing the functional connection between the goods and/or services, competent authorities should take into account that <del>a leading good or service is established</del> <u>specific category of goods and/or services with a common purpose has been identified by the issuer.</u> Competent authorities should</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>Several respondents were of the view that the criterion 'leading good/service' is too subjective and that it will lead to divergent interpretation and practices by CAs. Some of these expressed concerns that there is a lack of clarity on how CAs should assess business models against this criterion, the level of detail and how it would be associated with the ancillary goods/services. In relation to this, to avoid interpretational issues, a few respondents proposed for the EBA to introduce a definition of a leading good/service or to introduce criteria for CAs to take into account when identifying the leading good/service.</p> <p>Several of the respondents expressed concerns that the leading good/service would depend on the customers' behaviour and choice.</p> <p>A few of the respondents were of the view that the assessment of the functional connection on the basis of leading and ancillary goods/services will be impossible to assess in practice, or at least not possible for all business models or sectors.</p> <p>Several of these respondents further elaborated that some functionally connected goods and services may not have a leading good/service and that thus the assessment by CAs should be carried out horizontally, and not in a hierarchical vertical manner.</p> <p>A few respondents expressed concerns that it may be challenging to identify a single leading</p>	<p>The EBA has arrived at the view that a particular definition or criteria in setting out the category of goods and services is not required since the identification of the category will depend on the specific business model and area of activities. Flexibility and technological neutrality will be desirable from that perspective. Therefore, the EBA arrived at the view that it is best to be left for the issuer to justify their rationale for the proposed category of goods/services.</p> <p>Finally, the EBA deemed the proposed approach consistent with the requirements of Article 3(k)(ii) of PSD2 and the related Recitals 13 and 14 of PSD2, since it provides more detail on how a limited range of goods and services should be perceived and the functional connection between those assessed. It will also facilitate the assessment of Cas on determining which business models could fall within the scope of this exclusion and bring about a level playing field across the EU.</p>	<p>check whether the <del>service provider</del> <u>issuer</u> has identified the <del>leading good or service and the ancillary goods and/or services</del> <u>goods and/or services falling within the specific category</u> and <u>whether it has</u> described the functional connection between them in the notification under Article 37(2) of PSD2.</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>good/service, with a few others sharing the view that the leading good/service may also be subject to change over time.</p> <p>A few respondents were of the view that more than one leading good can exist and suggested to accommodate this in the Guidelines.</p> <p>Several respondents expressed their view that an approach based on a leading good/service is too narrow and restrictive. One of them informed that this may prevent the development of innovative products and services.</p> <p>A few respondents were of the view that the criterion leading good/service is not applicable to all business models and will require change in some of the existing practices.</p> <p>A few respondents suggested that an approach based on a leading good/service would not offer greater consumer protection.</p> <p>A few of the respondents were of the view that the terms ‘functional connection’ and ‘leading good and/or service’ are not provided by PSD2 and thus should not be used in the Guidelines since they will contradict level 1, with one of them viewing the hierarchical ranking as an additional requirement not envisaged in PSD2.</p>		
78	<p>A few respondents were of the view that the reference to ‘direct functional connection’ is not sufficiently clear and not in line with the</p>	<p>The EBA has arrived at the view that the functional connection between the goods and services should exist. It is further clarified in Guideline 4.2 that the functional connection should also be ascertained with</p>	<p><i>See the change to Guideline 4.2 in row 77 above.</i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>requirements of PSD2, which would lead to confusion and different interpretations.</p> <p>One respondent further requested clarity on whether the relevant goods/services must have the same function.</p>	<p>the identification of a specific category of goods/services with a common purpose (see the EBA analysis in the row above).</p> <p>Finally, in order to be consistent with the wording of Recital 13 of PSD2, the EBA has deleted the reference to 'direct' in Guideline 4.1.</p>	<p><i>Guideline 4.1</i></p> <p><i>Competent authorities should take into account that in order for the use of a specific payment instrument to be considered as limited for acquiring a very limited range of goods or services under Article 3(k)(ii) of PSD2, a <del>direct</del> functional connection between the goods and/or the services that can be acquired with the payment instrument should exist.</i></p>
79	<p>Several respondents suggested that the EBA should introduce in the Guidelines a non-exhaustive list of examples of business models and services that would fall within the exclusion under Article 3(k)(ii) of PSD2 and the provisions of Guideline 4. One respondent also suggested listing examples of goods and services that do not have a functional connection between them.</p>	<p>The EBA maintains its view that it should refrain from providing examples of connected goods and services since this will introduce a risk of misinterpretation of these examples, in particular these can be perceived as the only viable options for falling under the scope of the exclusion, or as a standard that is to be strictly applied by CAs.</p>	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	A few respondents sought clarity on specific business models and cases.	<p>Moreover, it will be very challenging to set a list of examples that will be appropriate for all Member States and all business models, as well as future proof.</p> <p>In addition, setting examples without context may unintentionally impact the scope of the exclusion (either broadening or narrowing it).</p> <p>Therefore, the EBA has maintained its view that the identification of the functional connection should depend on the rationale justified by the issuer to the CA.</p>	
80	One respondent suggested that to ensure a harmonised and consistent approach in the assessment of the exclusion under Article 3(k) of PSD2, CAs should publish the motivation and conclusion of their assessment, including on their websites and/or national registers.	The EBA has arrived at the view that the proposal relates to administrative procedures of CAs and thus going beyond the remit of the EBA and the purpose of these Guidelines.	None.
