

PERIMETER GUIDANCE (PAYMENT SERVICES) INSTRUMENT 2021

Powers exercised

- A. The Financial Conduct Authority (“the FCA”) makes this instrument in the exercise of the power in Regulation 120 (Guidance) of the Payment Services Regulations 2017.

Commencement

- B. This instrument comes into force on 30 November 2021.

Amendments to material outside the Handbook

- C. The Perimeter Guidance manual (PERG) is amended in accordance with the Annex to this instrument.

Citation

- D. This instrument may be cited as the Perimeter Guidance (Payment Services) Instrument 2021.

By order of the Board
25 November 2021

Annex

Amendments to the Perimeter Guidance manual (PERG)

In this Annex, underlining indicates new text and striking through indicates deleted text.

15	Guidance on the scope of the Payment Services Regulations 2017
...	
15.5	Negative scope/exclusions
...	
Q40.	Which types of payment card could fall within the so-called “limited network” exclusion (see PERG 15, Annex 3, paragraph (k))?
<p>The “limited network” exclusion forms part of a broader exclusion which applies to services based on specific payment instruments that can be used only in a limited way and –</p> <ul style="list-style-type: none"> (a) allow the holder to acquire goods or services only in the issuer’s premises; (b) are issued by a professional issuer and allow the holder to acquire goods or services only within a limited network of service providers which have direct commercial agreements with the issuer; (c) may be used only to acquire a very limited range of goods or services; or (d) are valid only in the United Kingdom, are provided at the request of an undertaking or a public sector entity, and are regulated by a national or regional public authority for specific social or tax purposes to acquire specific goods or services from suppliers which have a commercial agreement with the issuer. <p><u>It is an overarching requirement for the exclusion to apply that the payment instrument can be used only in a ‘limited way’. This means that even if a payment instrument could be said to fall under one of the paragraphs (a) to (d) above, it may not qualify for the exclusion if, on a reasonable view, it is not sufficiently limited. In particular, the recitals to PSD2 (which the PSRs 2017 implemented) indicate that the following should not be considered ‘limited’ (see recitals 13 and 14 PSD2):</u></p> <ul style="list-style-type: none"> <u>payment instruments that can be used to acquire goods and services within more than one limited network;</u> <u>payment instruments that can be used to acquire an unlimited range of goods and services;</u> <u>specific-purpose instruments which become general-purpose;</u> 	

instruments that can be used in a network of service providers which is continuously growing.

Generally, it will not be sufficient to rely on the customer terms and conditions alone to demonstrate that an instrument can only be used in a limited way. We would expect providers to take such steps as are reasonably practicable to ensure the limitation is effective, including functional restrictions where technically possible. The limitation should also be reflected in the marketing of the product.

As regards (a), examples of excluded instruments could include:

staff catering cards - reloadable cards for use in the employer's canteen or restaurant;

tour operator cards - issued for use only within the tour operator's holiday village or other premises (for example, to pay for meals, drinks and sports activities);

team related cards - cards that can only be used at a specific stadium or team's website;

store cards - where the card can only be used at the issuer's premises or website (so where a store card is co-branded with a third party debit card or credit card issuer and can be used as a debit card or credit card outside the store, it will not benefit from this exclusion).

While store cards that can be used on a department store website to purchase items from concessions may benefit from the exclusion, payment instruments that can be used on online marketplaces are unlikely to do so. This is because the scale of the operation and the very broad range of the goods and services that can be sold or the sellers that can sell through such marketplaces mean that instruments that can be used on them are unlikely to be sufficiently limited.

~~On the other hand, in~~ In our view, 'gift cards' where the issuer is a retailer and the gift card can only be used to obtain goods or services from that retailer are not payment instruments within the meaning of the PSRs 2017. This is because these basic gift cards do not initiate payment orders; payment for the goods or services is made by the customer to the retailer of the goods in advance, when the card is purchased from the retailer. Accordingly, this exclusion is not relevant to them.

