

Single Rulebook Q&A

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Paragraph	14
Subparagraph	-
COM Delegated or Implementing Acts/RTS/ITS/GLs/Recommendations	EBA/GL/2022/02 - Guidelines on the limited network exclusion
Article/Paragraph	1.6 and 1.7
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Disclose name of institution / entity	No
Type of submitter	Industry association
Subject matter	Reading of the term "means of payment"
Question	<ol style="list-style-type: none"> 1. What are the 'means of payment' in the LNE Guidelines (guidelines 1.6 and 1.7)? Does the term refer to the technological level of a physical device or a digital carrier, which may accommodate several payment instruments, such as plastic card (chip or magnetic stripe), a mobile phone, a wallet, an app, a wearable, a tablet, a PC or even a specific storage location on an external server? 2. Please provide examples of 'other means of payment' that are relevant in practice from the EBA's perspective. 3. How is the definition of payment instrument according to Article 4(14) PSD2 to be read in the context of the LNE Guidelines? 4. Is the interpretation of the adjective "card-based" (in combination with means of payment) in line with the same adjective in combination with payment instruments according to Article 2(20) of Regulation (EU) 2015/751 ("IFR")?
Background on the question	Paragraphs 1.6 and 1.7 of the EBA Guidelines on the limited network exclusion under PSD2 (EBA/GL/2022/02; "LNE Guidelines") refer to the terms "a single card-based or other means of payment". The terms "means of payment" or "card-based means of payment" are not further described or

defined in the LNE Guidelines. In the Directive (EU) 2015/2366 ("PSD2"), the term "means of payment" is used in some recitals and in one article (98), but there is no definition. It is clear from paragraphs 1.6 and 1.7 that the term "means of payment" is not identical with a "payment instrument", since a means of payment can accommodate several payment instruments according to both articles. A payment instrument is defined in Article 4(14) PSD2 as follows: "payment instrument" means a personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used in order to initiate a payment order." Based on this definition, a payment instrument enabling the initiation of a payment order could be: a device, a set of procedures, a device and a set of procedures. Based on the usage of the expression "device" in the PSD2, it should be considered in this context as something physical, while the set of procedures refers to the functionality of the instrument. The PSD2 refers in recitals and articles also to card-based payment instruments, but here, a definition is missing. However, the IFR contains a legal definition of card-based instruments in Art. 2 (20): "card-based payment instrument" means any payment instrument, including a card, mobile phone, computer or any other technological device containing the appropriate payment application which enables the payer to initiate a card-based payment transaction which is not a credit transfer or a direct debit as defined by Article 2 of Regulation (EU) No 260/2012." At this point, the term "payment instrument" focuses obviously on the feature of a payment instrument as "device": "including a card, mobile phone, computer or any other technological device" while the function and procedure is shifted to the term "payment application". According to this definition, the adjective "card-based" has nothing to do with the type of technical device (card or not), but exclusively with the specific functionality of the device as container of a payment application. Therefore, the adjective "card-based" is a criterion for the card application (initiating card-based payment transactions). The definition of "card-based transactions" according to Art. 2(7) of the IFR). confirms this logic: "'card-based payment transaction' means a service based on a payment card scheme's infrastructure and business rules to make a payment transaction by means of any card, telecommunication, digital or IT device or software if this results in a debit or a credit card transaction. Card-based payment transactions exclude transactions based on other kinds of payment services."

The device feature of the payment instrument is also in the foreground at another point, as for example in the definition of co-badging (Art. 4 (48) of the PSD2 respectively Art. 2 (31) of the IFR): "co-badging" means the inclusion of two or more payment brands or payment applications of the same brand on the same card-based payment instrument. Here, too, we find a clear distinction between the two levels: "device" and "applications". The interpretation of this definition according to the terms used should be as follows: The card-based payment instrument as a device contains (at least) one payment application that can initiate card-based transactions. Two or more payment applications are contained on this device. It remains open