81	One respondent expressed concerns that it will be disproportionate to include all functionally connected goods and services in the national registers since these may be subject to change and thus the content of the registers may be misleading. The respondent was of the view that the indication of goods and services should not be mandatory in the notification sent to CAs.	<p>The Guidelines proposed in the public consultation did not contain a provision requiring the list of functionally connected goods and services to be made available in the national registers.</p> <p>The EBA also disagrees with the second statement that the information about the connected goods and services should not be included in the notification sent to CAs because this is crucial information to inform whether the range of goods and services is limited and whether the service provided falls within the exclusion under Article 3(k)(ii) of PSD2.</p>	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
82	<p>Several respondents were of the view that the complementary indicators in Guideline 4.4 need to be clarified further in order to achieve legal certainty and the objective of bringing consistency and harmonisation to the application of the legal requirements. In their view, these indicators are not precise enough and lack tangible metrics for CAs to assess them against.</p> <p>Moreover, some of these respondents sought clarity on whether the additional indicators are optional or mandatory and whether all of them should be submitted and assessed cumulatively. A few of them expressed preference for these indicators to be non-binding points of reference.</p> <p>A few of these respondents were of the view that PSD2 does not provide for the introduction of such indicators and suggested deleting them. In their view, the restrictive character of the LNE is ensured with the limitation of the instrument to the purchase of a very limited range of goods or services.</p> <p>A few of the respondents were of the view that the indicators are volatile and subject to change, which will require their update over time. In their view, this will contradict the provision of Guideline 6.4 on the one-off submission of the notification.</p>	<p>The EBA has arrived at the view that the indicators complement the assessment under Guidelines 4.1 and 4.2 and bring consistency and harmonisation in the information provided to and assessed by CAs, therefore the EBA has decided to retain them in the Guidelines. At the same time, the way the indicators are set out allows the accommodation of different business models for the provision of excluded services and specificities of the market within the Member States.</p> <p>Nevertheless, in the light of the feedback received from the public consultation, the EBA agrees more clarity about the use and purpose of the indicators under Guideline 4.4 is needed to bring about a harmonised approach in the application of the LNE across the EU.</p> <p>The EBA has, therefore, reconsidered the positioning of these indicators and would like to clarify that the provision of these indicators is mandatory for all business cases and that CAs should always assess the notification under Article 37(2) of PSD2 against all of these indicators. CAs should be able to take a duly motivated decision also on the basis of the indicators (or even a single indicator) regarding whether the activity qualifies or not as a limited network. The EBA has reflected this in the Guidelines.</p> <p>However, in the light of the specific concerns raised in relation to particular indicators, the EBA has decided to clarify some of the indicators and delete others (see the below rows in relation to Guideline 4).</p>	<p><i>Guideline 4.4</i></p> <p><i>Complementary to the assessment under Guidelines 4.1 and 4.2, <del>and</del> depending on the specific business model for provision of services and the size and specificity of the market within the respective Member State, competent authorities should take into account, <u>based on the size and specificity of their market, all of the following additional indicators: [...]</u></i></p>





Comments	Summary of responses received	EBA analysis	Amendments to the proposals
83	Several respondents were of the view that Guideline 4.4 should provide more clarity on how the different indicators should be weighted and how these correlate to Guidelines 4.1 and 4.2.	<p>The EBA would like to clarify that there is no weighting on the various indicators since all indicators are equally important in informing CAs in their final conclusion on the assessment of the business model. They complement the assessment under Guidelines 4.1 and 4.2 and bring consistency and harmonisation in the information provided to and assessed by CAs.</p> <p>As mentioned in row 55 above, the provision of these indicators is mandatory for all business cases and CAs should always assess the notification under Article 37(2) of PSD2 against all of these indicators.</p>	See the change in row 55 above.
84	A few respondents were of the view that the EBA should introduce practical examples to facilitate the assessment of the CAs against Guideline 4 and mitigate the risk of inconsistent and divergent approaches.	The EBA has arrived at the view that while practical examples may facilitate the implementation and application of some aspects of the Guidelines, such examples may lead to a narrow and restrictive interpretation of the Guidelines, thus excluding certain business models from the scope of application. Moreover, assessing whether a certain business model falls within a LNE will not only depend on the type or nature of the business but also on the description of how the services will be provided, which is subject to the respective assessment by the CAs. Therefore, the EBA has not introduced any changes to the Guidelines.	None.
85	Several respondents sought clarification on whether the thresholds of the indicators under Guideline 4.4 will be set out by the national CAs.	The EBA clarifies that in line with the requirements of Article 37(2) of PSD2 and Guideline 4, the thresholds of these indicators need to be set out, not by the CA, but by the issuer. CAs, in turn, should assess the	<i>Guideline 4.4 (as set out in the Final Report)</i> [...]