In order to meet the test in (b), recital 13 of PSD2 states that the instrument must be limited to use at a 'specific retailer or specific retail chain, where the entities involved are directly linked by a commercial agreement which for example provides for the use of a single payment brand and that payment brand is used at the points of sale and appears, where feasible, on the payment instrument that can be used'. It also states that to help limit risks to consumers, it should not be possible to use the same instrument to make payment transactions to acquire goods and services within more than one limited network.

Recital 14 of PSD2 goes on to state that 'instruments which can be used for purchases in stores of listed merchants should not be excluded from the scope of this Directive as such instruments are typically designed for a network of service providers which is continuously growing.'

In our view, examples of excluded instruments falling within (b) include:

transport cards - where these are used only for purchasing travel tickets from providers within a closed system (for example, the Oyster card which provides access to different service providers within the London public transport system);

fuel cards (including pan-European cards) - where these are issued for use at a specified chain of fuel stations and forecourts at these stations;

membership cards - where a card can only be used to pay for goods or services offered by a specific club or organisation;

store cards - where the card can be used at a specified chain of stores sharing a common brand, whether under common ownership or under a franchise agreement; between the store owners and the issuer.

store cards - where the card can be used at stores under common ownership, even where they do not share a common brand;

a card that can only be used to buy goods or services within a specific university campus.

We would not generally expect ‘city cards’ to fall within this exclusion, to the extent that participation is open to all a city’s shops and businesses.

‘Mall cards’ may fall within this exclusion if, on the facts, the criteria are met. In our view you will not be able to take advantage of this exclusion unless: it is made clear in the relevant terms and conditions of the card that the purchaser of the value is only permitted to use the card to buy from outlets of merchants located within that particular shopping centre with whom you have direct commercial agreements located within a particular shopping centre; and the card is functionally restricted to one shopping centre. A card that can be used at a number of different shopping centres, or where use is restricted only by the terms and conditions that apply to the card and is not functionally restricted is unlikely to fall within this exclusion. There must be direct commercial agreements in place between the issuer and the merchants – this will not be satisfied where the merchant’s agreement is with the shopping centre, a programme manager or a different entity in the issuer’s group and not the issuer.

Outside these cases there may be other situations where a network is sufficiently limited. In these cases, we will consider what factors constrain the growth of the network, and whether these are sufficiently robust and independent to ensure the overarching condition is met.

We also believe that placing an arbitrary cap on the number of firms that can be within a network, without any reference to the specific characteristics of the case, is not an appropriate approach. Similarly, we believe that a cap on membership numbers volunteered by an issuer without reference to any independent limitation will not be an appropriate approach.

Examples of where the network is not sufficiently limited include: trade associations that have membership criteria which are open and which could not therefore exclude continuous growth; and mobile app-based payment instruments which have an unlimited number of providers of goods and services.

In relation to (c), recital 13 states that it should only be possible to purchase a ‘very limited range of goods or services, such as where the scope of use is effectively limited to a closed

number of functionally connected goods or services regardless of the geographical location of the point of sale’.

Examples of instruments falling within (c) could be:

fuel cards - where these can only be used to purchase fuel and a closed number of goods or services that are functionally connected to fuel (such as engine oil and brake fluid), including where the cards can be used at multiple retail chains;

transport cards – where these are used only for purchasing travel tickets; ~~(for example, the Oyster card which provides access to different service providers within the London public transport system).~~

payment instruments that can be used only to purchase taxi journeys;

payment instruments that can be used only to purchase live entertainment tickets and services directly tied to live entertainment events;

payment instruments that can be used only to purchase digital content within an online game to pay developers of these games.

In our view, instruments falling within (d) could include:

pre-paid cards provided by local authorities to benefit recipients for use at a specified chain of grocery stores;

government-issued childcare vouchers.

Instruments for the purpose of this exclusion can include vouchers, mobile applications, cards and other devices.

Service providers relying on paragraphs (a) to (c) of this exclusion are required to notify the FCA where the total value of payment transactions executed through such services exceeds 1 million euros in any 12 month period as directed: see <https://www.fca.org.uk/firms/limited-network-exclusion>.

