Ending IBAN Discrimination—Where Are We and What Can Be Done in 2024?

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Bank accounts; Cross-border transactions; Discrimination; EU law; Payment services

Abstract

This article examines the persisting problem of IBAN discrimination in the EU, which is the practice of refusing or charging more for cross-border payments based on the IBAN of the payer or payee. It explains the origin and function of IBANs and VIBANs, which are identifiers for bank accounts and payment transactions, and how they are supposed to facilitate cross-border payments within the EU and beyond. It also analyses the existing EU legislation that prohibits IBAN discrimination, such as the PSD2 and the SEPA Regulation, and the challenges and gaps in their implementation and enforcement. It then explores the potential solutions and prospects for ending IBAN discrimination and whether introducing a pan-EU IBAN system, developing innovative and secure payment solutions, or amending existing anti-discrimination laws could help. IBAN discrimination is not only a breach of EU law, but also a barrier to the completion of the Banking Union and the digital Single Market, and EU legislative policymakers should have a vested interested to achieve a truly integrated and competitive payment market during 2024.

The International Bank Account Number (IBAN) is an internationally agreed-upon method for identifying bank and payment accounts across national borders. IBANs aim to improve communication and the processing of cross-border transactions with a reduced risk of transcribing errors. Despite the IBAN's central importance to the functioning of the EU's single market, not just for financial services, and despite the EU passing laws to prevent IBAN discrimination, payment services users, mostly retail clients but also corporates, still regularly experience IBAN discrimination.

IBAN discrimination, or the practice of refusing or charging more for cross-border payments within the EU based on the IBAN of the payer or payee, has been a long-standing obstacle to the integration of the EU's single market and the freedom of movement of capital and services. IBAN discrimination has been against the law across the EU since 2014, yet it still remains commonplace for consumers and corporates alike.

IBAN discrimination may arise within one EU Member State or across EU Member States. Despite the existing EU legislation that prohibits IBAN discrimination, such as the Payment Services Directive (PSD2)[1] and the Single Euro Payments Area (SEPA) Regulation,[2] many consumers and businesses still face difficulties and extra costs when making or receiving payments across the EU and in across SEPA. Moreover, compliance with existing and new reporting obligations, including as part of the CESOP regime have reignited issues around IBAN discrimination. This article discusses IBAN discrimination, its legal implications and prospects for reduction in the EU.

What is an IBAN why does it matter to the EU?

Before the implementation of IBAN in the EU, consumers were often confused by the several national standards used to identify bank accounts, such as bank, branch, routing codes and account numbers. Consequently, there were instances where the payment routing information was incomplete or missing. The routing information, as defined by ISO 9362 (often referred to as business identifier codes (BICs), SWIFT ID or SWIFT code, and SWIFT-BIC), does not have a prescribed structure for the transaction. Consequently, the identification of accounts and types of transactions using such system is determined by the agreements made between the parties involved in the transaction. Additionally, the absence of cheque digits in such system prevents the sending bank from verifying the accuracy of the routing information before delivering the payment. This also means that any errors made during the transcription process are difficult to detect. The occurrence of routing issues led to delays in payments and additional costs for both the sending and receiving banks, as well as the intermediary routing institutions.

An IBAN is a unique identifier for a customer's account with a financial institution. The IBAN has up to 34 alphanumeric characters, including a country code, two check digits and a number consisting of the domestic account number, branch identifier and potential routing information. Before completing a transaction, the check digits enable a check of the account number to guarantee its validity.

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[1] Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market, amending Directives 2002/65, 2009/110 and 2013/36 and Regulation 1093/2010, and repealing Directive 2007/64 [2015] OJ L337/35, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015L2366-20151223*.

[2] Regulation 260/2012 of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation 924/2009 [2012] OJ L094/22, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02012R0260-20140131*.

While each country using IBAN has a particular national IBAN format, the International Organization for Standardization (ISO) in particular through the ISO 13616 standard, as amended, specifies the structure of an ISO-compliant national IBAN format. ISO itself designated the Society for Worldwide Interbank Financial Telecommunication (SWIFT) as the registration authority for national IBAN formats. Only a national standards body or a national central bank may request a national IBAN format registration for its individual country.[3] First designed to enable payments within the EU, IBAN has since been adopted by the majority of European nations as well as numerous nations in other regions, including in the Middle East and the Caribbean.

In order to end fragmentation in the EU of differing national standards for (bank) account identification, IBANs were initially adopted in 1997 by what was then the European Committee for Banking Standards (ECBS). In 2006 those functions were taken over by the European Payments Council. IBANs were chosen as the foundation for electronic straight-through processing in the European Economic Area (EEA) and the equal treatment and charges for domestic and cross-border credit transfers operating on the principle that a bank fee for a domestic credit transfer must be the same as a fee for a cross-border credit transfer.

