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Re	Response to EBA's consultation on the draft guidelines limited network exclusion under PSD2

I. INTRODUCTION

1. With great interest, we have taken note of the Draft Guidelines on the limited network exclusion under PSD2 of 15 July 2021 (**Draft Guidelines**) as prepared by the European Banking Authority (**EBA**). We are pleased to see that on a European level further explanation will be given on the scope and application of this limited network exclusion (**Exclusion**).

2. Finnius advocaten B.V. is a boutique law firm based in Amsterdam, the Netherlands, focusing exclusively on financial supervision law. An important part of our client base consists of payment institutions, payment service providers and electronic money institutions, including entities using the Exclusion. In addition, we advise many market parties on the issuance of payment instruments (such as gift cards, fuel and mobility cards) and the use of the Exclusion. Furthermore, we are in close contact with, among others, the Dutch Gift Card Association and the Dutch Central Bank.

3. We are pleased with the opportunity to respond to EBA consultation and hope that this will contribute to your considerations when finalizing the Guidelines on the Exclusion. In this consultation response, we first discuss a number of general comments in Section II and subsequently provide our comments on specific parts of the Draft Guidelines in Section III. Our comments are structured on the basis of the reporting methods as outlined by EBA in Section 1 of the Draft Guidelines.

II. GENERAL REMARKS

4. As a first general comment, we would like to express that we appreciate the fact that EBA has taken the initiative to issue guidance on the Exclusion and consult the draft version. We have experienced that market parties face divergent interpretations by supervisory authorities in the various member states and we have also noticed that there is a lack of (practical and clear) guidance concerning the interpretation and use of the Exclusion. This can lead to

confusion among market participants and – even more important – to an uneven playing field because the Exclusion is applied differently across EU member states (e.g. Germany versus the Netherlands). Against the background to promote further harmonisation of the internal market, which is one of the core objectives of PSD2, we welcome the arrival of this guidance document of EBA.

5. An important goal in this context in our view is that the final Guidelines provide for criteria that are as clear and precise as possible, with the aim of bringing greater convergence to a number of aspects in relation to the Exclusion. By formulating criteria that are as clear and precise as possible, national supervisors will also be able to interpret and apply the Exclusion in the most uniform manner possible. This also enhances legal certainty as well as a level playing field for market participants who use, or want to use, the Exclusion.

III. COMMENTS TO THE DRAFT GUIDELINES

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

COMMENT 1*: *no geographical restriction (paragraph 10 Draft Guidelines and guideline 1.12)

6. In paragraph 19 of the Draft Guidelines, EBA notes that no geographical restrictions should be imposed on the use of the Exclusion. Guideline 1.12 is introduced in this context. We fully support this view (which we believe is in line with PSD2) and welcome highlighting this starting point in EBA Guidelines. This specific Guideline makes clear how the Exclusion relates to cross-border activities. Therefore, we request EBA to maintain this Guideline with the explanation of the 'cross border effect'.

COMMENT 2*: *no use of multiple components possible under the Exclusion (paragraph 21 Draft Guidelines and guideline 1.11)

7. In Guideline 1.11 it is stated that the exclusions based on Article 3(k) of PSD2 cannot be combined at payment instrument level with another exclusion from the scope of application of PSD2, including other exclusions under Article 3(k) of PSD2. We are of the opinion that this statement is not correct from a legal perspective and also is not in accordance with the PSD2 directive. It is the type of activity with all case-related circumstances that determine if, and if so what exclusion is applicable. This means that more than one exclusion may be applicable based on the circumstances at hand. This cannot be ignored. However, we do understand that an entity that notifies the supervisory authority (when meeting the EUR 1 million threshold) that it uses the Exclusion, should explain on the basis of what specific exclusion it seeks registration as an exempt entity. The supervisory authority can then assess whether or not the criteria relevant for that exclusion are met. We would like to suggest EBA to reconsider and refine its statement.

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Q2. Do you have comments on Guideline 2 on the limited network of service providers under Article 3(k)(i) of PSD2?

COMMENT 3*: *further clarification on the criterion 'limited network of service providers' (general remark and guideline 2.1)

8. In the Draft Guidelines a list has been drawn up reflecting potential criteria for assessing the existence of a 'limited network'. In doing so, EBA has considered which criteria should or should not be taken into account in such an assessment. In our view, the presentation of a long list of criteria, which then are discussed in the context of their applicability, is of great value. This because it shows what criteria have been taken into account and why a specific criterion is considered relevant or not. This helps to understand the line of reasoning and the choices that have been made. We strongly recommend keeping this type of information (and level of detail) in the Guidelines.

9. The criteria under Guideline 2.1 provide more guidance than has been the case so far. However, we think that – even under the criteria presented – there remains a lot of room for interpretation by the supervisory authorities with respect to the application of the criteria in relation to a specific case. After all, the margins for the supervisory authorities to give an interpretation to the concept of 'limited network' are still wide, while it is precisely this aspect where market parties seek more clarity and clear guidance with respect to the question of whether or not the network they are part of qualifies as a 'limited network'. Against this background, we suggest to also implement a mechanism where supervisory authorities are transparent about their interpretations and seek input from EBA in borderline cases. This would support achieving greater convergence in the use of the Exclusion throughout the EU.

