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# International Developments in Consumer Financial Services Law 2007-2008

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# International Developments in Consumer Financial Services Law 2007-2008

**Abstract**

This Survey reviews international consumer financial services law developments in 2007 and 2008 (through August 15, 2008) in the areas of payment systems, the European Convention of Human Rights, insolvency laws, and consumer privacy. This review makes the contrast between the European and U.S. approaches to consumer regulation apparent, in particular the EU preference for direct regulation as compared to the tradition of private remedies in the United States.

**Keywords**

consumer financial services law, European Union, European Commission, European Convention on Human Rights, Single Euro Payments Area, payment systems, interchange fees, mobile payments, data security breach laws, spyware

**Disciplines**

Consumer Protection Law

## International Developments in Consumer Financial Services Law 2007–2008

By Gregory M. Duhl\*

### INTRODUCTION

Financial markets around the world have suffered recently as a result of the subprime mortgage crisis in the United States.<sup>1</sup> The International Monetary Fund recently predicted that worldwide losses from the U.S. subprime mortgage crisis could reach \$1.405 trillion,<sup>2</sup> up from the estimate of \$945 billion in April, in large part from losses on mortgage-backed securities.<sup>3</sup> In Europe, credit conditions have worsened and the housing market has tightened, especially in the United Kingdom, Ireland, and Spain.<sup>4</sup> Economic growth is expected to be

\* Associate Professor of Law, William Mitchell College of Law, St. Paul, Minnesota. I thank Jason Kilborn for contributing his expertise on European insolvency laws, and Brianna Blazek, Eric Elzen, and Erin Soldner for their research assistance.

1. See Jenny Anderson & Heather Timmons, *Why a U.S. Subprime Mortgage Crisis Is Felt Around the World*, N.Y. TIMES, Aug. 31, 2007, at C1, available at <http://www.nytimes.com/2007/08/31/business/worldbusiness/31derivatives.html>. According to J.P. Morgan,

there are about \$1.5 trillion in global collateralized debt obligations, and about \$500 billion to \$600 billion in structured-finance C.D.O.[s], referring to those made up of bonds backed by subprime mortgages, slightly safer mortgages and commercial mortgage backed securities.

Many of the products have proved to be highly problematic as the underlying assets—the subprime mortgages—have gone bust, revealing dangerous amounts of leverage in the securities that few people could value. As a result, they have become like a potent computer virus, leaving many people fearful that they too will be affected.

*Id.*

2. Martin Wolf, *Governments Have At Last Thrown the World a Lifeline*, FIN. TIMES (UK), Oct. 15, 2008, at 13.

3. *US Mortgage Crisis May Cost \$945 Billion Worldwide: IMF*, DETROITPROGRESS.COM, Apr. 10, 2008, <http://detroitprogress.com/?p=16>.

4. See Frederic S. Mishkin, Governor, Bd. of Governors of the Fed. Reserve Sys., Remarks at the Caesarea Forum of the Israel Democracy Institute, Eliat, Israel: Global Financial Turmoil and the World Economy (June 2, 2008), <http://www.federalreserve.gov/newsevents/speech/mishkin20080702a.htm>. The housing bubble in the United Kingdom, as well as in the rest of Europe, has burst. See David Olive, *Why the World's Economies Are Sinking: Developing Nations Are Flexing Their Muscles, While Rich Countries Appear to Be Weakening in Global Meltdown*, TORONTO STAR, July 20, 2008, at A13. Economic growth in Canada, Asia, and Australia has slowed as well, at least in part as a result of the credit crunch in the United States. See *id.* The English, French, and German governments have provided a combination of emergency loans, capital infusion, and lending guarantees to banks in their respective countries. See Steven Erlanger & Katrin Bennhold, *Government on Both Sides of the Atlantic Push to Get*

minimal in 2009.<sup>5</sup>

The worsening plight for consumers in the United States comes on the heels of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).<sup>6</sup> Under BAPCPA, more of the risk of credit shifted away from creditors engaging in what became increasingly risky subprime lending and toward the consumer borrower.<sup>7</sup> In contrast, bankruptcy reforms in European countries during this past decade have been targeted more at benefiting and providing counseling to overburdened debtors.<sup>8</sup> In Belgium, for example, the government imposes a tax on lenders based on the total number of defaults that they have at the end of the year.<sup>9</sup> France recently implemented the first “[c]hapter 7-style immediate fresh start procedure on the continent,”<sup>10</sup> just a year before BAPCPA made it more difficult for debtors to file for chapter 7.<sup>11</sup> Still, European insolvency law traditionally has lagged behind the United States in terms of protecting consumer debtors.

In other areas of consumer financial services law, the European Union (“EU”) and nations in Europe have largely been more aggressive than the United States in enacting legislation to protect consumers. This Survey reviews international consumer financial services law developments in 2007 and 2008 (through August 15, 2008) in the areas of payment systems, the European Convention on Human Rights, insolvency laws, and consumer privacy. This review makes the contrast between European and U.S. approaches to consumer regulation apparent, in particular the

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*Banks to Lend*, N.Y. TIMES, Nov. 7, 2008, at A6. By the end of 2008, many European countries had entered, or were entering, a recession. See Larry Elliott & Tony Helm, *Brown: Major Countries Must Cut Taxes Now*, GUARDIAN (UK), Nov. 14, 2008, at 1.