These established principles on equal treatment were anchored into law and the creation of SEPA and the EU's SEPA Regulation. Moreover, the European Central Bank (ECB) created the TARGET2 system and various rulebooks[4] that unifies the technical infrastructure of 26 central banks of the EU. Sweden maintains an opt-out despite softening its stance on TARGET2 and TARGET2-Securities systems since September 2021. Sweden entered into closer-cooperation with the ECB on a host of supervisory matters on 25 January 2023.[5]

In summary, IBAN imposes a flexible but consistent format which is enough for account identification and includes validation information to prevent transcribing errors. Where IBANs are used, transnational money transfer errors have been reduced to less than 0.1% of total payments within individual EU Member States but create the ability for discrimination much of which is underreported.

Further innovation has been led on a technical front as a result of both the PSD2 and the SEPA Regulation culminating in the advent of virtual IBANs offering banks, payment service providers (PSPs) and payment users a new means of how to make and receive payments.

Virtual IBANs

The advent of virtual IBANs (VIBANs) has pointed to what is possible where technology can nimbly navigate and trounce national constraints. In summary, a VIBAN is a unique identifier that allows a bank or a PSP to route incoming payments to a specific account or sub-account, without requiring a physical IBAN for each customer or transaction.

A VIBAN is typically linked to a master IBAN, which is a real bank or PSP account that holds the funds received by the VIBANs. The master IBAN can belong (i) to the bank or the PSP that issues the VIBANs, or (ii) to a third-party intermediary that facilitates the payment processing. The VIBANs are usually generated and assigned by an algorithm or a software system and can have different formats and lengths depending on the country and the provider.

The main benefits of using a VIBAN are:

- It simplifies and streamlines the payment reconciliation process, as each VIBAN can be associated with a specific customer, invoice, currency or purpose and the payment details can be automatically matched and updated in the accounting system.
- It reduces the operational costs and risks of managing multiple physical bank accounts, as the VIBANs can be created and closed on demand, without the need for opening, maintaining or closing real bank or PSP operated accounts.
- It enhances the customer experience and satisfaction, as the VIBANs can offer faster, cheaper and more transparent cross-border payments (including with a country code outside the jurisdiction of their habitual residence) and can also enable customers to receive payments in their preferred currency or from their preferred payment method.
- It improves the compliance and security of the payment transactions, as the VIBANs can comply with the regulatory standards and requirements of different jurisdictions, and can also prevent fraud, errors or misrouting of payments by validating the sender and the recipient information.

Some examples of use cases for VIBANs are:

- E-commerce platforms or marketplaces that need to collect and distribute payments from and to multiple sellers and buyers across different countries and currencies,

[3] See further details at: SWIFT, "International Bank Account Number", *https://www.swift.com/standards/data-standards/iban-international-bank-account-number*.
[4] See, inter alia, ECB, Information Guide for Target2 Users, *https://www.ecb.europa.eu/paym/target/target2/profuse/nov_2020/shared/pdf/Information_Guide_for_TARGET2_users_v14.0.pdf* as well as updates from March 2023 available at: *https://www.ecb.europa.eu/press/pr/date/2023/html/ecb.pr230321~f5c7bddf6d.en.html* and *https://www.ecb.europa.eu/paym/target/t2/html/index.en.html*.
[5] See ECB, press release, "ECB boosts cooperation with the six EU Member States not part of European banking supervision", *https://www.bankingsupervision.europa.eu/press/pr/date/2023/html/ssm.pr230125~43ac001440.en.html*.

and that want to offer a seamless and customised payment experience for their customers.
- FinTech companies or PSPs that want to offer innovative and flexible payment solutions for their clients, such as multi-currency accounts, digital wallets or payment cards and that want to leverage the existing banking/PSP infrastructure and network without having to open physical bank accounts in each country—thus free of national border constraints but not necessarily free of what then becomes potential VIBAN discrimination.
- Businesses or individuals that need to receive or send frequent or large payments from or to different countries or currencies and that want to avoid the high fees, delays or errors that can occur with traditional bank transfers or intermediaries.

What is IBAN discrimination?

IBAN discrimination refers to situations where persons (natural or legal) are denied services or face barriers because of their (V)IBAN. Article 9 of the SEPA Regulation states that a payer or payee cannot specify the Member State in which the account to be debited or credited is located. Despite this directly applicable rule, some companies and even public administrations still refuse to make or receive payments (direct debits or credit transfers) to/from non-domestic accounts. This practice of (V)IBAN discrimination is a clear breach of the SEPA Regulation.

