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## Consultation Paper on Guidelines on the Limited Network Exclusion under PSD2

- 1 With this joint statement, the associations UNITI Verband mittelständischer Mineralölunternehmen e.V. and MWV Mineralölwirtschaftsverband e.V. represent independent fuel card issuers, including DKV EURO SERVICE MOBILITY GmbH + Co. KG, UTA UNION TANK Eckstein GmbH & Co. KG, LOGPAY TRANSPORT SERVICES GmbH, as well as the mineral oil companies as issuers of brand-dependent fuel cards.
- 2 Fuel cards, which the PSD2 explicitly names as payment instruments potentially covered by the limited network exclusion, enable the cash-free purchase of goods (especially fuel, vehicle parts and accessories) and services (customs clearance, vehicle repair) for the transport industry as well as the efficient collection of tolls for the states in Europe. They are mainly used by commercial customers. Alongside conventional fuels, alternative fuels (e-mobility, hydrogen, LPG) are increasingly gaining in importance, just as the product range as a whole has to be continuously adapted to the changing needs of users.
- 3 Nevertheless, the options for purchasing goods and services using a fuel card are limited to a clearly defined range of offers. This range of offers corresponds to specific needs of the users of fuel cards in the transport sector, which has to equip several million vehicles and drivers with instruments and ensure misuse of those instruments is limited as much as possible. Fuel cards can therefore only be used for purposes that serve the business needs of their customers. This means that a fuel card has to be usable for the entire range of situations - both typical and atypical (breakdowns, accidents, etc.) - that vehicle drivers might face. The vehicle drivers have neither payment cards from their employer nor sufficient cash to be able to pay on-the-road expenses which often amount to several hundred Euros in individual cases. In case of repairs, this can often amount to several thousand Euros in individual cases, and especially drivers on international trips incur four- or five-figure expenses for fuel, tolls, repairs, etc. .
- 4 Another characteristic of fuel cards is that the customer receives country-specific invoices from the issuer of the fuel card for all transactions, which entitle him to claim input tax (*Vorsteuer*). The issuer of the fuel card therefore has to be the service provider vis-à-vis its customer for the purpose of sales tax law. For example, the issuer has to sell fuel in its own name and for its own account after having purchased it from the operator of the petrol station in its own name and for its own account. Tolls subject to sales tax have to be marketed in such a way that the issuer is able to report its own sales tax, etc. Also in this respect, fuel cards cannot be substituted by classic payment cards because their use does not allow the issuer of the payment card to become the service provider for sales tax purposes. The drivers would have to request sales tax invoices for each payment transaction with a payment card, collect them and submit the originals to their



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- employer. The employer would have to book each receipt individually and, in the case of foreign VAT, submit each individual receipt for the refund of input tax. Invoices that an average fuel card customer receives from his fuel card company once or twice a month often include thousands of individual transactions that were initiated by a hundred or even a thousand drivers in the various European countries.
- 5 This special feature of fuel cards means that the risk of sufficient creditworthiness of the fuel card companies is only borne by the customer in exceptional cases to a small economic extent. Because with accepted fuel card payment, the customer owes payment exclusively to the fuel card company; even if the fuel card company became insolvent, the petrol station operator would not be able to demand payment from the customer. Unlike with payment cards, the customer is not subject to a double payment obligation. Almost without exception, the risk of sufficient creditworthiness is borne by the suppliers of the fuel card company: in the fuel business by the large mineral oil companies and in the toll business ultimately by the toll charging states. These market participants are able to assess and mitigate their risks for their own account, ensuring there are appropriate safeguards in place. This explains why customers of fuel card companies have not suffered any losses related to creditworthiness in the past decades and why such losses are not to be expected in the future either.
  - 6 These few comments are intended to shed light on the fuel card business, which, in view of its importance for the smooth movement of goods and passengers in Europe, is explicitly addressed in the rationales of PSD2 as an application case of the limited network exclusion. The international fuel card business depends on uniform handling in the countries of Europe. Disruptions would not only affect the issuers of the fuel card, but would have the potential to cause significant disruption to the movement of goods in Europe and thus to the economy as a whole. The interest in legal certainty and uniform conditions throughout Europe is not limited to the issuers of fuel cards, their suppliers and their customers. It has an economic dimension.
  - 7 From the point of view of fuel card companies, the EBA guidelines can make an important contribution to achieving more legal certainty and legal uniformity in Europe. They are also a suitable means of addressing and solving the current disadvantage that market participants based in the EU have to endure in comparison with suppliers who offer their products in the EU but are based in non-EU countries. Thus far, the EU supervisory authorities have not addressed these market participants. In fact, in order to ensure uniform conditions for all providers which offer their services in the EU and thus to ensure a uniform standard for all customers of fuel card companies, it will be necessary to only impose such requirements on the providers of fuel cards based within the EU that the supervisory authorities can also and especially fulfil with regard to providers that are based outside the EU but have European customers or access to the European network of petrol stations.
  - 8 This is the background against which we would like you to read and understand our comments and proposals on the guidelines.