whether the adjective "card-based" must refer to at least one or to all payment applications. The meaning of the term "payment instrument" therefore depends on the context: device and/or payment application. In the text of the PSD2 we find different interpretations, e.g. Art. 68 and 69 (payment application) or in Art. 70 rather as device. In the recitals, on the other hand, there are confusing and inconsistent statements in some places, such as: "Payment services offered via internet or via other at-distance channels, the functioning of which does not depend on where the device used to initiate the payment transaction or the payment instrument used are physically located" (Recital 95) or "The use of a card or card-based payment instrument..." (Recital 68). However, a consistent application of this hybrid definition of the payment instrument leads to strange results. The issuer of the application does not have to be identical with the issuer of the device. Example: Smartphone as device and a payment application of a PSP. The smartphone meets the requirements of the definition of a payment instrument: "a personalised device...and used in order to initiate a payment order." According to Annex 1 of the PSD2, the issuing of a payment instrument is a payment service. So far, the provision of smartphones on which a payment application can be loaded is not yet considered a payment service under PSD2. In practice, there is even an intermediate stage between the technical device (smartphone) and the digital payment application: the digital wallet, in which different payment applications from different providers can be loaded (e.g. Google Pay wallet with payment cards of issuer A, B etc.). So far, however, only the providers of the payment applications are supervised as PSPs according to PSD2 and not the hardware- and/or software-based container providers. Consequently, either the definition of a payment instrument according to Art. 4(14) of the PSD2 is wrong, its PSD2-inherent interpretation or the practice of the supervisory authorities. From our understanding, a set of procedures agreed between the payment service user and the payment service provider and used in order to initiate a payment order is not an option but a criterion and minimal requirement for every payment instrument. A new definition of payment instrument that is in line with supervisory practice could read: "payment instrument' means a set of procedures agreed between the payment service user and the payment service provider and used in order to initiate a payment order. This payment application could be contained in a physical device (like a card, smartphone, tablet etc.) and/or in a personalised digital carrier (e.g. wallet)." We strongly suggest amending the definition in the proposal for a PSD3. Against this background, the new term "card-based means of payment" used by the EBA in the LNE Guidelines is difficult to interpret. Obviously can a single (card-based) means of payment accommodate one or more payment instruments. The interpretation of a payment instrument as a device leads to the fact that the means of payment is not a physical device or digital carrier. If one interprets a payment instrument only as a payment application (set of procedures), one could interpret a means of payment as a device or carrier. However, this

interpretation contradicts the current legal definition of a payment instrument. The German supervisory authority BaFin published its opinion that the term "means of payment" as used in the EBA Guidelines should be interpreted as "carrier"(no indication whether physical and/or digital). A card and a wallet are mentioned as examples (BaFin, Die Zeit läuft, 19.04.22): <https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Fachartikel/2022/...> If we assume that the EBA actually interprets the term "means of payment" as a physical device and/or digital carrier of payment applications too, this view has significant consequences. The restrictions of the LNE Guidelines refer to payment instruments. The respective issuers must comply with these restrictions in order to be eligible for the LNE. In practice, only the issuers of payment instruments in the sense of payment applications are subject to the PSD2, not the issuers of physical devices and digital carriers. According to Art. 1.7 of the LNE Guidelines, the issuer of an LNE payment application must now ensure that its payment instrument (in the sense of a payment application) is not hosted by a device/carrier that also contains a regulated payment application. As a rule, the issuer can only guarantee this if he also provides a specific device and/or carrier for his payment application. At the same time, he must technically and contractually prevent the customer from loading a regulated payment application on this device or carrier. If physical devices fall under "other means of payment", LNE payment instruments cannot be offered as digital payment apps that can be loaded on a smartphone, tablet or PC if these devices cannot be controlled by the issuer regarding the use of other third-party payment apps. The bottom line is that LNE payment applications can practically only be made available to the consumer on monofunctional plastic cards or other devices (e.g. wearables), issued by the issuer too. An absurd and not very consumer-friendly result. If only the digital carrier level falls under "other means of payment", Art. 1.7 leads to the result that LNE payment applications can only be loaded as proprietary wallets of the issuer and not in third-party carriers (such as Apple Pay).

Final answer

Guidelines 1.6 of the EBA Guidelines on the limited network exclusion under PSD2 (EBA/GL/2022/02) specifies that '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.'

The EBA clarifies that the term 'means of payment' does not distinguish between physical and digital means of payment and, therefore, captures both. The term 'single card-based means of payment' refers to means of payment that accommodate card-based payment instruments, while the term 'other means of payment' refers to means of payment that accommodate payment instruments that are not card-based.

The use of the terms 'payment instrument' and 'card-based payment instrument' is consistent with the respective definitions set out in Article

	3(14) of Directive (EU) 2015/2366 and Article 2(20) of Regulation (EU) 2015/751 respectively.
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