

The CSSF clarifies the requirements and the notification obligation for persons willing to benefit from the limited network exclusion under PSD II

On 18 May 2022, the CSSF published [CSSF circular 22/812](#) (the CSSF Circular) through which it integrates into its administrative practice and regulatory approach the EBA guidelines¹ on the so-called limited network exclusion (LNE) under Directive 2015/2366 (PSD II) (the Guidelines). The LNE enables service providers to issue certain payment instruments or e-money without requiring a licence under PSD II. In this context, the CSSF also published a [press release](#) with further details on the notification process for persons willing to benefit from the LNE (the Press release) and a specific template [notification form](#).



The concept of LNE and key aspects of the Guidelines

The LNE

- Set out in article 3(k) of PSD II², the LNE excludes from the scope of PSD II services based on specific payment instruments that can be used only in a limited way³, provided that these instruments meet one of the following conditions:
 - the instrument allows the holder to acquire goods or services (products) only within the premises of the issuer or within a limited network of service providers under direct commercial agreement with a professional issuer;
 - the instrument can be used only to acquire a very limited range of goods or services; or

¹ [EBA guidelines on the limited network exclusion under Directive 2015/2366 \(EBA/GL/2022/02\)](#). These guidelines aim to address inconsistencies on how the LNE has in the past been applied across the EU, foster supervisory convergence and ensure transparency for service providers and customers alike.

² Transposed by article 3 (k) of the Luxembourg act of 10 November 2009 on payment services, as amended (the **PSA**).

³ Article 1(4) of the revised Electronic Money Directive provides that it does not apply to monetary value stored on instruments excluded under article 3(k) of PSD II.

- the instrument is 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.
- Article 37(2) of PSD II⁴ sets 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 PSD II to notify the respective national competent authority (**NCA**) that in turn, shall assess whether the activity falls under the LNE or whether it requires authorisation as a payment or e-money institution.

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

- Guideline 1 defines what is meant by “specific payment instrument” within the meaning of article 3(k) of PSD II, clarifying that “payment instruments” for the purposes of the LNE are payment instruments as defined by article 4(14) of PSD II. Therefore, issuers can benefit from the LNE not only when they offer physical payment instruments (e.g. plastic cards), but also when they offer other means of payment (e.g. digital payment apps);
- The issuer of a payment instrument must limit the use of such instrument by applying both “contractual” and “technical” restrictions to justify the exclusion. This means that the sole use of a contractual agreement does not suffice as a restriction, making it practically impossible to justify the exclusion solely by providing a legal restriction, e.g. through the use of general terms and conditions.

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

- Guideline 2 describes the criteria for a network of service providers to be considered “limited” under article 3(k)(i) PSD II by setting out certain “criteria” that must be taken into account by NCAs and “complementary indicators” that should be considered⁵;
- It also clarifies that a limited network can consist of physical stores only, online stores only or a combination of physical and online stores. However, Guideline 2 provides that NCAs should not make a distinction between the types of stores and should not require the type of products provided in online stores to be dependent on the type of products offered in physical stores or vice versa.

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

- Guideline 3 clarifies that “premises” within the meaning of Article 3(k)(i) of PSD II is limited to physical premises of the issuer. Accordingly, payment instruments allowing the holder to acquire goods or services only in the premises of the issuer cannot be used in online stores⁶.

⁴ Article 3-1 (1) of the PSA.

⁵ However, in its final report on the Guidelines, the EBA clarifies that both the criteria and the indicators are mandatory for all business cases and that the indicators are equally important and have the same weight in the assessment by NCAs.

⁶ Payment instruments intended to be used in online stores can, of course, still fall under another subcategory of the LNE, if they meet the respective requirements.

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

- Guideline 4 provides guidance on the meaning of “very limited range of goods or services” under article 3(k)(ii) of PSD II, emphasising that there must be a “functional connection” between the goods and/or services that can be acquired with the payment instrument. When assessing the functional connection between the goods and/or services, NCAs should take into account that a specific category of goods and/or services with a common purpose has been identified by the issuer. This functional connection can also exist between physical and digital products;
- Like Guideline 2, Guideline 4 sets out several complementary indicators that NCAs should consider when assessing whether a payment instrument falls under article 3(k)(ii) of PSD II.