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

### On Guideline 1.3 and Rationale 10

#### 1. Proposed amendment

9 We propose Guideline 1.3 be supplemented as follows:

10 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 services 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, [unless the intermediary provides the payment service exclusively in relation to payment instruments which fall within the scope of the LNE.](#)

11 We propose the last sentence of rationale 10 be amended as follows:

12 The EBA further clarifies in the same Guideline that, in order for the service to be considered as falling under the scope of the LNE, it should be [provided exclusively in connection with payment instruments which fall within the scope of the LNE directly related to the purchase of goods and/or services](#), otherwise the activity would constitute a provision of payment services or electronic money and thus would require authorization under PSD2 or EMD2 respectively.

#### 2. Justification

13 According to Article 3(k), services based on certain payment instruments that can only be used to a limited extent are not considered to be payment services. This should apply irrespective of who provides the payment service. There is no reason not to exclude a payment service from the LNE only because the issuer of the payment instrument does not provide it itself, as issuers of payment instruments can be dependent on cooperation with other service providers based on the distribution of tasks. If the other service provider provides a money transfer exclusively for a payment instrument that fulfils the requirements of the LNE, according to PSD2, the issuer's service provider also provides a permission-free payment service. Because the activity of the other service provider is also based on the use of an excluded payment instrument. Furthermore, the payment volume exempted from PSD2 is not increased by the use of additional service providers; always only the same amount is transferred onwards. Ultimately, the guidelines should seek to be consistent with PSD2.



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## On Guideline 1.7 and Rationale 14

### 1. Proposed amendment

14 We propose Guideline 1.7 be amended as follows:

15 1.7 Competent authorities should ~~also ensure~~take into account that a single card-based means of payment can~~not~~ accommodate simultaneously payment instruments within the scope of PSD2 and specific payment instruments within the scope of Article 3(k) of PSD2 provided that it is made clear to the user that he will not benefit from some of the protections for payment service users according to PSD2.

16 Rationale 14 should be amended to allow the combination of regulated and non-regulated payment instruments, provided that it is made clear to the user that he will not benefit from some of the protections for payment service users according to PSD2.

### 2. Justification

17 It is not practical for issuers of payment instruments to issue two means of payment, one of which is (i) a regulated general-purpose/open-ended means of payment and the other of which is (ii) a non-regulated specific-purpose/closed-ended means of payment, as this impairs the user experience and imposes significant additional costs on the issuer.

18 A physical distinction between a regulated and a non-regulated means of payment is not necessary to achieve the purpose of clarity regarding the nature of the instruments, as there will be technical solutions to ensure that users always know which instrument they are using, especially in relation to digital means of payment (where users can select the different means of payment within an app, e.g. by individual selection or swiping), but also at a point of sale (POS). Therefore, the established technology-agnostic approach should be maintained by the national supervisory authorities as long as a clear user understanding can be ensured by other means. Otherwise, digitalization and innovation efforts will be hindered.

19 The prohibition on combining regulated and non-regulated means of payment in a single card-based means of payment is contrary to the view taken by the German supervisory authority (BaFin) with regard to the implementation of PSD2 in German law. Thus, the market participants in Germany have relied on the possibility of combining regulated and unregulated means of payment in a single means of payment, especially with regard to the strategic development of their business model and the option of applying for a payment services licence.



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## On Guideline 1.12 and Rationale 19

### 1. Proposed amendment

20 We propose Guideline 1.12 be supplemented as follows:

21 Competent authorities should take into account that the issuer of the payment instrument can be established in a Member State different from the Member State of the respective competent authority, which has received the notification under Article 37(2) of PSD2 [and that issuers established outside the EU must also submit notifications in accordance with Article 37\(2\) of PSD2 if they provide payment services in the Member State.](#)

22 We propose Rationale 19 be amended as follows:

23 With regard to the physical location of the issuer of the specific payment instrument referred to in Article 3(k) of PSD2, the EBA did not consider that any geographical limitations should apply and has, therefore, specified in Guideline 1.12 that the issuer of the payment instrument can be established in a Member State different from that of the jurisdiction where services are being provided, [and that issuers established outside the EU must also submit notifications in accordance with Article 37\(2\) of PSD2 if they provide payment services in the Member State.](#)

### 2. Justification

24 Based on the EBA's position that no geographical restrictions should apply, service providers established in the EU cannot be subject to stricter rules than service providers established outside the EU but providing payment services in the EU (customer and/or payee is established in the EU). Such an approach would lead to serious competitive disadvantages for the EU-based service providers combined with the risk that they would have to consider relocating their business to group companies based outside the EU. There would also be a different level of protection for customers, although the customers would not usually be aware of this. Non-EU nationals providing payment services in an EU Member State should therefore be placed on an equal footing with EU nationals, both in terms of notification requirements and in terms of the overall supervision of the compliance with the conditions for the use of the LNE.

