

UKGCVA meeting with FCA regarding notification under the limited network exemption

Date: **17 October 2018.**

At : Locke Lord, 201 Bishopsgate, London EC2M 3AB

Attendees: **FCA:** Shamma Khan, Senior Associate, Payment Services, Retail Authorisation and Clare Paget, General Counsel, FCA.

UKGCVA: Gail Cohen, Freddie Mills

UKGCVA Members: Jackie Barker (Consultant), Alex de Berry (National Book Tokens), Gareth Gillatt (Reward Cloud), Stuart Green (EML Payments), Chris Hurst (EML Payments), Sophia Knight (Asda), Siobhan Moore (Locke Lord), Nathan Naylor (Society of London Theatre), Juliette Savage (intu Properties), Martin Scott (Society of London Theatre), Eve Shaw (TJX Europe), Gary Simpson (Amazon), Tony Stacey (National Garden Gift Card), Neil Wake (flex-e-card), Dave Walsh (GVS), Angela Webster (SVM Global)

A. FCA Presentation

The FCA gave a power point presentation which set out the criteria for programmes that can be operated under both the Electronic Money Regulations 2011 (**EMR**) and Payment Services Regulations 2017 (**PSR**) Limited Network Exemption (**LNE**). Note the exemptions are the same as both were introduced by the Second Payment Services Directive (2015/2366). The FCA also set out the procedure for businesses to notify the FCA about such programmes, which is now required under EMR and PSR. Service providers who operate LNE programmes must notify the FCA if the total value of the payment transactions executed through such programme or made with the monetary value issued in any period of 12 months exceeds €1 million.

An LNE programme is one that is

“based on specific payment instruments that can be used only in a limited way and meet one of the following conditions:

(i) allow the holder to acquire goods or services only in the issuer's premises;

(ii) 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; or

(iii) may be used only to acquire a very limited range of goods or services

...”

The deadline to make the notification is **10 February 2019**. However if programmes currently meet the financial threshold requirements then businesses may submit their notification now.

Notification must be done through the FCA’s Connect system (its online portal). Cost of notification is £300.

Businesses must provide specific information in the notification, including:

- a description of each service provided in the UK that is considered to fall within the limited network exclusion; and
- the exclusion by virtue of which the services are not payment services

Information provided in the notification will be displayed on the FCA’s Financial Services Register.

Notifications must be made every 12 months while the financial threshold conditions are fulfilled.

B. Q&A Session

The FCA answered various questions from attendees. Points raised by the FCA in response to questions were:

- Businesses should submit their notification sooner rather than later. If the FCA has any questions it will raise them with the business.
- Businesses wishing to rely on the LNE for a “very limited range of goods or services” must be able to demonstrate the limitation. As per the FCA’s Perimeter Guidance (PERG), the goods or services that can be purchased must be effectively limited to a closed number of functionally connected goods or services regardless of the

geographical location of the point of sale. The example given in PERG is that a fuel card, may 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. The FCA will consider whether the operator of a programme has the technical ability to block gift cards being used to purchase goods or services outside of the limit range, but it does not view this as the deciding factor for qualification under this LNE limb.

- When a business submits its notification, it should provide all relevant evidence to demonstrate it meets the exemption, this includes, in the case of the LNE relating to a limited network of service providers, it recommends providing the contracts in place between the professional issuer and the service provider (or the template if they are substantially similar).
- When the FCA receives a notification, it will make an assessment and provide feedback to the applicant. There is statutory deadline within which the FCA must assess and make a decision, so if it has queries the FCA can raise them during the assessment phase. The notification period is to be used to engage in dialogue with the FCA before it makes its final decision.
- Whilst the notification is with the FCA, the applicant does not have to do anything.
- if nothing further to provide - only at that point will say nothing more you can do.
- If FCA agrees the programme falls within the LNE, it will confirm with the application and the entry will go on the FCA register. If not, it will explain to the application why it does not. Applicants can appeal any decision of the FCA through the Upper Tribunal.
- There is no European central database of registered LNE operators yet.
- The FCA does not intend to change the frequency of notification – it will be in notification on an annual basis.

C. Questions for FCA to consider further

A number of questions were raised but the FCA were not in a position to provide an answer and requested they be submitted to them for further consideration. These are set out below.

1. LNE interpretation

(i) With respect to gift card programmes that fall under the LNE of “a very limited range of goods or services”? Can the FCA confirm that “functional connection” between goods / services is only an example of demonstrating the limited range, but it is not the defining element required to qualify under this exemption? Businesses may issue gift cards that permit the cardholder to purchase specific (and a limited range of) goods or services but such goods / services may not necessarily be functionally connected. We would expect these types of gift cards to also benefit from the exemption. Will the FCA provide additional guidance on this point?

(ii) Is the FCA currently, or proposing to share information / assessment criteria on programmes that do / do not fall within the LNE with other Member States?

2. Notification process and steps in the event the FCA do not believe a particular gift card programme falls within the LNE

(i) Can the FCA outline the procedure in the event it viewed an unregulated gift card programme as one that should be brought into scope of the EMR?

(ii) In this regard, can the FCA provide details of the appeal process to the Upper Tribunal?

(iii) Can the operator still operate its gift card programme pending the outcome of its appeal to the Upper Tribunal?

(iv) What would happen to existing gift cards (and funds loaded on them) if an existing exemption was revoked? Members have gift cards in circulation with a validity period ranging from 6 months to no expiry.

(v) How long after the LNE exemption is revoked would a business have to find an electronic money issuer / become authorised?

(vi) Does the FCA intend to publish the appeal process in its Guidance?

3. Engaging with gift card operators

(i) How is the FCA intending to engage with / police gift card operators who are not members of key trade associations e.g. UKGCVA and Prepaid International Forum ? It is the UKGCVA's observation that such operators are unlikely to have dealings with the FCA and they are likely not to be aware of these regulatory obligations.

4. Closed Loop Gift Card Programmes Outside of Scope of EMR

(i) The FCA proposed in its recent consultation paper (CP18/25) "Our Approach to final Regulatory Technical Standards and EBA guidelines under the revised Payment Services Directive (PSD2)" to clarify its view on closed loop gift cards (those that are issued by and only accepted at a single legal entity), so that it is made clear in its Guidance that operators of closed loop gift cards do not need to notify the FCA about such programmes.

Can the FCA confirm this clarification is going to be made and if so when will it be published? A number of members operate such programmes are waiting to hear from the FCA on this.

Relevant extract of the Consultation is below:

"Closed loop gift cards

7.10 When we originally consulted on implementation of PSD2, we were asked by stakeholders to clarify whether 'closed-loop' gift cards, that do not come under the definition of e-money, were within scope of the limited network exclusion (LNE) and subject to the notification requirements for businesses operating under this exclusion.

We acted on this feedback by amending Question 40 of PERG to clarify that excluded instruments under the LNE could include store cards, eg, closed-loop gift cards.

7.11 We have since received feedback that the term has different interpretations and is causing confusion amongst industry participants.

7.12 We consider that 'gift cards' are not payment instruments in the way that is intended in PSD2 where the issuer is a retailer and the gift card can only be used to obtain goods or services from that retailer. We propose to make this clarification in PERG (see Appendix 1).

7.13 The outcome of changes to this guidance will be that notifications would not be expected from issuers of gift cards (such as retailers) where the issuer is the only possible beneficiary when the gift card is 'spent'. That includes retailers that issue their own gift cards.

7.14 We propose to remove reference to 'closed loop' and provide further clarification."