...	
Q41A.	In what circumstances are payments made via a mobile phone excluded?
<p>The ‘electronic communications exclusion’ (see PERG 15 Annex 2 paragraph (1)) applies to payment transactions resulting from services provided by a provider of electronic communications networks or services.</p> <p>For this exclusion to apply the service must be provided in addition to electronic communications services for a subscriber to the network or service and the payment must be charged to the related bill.</p> <p>Where the provider of the network or service allows the customer to pay for eligible transactions out of a prepaid balance that is also used to purchase the electronic</p>	

communications services, in our view this will amount to the payment transaction being charged to the related bill.

The exclusion only applies:

to the purchase of digital content and voice-based services (such as music and other digital downloads and premium rate services), regardless of the device used for the purchase or consumption of the digital content; or

when performed from or via an electronic device for donations to charity (for example SMS donations) or for the purchase of tickets.

In all cases the value of any single payment transaction must not exceed £40, and the cumulative value of payment transactions for an individual subscriber in a month must not exceed £240.

The exclusion does not only apply to purchases made via mobile phones. It could, for example, apply to the purchase of music streaming, news content or other digital services through a smart TV or set-top box if provided in addition to electronic communications services and charged to the related bill.

The exclusion does not apply to the purchase of physical goods.

A An electronic communications network or service provider providing services falling within the electronic communications exclusion must notify the FCA and provide it with an annual audit opinion that the transactions to which the services relate comply with the financial limits - as directed. See: <https://www.fca.org.uk/firms/electronic-communications-exclusion>. For the purpose of application of the financial limits, the FCA will expect notification on the basis of individual telephone numbers or SIM cards being treated as separate ‘subscribers’, rather than account holders.

~~In practice electronic network operators often do not deal directly with suppliers of digital goods and services, but via carrier billing platforms that act as intermediaries or aggregators. The PSRs 2017 make clear that where a network operator benefits from the exclusion with respect to a particular transaction, the provider of any other payment service resulting from that transaction will also benefit from the exclusion. The service provided by the billing platform to merchants will amount to a payment service (for example merchant acquiring or operation of a payment account) only where it results from transactions that do not fall within this exclusion.~~

Where a provider of a network or service sells subscribers additional goods or services itself (i.e. where it is acting as principal) this exclusion will not be relevant, as no payment service is being provided by the provider of the network or service even if the payment is charged to the related bill.

<u>Q41B.</u>	<u>I act as an intermediary between suppliers of digital goods and services and network operators. Does the electronic communications exclusion apply to me?</u>
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In practice, electronic network operators often do not deal directly with suppliers of digital goods and services, but via carrier billing platforms that act as intermediaries or aggregators.

The PSRs 2017 make clear that where a network operator benefits from the exclusion with respect to a particular transaction, the provider of any other payment service resulting from that transaction will also benefit from the exclusion (this is known as the “cascade”).

The service provided by the billing platform to merchants will amount to a payment service (for example, merchant acquiring or operation of a payment account) only where it results from transactions that do not fall within this exclusion.

All firms which form part of the cascade with respect to a particular transaction can benefit from the ECE for that transaction. However, if the firm at the start of the cascade does not comply with the conditions for the ECE, this will affect the other firms within the chain of providers. Since they cannot benefit from the cascade if the original transaction is not within the ECE, they will need to consider what action they need to take to avoid breaching the regulations, such as becoming authorised.

This may be a particular issue for phone-paid services where both ‘originating operators’ and terminating operators potentially provide payment services to their customers. Typically, the originating operator is the telecoms provider of the purchaser of the digital goods or services and the ‘terminating operator’ is typically the telecoms provider to the supplier of digital goods and services. A terminating operator’s carrier billing platform may for example involve the provision of merchant acquiring services to and/or operation of a payment account for a supplier.

Originating operators can directly ensure financial thresholds in the ECE conditions are not breached with respect to a particular transaction. For example, they can cap the cost of a call and put in place monthly spend caps. This will not be possible for terminating operators. As a result, they will need to consider how they can ensure that the ECE limits have not been exceeded if they wish to rely on the exclusion.