25 If EU supervisory authorities do not consider themselves able to apply all the supervisory actions provided for in the Guidelines equally to EU nationals and non-EU nationals providing payment services in an EU Member State, this should not lead to a privileging of non-EU nationals or to an increased risk for customers dealing with a service provider established outside the EU.



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

##### On Guideline 4.2 and Rationales 44 and 46

##### 1. Proposed amendment

26 We propose Guideline 4.2 be amended as follows:

27 4.2 When assessing the functional connection between the goods and/or services, competent authorities should take into account that it is equivalent whether the functional connection is based on a leading good or service or on a common purpose is established. Competent authorities should check whether the service provider has identified the leading good or service and the ancillary goods and/or services or the common purpose and has described the functional connection between them in the notification under Article 37(2) of PSD2. An indication of all goods and services is not a requirement of the notification under Article 37(2) of PSD2 and in particular is not part of the entry in the national register under Article 14(2) PSD2 or the central register under Article 15 PSD2. However, for the purpose of verifying the notification, the competent authorities may require service providers to provide information on the goods and services in order to avoid doubts concerning compliance with the LNE in individual cases.

28 We propose Rationale 44 be amended as follows:

29 When it comes to the second approach, the EBA arrived at the view that it would be ~~very~~ challenging to set different exhaustive categories with various goods and services that would be appropriate for all Member States and all business models, present and future. However, this approach (in addition to the first approach) is recognised as necessary. In any case, in certain applications, such as fuel cards, based on the function of the payment instrument, it can be outlined that it can only be used for a limited range of goods and services. Other approaches have proven insufficient in such cases, but may be useful in other areas. The EBA, therefore, discarded this option.

30 If the EBA maintains that the first approach is necessary alongside the second, Rationale 46 should be amended as follows:

31 When assessing the first approach on focusing the assessment on the functional connection justified by a leading good or service, the EBA arrived at the view that this ~~would be the most suitable approach because it would~~ has its justification alongside the second approach. Each of the approaches is equally suitable because it would:



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- restrict the use of the instrument;
- limit potential risks to consumers;
- limit potential disadvantages to regulated firms;
- accommodate different business models;
- be more specific on the relationship between the various goods and services;
- provide flexibility to service providers to set-out the range of goods and services; and
- facilitate the assessment by competent authorities.

## 2. Justification

- 32 The EBA's approach to provide clarification in particular on the question of what constitutes "functionally connected" goods and services within the meaning of Rationale 13 of PSD2 is supported (see Rationale 43 of these guidelines).
- 33 However, it will be difficult or impossible to identify only one leading good/service. Instead of focusing on a leading good/service, focusing on a common "purpose" should be recognised as an equivalent option.
- 34 This is because in the mobility area, for example, the goods fuel and tolls play an equally important role, without it being possible for fuel to be subordinated in its importance behind tolls or vice versa. Rather, in the mobility area it is generally understood and common practice that individual goods/services are not subordinated to other goods/services. All goods and services that can be obtained via a fuel card are solely subordinated to one common purpose. This approach is in line with the legal basis of the LNE in Article 3(k) of PSD2, which equates all goods/services covered by the LNE. A sole link to a leading good/service while excluding the limitation of the range of goods and services via the common purpose would lack a legal basis.
- 35 The functional purpose of mobility service cards is "anything that moves the vehicle", so the LNE covers, for example, conventional and alternative fuels, breakdown services, tolls, security services, parking and ferry fees. As understood by the competent authority in Germany and the fuel card companies, the exemption under Article 3(k)(ii) of PSD 2 does not include "what serves the driver", i.e. for example food and drinks at petrol stations.
- 36 In case of an exclusive connection to a leading good, it would be completely open in the case of fuel cards, whether among the two, goods with the highest turnover, "fuel" and "toll", one or the other is the "leading" good. Based on the general understanding, fuel might be considered as the leading good for "fuel cards". Or should the leading good be determined on the basis of the turnover ratios (of the fuel card company or the customer), which may vary within the industry and



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- be subject to change? Furthermore, Guideline 4.2 and the Rationales could be understood in such a way that there may only be one leading good and doubts could arise that fuel and tolls are still recognised as LNE. However, this seems incompatible with PSD2, which explicitly recognises fuel cards within the ambit of the LNE.
- 37 In addition, it can only be justified with the functional approach and a common purpose that the services in case of breakdowns or accidents, which have to be handled quickly and efficiently in the public interest and can be handled thanks to the fuel cards, are linked to a “leading good” such as fuel or tolls. If this approach were not recognised as equivalent, there would be a risk that national supervisory authorities would assess the goods/services associated with the leading good in a completely different way. For example, some national supervisory authorities might consider breakdown services as a related service, while others would exclude breakdown services as non-related. A clear framework is only recognisable if it is linked to the functionally connected purpose (“everything that moves the vehicle”), which is about mobility and all goods/services related to mobility.
- 38 It should also be taken into account that the range of goods and services is constantly evolving through innovation and progress. This means that the portfolio of goods and/or services is constantly changing. In particular, the innovations in the fuel industry in the direction of more efficient and sustainable service provision not only result in the significant development of existing goods and/or services, but also in the creation and market launch of many new goods/services. One example is the current development in the e-mobility sector. In order to be able to take the overall economic, political and climate protection-oriented innovations into account in the assessment of the LNE, a link to a leading purpose is therefore efficient, as this would also include new technologies and the resulting goods/services in the scope of the LNE.
- 39 Due to this constant change, entering all the goods and services which the LNE is used for in the national registers or the central register would not be practical. The discontinuation of a good or service or an addition to the range will not normally be significant within the meaning of the Guidelines and accordingly will not trigger a new notification obligation. This would make the entries in the registers misleading in many cases. In the interest of legal clarity, the indication of the goods and services should also not be a mandatory part of the (first) notification according to Article 37 (2) PSD2. Only the information that is absolutely necessary for assessing whether the LNE has been legitimately claimed and that triggers the obligation to submit a notification of change in case of changes should be a compulsory part of the notification. The tasks of the competent authorities are already taken into account with the right to request further information if they need it.