IBAN discrimination becomes particularly apparent and problematic when people try to open payment accounts, apply for loans or make international transactions. Some payment accounts refuse to open accounts for people with foreign IBANs, while others charge them higher fees. Additionally, some companies refuse to accept payments made with foreign IBANs, making it difficult for people to make purchases or pay bills. The same is true where some authorities, including tax authorities claim they are unable to make payments to accounts that from their perspective has a "foreign" IBAN. This is particularly problematic when persons seek to make use of their freedom of movement of persons' rights and would expect payments due, such as a tax rebate, to an (V)IBAN of their choosing and not to the IBAN account that they may have had while resident in said former EU Member State. Aside from tax rebates, IBAN discrimination hampers the freedoms that are legally available to those:

- studying abroad and making use of EU programmes to do so, are hampered when their IBANs cannot "travel" with them as freely for making and receiving payments in another EU Member State in which they reside to study;
- Europeans living in another Member State—mainly for professional reasons and much has been done to reduce and eliminate discrimination on, say, recognition of professional qualifications and much else affecting the ability of citizens to work and/or relocate to work cross-border—why not for IBANs?; and
- Europeans retiring in another Member State—an increasing number of mobile Europeans are pensioners or of pensionable age. Most move in search of better climate, new experiences in a new phase of their lives or to be closer to family. Pensioners have a legal right to receive the pension for which they have contributed, even if they reside in a Member State other than the one whose nationality they possess. Slow bureaucracy hinders the ability to clearly calculate and then claim the pension rights for the period in which they worked in another country—more pressingly, and something the EU is trying to solve, in part, through the Pan-European Pension Product (PEPP) Regulations is that the retirement systems of different EU Member States (still) vary significantly which also hinders the ability to receive payments from individual national authorities, many of whom will prefer an IBAN in the same state of the authority as opposed to where the pensioner may have retired to.

In summary, IBAN discrimination is a form of financial discrimination that can have serious consequences. People who are denied payment accounts may be unable to receive their wages or access other financial services, leaving them vulnerable to exploitation and financial insecurity. Similarly, people who are charged higher fees for using foreign IBANs may be unfairly burdened with extra costs. Regardless of how and where IBAN discrimination strikes, it deprives persons of their EU rights while concurrently undermining the operation of and faith in the single market.

Legal issues and prospects for legal reform

IBAN discrimination raises important legal questions, particularly around discrimination and equal treatment. In many countries, discrimination based on factors such as race, gender or religion is illegal. While art.9 of the SEPA Regulation prohibits IBAN discrimination (and logically if not legally anchored also VIBAN discrimination) there is no clear legal framework for addressing discrimination based on (V)IBANs.

One potential legal avenue is to argue that IBAN discrimination is a form of nationality discrimination. This is because IBANs are linked to specific countries and regions, meaning that people with foreign IBANs may be treated differently because of their nationality. All EU countries have laws that prohibit discrimination based on nationality, which could be used to challenge IBAN discrimination, yet such legal challenges can be prohibitively expensive for those, even where consumer associations make use of class actions (under new EU law facilitating that), and are not free from counter-arguments that a court, ombudsman or other dispute resolution body may be inclined to follow.

Another approach is to argue that IBAN discrimination violates principles of equal treatment and non-discrimination. These principles are enshrined in many national and international laws, including the Universal Declaration of Human Rights. By denying people services or charging them extra fees based on their IBAN, banks and other institutions may be violating these principles.

There is growing awareness of IBAN discrimination and its negative impacts. As a result, there are prospects for reform in this area and one pressing imperative is to improve the ability for those affected to report such discrimination. Closing the gap between the law and its effective application remains imperative.

Another potential solution is to introduce pan-EU regulations that specifically prohibit IBAN discrimination. This could involve amending existing anti-discrimination laws (or use PSD3 to do so) to include IBANs as a specific protected category. It could also involve introducing new regulations specifically targeted at IBAN discrimination.

In addition to legal solutions, there are also technological solutions that could help address IBAN discrimination. For example, some FinTech companies are developing platforms that enable cross-border payments without the need for IBANs. These platforms use technologies such as blockchain to securely and efficiently transfer funds across borders. If the EU legislative and regulatory policymakers want to ensure that such payments activity, in particular such that is at risk of (V)IBAN discrimination, does not veer off into solutions that are subject to comparably less supervisory oversight then it may wish to consider using PSD3 as a pre-emptive prevention measure. Such legislative efforts could enable and reinforce the creation of a standardised system for cross-border payments that is not linked to specific countries or regions and this could take the form of a pan-EU (V)IBAN. Such approach could eliminate the need for purely national-prefixed linked IBANs and reduce the potential for discrimination.

So why is there (currently) no pan-EU (V)IBAN?

The EU's single market, including beyond "just" financial services, aims to allow the EU's freedom of movement of capital, goods and services to be free from national constrains. Nevertheless, the reason why there is, at present, no pan-EU IBAN is because of the very design of IBANs, i.e. being generated based on national bank codes and account numbers.

The current make-up of IBAN was developed gradually and incrementally by different countries and regions (including outside the EU), rather than as a unified and harmonised initiative from the start. SEPA, which is pan-EU in design therefore relies on the design of the IBAN system, which aims to be compatible and interoperable with the existing domestic bank account systems, rather than to replace or overhaul them. Therefore, the IBAN system "had to" respect and accommodate the different legal, regulatory, technical and operational aspects of the domestic bank account systems, which may have different historical, cultural and institutional backgrounds and preferences. For example, some countries may have centralised or decentralised banking systems, different levels of bank or branch identification, different account number lengths or formats, different check digit algorithms or different customer data protection rules. These factors may have influenced the design and implementation of the national or regional IBAN formats and may have posed challenges or constraints for achieving a pan-EU or global IBAN standard.