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>notification in the light of the information provided by the issuer.</p> <p>The EBA has clarified in Guideline 4.4 that the CA should take into account the indicators as provided/envisaged by the issuer.</p>		<p><i>a) <del>The volume and value of payment transactions envisaged to be carried out with the payment instruments on an annual basis, as envisaged by the issuer;</del></i></p> <p><i>b) <del>The envisaged maximum amount to be credited to the payment instruments, as envisaged by the issuer;</del></i></p> <p><i>c) <del>The envisaged maximum number of users of the payment instruments to be issued, as envisaged by the issuer; and</del></i></p> <p><i>d) <del>The risks which consumers may be exposed to faced by the customer when using the specific payment instrument,</del></i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
86	<p>Several respondents were of the view that the EBA should set out specific metrics in relation to the indicators in Guideline 4.4, in particular those under items a) to c). In their view, this will avoid different interpretations of the requirements and ensure harmonisation of the practices in the assessment of the notifications for exclusion under Article 3(k) of PSD2.</p> <p>In the view of some of these respondents, the volume and value of payment transactions carried out with the excluded instruments and the amounts to be credited to the payment instruments should be weighted towards the specificities of the national market and take into account the specificity of the goods and services provided.</p> <p>Moreover, a few respondents expressed a view that the envisaged maximum number of transactions and users will be difficult to forecast.</p> <p>Finally, a few respondents were of the view that introducing such indicators focusing on the envisaged number and amount of transactions, amounts to be credited on the instruments and number of instruments issued will be detrimental to the growth of the network.</p>	<p>The EBA would like to reiterate that these indicators are set out in a high-level manner in order to be able to accommodate a broad range of industries comprising different business model and different types of markets across the Member States. In relation to this, it is not feasible to provide precise metrics accommodating all of these for the purpose of the assessment of business models by CAs. Therefore, the assessment should be carried out on a case-by-case basis.</p> <p>In that regard, the EBA did not find compelling arguments to change the approach proposed in the CP. On the contrary, the EBA views some of the arguments (e.g. that these indicators will restrict the growth of the networks) as in line with the rationale behind the EBA's proposal, which was to limit the exponential growth of the limited networks without proper overview by the CA.</p> <p>However, the EBA agrees with the proposal that the indicators should take into account the specificities of the national market since the exclusion is provided for each Member State, which, at times, have different structure and size of their markets. The EBA has, therefore, clarified that the thresholds under Guideline 4.4 should be assessed taking into account the specificities of the national market.</p>	<p><i>as identified by the issuer.</i></p> <p><i>See the change in row 82 above.</i></p>
87	<p>A few respondents suggested deleting the criterion in relation to the maximum number of users of</p>	<p>The EBA does not agree with the respondent. While the functional connection is the leading criterion to</p>	<p><i>Guideline 4.4(c)</i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>payment instruments under Guideline 4.4(c). In their view, this indicator is not relevant for the assessment of the functional connection between the goods and/or the services that can be acquired with the payment instrument.</p>	<p>be taken into account by CAs in their assessment for this particular exclusion, there may be other indicators that are relevant for the assessment, including the number of payment instruments envisaged to be issued.</p> <p>On this particular indicator, to facilitate the issuers, the EBA focused the indicator on the envisaged maximum number of payment instruments to be issued, instead of users of the instruments.</p>	<p><i>The <del>envisaged</del> maximum number of <del>users of the payment instruments</del> <u>to be issued, as envisaged by the issuer; and</u></i></p>
88	<p>A few respondents were of the view that the indicators under Guideline 4.4 should focus more on the risks, in particular the money laundering risk in the industry and the risk posed to consumers. Some of them hinted that if the protection of consumers is sufficient, then it should be taken into account in the assessment of the specificities of the instrument by CAs and granting the exclusion.</p>	<p>The CP envisaged the risk that the use of the instrument poses to the customer as an indicator to be taken into account in the assessment.</p> <p>As stated in the analysis of the other issues related to the indicators under Guideline 4.4, the EBA sees merit in retaining those since they aim at limiting the use of the instrument.</p> <p>Finally, on the proposal to cover money laundering risks, the EBA has arrived at the view that these Guidelines cannot introduce requirements that go beyond the scope of Articles 3(k) and 37 of PSD2, as well as requirements in relation to EU legal acts, other than PSD2.</p>	<p>None.</p>
89	<p>A few respondents suggested clarifying the reference to the 'risks which consumers may be exposed to' in Guideline 4.4(e). In their view, the risks should be clearly articulated or removed from the final Guidelines since they may lead to uncertainty in the interpretation.</p>	<p>The EBA would like to clarify that the indicator intends to capture risks related to the use of the instruments by customers. The EBA has, therefore, amended the Guideline accordingly.</p>	<p><i>Guideline 4.4(d) (previous Guideline 4.4(e))</i></p> <p><i>The risks <del>which consumers may be exposed to</del> <u>faced by the customer when</u></i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>One respondent sought clarification on whether the reference to risks is in the context of the use of the excluded payment instrument or whether it covers all applicable risks. Another respondent sought clarification on whether the reference to risks is related to clients (risks concerning their business or professional activities, reputational risk, or fraud risk) or to products/services (lack of transparency, complexity of the transaction, value of the product).</p>		<p><u>using the specific payment instrument, as identified by the issuer.</u></p>
90	<p>A few respondents were of the view that Guideline 4.4 should not distinguish between consumers and non-consumer users when assessing whether an instrument falls under the scope of the LNE or not. They were of the view that since PSD2 does not make such a distinction, neither should the Guidelines.</p>	<p>The EBA acknowledges that the users of the excluded instruments may be consumers but also business users and has, therefore, amended the Guideline to reflect that.</p>	<p><i>Guideline 4.4(d) (previous Guideline 4.4(e))</i> <i>The risks <del>which consumers may be exposed to</del> faced by the customer when using the specific payment instrument, as identified by the issuer.</i></p>
91	<p>A few respondents were of the view that categories of customers should not be an additional indicator due to a lack of legal basis. Moreover, they considered the indicator too subjective and questioned its added value since the only distinction that could be made in their view is between consumers and non-consumers.</p>	<p>The EBA agrees with the rationale provided by the respondents and, taking into account that the information about the indicators under Guideline 4.4 will be required from all issuers, has deleted the indicator 'categories of customers being targeted' (as proposed in Guideline 4.4(d) of the CP) from the Guidelines.</p>	<p><i>Guideline 4.4(d)</i> <i>The categories of customers being targeted;</i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	Some of these respondents suggested that, if not deleted, the indicator should at the very least be further clarified.		
92	A few respondents were of the view that there is no legal basis for proposing the indicator ‘whether the management of the network is centralised’ and proposed to delete this indicator. They also considered the indicator as too subjective and open for interpretation.	The EBA agrees with the rationale provided by the respondents and, taking into account that the information about the indicators under Guideline 4.4 will be required from all issuers, has deleted the indicator ‘whether the management of the network is centralised’ (as proposed in Guideline 4.4(f) of the CP) from the Guidelines.	<del>Guideline 4.4(f)</del> <del>Whether the management of the network is centralised.</del>
93	One respondent suggested the establishment of an expert body consisting of members of the EBA, the national CAs and service providers operating under an LNE. In their view, this would ensure the harmonised and consistent application of the legal requirements under PSD2 and the EBA Guidelines, in particular the additional indicators set out in Guideline 4.4, which are deemed as leaving room for interpretation, thus giving rise to potential different interpretations by CAs.	The EBA disagrees with the proposal since there is no legal basis under PSD2 that can justify the establishment of such a body.  Moreover, ensuring the consistent, effective and harmonised application of the legal basis is one of the objectives of the EBA.  Finally, it should be noted that one of the objectives of these Guidelines is to bring about the consistent and harmonised application of the LNE. Accordingly, some of the Guidelines introduced, in particular those that require the provision of information about different jurisdictions where the service provider operates or has submitted a notification for exclusion, aim at increasing the transparency in the activities carried out by these service providers and thus allowing CAs to contact each other, if needed.	None.