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## On Guideline 4.4 and Rationale 48

### 1. Proposed amendment

40 We propose Guideline 4.4 be reworded as follows:

41 4.4 The eligibility to use the LNE is conclusively assessed in accordance with guidelines 4.1 and  
4.2. They are also to be applied by the competent authorities to service providers established  
outside the EU who provide payment services in the Member State.

42 We propose Rationale 48 be amended as follows:

43 To be consistent with the approach taken in the assessment of limited network of service provid-  
ers, the EBA also ~~considered introduced~~ introducing in Guideline 4.4 complementary indicators  
that can be taken into account by competent authorities when assessing if the use of a specific  
payment instrument can be considered as limited for acquiring a very limited range of goods or  
services under Article 3(k)(ii) of PSD2. However, the EBA has not implemented this approach be-  
cause it has no basis in the PSD2 and would increase the risk of different legal applications in the  
EU Member States. Especially in case of cross-border services, it is in the interest of the users that  
theythe users can be offered uniformly acrossin the EU Member States. Otherwise, there is a risk  
of reducing the offers to the lowest common denominator, because differentiations by individual  
countries would regularly not be feasible. Instead, the EBA has decided to take account of unde-  
sirable developments by updating these guidelines if necessary.

44 In order to enable a uniform Europe-wide assessment of the LNE by the national authorities, we  
propose the establishment of an expert body consisting of members of the EBA, the national com-  
petent authorities and LNE market participants, which would be available to the national author-  
ities and market participants as a point of contact and which could issue non-binding recommen-  
dations in the interest of a uniform Europe-wide assessment of the LNE in compliance with the  
legal requirements, including the EBA guidelines.

### 2. Justification

45 The restrictive character of the exclusion provision is already ensured by the very limited range of  
products and services enshrined in law in Article 3(k)(ii) of PSD2, so that additional indicators are  
not necessary and could therefore at best be non-binding points of reference for the national  
authorities and market participants. Guidelines 4.1, 4.2 (in their version to be amended) and 4.5,  
which explain the restrictive nature of the LNE in more detail, provide sufficient assistance to be  
able to assess the conditions for using the LNE in accordance with the intentions of the legislator.

46 Moreover, PSD2 does not provide for the introduction of additional indicators. The restrictive  
character of the LNE is guaranteed as soon as the payment instrument can only be used for a very



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- limited range of goods or services. As long as this limited range of application is not changed, there should be no risk of the exemption being revoked in the event of a successful development of the business, an increase in volume, transactions, the amount credited or the number of users.
- 47 If, without a legal basis, the indicators in the Guideline Proposal 4.4, which are completely open to interpretation, were to be added, there is a risk that the use of the limited network exclusion itself would become impossible. This is because, as explained in point no. 46, service providers would no longer be able to rely on the fact that their exempted business model would continue to be covered by the LNE in case of e.g. growth, changes in volume and/or transactions or increases in users. However, since the business models that rely on the LNE are designed for growth, they need to grow in order to survive. Otherwise, the service providers concerned will at some point become insolvent. As a consequence, it would be effectively impossible to base a business model on an exception enshrined in the law.
- 48 The introduction of additional indicators would, contrary to the EBA's objective, increase the divergence of supervisory practices among the national authorities. There is a risk of completely different application of the exclusion provision, depending on local markets and business models and the individual risk-taking appetite of the respective national supervisory authority. Considering that service providers would have to register the exclusion provision in each individual jurisdiction in which they operate, this is not practicable and would make cross-border application of the LNE within the EU effectively impossible.
- 49 In the interest of legal certainty, a strict distinction needs to be made between circumstances that are decisive for the legitimate use of the LNE and those which the competent authorities wish to obtain in order to be informed about the market conditions and circumstances of service providers using the LNE. The circumstances mentioned in Draft Guideline 4.4 are subject to constant change, so that service providers would constantly face the question of whether they have to keep informing the competent authorities of this change. This contradicts the principle of one-off notification. This problem is exacerbated when market participants operate in more than one EU country, as this means that these change notifications have to be made to all the supervisory authorities involved. This is an administrative burden that entails an enormous amount of work and considerable costs, both for monitoring the development of the indicators in each country and for the required notification of changes, but also for the competent authorities, which would constantly have to deal with notifications of changes that are irrelevant for the decision on whether the LNE is being wrongfully used.
- 50 Even if one wanted to apply complementary indicators as mentioned in the guidelines, it has to be taken into account that the service providers would not be at all able to calculate these kinds of indicators:



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i)

The volume and value of payment transactions made with the exempted payment instruments may depend on whether the economy is in a boom or a recession phase, which can be completely different within the EU at any given time;

ii)

A successful acquisition of new customers as well as the expansion of the business to other EU Member States may immediately and significantly change the planned (i) quantity and value of payment transactions and (ii) the maximum number of users.

iii)

The target group for mobility service cards is extremely diverse and can include private and commercial users, locally operating fleet companies as well as international fleet operators. Some companies may operate predominantly in countries where tolls are standard and may therefore be able to raise much higher amounts for each payment instrument than small, locally operating companies in countries without tolls. In addition, a service provider may introduce a new, functionally related good or a new service, which also changes the usage profile. Therefore, it will not be possible to provide for a maximum amount that can be credited to the payment instruments.

## On Guideline 4.5 and Rationale 49

### 1. Proposed amendment

51 We propose Guideline 4.5 be amended as follows:

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

53 We propose Rationale 49 be amended as follows:

54 49. Finally, it should be noted that the requirements of Guideline 4, should be applied by competent authorities in ~~a restrictive~~such a way that ~~does not allow for the possibility~~they prevent a specific-purpose instrument ~~to from~~developing into a general-purpose instrument and thus falling outside the scope of the LNE.

### 2. Justification

55 The proposals take account of the fact that the guidelines set out the framework of the LNE such that there is no need for restrictive handling and the PSD2 would also not provide a basis for this. The alterations help to avoid additional legal uncertainty.



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

### Guideline 5.2 and Rationale 52

#### 1. Proposed amendment

56 We propose Guideline 5.2 be amended as follows:

57 5.2 Competent authorities should ensure that in the cases where authorised payment service providers or electronic money issuers provide also services under Article 3(k) of PSD2, the regulated 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 use of different brands. In this context, the competent authorities should not impose overly strict requirements, because the customer of an authorised payment service provider or electronic money issuer always benefits from the institution-related protection of PSD2.

58 We propose Rationale 52 be amended as follows:

59 52. In order to address these concerns, the EBA introduced ~~specific~~ requirements in Guideline 5 to ensure a proper delineation between regulated and non-regulated services. In particular, Guideline 5.2 specifies that the delineation between regulated and non-regulated services should be carried out in an easily recognisable way, including through the use of different brands. To address the risks for users of the payment instrument, Guideline 5.3 further specifies that users of the excluded instruments provided by regulated entities, should be informed that said instruments are not regulated and supervised and that they do not benefit from the protection of PSD2. Since the customer of an authorised payment service provider or electronic money issuer always benefits from the protective mechanisms of the PSD2, which apply to the institution as such, no overly strict requirements are to be placed on the notification.

#### 2. Justification

60 We share EBA's approach explained in Guideline 5.1 and Rationale 50 that PSD2 allows regulated payment service providers to also provide services under the LNE. In contrast, there is no need to inform the supervisory authorities and users in a qualified manner about regulated and non-regulated services and to use different brands to differentiate between them. This is because if a company is subject to the regulations of the PSD2, as a payment service provider it



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must comply with the increased protection requirements stipulated in the PSD2. The strict requirements of the PSD2 for supervised institutions, for example with regard to the qualification of the management, the organisation, the structure of the IT systems, the capital resources and accounting, apply to the institution as such. If a payment service institution also offers non-regulated services within the meaning of the LNE, these are also subject to the superordinate protection requirements to be complied with. Only practically feasible requirements should be put in place to distinguish regulated payment services from services subject to the LNE. This would especially not be the case if the use of different brands was required, because the brand is usually the name of the company or derived from it, especially if a whole group of companies uses a uniform brand. The use of the single brand for the regulated payment services and the services subject to the LNE must therefore be permissible in order to establish the link to the company or group of companies. The competent authorities and the users can be informed in many other ways as to which payment services are regulated and which are not. Therefore, the indication that the payment instrument used is one that is not covered by the PSD2 should be sufficient. The competent authorities are regularly aware of this on the basis of the applications for permission. As a result, Rationale 51 should be adapted insofar as it speaks of a risk of insufficient transparency for the competent authorities.