Even with the advent of IBANs and VIBANs in the EU, payments activity has left being the exclusive purview of banks and PSPs, which are regulated, in the EU, primarily under PSD2 and or the second E-Money Directive (EMD2).[6] While PSD2 went hand in hand with the SEPA Regulation leading to a successful delivery of SEPA in the EU, further reforms are ahead in the form of PSD3 reshaping PSD2 and EMD2. [7] Regrettably PSD3, as currently proposed, does not touch IBANs nor standards on VIBANs nor any means on how to decouple IBANs from individual EU Member States through a pan-EU (V)IBAN as a true pan-EU alternative.

A move to a real and/or VIBAN-based pan-EU IBAN system would require support from market participants inasmuch as legislators and regulators. Given the interest of legislative and regulatory policymakers in future-proofing both (i) payment instruments and (ii) payments systems and how they operate in the EU, what could such a pan-EU IBAN look like?

One possible way to approach that question is to consider the following steps (both technically and through legislative and regulatory rulemaking):

[6] Directive 2009/110 of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60 and 2006/48 and repealing Directive 2000/46 [2009] OJ L267/7, available at: *https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32009L0110*.
[7] Further details available at PWC, "Introducing the PSD3, PSRs and FIDAR—reshaping the EU's regulatory framework on payment services and e-money", *https://legal.pwc.de/en/news/articles/introducing-the-psd3-psrs-and-fidar-reshaping-the-eus-regulatory-framework-on-payment-services-and-e-money*.

- *Define the scope and objectives of a pan-EU IBAN*. For example, is it meant to facilitate cross-border payments, reduce fragmentation and costs, enhance financial integration and inclusion, or support the development of a digital euro? What are the benefits and challenges of introducing a pan-EU IBAN, and how would it affect existing national IBAN formats and schemes?
- *Design the technical specifications and standards of a pan-EU IBAN*. For example, what would be the optimal length, structure and format of a pan-EU IBAN? How would it incorporate the country code, the check digits, the bank identifier and the account number? How would it ensure compatibility and interoperability with existing IBANs and payment systems, as well as compliance with regulatory and legal requirements?
- *Develop the governance and operational framework of a pan-EU IBAN*. For example, who would be responsible for issuing, validating and maintaining a pan-EU IBAN? How would the allocation and registration of bank identifiers and account numbers be coordinated and harmonised across the EU? How would the data protection, security and privacy of a pan-EU IBAN be ensured and enforced? It is conceivable that such a role should fall to the ECB as the gatekeeper of the SEPA area.
- *Implement and promote the adoption and usage of a pan-EU IBAN*. For example, how would the transition from national IBANs to a pan-EU IBAN be managed and communicated to the relevant stakeholders, such as banks, payment service providers, customers and authorities? What would be the incentives and disincentives for adopting a pan-EU IBAN, and how would they be aligned with the objectives and benefits of the initiative? How would the performance and impact of a pan-EU IBAN be monitored and evaluated over time?

A possible example of a pan-EU IBAN could look something like this:

EU02 1234 5678 9012 3456 7890

Where:

- EU is the country code for the European Union—thus replacing a country prefix such as DE for Germany, IE for Ireland or FR for France etc;
- 02 is the check digit, calculated according to the IBAN standard;
- 1234 is the bank identifier, assigned by a central authority or registry at the EU level (such as the ECB—acting either in its payment systems oversight role and/or its role at the head of the single supervisory mechanism of the banking union); and
- 5678 9012 3456 7890 is the account number, consisting of 16 digits that can be chosen by the customer or generated randomly. This approach, as in existing use of VIBANs, would permit the creation of a pan-EU VIBANs.

Even where a pan-EU-based (V)IBAN could be a welcome and feasible alternative in the EU to national-linked IBANs by ending discrimination and making the single market more single, complications arise as a result of CESOP—a tax driven reporting framework that will have an (adverse) transformative effect across much of the market. It remains to be seen how CESOP may impact how payment users choose payment channels.

Complications or clarity as a result of CESOP?

On 18 February 2020, the Council of the European Union (the Council) adopted a legislative package consisting of Directive 2020/284 (the CESOP Directive)[8] and Regulation 2020/283[9] on measures to strengthen administrative cooperation to combat VAT fraud (collectively the CESOP regime) setting out requirements applicable to PSPs offering payment services in the EU to transmit information on cross-border payment originating from Member States and on the beneficiary (i.e. the payee) of these cross-border payments. PSPs will have to monitor and transmit information on those who receive more than 25 cross-border payments per quarter to the tax administrations of the Member States. This regime entered into full force during January 2024.