94	One respondent was of the view that in order to ensure legal certainty, Guideline 4.5 should be toned down and avoid referring to a restrictive	The EBA understands that the application of all exclusions from the scope of PSD2 should be applied in a restrictive manner. However, since the provisions	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	application. The respondent proposed drafting amendments.	of Guidelines 4.1 and 4.2 and the additional indicators in Guideline 4.4 do not rely on tangible metrics, as also highlighted by some of the respondents to the public consultation in relation to the indicators, the EBA arrived at the view that in order to prevent a wide interpretation of these provisions, some further guidance on their application should be provided. That was the reason for introducing Guideline 4.5 in that manner.	
<b>Question 5. Do you have comments on Guideline 5 on the provision of services under Article 3(k) of PSD2 by regulated entities?</b>			
95	<p>Several respondents sought clarification on the reference to ‘different brands’ and what is envisaged to be covered by that term.</p> <p>A few respondents suggested focusing on the distinction between the two products rather than the brand (of the company) since the latter would be the same for both instruments.</p> <p>A few respondents suggested to amend the wording of Guideline 5.2 by referring also to different naming in addition to the reference to different brands.</p> <p>Another respondent suggested that there may be alternative methods to ensure clear and easy distinction between the instruments, for instance by referring to ‘regulated’ or ‘excluded’ instruments.</p> <p>Two respondents were of the view that the reference to ‘different brands’ in Guideline 5.2</p>	<p>The EBA reiterates that the reference to ‘different brands’ as proposed in Guideline 5.2 from the CP was intended to differentiate between the regulated and non-regulated services in a clear and easily accessible manner.</p> <p>This does not exclude the situation where regulated and non-regulated payment instruments issued by the same regulated payment services provider will be accepted by the same PSP.</p> <p>In order to address the concerns raised by the respondents and to provide greater clarity and legal certainty, the EBA has decided to amend Guideline 5.2 by referring to a visual manifestation, rather than ‘different brands’. This should provide flexibility to issuers to decide on how to delineate between regulated and non-regulated instruments but at the same time to achieve the intended objectives of improving transparency and clear delineation between regulated and non-regulated services. Such</p>	<p><i>Guideline 5.2</i></p> <p><i>Competent authorities should ensure that in the cases where <del>authorised</del> payment service providers or electronic money issuers <u>also</u> provide <del>also</del> services under Article 3(k) of PSD2, these <u>regulated</u> entities distinguish the regulated payment services/electronic money from the services excluded under Article 3(k) of PSD2 in a clear and</i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>should not be understood in the context of a ‘payment brand’ but as a name of the payment instrument (e.g. a lunch card).</p> <p>One respondent was of the view that there is no legal basis for making this distinction and that delineation is ensured by the communication with the customer and the technical restrictions in its use.</p> <p>Two respondents suggested that the reference to different brands would put regulated entities in a disadvantageous position, in particular hybrid payment institutions.</p> <p>Two respondents were of the view that the part of Guideline 5.2 on ‘including through the use of different brands’ should be deleted since customers of regulated entities benefit from the protection of PSD2. One of these suggested that customer protection is also ensured by Guideline 5.4 and that imposing the use of different brands can be a supervisory action.</p>	<p>a visual manifestation may, inter alia, cover various features, such as a brand of the limited network, a logo, product name, symbol, trademark and others.</p> <p>The EBA did not find compelling arguments on why the provision will not be in line with the legal requirements of PSD2. On the contrary, the EBA has arrived at the view that the provision is in line with the objective of PSD2 to enhance customer protection since important PSD2 provisions, e.g. the requirements on liability for unauthorised transactions or the application of strong customer authentication, will not apply to the excluded services.</p>	<p><i>easily recognisable way, including through the <del>use of different brands</del> provision of a <u>specific visual manifestation</u>.</i></p>
96	<p>One respondent sought clarification on the means of communication referred to in Guideline 5.3 and whether these can include terms and conditions, where appropriate.</p>	<p>The EBA would like to clarify that it is for issuers to decide on the means of communication to their customers. These may include terms and conditions but also other alternatives (e.g. websites, physical premises). Anyway, all of these means of communication, including the terms and conditions, should be written in a simple and clear way.</p>	None.
97	<p>One respondent was of the view that the clear communication with customers should suffice for</p>	<p>The Guideline intends to ensure that users will be aware of differences between regulated and non-</p>	None.





Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>the purpose of the delineation between regulated and non-regulated instruments. In their view, the need to inform customers that they do not benefit from the protection for payment services users under PSD2 under Guideline 5.3 should be deleted since it will put regulated entities in a disadvantageous position.</p>	<p>regulated payment instruments issued by the regulated PSP.</p> <p>The EBA did not see compelling arguments for why regulated entities can be put in a more disadvantageous position compared to non-regulated since the latter will not face the need to delineate between regulated and non-regulated services.</p> <p>Moreover, regulated entities have the possibility to treat these services as regulated activities.</p> <p>Finally, the EBA has arrived at the view that informing customers about the lack of protection under PSD2 is crucial in order to promote transparency and customer protection.</p>	
<p>98</p>	<p>One respondent proposed that non-regulated firms providing services excluded under the LNE should also inform their customers that they do not benefit from the protection under PSD2.</p>	<p>While the EBA sees merit in the proposal since it aims at ensuring a higher level of transparency and consumer protection, the EBA has arrived at the view that the proposal goes beyond the scope of these Guidelines since it suggests introducing direct requirements that are not directly related to the provisions of Articles 3(k) and 37 of PSD2 to non-regulated entities.</p> <p>Moreover, it may be seen as a disproportionate administrative burden.</p> <p>In addition, such information would be out of context since the entity will not provide any services under PSD2.</p> <p>The EBA has, therefore, not incorporated the suggestion.</p>	<p>None.</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
99	One respondent sought clarity on whether the actions taken by CAs under Guideline 5.4 would be preceded by a dialogue with the regulated entity. They proposed to establish such a communication as a first step in order to allow CAs to take a more informed decision.	CAs have discretion on the supervisory actions they intend to take, which may or may not include having a dialogue with the respective firm. Therefore, the EBA cannot impose a specific step to be introduced in their supervisory process.  Nevertheless, the EBA understands that a dialogue with the issuer is usually a part of the process of assessing the notification, which, together with the information provided by the issuer at that stage, should ensure that CAs are properly informed.	None.