Guideline 5: Provision of services under Article 3(k) of PSD II

- Guideline 5 clarifies that regulated payment service providers and e-money institutions can also make use of the LNE, provided that these entities distinguish the regulated payment services/e-money business from the services excluded under article 3(k) of PSD II in a clear and easily recognisable way (including through the provision of a specific visual manifestation);
- In addition to this, they must inform the user of the excluded 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 the PSD II.

Guideline 6: Notifications under Article 37(2) of PSD II

- The notification procedure was one of the major concerns for the EBA when drafting the Guidelines, as there were significant differences across the Member States with respect to its implementation. Guideline 6 now describes the notification procedure under Article 37(2) of PSD II, specifying, amongst others, the information which needs to be included in the notification, the assessment criteria of the NCAs, and the calculation of the threshold;
- The issuer of an excluded payment instrument needs to submit the notification to the relevant NCA in each Member State where the users of the payment instruments are located and where the threshold is exceeded. The threshold is to be calculated for each Member State separately by combining all payment transactions executed in the respective Member State;
- Some NCAs require an annual resubmission of the notifications under Article 37(2) of PSD II. However, Guideline 6 provides that the notification is to be submitted by the issuer only once, unless substantial changes occur, e.g. where the issuer intends to increase the number of providers of goods and/or services, the issuer intends to offer services under Article 3(k)(i) or (ii) of PSD II based on an instrument not covered in the original notification, or the previously notified specific category of goods and/or services with a common purpose is intended to be changed.

Guideline 7: Limited network under Article 3(k)(iii) of PSD II

- Guideline 7 clarifies that payment instruments under Article 3(k)(iii) PSD II do not need to fulfil the requirements under Article 3(k)(i) and (ii) PSD II. It follows that payment instruments are eligible for this exclusion, even if they are not “limited” within the meaning of the other types of exclusions of the LNE.



The notification obligation under article 3-1 (1) of the PSA applies to all persons providing in Luxembourg services based on specific instruments that can be used only in a limited way where certain thresholds are reached

Persons in scope

- All concerned persons regardless of the sector (i.e. financial sector or not) and their regulatory status (i.e. regulated or not);
- Grandfathering provision: persons currently benefiting from an exclusion and that already submitted a notification to the CSSF shall submit a new notification as soon as possible and at the latest by 1st September 2022.

Services in scope

- Services based on specific instruments as per the criteria defined in article 3 (k) (i) or (ii) of the PSA, as further detailed in the Guidelines;
- In its Press Release, the CSSF lists a few examples: store cards, gift cards, petrol cards, shopping centre cards, meal vouchers, transport cards, membership cards with payment functionality, or other similar instruments.

Geographical scope

- Services provided in Luxembourg;
- In its Press Release, the CSSF clarified that the notification obligation shall apply whenever the specific instrument can be used from and in Luxembourg.

Thresholds triggering the notification obligation

- The total value of payment transactions executed over the preceding 12 months exceeds the amount of EUR 1 million.



The requirements of the CSSF Circular apply as from 1st June 2022 and notifications shall be carried out using the CSSF template

The notification obligation as per the requirements of the new CSSF Circular will be applicable as of 1st June 2022. The notification must be submitted to the Innovation, Payments, Market Infrastructures and Governance (**IPIG**) department of the CSSF using the specific CSSF template form within one month from the moment the conditions are met⁷.

Persons that already benefit from the exclusion have, as seen above, until 1st September 2022 to submit a new notification. In this context, those persons should (re)consider whether their services still fall under the LNE as interpreted in the Guidelines.

⁷ In case of questions on this exclusion, the IPIG department may be contacted at ipig@cssf.lu

For further information on the topic, please reach out to your usual A&O contact, or any of the below relevant contacts.



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