The CESOP Directive defines cross-border payments as any payment where "the payer is located in a Member State and the payee is located in another EU/EEA Member State, in a third territory or a third country".[10] Notably, under the CESOP regime this information is centralised in a European Database (the Central Electronic System of Payment Information (or CESOP)) where it is stored, aggregated and cross-checked with other European databases including onward reporting to anti-fraud experts of Member States via a network called Eurofisc.

[8] Council Directive (EU) 2020/284 of 18 February 2020 amending Directive 2006/112 as regards introducing certain requirements for payment service providers [2020] OJ L62/7, available at: *https://eur-lex.europa.eu/eli/dir/2020/284/oj*.
[9] Council Regulation (EU) 2020/283 of 18 February 2020 amending Regulation 904/2010 as regards measures to strengthen administrative cooperation in order to combat VAT fraud [2020] OJ L62/1, available at: *https://eur-lex.europa.eu/eli/reg/2020/283/oj*.
[10] See art.1 of CESOP Directive inserting art.243b(1), para.2 in Ch.4 of Title XI of Directive 2006/112.

The CESOP regime aims at (i) better detection of possible e-commerce VAT fraud, and (ii) improvement in the collection of tax revenues on cross-border transactions. To this end, PSPs operating in or through the EU and indeed the EEA will very soon be required to retain and report information about cross-border payments that they process. Client facing documentation of such PSPs may need to change to accommodate such collection and data processing. As a result, PSPs may need to ensure they obtain consent from payees so as to comply with the CESOP regime.

How and by what means client consent is obtained may differ between legal systems of Member States.[11] Furthermore, it may be driven by (i) where and how a PSP that is required to comply with the CESOP regime interacts with a payee and (ii) pursuant to what governing law of its client facing documentation it is transacting as well as (iii) whether the payee has any consumer protections at law in the jurisdiction where the payee is domiciled. All of this will determine whether a PSP can make use of "deemed consent" or must use "active consent" to be able to collect, analyse and report data on the payee as contemplated by CESOP. In short, while the CESOP regime may be comprehensive in introducing a pan-EU reporting framework the legal aspects of obtaining effective consent from notably retail clients that are payment services users are very much fragmented along national lines and driven by consumer protection laws and principles of contract law of individual EU Member States—the IBAN acts as the anchor around which the CESOP regime's reporting obligations are determined.

To determine which PSP ultimately holds the reporting obligation, the location of the PSPs for both the payer and payee are decisive. Where both PSPs—of the payee and payer—are located in the EEA, the obligation to report will fall on the PSP of the payee. Where the PSP of the payee is located in a third country, said obligation falls on the PSP of the payer. The respective locations are determined by the IBAN or another identification code. Although this may appear straightforward in theory, there are likely to be many situations, in practice, in which the identification codes do not correspond to the actual location of the payee or payer. Notwithstanding this inconsistency, the guidelines that have been published in support of clarifying the CESOP regime[12] specify that the fact that the location of the payer and payee based on their respective proxies could differ from their real location does not matter for the purpose of art.243c, which sets the determination criteria on whether a payment is considered as cross-border and thus should be evaluated for CESOP reporting purposes. This determination relies on proxies in order to assign a country easily to the payer and the payee. As such, on one hand, the location of the payer shall be considered in the Member State corresponding to:

- the IBAN of the payer's payment account or any other identifier which unambiguously identifies, and gives the location of, the payer; or in the absence of such identifiers; and
- the BIC or any other business identifier that unambiguously identifies, and gives the location of, the PSP acting on behalf of the payer.

On the other hand, the location of the payee shall be considered to be in the Member State, third territory or third country corresponding to:

- the IBAN of the payee's payment account or any other identifier which unambiguously identifies, and gives the location of, the payee; or in the absence of such identifiers; and
- the BIC or any other business identifier that unambiguously identifies and gives the location of, the PSP acting on behalf of the payee.

Where payees hold multiple accounts, payments should be aggregated for such payee. It is common, nowadays, that a payee offers different payment methods (i.e. direct debit or credit transfers) for the purpose of which it holds different accounts managed by different PSPs. As the person behind these accounts is a single entity, however, the payers' PSP—possibly the same—must identify whether all the payment accounts are actually linked to a single entity. To do so, PSPs are free to use any information at their disposal, including information collected during the creation of the payment account. As a result, where the aggregation of payments exceeds the threshold number of 25, all payments irrespective of their method would have to be reported to CESOP.