100	One respondent was of the view that Guideline 5 should contain provisions for the cantonment of funds and limits to be spent with the non-regulated payment instruments that can be checked annually by the CAs.	The EBA has arrived at the view that such a proposal will go beyond the requirements of Article 37(2) of PSD2. The EBA has, therefore, not incorporated it.	None.
101	One respondent agreed with the need to introduce measures to inform customers making use of an excluded service that they will not benefit from the protection envisaged in PSD2. However, the respondent was of the view that additional measures can be incorporated to distinguish further between regulated and non-regulated activities, in particular the implementation of internal policies and processes, specific pre-contractual information to be provided to customers, opening a dedicated account holding funds for the non-regulated services, reference to other countries where the entity notified the provision of exempted services, and use of different brands for regulated and non-regulated services.	The intention of Guideline 5 was indeed to delineate between regulated and non-regulated services and ensure that the information is clearly presented to customers.  With regard to the additional proposed measures, the EBA has arrived at the view that some of them are already covered in the Guidelines, e.g. the countries where the excluded issuer carries out activities and the reference to different brands (visual manifestation).  Some of the other proposals (e.g. opening separate accounts for the funds held on the instruments, the introduction of internal procedures, or disclosure of information), however, go beyond the scope of the	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		LNE as envisaged in PSD2 and are quite similar to the authorisation procedure envisaged for regulated entities. The EBA cannot, therefore, introduce them since they will contradict the full-harmonisation level-1 provisions.	
102	One respondent expressed doubts in relation to the possibility envisaged in Guideline 5.4 for CAs to request the separation of the services excluded under Article 3(k) of PSD2 in another legal entity.	<p>The EBA would like to clarify that Guideline 5.4 envisages the possibility for CAs to take supervisory actions.</p> <p>CAs have discretion to decide on the exact actions to be taken. Separation of the excluded services into another legal entity is just one example of actions that may be taken.</p>	None.
103	One respondent suggested that the supervisory actions under Guideline 5.4 should also apply to non-regulated entities because there is no legal basis to distinguish between the two types of entities.	<p>The EBA has arrived at the view that CAs cannot take supervisory actions under PSD2 in relation to non-regulated entities because these providers are outside the scope of the Directive.</p> <p>This is without prejudice (i) to the requirement of Article 37 of PSD2, which allow CAs to prohibit natural or legal persons from providing payment services without the appropriate authorisation or (ii) to the possibility for CAs to request additional information to ensure that the services fall within the scope of an exclusion from the scope of the Directive.</p>	None.
104	One respondent sought clarity on whether services that can benefit from an exclusion can be provided as regulated services.	<p>The EBA has arrived at the view that the question relates to the interpretation of PSD2 and, therefore, this aspect cannot be reflected in the Guidelines.</p> <p>Nevertheless, the EBA understands that it should be possible for services that can benefit from an exclusion to be treated on a voluntary basis as</p>	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		regulated services, provided that they fall within the scope of the respective regulated service (payment service or e-money).	
105	One respondent was of the view that Guideline 5 should explicitly mention that the anti-money laundering obligations of the regulated entity are not applicable to the excluded activities.	The proposal goes beyond the scope of these Guidelines, which aim to contribute to the consistent and harmonised application of the exclusion under Article 3(k) of PSD2 and to specify the details of the notification process under Article 37(2) of PSD2 and of the description of the activity made publicly available under Article 37(5) of PSD2.  The EBA is legally not able to clarify the application of other EU legal acts, including the Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.	None.
106	One respondent was of the view that the provisions of Guidelines 5.2 and 5.3 are duplicative and may bring legal uncertainty.	The EBA has arrived at the view that these Guidelines are not duplicative since they have different purposes, namely Guideline 5.2 focuses on the need for clear delineation between regulated and non-regulated services, while Guideline 5.3 focuses on the communication to customers. The EBA has, therefore, not introduced any changes to the Guidelines.	None.