10. We kindly request EBA to take another critical look at the criteria included in Guideline 2.1, and in particular to consider whether it is possible to further quantify one or more criteria. This could include, for example, the inclusion of a threshold with respect to the number of connected service providers (for example a threshold of 100 connected service providers), which in any event would qualify as a 'limited network'. This would establish a clear boundary for market parties participating in smaller networks, also taking into account that the network does not grow unlimitedly and with due observance of the other criteria. These market parties would then be able to make use of the Exclusion, with the result that a substantial proportion of market parties in smaller networks would be helped without impairing the limited nature of the Exclusion.

COMMENT 4*: *the formulated criteria of a 'geographical area' (paragraphs 24-26 Draft Guidelines and guideline 2.1)

11. One of the criteria used by EBA for assessing the existence of a limited network relates to the geographical area. EBA uses a flexible approach in this regard. The criterion also raises new questions of interpretation that remain unanswered.

12. EBA uses various criteria, not all of which are equally clear. These include the following:

- the term "specific region": this is a relatively vague delineation because in practice a specific region can vary in size;
- it is unclear how exactly the term "local producers" relates geographically to "specific region". The latter definition implies a wider scope than "local producers";
- finally, the definition "town" leaves much room for discussion and inconsistent application by national supervisors. A "town" can vary from a small municipality to a metropolitan area.

13. The above shows that, in practice, new terminology is likely to lead to new questions of interpretation, with the result that supervisory authorities will deal with them differently. The current interpretation of the 'geographical area' criterion is in our view too vague and does not lead to a proper delineation of the 'limited network'. A means of addressing this potential issue could be a further clarification by EBA regarding the terminology referred to above. For instance by more precisely defining a 'specific region' or 'town', possibly accompanied by a more extensive list of concrete examples. If this approach is not considered feasible, then consideration could be given to applying the geographical criterion only to the use of the payment instrument and omitting the criterion for the type of connected service providers.

***COMMENT 5*: further clarification on what can be considered as 'common brand' (paragraph 29 Draft Guidelines)**

14. We welcome the use of the criterion "the use of a common brand" because this criterion provides more guidance and clarity with respect to assessing the existence of a 'limited network'. Based on EBA's further explanation under margin number 29 of the Draft Guidelines, it is clearly indicated that this criterion is met at the moment that the service providers appear under a certain brand, preferably by visual manifestation.

15. We believe that the Guidelines will benefit from further clarification of this criterion by giving several concrete examples. It goes without saying that this criterion should comprise different providers working under the same franchise system, as referred to in paragraph 25 of the Draft Guidelines. But there are numerous options of parties cooperating and reaching out to the public under one brand or label. We are of the opinion that also other structures focusing on a close cooperation and using one brand or quality mark should be able to use the Exclusion as a limited network. Therefore, we recommend to not restrict this criterion to participants in a franchise formula, but also make it possible that other forms of parties cooperating under a common brand, can benefit from the Exclusion. We request EBA to include in its explanation of this common brand criterion one or more examples as to when this is or can be the case, at the very least thinking of certain quality marks (e.g. for (on association of) specialist garage companies). In such a case, professional craftsmen are united and propagate a certain quality mark, but not necessarily on the basis of a formal franchise system.

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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?

COMMENT 6*: *the identification of what should be considered as 'very limited range of goods and services' (paragraphs 43-46 Draft Guidelines and guidelines 4.1 and 4.2)

16. Based on the approach taken by EBA and laid down in guideline 4.1, a 'leading good and/or service' must be identified and established. Based on EBA's explanation, we understand that this was based on a consideration of three potential approaches (we refer to paragraphs 43-46 Draft Guidelines). EBA then considered five different options in Section 5 of the Draft Guidelines, including option 2.2 ('Focus on a functional connection between a leading product and/or service and connected products and/or services') and option 2.3 ('Focus on a functional connection between goods and services based on a case-by-case assessment'). Eventually, EBA opted for option 2.2.

17. We have some comments on the approach chosen by EBA:

- Recital (13) PSD2 stipulates that this part of the Exclusion relates to goods and/or services that are 'functionally connected'. In the Draft Guidelines, EBA has introduced the criterion 'leading product and/or service'. This leads to a classification between goods or services, while in our opinion this does not follow from PSD2. On the basis of the Draft Guidelines the main product must be selected, with additional products linked to it. However, in our view, the wording 'functionally linked goods and/or services' relates to the mutual relationship between products and services, without a product having to be leading. This interdependence must be analysed from the function of the products or services. Due to the option chosen by EBA, we think this part of the exception is restricted more than necessary, while PSD2 does not seem to provide a basis for this. Furthermore, it may lead to additional interpretation issues.