In the opposite scenario where the PSP of the payee receives multiple payments to different accounts which are all owned by a single payee, it is the payee's PSP which will have to identify whether these payments must be reported. To this end, the latter will have to use all information it has available to determine whether the accounts refer to the same payee and correspondingly aggregate all payments it completes to these accounts. The payers' PSP will not be captured by reporting

[11] While arguably much needed, harmonising contract law across the EU has been "too difficult to reform" to date. Contract law is a core area of private law that reflects the values, preferences and expectations of the parties and the societies involved in contractual relations. Harmonising contract law would require a high degree of convergence and compromise on sensitive and controversial issues, such as consumer protection, fundamental rights, liability, remedies and interpretation. However, the Member States have different views and approaches on these issues, based on their historical, social and economic backgrounds, and their legal systems, which are influenced by various sources. The EU has limited competence and legitimacy to legislate on contract law, which is largely reserved to the national level, and faces resistance and scepticism from some Member States and stakeholders, who fear losing their autonomy, identity and diversity. To date, the proposal for a Common European Sales Law (see *https://commission.europa.eu/business-economy-euro/doing-business-eu/contract-rules/common-european-sales-law_en) remains sidelined*.

[12] "Guidelines for the reporting of payment data from payment service providers and transmission to the Central Electronic System of Payment information (CESOP)" available at:*https://taxation-customs.ec.europa.eu/document/download/3d5c333b-2268-4397-b688-4d3e547c1b72_en?filename=Guidelines%20for%20reporting_V1.1_28.11.23.pdf*

obligations under CESOP, unless it executes payments to a non-EU payment account of the same payee, in which case it will have to take these payments into consideration in order to calculate the threshold.

As is more frequently the case, a scenario where say an Italian-based online PSP provides Italian IBANs to an account holder in, say, ordinarily domiciled in the Netherlands, this IBAN will not correspond to the actual place of residence of the account holder. For example, it is not unrealistic to imagine a situation in which an Italian national, living and studying in the Netherlands transfers money from its account opened with a bank in the Netherlands to its own account in Italy. This is permitted. Indeed, IBAN discrimination, while still a practical problem, is actually prohibited as a matter of EU law. However, the CESOP regime complicates this scenario as under PSD2 and CESOP accordingly, this transfer would be qualified as an in-scope cross-border payment. On the basis of the IBAN and the locations of the PSPs, this payment could also be categorised as cross-border and thus be reportable. In the context of growing cross-border e-commerce, it remains to be seen how proportionate and adequate the current design of the CESOP regime will remain.

Conclusion

IBAN discrimination is a serious issue that can have significant consequences for individuals and communities. While there is currently no clear legal framework for addressing IBAN discrimination, there are means for reform. In 2023 and 2024, the European Commission is expected to review the effectiveness and impact of the existing legal framework and to propose possible amendments or new measures to enhance the protection of consumers and businesses from IBAN discrimination. Some of the options that could be considered by the European Commission are:

- introducing more harmonised and effective sanctions and remedies anchored in an EU regulation that acts to dissuade IBAN discrimination. This could include fines, compensation or injunctions and thus ensure consistent and proportionate application of preventing IBAN discrimination by national authorities and courts;
- strengthening the role and cooperation of national competent authorities, consumer protection agencies and alternative dispute resolution bodies in monitoring, reporting and resolving cases of IBAN discrimination, and providing them with adequate resources and guidance;
- enhancing (further) the transparency and comparability of fees and charges for cross-border payments within the EU, and ensuring that consumers and businesses are informed and consent to any additional costs or conditions associated with their IBAN;
- promoting the use and acceptance of innovative and secure payment solutions, such as instant payments, mobile payments or e-wallets, that can facilitate cross-border transactions and reduce the dependence on IBANs; and
- encouraging the dialogue and cooperation among stakeholders, such as PSPs, merchants, trade associations and consumer organisations, to exchange best practices, identify common challenges, and develop solutions to prevent and eliminate IBAN discrimination.

IBAN discrimination is not only a breach of EU law, but also a barrier to the completion of the banking union and the digital single market, and a source of frustration and inconvenience for millions of EU citizens (regardless of age) and businesses.

In 2024, after 10 years of IBAN discrimination being outlawed, the EU should aim to achieve a truly integrated and competitive payment market, where IBAN discrimination is a thing of the past and where consumers and businesses can enjoy the full benefits of the single currency (which itself celebrates its 25th anniversary) and the freedom of movement of capital and services across the single market.

In addition to introducing new regulations, creating standardised systems such as a pan-EU (V)IBAN as a viable alternative to nationally anchored systems, it may be possible to eliminate IBAN discrimination also through technological means. Such approach could also make CESOP more workable and at the same time promote greater financial inclusion and equality by making the single market truly more single.

BOOK REVIEW

Clearing OTC Derivatives in Europe, by Bas Zebregs, Victor de Seriere, Rezah Stegeman and Patrick Pearson, (Oxford University Press, 2023), 624 pages, hardback, £195, ISBN: 9780192868725.