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

### **Insertion of a new Guideline (here 6.0) and amendment of Rationale 55**

#### **1. Proposed amendment**

61 We propose a new guideline be inserted before guideline 6.1 (here referred to as 6.0):

62 6.0 In connection with the notifications pursuant to Article 37(2) of PSD2, the competent authorities take into account that the provision of services using the LNE is a freedom of activity enshrined in European law and that the legally secure exercising of this freedom of activity must be ensured in the overall economic interest of the European states and consumers. This presupposes uniform handling by the competent authorities and equal treatment of service providers based in the EU and outside the EU in the case of services offered across national borders throughout Europe. The national supervisory authorities therefore exchange information on cross-border services in order to ensure a level playing field and legal certainty, not only for competitors from different EU Member States, but also for a single market participant using an exempted payment instrument throughout the EU.



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- 63 We propose Rationale 55 be supplemented with the following sentences at the end:
- 64 However, PSD2 obliges EU Member States to allow services to be provided without authorisation under the conditions of the LNE. In the same way as EU Member States cannot make services that meet all the conditions of the LNE of PSD2 subject to authorisation, the competent authorities base their actions on the decision of the European legislator. A legally secure administrative practice that is as uniform as possible throughout Europe corresponds to the freedom of action of the market participants and is in the overall economic interest of the EU Member States.

## 2. Justification

- 65 Guideline 6.1 contains a welcome clarification that an exempted means of payment can be used throughout the EU and it goes without saying that an exclusion is not transferable. Nevertheless, PSD2 has created legal uniformity in Europe for unregulated services in the area of payment services. It obliges the EU Member States to allow certain services without authorisation and explicitly states fuel cards as one of the cases of application in the rationales. The fuel card business - like many other services that PSD2 recognises as excluded under its uniform Europe-wide requirements - is inherently a pan-European business that is tailored to specific requirements of economic life in Europe and has served them without disruption for decades. The supply chains in Europe are based on the safe, cost-effective and efficient on-the-go supply of fuel and other goods and services to the transport industry and the equally safe, cost-effective and efficient collection of tolls in Europe. Any legal uncertainty, and even more so any inconsistent handling in Europe, not only jeopardises the freedom of action of fuel card companies, which is recognised under European law as being excluded. It constitutes a potential disruption of important supply chains in Europe.

## On Guideline 6.1 and Rationales 55, 59 and 60

### 1. Proposed amendment

- 66 We propose Guideline 6.1 be supplemented at the end as follows:
- 67 6.1 If the notification made by a service provider in its home Member State contains the information that it also provides the service in other Member States and that the thresholds laid down in Article 37(2) of PSD2 are also exceeded there, the authority of the home Member State is to pass on the notification to the competent authorities of the other Member States and inform the service provider which made the notification. In this case, the service provider is deemed to have fulfilled its notification obligations under Article 37(2) of PSD2 to the competent authorities of all Member States mentioned in the notification. If a competent authority intends to issue a reasoned decision pursuant to Article 37(2) PSD2 that the activity should not be recognised as a limited network, it will first give the competent authorities of the other Member States the opportunity to comment and incorporate in its decision that, as far as



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possible, uniform conditions should apply in the EU Member States.

68 Following the insertion referred to in point no. 63, we propose Rationale 55 be further supplemented as follows:

69 It is in the interest of the service providers concerned as well as the competent authorities of the EU Member States to make the notification procedure under Article 37(2) PSD2 as simple as possible whilst maintaining the tasks and powers of the national competent authorities. National competent authorities are familiar with an internal exchange of information and cooperation in the area of activities subject to authorisation and are, on the whole, relieved if they only have to deal with service providers who provide services in their country but are based in another EU Member State on the basis of information and documents from the home Member State and its assessment of compliance with the LNE. Simplified responsibilities for service providers based outside the EU and providing payment services in an EU Member State can be agreed between the competent authorities if this appears appropriate.

70 We propose Rationale 59 be amended as follows:

71 The EBA considered whether the information about excluded services provided on a cross-border basis should be exchanged between competent authorities in order to ensure a level-playing field across the EU. The EBA, ~~however,~~ arrived at the view that such a process is in the interest of all concerned. The competent authorities can process the notifications submitted by the service providers established in their country most effectively and deal with the circumstances of these service providers most effectively. If each competent authority receives information compiled by the competent authority responsible for the home country on the services provided in the other Member States, they will be able to take their decisions more effectively on that basis, without being limited in their competences to supervise the services carried out in their country. This approach is also in the interest of all parties involved, because notifications with the same content by internationally operating service providers, which they would have to submit in each national language and, if necessary, taking into account individual requirements of the respective competent authorities, would be associated with considerable costs, which would ultimately have to be borne by the consumers. ~~not be desirable since it will introduce an administrative burden for competent authorities and delay the assessment of the notifications under Article 37(2) of PSD2.~~

72 We propose Rationale 60 be amended as follows:

73 The EBA, ~~however,~~ considers that it would be helpful for competent authorities to be aware about the provision of excluded services by the same service provider in other Member States. The EBA has decided, however, therefore, in the interest of transparency and reliability of the registers decided to request from competent authorities to include this information in the description of the activity that should be covered in the national and EBA register as specified under Article 37(5) of PSD2. ~~not to record in the national register in which other EU Member States the services are offered. In which EU Member States the services are to be offered as specified under Article 37(5)~~



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of PSD2 is only to be registered in the EBA register, in which each service provider is listed only once. This should be reflected in the respective fields that already exist in both the EBA registers. This information is accessible to the competent authorities as well as to the parties involved and covers all information requests. In the interest of the reliability of the national registers, only information that the service provider is obliged to report to the respective national authority should be entered there.