- EBA justifies its choice for a 'focus on a functional connection between a leading product and/or service and connected products and/or services' as follows: "*Option 2.2 provides the most prescriptive approach and thereby is to provide the highest protection for consumer, to accommodate different business models, while facilitating the assessment for CAs and not introducing additional burden to service providers*". In our view the introduction of the criterion "leading product and/or service" does not provide for arguments that consumers are better protected. Also, the group of connected products and/or services may develop over time and a product qualified as leading may no longer be leading. We suggest focusing on the common denominator of connected products and/or services.

18. In our opinion, market parties will benefit most from the focus on a functional connection between goods and services that will be assessed on a case-by-case basis by the national supervisor (option 2.3). This way, the position of market parties is done justice and their

business models are best accommodated with this option. In addition, this approach does not introduce any new terms for which PSD2 does not provide a (legal) basis. The argument that option 2.3 leads to additional administrative burden on the side of the supervisory authority does not hold in our view, because in practice also under option 2.2 the cases will have to be submitted for evaluation to the supervisory authority when an obligation to notify arises under the Exclusion.

19. To provide as much guidance as possible to supervisory authorities and market participants as to when a functional connection between goods and/or services exists or may exist, we suggest that EBA considers formulating a - non-exhaustive – list of examples of such product and/or service groups. This will in our view lead to a better understanding of the possibilities and scope under the Exclusion. We are convinced that the alternative method described above is the best optimum with respect to the interpretation and application of this element of the Exclusion.

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

***COMMENT 7*: calculation threshold with regard to the notification requirement (paragraphs 61-62 Draft Guidelines and guideline 6.7-6.8)**

20. EBA states in guideline 6.7 that in calculating the thresholds referred to in article 37 (2) PSD2 at the level of each service provider, all payment transactions must be combined when the service provider provides more than one specific payment instrument.

21. We would like to comment on this approach:

- In paragraphs 61-62 Draft Guidelines EBA justifies that the approach chosen is in line with the provision of Article 37(2) PSD2. However, the calculation method as proposed by EBA does in our opinion not follow from the wording of this provision or from the rationale behind PSD2. The first sentence of Article 37(2) PSD2 EBA is referring to, does not support the starting point that a service provider must cumulate the volume of all payment transactions of different payment instruments it has issued in case the Exclusion applies to each single payment instrument.

- In paragraph 62 of the Draft Guidelines EBA states that the approach it has chosen would allow capturing payment instruments that may fall under the scope of PSD2 even though the transactions carried out with them individually do not necessarily exceed the thresholds set out in Article 37(2) of PSD2. To our understanding, the EUR 1 million threshold has been introduced to give supervisory authorities more insight and grip on unregulated entities using the Exclusion, while an important side effect is that small service providers with insignificant payment volumes making use of the Exclusion are not subject to a notification requirement. The accumulation proposed by EBA means that this starting point is abandoned, resulting in the situation that small service providers issuing different payment instruments with insignificant payment volumes are

also brought under the notification requirement. In our view, this does not make a valuable contribution to reaching the objectives of PSD2. Moreover, it does increase the administrative burden for smaller service providers. Also, each payment instrument will have to be assessed on its own merits whereby one is an instrument within a limited network and the other is related to a limited range of goods and/or services.

- Furthermore, EBA suggests that non-cumulation contributes to circumvention attempts. In our opinion, this is incorrect because the question whether a licence obligation exists under PSD2 does not relate to (cumulation of) the payment volume(s). It is the actual activity performed and the nature of the payment instrument involved which is most relevant for the assessment of whether the activities require a licence under PSD2.

- Finally, the cumulation of payment volume proposed by EBA does not take away possible concerns in this respect. Service providers can structure their activities in a way that each payment instrument issued under the Exclusion is linked to a separate legal entity. The approach suggested by EBA is in our view a good example of over-regulating the market.

22. We would like to suggest amending Guideline 6.7 in such a way that the payment volume threshold of EUR 1 million of a service provider is not cumulated when different payment instruments are issued by one entity (whereby each payment instrument could make use of the Exclusion). This threshold should, in our view, rather be linked to the payment volume of one specific payment instrument issued by an issuer.

***COMMENT 8*: policy changes and impact on existing registrations (relating to paragraph 67 Draft Guidelines and guideline 6.9)**

23. The Guidance is likely to impact the interpretations and case handling by supervisory authorities going forward. This raises the question whether or not the supervisory authorities will in a way grandfather the cases where entities are registered as exempt entities using the Exclusion, or not. It goes without saying that from a 'principle of legal certainty' perspective that grandfathering would be the preferred step. Also, there may be cases where a supervisory authority has assessed a case and concluded that a set-up does not meet the criteria to use the Exclusion, whereas this would be possible under the new Guidelines. We assume that the entities involved may ask the supervisory authority involved to reassess their case and welcome a statement from EBA about its expectations vis-à-vis the supervisory authorities in this respect.

Yours faithfully,
Finnius advocaten B.V.