Derivatives clearing was until recently a minority sport. However, legislative changes since the financial crisis of 2007–08 have resulted in a step change in the use of clearing in the derivatives market. Whereas in 2009 around 35% of interest rate swaps were cleared, the introduction of the clearing mandate nearly doubled that figure to 60% by 2014,[1] and now stands at 75%. Even more remarkably, in the market for credit default swaps, levels of clearing which were negligible as late as 2015 are now nearly 70%.[2] It is not unreasonable to say that the global derivatives market is now predominantly a cleared market, and an understanding of clearing—and in particular the legal risks and liabilities to which clearing exposes dealers and clients—is an absolute necessity for all derivatives lawyers, and indeed all those lawyers whose practice touches more than the most basic tools of corporate finance.

This is therefore an important and necessary book. Since the primary cleared markets of the European continent are—and are likely to remain—in London, the "in Europe" of the title may be initially offputting, but this is a misimpression. What the book describes is the consensus on derivative clearing broadly established at international level by the G20 and implemented in the EU in the post crisis period at a time before Brexit was even a twinkle in the eye of its sponsors. The book therefore sets out the consensus position on clearing as it applies both to UK and EU central counterparties (CCPs), and indeed to many CCPs outside Europe which have modelled their regulatory and legal structures on the global consensus. It is therefore an invaluable resource for derivatives lawyers outside as well as inside the EU.

As to the work itself, some of the most interesting and informative material is that which explains how the current position came to be. In order to understand any regulatory regime, it is usually necessary to have an historical perspective, since any end result is the result of the interplay of conflicting forces and interests. Patrick Pearson's chapter, which reprises the steps by which the current regime came into being, is therefore invaluable.

The remainder of the work falls into distinct sections. The second section deals with the day-to-day function of a CCP. This—for lawyers—involves a detailed examination of the mechanisms by which contracts enter and leave the clearing system, and in particular as to what the legal relations between CCP, clearing members and clearing clients actually are. This topic is entirely non-obvious—it has been correctly said that the London and US models are pretty much identical in their effects, save that London uses a principal-to-principal model with agency characteristics, whereas the US uses an agency model with principal-to-principal characteristics. This sort of thing may be irrelevant to dealers and risk managers, but is critical to lawyers dealing with trading documentation, and the chapters by Chamorro-Courtland on underlying legal relationships, and Dwyer and Lancelott on clearing documentation, are particularly helpful in this regard.

The primary economic function of a CCP on a day-to-day basis is as a machine for collecting and administering collateral from counterparties. One of the primary drivers for the introduction of mandatory clearing was a perception that trading in the OTC market was seriously undercollateralised, and one of the benefits for supervisors of central clearing is that it gives them a much greater degree of visibility of both exposures and collateral levels. However, there is more to systemic stability than collateral levels, and fragmentation of clearing, by breaking netting sets, may also be destabilising. This takes us to the biggest question of all as regards CCPs—how should they be structured in order to maximise stability? This issue is addressed from two perspectives—Manmohan Singh's analysis of collateral levels and policy, and Lewis and Murphy, who consider different models of CCP ownership and structure. These chapters should be required reading for policymakers in this area.

Finally in this section, there is the chapter on the capital requirements applied to bank exposures to CCPs by bank capital regulators. Since banks are generally the gatekeepers to CCPs for their clients, requiring them to hold capital against CCP positions potentially reduces their ability to offer clearing services to their clients, thereby undermining the policy objective of encouraging client trading onto clearing. The rules which seek to address this problem are neither easy nor straightforward, and Peters does a good job of disentangling them.

[1] D. Domanski, L. Gambacorta and C. Picillo, "Central Clearing: Trends and Current Issues" (December 2015) *BIS Quarterly Review*.
[2] BIS, "OTC derivatives statistics at end-June 2023" (16 November 2023).

The third section relates to the process of default management. It is not always as obvious as it might be that any consideration of the risks inherent in clearing begins and ends with the member default management process—this is where the rubber meets the road in terms of the member or client suddenly finding himself without the hedges or collateral balances that he had assumed that he had. Consequently, the foundation of any risk analysis for users of derivatives clearing is a clear and detailed understanding of the minutiae of default management. Unfortunately, it is exceptionally difficult to derive any such understanding from the rules of CCPs themselves, which tend (for good reason) to be expressed in the broadest possible terms. These chapters are therefore exceptionally useful. Zebregs explains the position from the perspective of a client of a failed clearing member—how does he get his money back, and what can the CCP do to help or hinder him in that regard. This theme is taken up by Horner, who explains in detail the powers which a CCP is likely have over the assets and liabilities of a failed clearing member, and how it is likely to deal with them.