## 2. Justification

- 74 UNITI and MWV identify an urgent need for simplification and standardisation of the notification procedure among all parties involved. Furthermore, the risk of overloading the central register in accordance with Article 15 PSD2 must be averted. This danger is particularly imminent if service providers are obliged to provide further information and the competent supervisory authorities are required to include further information in the national registers. For example, the issuers of fuel cards would be named in 27 national registers and each of the registers would name all 27 EU Member States in which they operate. The information needs of both the competent authorities and the parties involved are met if each service provider is listed in the central register indicating all the Member States in which the services are offered. This is ensured by Guideline 6.9.
- 75 The current circumstance that not only internationally operating fuel card companies, but also internationally operating service providers of other sectors are regularly only notified in their home country and that the supervisory authorities of the other countries tolerate this, is an indication for UNITI and MWV that the service providers would be overburdened if they had to notify themselves in each individual EU Member State according to the individual requirements of the respective authorities in the respective national language and the national supervisory authorities are not set up to deal with foreign service providers in the same way as with domestic service providers. The fact that apparently no supervisory authority of an EU Member State deals with those service providers based in other EU countries who, without any notification, provide services to their clients established in EU Member States or to their payees established in the EU using the LNE services is even more significant. From the point of view of a level playing field, this is unacceptable.
- 76 The proposed amendments respect the fact that no European passport can be obtained for the LNE and share the objective of the EBA and PSD2 regarding information transparency. The proposal to only file each service provider's country of operation once in the EBA register and to make the gathering of this information efficient, instead of having 27 competent authorities of EU Member States collect the identical information, is in the interest of all parties involved.
- 77 Likewise, the proposed amendment respects the right of each national competent authority to intervene if it concludes that PSD2 requirements are not being complied with within its area of responsibility, irrespective of where the service provider concerned is based. However, an exchange between the competent authorities in Europe is urgently required in the interest of legal certainty and legal uniformity in Europe. If the service providers concerned did not make use of



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the LNE but carried out their business model on the basis of a national permit and a European passport, the coordination of the national competent authorities would be a self-evident necessity. From this point of view, the LNE saves the resources of the national competent authorities, which would have to coordinate to a much greater extent if the LNE was no longer in place.

## On Guideline 6.3 and Rationale 58

### 1. Proposed amendment

78 We propose Guideline 6.3 be amended and supplemented as follows:

79 6.3 The description of the activity referred to in Guideline 6.2 should include information:

~~a) on whether the goods and/or services that can be acquired are physical and/or digital;~~

~~b) a) 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 service provider; and~~

~~e) b) any the following other information allowing competent authorities to assess the notification against these Guidelines:~~

~~- ....~~

~~- .... [concluding statement of the necessary information]~~

80 We propose Rationale 58 be amended as follows with regard to sentences 2 and 3:

81 Said information should, ~~inter alia,~~ include the type of exclusion under which the activity is carried out, ~~the type of goods and/or services being offered (whether they are physical and/or digital), the Member States where excluded services are being provided~~ and all other information relevant for the assessment under these Guidelines. The EBA has specified this in Guidelines 6.2 and 6.3.



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## 2. Justification

- 82 In the proposed version, the guideline creates room for individual requirements of the competent authorities which are not compatible with the principle of a level playing field and legal certainty. With regard to the overall economic interests of the EU and its Member States and the dangers that a lack of legal certainty and legal uniformity of the fuel card business in Europe would entail for European supply chains, we refer to paragraph 65.
- 83 Information that may be of interest for general market monitoring by the competent authorities, without being decisive regarding the right to make use of the LNE, should not be requested by the competent authorities in the context of the notification. Otherwise, there is a risk of legal uncertainty as to whether a notification was properly made or not. There is also a risk that competent authorities confuse general information requests with notification requirements. One example in the context of the guidelines is the question of whether a product is offered physically or digitally. According to Rationale 1.2, this is irrelevant for the use of the LNE.
- 84 For the use of the LNE in a Member State, it is also irrelevant which other EU Member State the services are also carried out in. The information basis for this is the central register according to Article 15 PSD2, which is the only register that can guarantee the respective up-to-dateness of the information on services in other Member States (cf. point no. 100).

