Position paper referred to the EBA’s consultation on the Draft Guidelines on the limited network exclusion (LNE) under PSD2

Comments on the application of the limited network exclusion to local complementary currencies schemes (LCCS)

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Introduction

Local and complementary currency systems (LCCS) are payment instruments generally issued by non-profit organisations with the aim of pursuing various social, political and environmental objectives. Among LCCS there are different categories and one of these categories is that of digital currencies backed by conventional currency (euros), which in many cases, depending on their type of issuance, fall within the scope of PSD2, and it is to these that we will refer below.

This position paper argues that LCCS should be more clear cases for the LNE so that experimentation in the field of social innovation they seek to promote can take place without obstacles. A more proportional regulatory framework that allows them to achieve the public good objectives they pursue would be the result.

Very often LCCS are funded by European grants and operate in partnership with municipalities because of their good social and economic objectives. This is demonstrated by the fact that, for example, the European Commission 2020 blockchain for social good award of €1 million for financial inclusion was awarded to the Gmerits consortium (Gmerits.eu), which included two local currency projects channelling municipal public spending through one LCCS in Milan and one in Barcelona. LCCS can operate at different scales, from small towns to entire regions.

MedTOWN European project, funded by the EU under the ENI CBC Med

Programme (enicbcmed.eu/projects/medtown), of which Asamblea de Cooperación por la Paz (acpp.com) is the lead beneficiary, seeks to promote schemes for co-creation of public services in public-private-community partnerships using various instruments, including LCCS. Within the framework of this project, we have been able to carry out a feasibility study of a LCCS project and see the difficulty of managing LCCS within the framework of the directives on payments and electronic money, a legal framework that is disproportionate considering the small consumer risks that LCCS pose, due to their small scale, their motivation to promote the public good, and their management, frequently undertaken by user and consumer associations or cooperatives that enjoy the support of local public administrations. The result is a difficulty for these projects to assume the high operational costs derived from regulation, which translates into a difficulty in carrying out their innovative mission focused on the common good.

It is noteworthy that article 3k of PSD2 (iii) provides grounds for exclusion for instruments aimed at social and fiscal purposes once they have been regulated, but before they are regulated, to create the embryonic stage versions of an innovation, public authorities very often follow the leadership and work in association with NGOs to produce innovations for the common good, and LCCS are typically created by NGOs with very little regulatory support.

The PSD2 sets out a number of examples that it considers as exclusion cases applicable to payment instruments for specific purposes, mentioning in particular: "shop cards, fuel cards, membership cards, public transport cards, parking tickets, meal vouchers or vouchers for specific services". In order to create a more proportionate regulatory framework for LCCS, it would be interesting for the EBA guidelines to include a reference to digital and euro-backed LCCS to ensure that competent authorities encourage and support the motivation to promote monetary innovations for the public good, and also to set a precedent for including LCCS explicitly among such examples of exclusion in the future drafting of a possible PSD3.

For the same purpose of generating a more proportionate legal framework for the operation of the LCCS, it would be very interesting not to block the possibility for an LCCS excluded by the LNE to be accommodated on the same card as a regulated instrument.

Finally, It would also be interesting that, when assessing the request for exclusion of a given instrument [in application of article 37 (2) of the PSD2], two additional criteria are taken into account: the motivation to serve the public good of the instrument, and the non-profit or public benefit character of the issuer.

In the following lines we describe our comments to the Guidelines.

Q1. DO YOU HAVE COMMENTS ON GUIDELINE 1 ON THE SPECIFIC PAYMENT INSTRUMENTS UNDER ARTICLE 3(K) OF PSD2?

With regards to guideline 1.7: “Competent authorities should also ensure that a single card-based means of payment cannot accommodate simultaneously payment instruments within the scope of PSD2 and specific payment instruments within the scope of Article 3(k) of PSD2”, we find this guideline problematic for several reasons:

1. "Single-card instruments" is a term that is nowhere defined in PSD2, and it would be unclear to include this term in the guidelines.

2. Guideline 1.7 is adding another criteria of exclusion of a payment instrument that is not in the legislation: the technology device with which the instrument is used. Article 3k of PSD2 defines the cases in which a payment instrument can be excluded from the regulation based on certain criteria. A guideline to harmonise the interpretation of the Limited Network Exclusion (LNE) is meant to discern when the instrument should be excluded based on the criteria provided by the directive. The fact that a single card-based means of payment accommodates simultaneously payment instruments within the scope of PSD2 and specific payment instruments within the scope of Article 3(k) of PSD2 is a question of the usage of the payment instrument. The usage is none of the criteria provided by the directive to exclude the payment instrument from the regulation.

3. Digital LCCS are frequently also monetary innovations, and the possibility to include this payment instruments in the same payment card (or Smartphone payment app) with electronic money might be very convenient for potential users for several reasons:

a) Because local digital currencies are sometimes used to pay the full price of the product, but sometimes they are also used to pay a fraction of the purchase price; being in the same payment card with e-money would facilitate to the user to pay with one payment operation a fraction of the price in the Local currency and the rest in e-money.

b) Because the future innovation in this kind of instruments may require that the local currency is used with the same card or payment app as e-money to fully tap the public good potential of the LCCS. As an example, we could test the possibility to use a complementary currency system to pay for an additional “price” of a product, for example, representing CO_2 emissions of the whole value chain of a product. (imagine that citizens get a “carbon currency” that they need to pay to get products and services which added value chain is intensive in CO_2 emissions). The fight against climate change requires innovation and it is necessary to have options to innovate in the transaction field. The option of placing together in the same card or payment app an exempted LCCS and e-money turns the payment process in this hypothetical case very simple and straightforward for the user, because the payment can be carried out in a single payment operation with the two currencies. Blocking this possibility might stop social innovations that are much needed in our challenging times.

4. EBA's concern for consumer protection has probably motivated this guideline 1.7, and this concern is shared by us, but consumer protection can be perfectly safeguarded following Guidelines 5.2, 5.3. and 5.4, assuring straightforward information to the customer in different ways, for instance, by naming the payment instrument in a way that is clearly indicative that it is a not-regulated payment instrument (calling the regulated instrument “euros” and the unregulated one “carbon currency”, for example) and providing sufficient and clear information about it.

For all the above mentioned reasons, we kindly suggest that guideline 1.7 is reformulated in a way that does not block the possibility that a LCCS that is excluded by the LNE can be accommodated in the same card, payment app or wallet than e-money instruments.

Q2. DO YOU HAVE COMMENTS ON GUIDELINE 2 ON THE LIMITED NETWORK OF SERVICE PROVIDERS UNDER ARTICLE 3(K)(I) OF PSD2?

As explained in the introduction, for the sake of producing a more proportional legal regime for the Local and Complementary Currency Systems (LCCS from now on), we suggest that the mission of the payment instrument and the management of the network is taken into account to take the decision on the exclusion of the instrument by the LNE. For instance, **including in guideline 2.2** two more criteria to be taken into account, such as:

h) Whether the mision of the payment instrument is aimed to the public good, including a description of the aimed public good it pursues.
i) Whether the management of the network is a non-for-profit entity or an entity that has been classified as an entity for the public interest.