<b>Question 6. Do you have comments on Guideline 6 on the notifications under Article 37(2) of PSD2?</b>			
107	Two respondents were of the view that the Guidelines should avoid using the term 'breach' of threshold since it may give rise to legal uncertainty. Instead, the respondents suggested referring to exceeding the threshold.	The EBA used both terms in the CP but has arrived at the view that using a single term will be more appropriate. Therefore, to avoid the likelihood of misinterpretation, the EBA has amended the	<i>Guideline 6.1 Competent authorities should take into account</i>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		<p>Guidelines by consistently using the term 'exceed' the threshold.</p>	<p><i>that the notification under Article 37(2) of PSD2 should be submitted by the <del>service provider</del> <del>providing excluded goods and/or services under Article 3(k)(i) and (ii) of PSD2 in different Member States</del> issuer to the competent authority in each <del>jurisdiction</del> <del>Member State</del> where the goods and/or services are provided the users of the payment instrument are located and where the thresholds set out in Article 37(2) of PSD2 <del>are</del> <del>breached</del> <del>exceeded</del> <del>is</del> <del>breached</del> <del>exceeded</del> in the particular <del>jurisdiction</del> <del>Member State</del>.</i></p>
108	<p>One respondent suggested that, to avoid misinterpretation, the Guidelines should explicitly</p>	<p>The EBA agrees and has introduced the respective clarification in the Guidelines, which now refer to 'issuer'.</p>	<p><i>The Guidelines have been amended in various places and</i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	refer to a 'professional issuer' instead of 'service provider'.		<i>now refer to 'issuer' instead of 'service provider'.</i>
109	A few respondents were of the view that it should be clarified further the place where goods and/or services are provided. Some of these were of the view that the Guidelines should clarify that the place of provision of the service is where the payment instrument is provided to the user/holder and not the place where it is accepted.	<p>The EBA would like to highlight that the place of provision of services online is a topic that is to be addressed at EU level, even beyond the provisions of PSD2.</p> <p>Nevertheless, for the purpose of these Guidelines, and to try providing more clarity on the application of the LNE under Article 3(k) of PSD2 and the submission of the notification by issuers to CAs, the EBA has focused Guideline 6.1 on the location of the users of the payment instrument (including both holders of instruments and merchants/service providers).</p> <p>The EBA would like to clarify that in the case of merchants, the location can be the physical location of the store or the URL extension in case of online stores.</p> <p>With regard to the cases where the URL extension of the merchant does not allow the identification of a particular jurisdiction, issuers can use the IP address of the holders of the instrument in a particular jurisdiction.</p> <p>With regard to the cases of holders of instruments, the location of the user can be ascertained by a physical address of the user or by an IP address.</p> <p>Finally, it should be noted that it is for each issuer to decide on how to identify the location of its users.</p>	<p><i>Guideline 6.1</i></p> <p><i>Competent authorities should take into account that the notification under Article 37(2) of PSD2 should be submitted by the <del>service provider</del> <u>providing excluded goods and/or services under Article 3(k)(i) and (ii) of PSD2 in different Member States issuer</u> to the competent authority in each <del>jurisdiction</del> <u>Member State</u> where <del>the goods and/or services are provided</del> <u>the users of the payment instrument are located</u> and where the thresholds set out in Article 37(2) of PSD2 <del>are</del> <u>is</u></i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
110	<p>A few respondents were of the view that the notifications under Article 37(2) of PSD2 should not be submitted for preventive purposes but only when the threshold has been exceeded. Accordingly, the EBA and national registers should comprise only providers who have exceeded the threshold.</p>	<p>The EBA has arrived at the view that PSD2 does not prevent issuers from submitting notifications to CAs when the threshold under Article 37(2) of PSD2 has not been exceeded. Therefore, it is for CAs to decide whether to assess these notifications or not depending on the administrative burden they may face.</p> <p>Accordingly, the EBA would like to further clarify that:</p> <ul style="list-style-type: none"> <li>➤ In the cases where the threshold under Article 37(2) of PSD2 is exceeded, service providers are required to submit a notification and the CAs, in turn, are expected to assess the notification and reflect it on the national and EBA registers.</li> <li>➤ In the cases where the threshold is not yet exceeded, but is very likely to be exceeded, the issuer is not required to submit a notification. In case a notification is submitted, the CA could assess the notification, but should not reflect it on the national and EBA registers.</li> <li>➤ In the cases where the threshold is not exceeded and is not expected to be exceeded, the issuer is not required to submit a notification. In case a notification is submitted, the CA could assess the notification, but is not expected to, and should</li> </ul>	<p><del><i>breached-exceeded in the particular jurisdiction-Member State.</i></del></p> <p><i><u>New Guideline 6.2</u></i></p> <p><i><u>Competent authorities should take into account that the notification under Article 37(2) of PSD2 should be submitted by the issuer for any given period shorter than 12 months when the total value of payment transactions executed exceeds the amount of EUR 1 million for that period.</u></i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		<p>not reflect the notification on the national and EBA registers.</p> <p>The EBA has not introduced changes to the Guidelines since the submission of a notification for preventive purposes is not covered by the Guidelines and Article 37(2) of PSD2 and because PSD2 is clear that the description of the activities exceeding the threshold under Article 37(2) of PSD2 shall be included in the registers.</p> <p>Finally, in relation to the submission of the notification to CAs when the threshold is exceeded, the EBA has introduced a new Guideline specifying that issuers should submit the notification at the moment when the threshold is exceeded. The calculation of the threshold should take into account the payment transactions carried out for the purchase of the goods and/or services within the limited network.</p>	
111	<p>One respondent asked for clarification that third parties cannot submit a notification to CAs without the express authorisation of the service provider.</p>	<p>The EBA has arrived at the view that Article 37(2) of PSD2 and Guideline 6 are clear that the responsibility for submitting the notification lies with the issuer. Therefore, third parties should not be able to submit notifications without the express delegation of the issuer.</p>	None.
112	<p>One respondent was of the view it will be challenging for service providers to notify CAs in the various Member States where they provide services. Accordingly, to avoid an administrative burden for service providers, the respondent suggested introducing a passport notification</p>	<p>As already clarified in the CP, the excluded services do not fall within the scope of application of PSD2 and, therefore, the issuers cannot benefit from passporting rights and subsequently cannot be passported in another Member State based on an</p>	None.





Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>regime where the CA of the home Member State notifies all other CAs in the other Member States where the service provider operates.</p>	<p>assessment carried out by the national CA of the 'home' Member State.</p> <p>Moreover, such a procedure will introduce a significant and disproportionate administrative burden for all CAs.</p>	
113	<p>One respondent, based on observations of individual practices by CAs, shared the view that the description of the activity as referred to in Guideline 6.2 should be more detailed and comprehensive than the type of exclusion under which the activity is carried out, e.g. by referring to a store card, a fuel card or others.</p>	<p>The EBA has arrived at the view that Guideline 6.3 (previously Guideline 6.2) explicitly distinguishes between the description of the activity and the type of exclusion under which the activity is carried out. Therefore, the concern raised by the respondent should not materialise.</p> <p>To provide greater clarity on the expectation about the length of the description of activities in the national register and to reduce the administrative burden for issuers and CAs, the EBA has clarified in Guideline 6.9 that CAs should include the description of the activity on the registers in a concise manner. However, the EBA sees a short reference to a store or a fuel card as insufficient.</p> <p>Finally, the EBA would like to clarify that the reference to other Member States where the issuer provides services should not be interpreted as jurisdictions where the issuer benefits from an exclusion under Article 3(k)(i) or (ii) of PSD2 because the threshold set out in Article 37(2) of PSD2 may not be exceeded.</p>	<p><i>Guideline 6.8 (currently 6.9)</i></p> <p><i>Competent authorities should include the <del>service provider</del> issuer in their national register under Article 14 of PSD2 and the central register of the EBA under Article 15 of PSD2 only once and reflect in a concise manner the description of the activities carried out with each specific payment instrument under Article 3(k) of PSD2. Competent authorities should also include in the description of activities in the</i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
114	<p>Two respondents were of the view that the information requested under Guideline 6.3(c) may be too demanding and comparable to an authorisation procedure for regulated services. The respondents expressed concerns that the requirement is too broad and open, thus leading to the likelihood of divergent applications of the requirement by CAs, some of which may request very detailed information.</p> <p>The respondents also considered that said information will be too burdensome for small entities.</p>	<p>The EBA would like to clarify that the requirement is not intended to mirror an authorisation procedure and to go to that level of detail.</p> <p>Moreover, it is intentionally left broad so that it can cover all the provisions set out in the Guidelines without explicitly repeating them one by one in Guideline 6.3. Therefore, the information is limited to the information relevant in the context of the analysis of the LNE.</p> <p>In case the issuer considers certain information not relevant within the context of these Guidelines, it is not expected to provide it.</p> <p>Since the other parts of the Guidelines that are being referred to are specific, the EBA has arrived at the view that Guideline 6.4(c) (former Guideline 6.3(c)) should not lead to different interpretations by CAs.</p> <p>Finally, the entirety of the Guidelines is developed by taking into account the principle of proportionality and leaving sufficient room for adaptation depending on the scale and size of the excluded activity.</p>	<p>registers, <del>the</del> information about other Member States where the same <del>service provider</del> issuer provides services under Article 3(k)(i) and/or (ii) of PSD2.</p> <p>None</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		<p>Therefore, smaller entities should not be too burdened by the provisions of Guideline 6.4(c) (former Guideline 6.3(c)).</p> <p>In relation to the above, the EBA has not introduced any changes to the Guidelines.</p>	
115	<p>One respondent was of the view that the term ‘substantial changes’ may be interpreted differently. They expressed concerns that some CAs may consider any change in the documents as substantial, thus requiring information from service providers frequently. On the contrary, in their view, substantial changes should be considered those where the specific way of operating or the applicable risks change.</p>	<p>The EBA has arrived at the view that Guidelines 6.5 and 6.6 (former Guidelines 6.4 and 6.5) are clear enough with multiple examples that focus on significant parts of the excluded services provided, with some of these being in line with the proposals from the respondent. Therefore, the EBA has not introduced changes to the Guidelines.</p>	None
116	<p>One respondent was of the view that the scope of Guideline 6.5 should be narrowed down by focusing only on the situations listed explicitly in Guideline 6.5 rather than leaving flexibility for NCAs to take into account other substantial changes. In addition, the respondent suggested deleting Guidelines 6.5(b) and 6.5(e).</p>	<p>The EBA has arrived at the view that Guideline 6.6 (former Guideline 6.5) aims at maintaining business model neutrality and thus should not be too prescriptive on all situations that will constitute a substantial change.</p> <p>At the same time, the Guideline brings sufficient consistency and harmonisation in the assessment by CAs by introducing specific situations to be considered as a substantial change.</p> <p>Finally, the EBA has not deleted Guidelines 6.6(b) and 6.6(e) (former Guidelines 6.5(b) and 6.5(e)) since these bring important aspects to be taken into account by competent authorities in their assessment of whether a particular service falls under the LNE or not.</p>	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
117	<p>Several respondents disagree with Guideline 6.7, in particular the approach taken on the calculation of the threshold at the level of each service provider. In their view, the approach is restrictive, would introduce an additional burden for service providers and may not allow the development of products meeting different needs.</p> <p>They proposed that the calculation of the threshold should be carried out at the level of each instrument.</p> <p>A few of the respondents suggested that the calculation of the threshold could be carried out at the level of each service provider but in relation to transactions carried out with instruments issued under the same type of exclusion under Article 3(k) of PSD2.</p>	<p>The EBA has not amended the approach taken in Guideline 6.8 (former Guideline 6.7) since it is in line with the wording of Article 37(2) of PSD2.</p> <p>Moreover, this will prevent the potential circumvention of the requirements of PSD2 by issuing several or more excluded instruments that do not exceed the threshold set out in Article 37(2) of PSD2.</p> <p>With regard to the proposal by a few of the respondents that the threshold should be calculated at issuer level by the type of exclusion, the EBA views this as not in line with Article 37(2) of PSD2, which prescribes, inter alia, that service providers providing 'both activities' (under Article 3(k)(i) and (ii) of PSD2) should submit a notification if the threshold is exceeded.</p> <p>In addition, the EBA took into account that the calculation at the level of the issuer only, and not by type of exclusion, will be simpler and clearer for issuers. It will also allow for earlier notification to CAs, which is in the spirit of the intention of the Guideline.</p> <p>In relation to the above, the EBA has not amended Guideline 6.7.</p>	None.