## On Guideline 6.5 and Rationale 64

### 1. Proposed amendment

85 We propose Guideline 6.5 be amended as follows:

86 6.5 Competent authorities should take into account that the substantial changes referred to in Guideline 6.4 can only include ~~but are not limited to~~ the situations where the use of the exemption under Article 3(k) of PSD2 is terminated or is a mandatory part of the notification under Article 37(2) of PSD2 in accordance with Guideline 6.3. It is therefore significant that

- a) the provision of the excluded services has terminated;
- ~~b) the service provider envisages to increase the number of providers of goods and/or services under Guideline 2.1(b) is intended to be increased;~~
- c) the envisaged specific geographical area for the provision of goods and/or services under Guideline 2.1 (c) is intended to be changed;
- d) the service provider intends offering services under Article 3(k)(i) or (ii) of PSD2 based on an instrument not covered in the original notification; or



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~~e) the previously notified leading good or service or the ancillary goods and/or services referred to in Guidelines 4.2 are intended to be changed.~~

87 We propose the following sentence 2 be added to Rationale 64:

88 In the interest of legal clarity for the service providers concerned and the competent authorities, this presupposes a conclusive definition of the circumstances that have to be reported, without prejudice to the right of the competent authorities to request additional information in cases of doubt.

## 2. Justification

89 The conditions under which a new notification under Article 37(2) PSD2 is to take place must, in the interest of legal certainty, be clearly defined and limited to the facts required to assess whether the LNE has been used legitimately.

## On Guideline 6.6 and Rationale 65

### 1. Proposed amendment

90 We propose Guideline 6.6 be amended as follows:

91 6.6 In any case, competent authorities can request from service providers to submit a new notification with updated information if they consider this necessary in individual cases to ensure that the information provided with the initial notification has changed.

92 We propose Rationale 65 be supplemented at the end by the following sentence:

93 In view of the EBA's decision that there is no need for regular updating of the notifications, the competent authorities shall not make use of this right without examining the individual case and without specific indications.

### 2. Justification

94 UNITI and MWV agree to Guideline 6.6 on the condition that the information to be provided as part of the notification under Article 37(2) PSD2 - as described in point no. 88 et seq. above - is conclusively defined. Otherwise, Guideline 6.6 is associated with unacceptable legal uncertainty, especially as inconsistent handling by the 27 competent authorities of the EU Member States is to be expected. It should be clarified that supplementary notifications are not to be requested without reasonable grounds, as this would undermine the EBA's decision not to require regular updates of the notifications in the common interest of the service providers and the competent authorities.



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## On Guideline 6.8 and Rationale 62

### 1. Proposed amendment

95 We propose Guideline 6.8 be amended as follows:

96 Competent authorities should include the service provider 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 the description of the activities carried out with each specific payment instrument under Article 3(k) of PSD2. In the central register of the EBA according to Article 15 of the PSD2, each service provider is only included once and all ~~Competent authorities should also include in the description of activities in the registers, information about other~~ Member States are listed, where the same service provider provides service under Article 3(k) of PSD2. This information is not part of the national registers under Article 14 of PSD2.

97 We propose Rationale 62 be supplemented at the end by the following sentence:

98 In the interest of transparency and reliability of the national registers, however, only information should be included there that a service provider has to report to the competent authority of the country concerned.

### 2. Justification

99 In the interest of transparent information of the parties involved and the reliability of the entries, it is imperative that

- each service provider is only named once in a national register according to Article 14 of PSD2 and also in the central register according to Article 15 of PSD2
- no information on activities in other EU Member States is entered in the national registers.

100 Entries in a national register on activities in another Member State are not required because they can be obtained from the central register. Furthermore, such registrations could never be reliable because there is no obligation to notify the national supervisory authorities if services are also provided in another Member State or if the relevant thresholds are exceeded for the first time in another Member State. In particular, such a notification obligation does not exist after a previous notification when activities are started in another EU Member State or if the relevant threshold values are exceeded in another Member State. These notification obligations only exist in the EU Member State concerned.



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## On Guideline 6.9 and Rationale 67

### 1. Proposed amendment

101 We propose Guideline 6.9 be amended as follows:

102 Competent authorities should ensure that the information provided by a service provider with the notification under Article 37(2) of PSD2 allows them to assess whether the activity falls under the scope of Article 3(k) of PSD2 or whether it will require authorisation under PSD2 or EMD2. In case the information [to be](#) provided with the notification [in accordance with Guideline 6](#) is incomplete, vague or ambiguous, the competent authority should request from the service provider additional information or clarification to the information already provided in order to take the decision.

103 We propose Rationale 67 be supplemented at the end by the following sentence:

104 In the interest of legal certainty and legal uniformity, the assessment is to be based on the information specified in this Guideline 6.

### 2. Justification

105 UNITI and MWF agree to Guideline 6.9 on the condition that the information to be provided as part of the notification under Article 37(2) PSD2 - as described in point no. 88 et seq. above - is conclusively defined. Otherwise, Guideline 6.9 is associated with unacceptable legal uncertainty, especially as inconsistent handling by the 27 competent authorities of the EU Member States is to be expected. It should therefore be clarified in Rationale 67 that the decision of the competent authorities is to be taken on the basis of the information which, in accordance with this Guideline, forms part of a proper notification. This does not affect the right of the competent authorities to ask additional questions if there are doubts about the correctness of the information.



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