De Serière—bravely—goes further and discusses the potential outcomes on the failure of the CCP itself. This is a difficult area. CCPs in general have mechanisms in their rulebooks which address what will happen in various different scenarios and these generally set out mechanisms giving a wind down to service closure. The reason for this is to give risk managers at member and client firms a degree of predictability to apply to their risk calculations. These mechanisms have now, however, been overlaid by a "resolution regime" copied from that designed for banks after the crisis by the Financial Services Board. It is by no means clear how these tools could or would be applied to a CCP in distress, at what point in the contractual wind-down path a CCP resolution might intervene, or indeed what it would do differently if it did. The creation of these regimes has therefore increased the degree of uncertainty in predicting the outcome of extreme CCP events without conferring any very obvious benefit on anyone, and the result is a muddy mess. De Serière also correctly identifies the problem that, given the failure of a major CCP, the government(s) concerned would immediately be obliged to address the issue of mandatory clearing. If the continuation of mandatory clearing were regarded as necessary for financial stability, it would presumably be necessary to prop up the CCP with government money in order to ensure that clearing remained possible. However, if mandatory clearing were regarded as dispensable, CCP clearing members could reasonably argue that the losses which they had suffered in the collapse of that CCP were the outcome of mistaken government policy.

The next part engages with the difficult question of the optimal structure of CCPs for the European market. Thomadakis and Lannoo provide an overview of the current clearing landscape across Europe, and come to the unsurprising conclusion that highly fragmented clearing and settlement infrastructures decrease efficiency and increase economic risk. The primary element of fragmentation in this regard is of course the separation between London and the EU, and they (bravely) point out that the EUs current policy stance of increasing fragmentation by forcing EU firms to clear on sub-scale EU CCPs and obstructing them from using large liquid London CCPs increases both systemic instability and the costs to EU firms of doing business, thereby handicapping them in the global market. The second element of this part is the discussion by Poilvert-Clediere and Jardelot of "open access" arrangements. This is an EU legislative proposal intended to permit EU clearing and settlement to consolidate without disturbing trading flows—the idea being to require EU trading venues to permit any clearing or settlement provider to provide clearing services on their venue, presumably in the hope that larger clearing and settlement providers would expand their services across multiple trading venues, and the magic of efficient markets would result in market users across the EU concentrating their settlement activities on a relatively small number of venues. As Poilvert-Clediere and Jardelot set out, the economic and policy logic behind this proposal is impeccable, and some empirical work is clearly needed as to its relative failure to take hold in the EU so far.

The OTC derivatives business pre-crisis was the paradigm of an efficient global market, in which participants dealt with each other almost without regard to national boundaries. CCPs, however, are very much national. The question of how to regulate CCPs whose business extends well beyond the boundaries of their state of incorporation is therefore one of the hardest questions for regulators to answer. Regulators in this regard have two problems. One is where their domestic firms deal heavily on an overseas CCP. Any firm dealing in size on an overseas CCP has a substantial amount of its assets committed to that CCP in the form of collateral, and if that CCP is not regarded as properly regulated then the home regulator has a problem. More importantly, there is always a slight fear in these circumstances that in the event of a crisis at the CCP, the national regulator of the CCP might be tempted to resolve it in a way which favours home firms and disadvantages foreign firms. Between developed nations this is solvable through mutual recognition and a degree of trust—as Karl points out, there is a well-established regulatory framework for financial markets infrastructure providers (FMIs) (a group which includes CCPs) produced under the auspices of the BIS and IOSCO, and this forms a common framework for CCP regulation across most of the world (apart from the anomalous position between the UK and the EU). However, this leaves two issues to be resolved. One is as to how to address banks who wish to deal on FMIs which their supervisors do not regard as properly regulated, and the other is how to address the residual concern that adherence to international principle may be dissoluble in a sufficient substantial market crisis. Technical measures can address the first—the second is harder. This section also contains an essay by Turing assessing the current position between the UK and the EU. This can best be summarised as the EU having granted de facto mutual recognition whilst publicly claiming to have done no such thing. It would be helpful if the position could be regularised. However, what is important about the current arrangements—as Turing correctly points out—is that any grant of mutual recognition by the EU to UK CCPs would have to be conditional on the EU having relatively high levels of regulatory information and visibility as to the day-to-day business of these CCPs. Arrangements to this effect have been put in place over the last few years, and will hopefully provide a basis for normalisation of relations on both sides going forward.

The final section looks to the future. Priem considers the extent to which distributed ledger technology might be used to reduce risks within the clearing system, and sets out a vision of what a DLT based derivatives clearing system might look like. Finally, Callens and Löber provide a fascinating review of the possible future issues facing derivatives clearing. These range from cyber-risks to the mismatch between markets and clearing infrastructures, and must now include environmental regulatory risk as well as the risk management pressures created in other areas of the capital markets (such as the move to T+1 settlement). Finally, there remains the unsettled area of CCP corporate governance, where there is a continuing and bitter dispute as to whether CCPs should be run as private profit-making enterprises, public utilities, or mutual associations of their users.

Overall, this book is a considerable achievement on the part of its editors. There is always a concern with books of essays from different contributors that the individual contributions will fit together into something less than an overview of the subject. In this case, the contributions mesh together into a thorough and detailed analysis of a topic which would probably have been beyond the ability of any one author to develop comprehensively. They have produced an invaluable work which addresses the past, present and future of derivatives clearing in a thorough and comprehensible manner, and are to be congratulated for that.

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