

The persisting need for a harmonised approach to LNE notifications under PSD2



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Introduction

Fuel cards are not payment instruments, and it is Fleet Card Europe's (FCE) view that they should be out of scope of PSD2. While currently some Member States also believe that fuel cards are out of scope of PSD2, others classify fuel cards under Article 3 ("Exclusions"). The continued lack of harmonisation on the interpretation of notification requirements under Article 3(k) means that fuel card issuers are dealing with a patchwork of divergent national procedures.

The lack of a harmonised approach across Member States was recognised as an issue by the EBA, who published guidelines on the limited network exclusion (LNE) under PSD2 in February 2022. Despite these updated guidelines, the envisioned clarity and introduction of a more uniform approach has not been realised and there continues to be a lack of harmonisation between Member States on the application of the LNE notification procedures.

Continued divergence in the application of the LNE does not align with the core principles of the internal market and puts an undue administrative burden on service providers which are currently deemed by Competent Authorities to fall under LNE. It is FCE's strong view that the EU needs to create a harmonised approach to the treatment of fuel cards and LNE notification requirements.

EBA guidelines on the limited network exclusion under PSD2

On 24 February 2022, the European Banking Authority published [Guidelines on the limited network exclusion under PSD2](#) to apply from 1 June 2022. These guidelines aimed to ensure the common, uniform and consistent application of European Union law in relation to **Article 3(k) of Payments Services Directive 2 "Limited Network Exclusion"**, which prescribes 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."*

In addition, Article 37(2) of PSD2, sets a threshold of €1 million for the value of payment transactions, which, if exceeded, would require issuers excluded under Article 3(k)(i) or (ii) of PSD2 to notify the

respective national competent authority (NCA). NCAs, in turn, assess whether the activity qualifies as a limited network or whether it requires authorisation as a payment or electronic money institution.

The 2022 guidelines arose due to ongoing questions on the interpretation and application of the requirements of Article 3(k) LNE and the related notification requirements, divergent practices applied across Member States and the need for transparency for consumers who are sometimes not aware that the protection under PSD2 does not apply to excluded instruments.

The updated guidelines clarified 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 well as the nature of the assessment indicators, i.e., that all of them are mandatory for the assessment by the NCA and that each can be used as a reason to reject granting the exclusion.

However, despite the updated guidelines, there continues to be a lack of harmonisation around notification procedures in the different EU Member States, with several EU Member States not agreeing to comply with the guidelines and, those who have agreed to comply, interpreting and applying the notification requirements differently.

The impact of a continued lack of harmonisation on the fuel cards industry

Fuel cards are not payment instruments as the authentication process that legitimises fuel card users is separate to the payments process. Fuel cards specifically do not initiate the transfer of funds and are not consumer focused, predominantly being used on a business-to-business basis. Rather, fuel cards are an identification instrument which by initiating a chain of purchases give access to a very limited range of goods or services. FCE believes that fuel cards should be out of scope of PSD2 entirely, however, fuel cards are currently included by certain NCAs, falling under the limited network exclusion under Article 3 ("Exclusions"). Out of caution, FCE members have notified NCAs in order to fulfil any potential obligations.

The continued lack of harmonisation on the interpretation of notification requirements under Article 3(k) means that fuel card issuers must continue to navigate a patchwork of divergent national procedures, which, in the experience of FCE members, vary significantly from country to country.

Variations include timelines, details that service providers are required to provide as part of activity description, or the frequency of the submission. Application forms vary from short and standardised ones paired with prompt reactions from the responsible NCA to very burdensome ones that require the continuous submission of information over an extended period. We believe that it is crucial that the treatment of exempted notification requirements under Article 3(k)(i) and Article 3(k)(ii) be harmonised to create a "level playing field" within the internal market, as the current, disintegrated approach, as recognised by the EBA, continues to place an unduly high administrative burden on businesses such as those of our members.

Examples of lack of harmonisation

Below outlined are examples of the lack of harmonisation for LNE notification requirements, which have been experienced by FCE members:

- **Lack of standardised application forms:** numerous NCAs provide a form which companies wishing to be notified under the LNE are required to complete. This is the case in Austria, the Czech Republic, France, Germany, Ireland, and Spain for instance. Each country, however, has its own form - there is no standard template - which in some cases, is only available in the local language. The information which applicants are required to provide in completing these forms varies from country to country. In several countries an excerpt from the commercial register must be included, for example in Austria, Hungary, and Spain. Spain, Austria, and Liechtenstein require further documentation in addition to the application form. Not only do the form requirements of each NCA diverge but also the way forms are to be approved and submitted, for example, in Ireland, Finland, Luxembourg, Estonia and Germany the form can be submitted online, whereas in Lithuania, Hungary, Greece and Portugal an original of the notification needs to be signed by company representatives and sent via registered mail or courier.
- **Lack of any application form or portal:** many NCAs do not have a standard form or portal through which an LNE application can be made. This is the case in Belgium, Estonia, Lithuania and Cyprus, for example. As such the methodology of submitting LNE notifications in these countries remains unclear. Some members have sought to address this issue by sending letters with key information which could be relevant for the application. Nevertheless, it would be more conducive if NCAs determined how an application should be made, rather than the applicants themselves. There is also a great deal of divergence in terms of the follow-up questions asked by NCAs following the successful submission of an LNE notification; some are interested in transaction volumes, others wish to know more about different fuel card types in a product portfolio, how the buy/sell business model works under which fuel card issuers operate or how the settlement process works.
- **Varying response times.** there is an overall lack of transparency about the process. For example, it is unclear whether LNE applicants should expect an acknowledgement of receipt of their application. In many countries, our members report there to have been no acknowledgement that their application has been received, despite having made their submissions by the deadline on 1 September 2022, as required. It is also unclear how long the entire application process will take, even approximately.