118	<p>A few respondents were of the view that a reasonable timeframe should be envisaged for CAs to assess the notifications submitted and whether the respective business model will require authorisation under PSD2 or EMD2. One of them considered 3 months as a reasonable time.</p>	<p>The EBA has arrived at the view that introducing a timeframe for the assessment of notifications by CAs will introduce additional requirements to those set out in Article 37 of PSD2, thus going beyond the scope of these Guidelines.</p>	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
119	<p>One respondent was of the view that Guidelines 2.1 and 4.2 stipulate very extensive and detailed information to be included in the notification under Article 37(2) PSD2, which will result in excessive administrative burden for issuers and CAs. They suggested that the notification should be a formal and streamlined step, while the information under these two Guidelines should be requested from CAs on an ad-hoc basis and in case of doubt in their assessment.</p>	<p>Therefore, the EBA is legally not able to introduce this suggestion in the Guidelines.</p> <p>The EBA has arrived at the view that the provision of the description of the activity, including the information under Guidelines 2.1 and 4.2, is an integral part needed in the assessment by CAs of whether a particular service could fall within the scope of the LNE or not. Therefore, it cannot be omitted from the notification to CAs.</p> <p>The EBA disagrees that providing this information will bring a higher administrative burden for issuers since the provision of the description of the activity is required anyway under Article 37 of PSD2. Moreover, having the information to be provided standardised and clarified by the Guidelines should facilitate issuers and reduce the administrative burden for CAs.</p> <p>Finally, even if some market participants argue that the information will increase the administrative burden for them, this should be outweighed by the enhanced customer protection and overall management of risks.</p>	None.
120	<p>One respondent was of the view that in the absence of passport recognition for non-regulated activities, it should be ensured that the CA of each host Member State where the payment instrument is used receives a notification under Article 37(2) of PSD2.</p>	<p>The EBA has arrived at the view that Guideline 6, and Guideline 6.1 in particular, is clear about this possibility. The changes introduced in Guideline 6.1 as a result of other comments by respondents should have led to further simplification and clarity on the text.</p> <p>The EBA has, therefore, not introduced additional amendments to the Guidelines.</p>	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<b>Question 7. Do you have comments on Guideline 7 on the limited network under Article 3(k)(iii) of PSD2?</b>			
121	One respondent was of the view that due to the limited number of examples in the recitals of PSD2, there is merit in the EBA providing more clarity on the rationale of this exclusion and examples of its application.	<p>The EBA has arrived at the view that the Guidelines are not intended to provide examples on the rationale behind provisions of level-1 text, in particular by elaborating further on the text of recitals of the respective legal act.</p> <p>Moreover, the examples proposed by the respondent relate to the respective national social or tax legislation, which are already publicly available.</p> <p>Therefore, the EBA does not see merit in amending the text of the Guidelines.</p>	None.
122	One respondent asked whether complementary local currencies (which they considered ‘social innovation’) aiming to foster cultural, environmental and social purposes should be included in the term social, especially those that are climate-oriented payment instruments by non-profit organisations.	<p>The EBA understands that the query aims at interpreting the reference to the term ‘social’ as introduced in PSD2. The EBA is legally not able to address with these Guidelines issues that are related to the interpretation of terms that the Directive may have intentionally left open.</p> <p>Moreover, the exclusion under Article 3(k)(iii) of PSD2 is based on specific national social or tax legislation. Therefore, it is not for the EBA to prescribe how these instruments should be set out for social purposes.</p> <p>In relation to the above, the EBA has not introduced any changes to the Guidelines.</p>	None.
123	One respondent indicated that the Ministry of Finance in a Member State has taken the approach where only products issued in a limited network or as limited-range products are to be recognised as	The EBA has arrived at the view that the issue goes beyond the remit of the EBA and national CAs under PSD2 to comment on a specific national tax legislation.	None.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>tax-exempt benefits in kind. Member States have tax sovereignty with regard to income tax but said legislator has referred to an exemption in their national income tax legislation. The submitter sought clarification on this to prevent any conflicting application of this requirement and reconcile supervisory application and tax law terms.</p>	<p>The EBA understands that PSD2 leaves discretion to Member States to decide how to set up such instruments for specific social or tax purposes. The EBA is, therefore, of the view that a distinction should be made between the assessment by national CAs, for the purposes of meeting the requirements of the LNE, and meeting the requirements of national tax or social law.</p> <p>Therefore, the EBA does not see the case described by the respondent as contradicting Guideline 7 since the latter clarifies that CAs should not require instruments under Article 3(k)(iii) of PSD2 to fulfil the requirements applicable to the other exclusions under Article 3(k) of PSD2.</p>	
124	<p>Two respondents sought additional explanation on the rationale and legal basis for instruments falling within the scope of the Article 3(k)(iii) of PSD2 exclusion not being required to fulfil the requirements of Guidelines 2 and 4 that apply to the limited network of service providers and the limited range of goods and services.</p>	<p>The EBA already highlighted in the Rationale section of the CP that the exclusions under Article 3(k) of PSD2 are standalone exclusions that should not be combined or mixed in. This means that the exclusion under Article 3(k)(iii) of PSD2, which is based on specific national legislation or requirements of national tax or social administrations, should not be treated as dependent on any of the other exclusions under Article 3(k) of PSD2. Moreover, The EBA clarified that the specific aspects on the use of the instrument, including its funding, are specified in the respective national social or tax law.</p> <p>Nevertheless, to provide further explanation and reasoning behind the approach taken, the EBA would like to clarify that the conditions for the limitation of the use of the instrument under Article 3(k)(iii) are set</p>	<p><i>Guideline 7.1</i></p> <p><i>Competent authorities should not require the <u>payment</u> instruments falling <u>within the scope of Article 3(k)(iii) of PSD2 to fulfil the requirements of Guidelines 2 and 4 that apply to the limited network of service providers and the limited range of goods and</u></i></p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		<p>out in the national legislation, as intended by PSD2. Accordingly, these instruments are fit for the purpose of the respective social and tax law, which, in turn, cannot be dependent on a prior assessment by a CA under PSD2.</p> <p>Finally, such an approach will avoid introducing excessive restrictions and an additional burden for issuers of instruments under Article 3(k)(iii) of PSD2, thus allowing greater flexibility in the assessment of the specific business model by the CAs.</p> <p>The EBA has introduced minor editorial amendments in Guideline 7.1 to clarify the above.</p>	<p><del>services applicable to the instruments excluded under Article 3(k)(i) and (ii) of PSD2.</del></p>