Examples of FCE member experience of LNE notifications in different EU Member States

Belgium:

National Bank of Belgium	No annual notification requirements
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While the National Bank of Belgium accepted the standard package of information supplied by members during the beginning of their application processes, the authority then advised a member that they do not need to apply as fuel card issuers do not need to be regulated. In late October, following a letter from a member for information a couple of months prior, the NBB responded that the original application constituted an “adequate notification format” but asked for an indication of which category the member would classify its product/service, with fuel cards being classed as “Registration Instruments” a terminology not used by other NCAs

France:

Banque De France - ACPR	Annual notification requirements
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For our members, the experience of applying for LNE in France has been more time consuming than in any other country, with one member citing that the process has lasted for 3 years in total. This is because the ACPR has asked for a great deal of sensitive information during its decision-making process, with over 100 individual queries asking for, among other things, flow charts, lists, detailed overviews, copies of contracts, forecasts, business plans, banking arrangements, financial statements. Unlike other NCAs, ACPR takes a prudential approach to LNE applications and as such, the regulator said a very high level of information was required to make its decision. This process has resulted in high legal costs and a disproportionate amount of time commitment from members.

Denmark:

Finanstilsynet	No annual notification required
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Denmark does not accept the catalogue of goods and services (“everything that moves the car”) negotiated by the German BaFin with the fuel card industry, as the functional connection of the goods and services listed in this catalogue is denied.

Germany:

BaFin	No annual notification required
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The BaFin application was relatively straightforward, with minor additional questioning. Some members were also required to provide our oil company reseller contracts. Other members have notifications which are still pending.

Ireland:

Central Bank of Ireland	Annual notification required
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The Central Bank of Ireland supplied members with a comprehensive application form. The form demonstrated that it understood the fuel card business model. There were no further queries ahead of granting of LNE.

Italy:

Bank of Italy	Annual notification required
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The Bank of Italy application was straightforward, with standard information being accepted, along with a number of clarification questions.

Netherlands:

Dutch Central Bank - DBB	No decision to-date, no annual notification required
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The application to the DBB was relatively straightforward however, beyond confirmation of receipt there has been no further communication.

Poland:

Komisja Nadzoru Finansowego	No annual notification required
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Poland considers fuel cards as out of the scope of PSD2 and argue that fuel cards issuers were not meant to submit notifications for such identification products in the context of LNE.

Portugal:

Banco De Portugal	No decision to-date, annual notification required
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The Bank of Portugal was slow to communicate on the LNE application process. Members applied via a moderately detailed 8-page application form and declaration in early 2020 but have yet to receive a formal response.

Spain:

Bank of Spain	Annual notification required
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The process with the Bank of Spain was similar to Portugal and was done through an application form. In a member's experience LNE was initially awarded without much delay and subsequent submissions have followed been similar

Outside of the above presented examples, a number of NCAs have not yet responded to FCE members following re-submissions, so it remains unclear what their position is.

Recommendation

We call for further harmonisation and information exchange among NCAs. While we appreciate the initial administrative effort this could entail, we believe this will lead to efficiencies for all parties and support a truly coordinated approach across the EU and EEA.

This would be particularly helpful in fostering timely decisions for approval or rejection of applications within agreed standard timeframes. Should this pressing issue not be addressed, the current regime of 30 largely diverging application processes will continue to be the norm.

Conclusion

The absence of a payment mechanism, the accounting and contractual mechanics that have governed this industry for several decades and the risk of default assumed by fuel card issuers, all actively argue for not considering a fuel card as a payment instrument, and thus excluding it from the Payment Services Directive.

A lack of harmonisation around LNE notifications renders the process of notification across the EU/EEA burdensome and unclear for fuel card issuers. It is our strong view that EU policymakers need to create a harmonised notification process.

While the EBA Guidelines, published in February 2022 aimed to achieve further harmonisation of the LNE notification process, this has not occurred and compliance with the guidelines remains inconsistent, with not all countries agreeing to comply, and those who agreed to comply continuing to operate divergent notification processes and administrative procedures, some examples of which we have highlighted in this document.