5. The International Monetary Fund has predicted that advanced economies will grow by .5 percent in 2009. See Wolf, *supra* note 2, at 13. The International Monetary Fund also has predicted that the economies of the United Kingdom, Denmark, and Sweden will grow by .2 percent in 2009 and that growth in emerging European economies will be slower than the 4.3 percent growth rate previously predicted. See Adam Cohen, *Europe Needs to Prepare for Recession*, WALL ST. J. (ASIA), Oct. 22, 2008, at 9.

6. See Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11, 12, 15, 18, and 28 U.S.C.).

7. See Posting of Jason Kilborn to Credit Slips, [http://www.creditslips.org/creditslips/2007/04/subprime\\_lendin.html#more](http://www.creditslips.org/creditslips/2007/04/subprime_lendin.html#more) (Apr. 3, 2007, 12:18 EST) (“Subprime Lending, Default Risk, and Personal Bankruptcy Reform”); but see Alvin C. Harrell, *Teaching Consumer Law Part Four*, 11 J. TEX. CONSUMER L. 8, 12 (2008) (reporting that this effect has been less pronounced than many predicted). This shift was in part a result of increased restrictions on the ability of consumer debtors to discharge liability for such debts. See, e.g., Henry E. Hildebrand, III & Keith M. Lundin, *Selected Changes Affecting Consumer Bankruptcy Practice in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 59 CONSUMER FIN. L.Q. REP. 370, 379–80 (2005).

8. See Posting of Jason Kilborn to Credit Slips, [http://www.creditslips.org/creditslips/2007/04/subprime\\_lendin.html#more](http://www.creditslips.org/creditslips/2007/04/subprime_lendin.html#more) (Apr. 3, 2007, 12:18 EST) (“Subprime Lending, Default Risk, and Personal Bankruptcy Reform”).

9. See *id.*

10. See *id.* (internal quotation marks omitted). For a discussion of German, Swedish, and Dutch reforms, see *infra* notes 55–61 and accompanying text.

11. See Michelle J. White, *Bankruptcy Reform Gave Creditors Too Much*, WASHINGTONPOST.COM, Aug. 21, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/19/AR2006081900413.html>. However, Professor Kilborn and others have noted that this has had a relatively small impact on the availability of chapter 7 relief for consumer debtors. See, e.g., Harrell, *supra* note 7, at 12.

EU preference for direct regulation as compared to the tradition of private remedies in the United States.<sup>12</sup>

## PAYMENT SYSTEMS

In the area of payment systems, interchange fees raised concerns around the globe, while the use of mobile payments continued to grow. Additionally, banks launched the first credit payment instrument for credit transfers under the Single European Payments Area project.

### INTERCHANGE FEES

An interchange fee is a fee that the acquiring bank (the merchant's bank) pays the issuing bank (the consumer's bank) for a credit card transaction in certain networks such as Visa and MasterCard.<sup>13</sup> The fee usually consists of a small flat amount and a percentage of the purchase total that varies based on the type of transaction and card, the merchant's industry, and the method of card acceptance.<sup>14</sup> The issuing bank deducts the interchange fee from the amount that the bank pays the acquiring bank for the purchase, and the acquiring bank pays the merchant the balance minus a small fee that the bank keeps for itself.<sup>15</sup> The United States government has not regulated interchange fees and has left any challenge to rising fees to private plaintiffs who are currently challenging how the card networks collectively set their fees under federal antitrust laws.<sup>16</sup> However, Congress has taken an interest in the rising fees and has held several hearings on the issue, most recently before a nineteen-member House Judiciary Committee Antitrust Taskforce on May 15, 2008.<sup>17</sup>

In Canada, as in the Netherlands, there are no interchange fees for debit transactions as banks bill their customers directly and do not assess any fees against merchants participating in the transactions.<sup>18</sup> Without interchange fees on debit cards, fees are more transparent, there is more competition, and costs are lower—they

12. This Survey focuses primarily on these areas and on developments within European nations and the EU. It does not attempt to survey international developments in consumer financial services exhaustively. In future surveys, I expect to focus on other regions and include different substantive areas of consumer financial services law.

13. See James M. Lyon, *The Interchange Fee Debate: Issues and Economics*, REGION, June 2006, <http://www.minneapolisfed.org/pubs/region/06-06/interchange.cfm>.

14. See *id.*

15. See *id.*

16. See David A. Balto & Ryan M. Marth, *International Developments on Payment Systems and Interchange Fees*, 61 CONSUMER FIN. L.Q. REP. 121, 122 (2007); Posting of Steven Semerano to Commercial Law Blog, <http://ucclaw.blogspot.com/2008/06/ubiquity-of-interchange-fees.html> (June 6, 2008, 17:28 EST) ("The Ubiquity of Interchange Fees").

17. See Christopher S. Rugaber, *Retailers Assail Credit Card Fees in House Hearing*, BOSTON.COM, May 15, 2008, [http://www.boston.com/business/articles/2008/05/15/ahead\\_of\\_the\\_bell\\_credit\\_card\\_fee\\_fight/](http://www.boston.com/business/articles/2008/05/15/ahead_of_the_bell_credit_card_fee_fight/); see also *EC Ruling on MasterCard Interchange Could Foster Regulations in the U.S.*, DIGITAL TRANSACTIONS, July 15, 2008, <http://digitaltransactions.net/newsstory.cfm?newsid=1634>.

18. Victor Lubasi, *Debit Card Competition: Signature Versus PIN*, CHI. FED. LETTER, Dec. 1, 2005, at 1.

are bundled and not assessed per transaction—to the consumer.<sup>19</sup> Although interchange fees on credit cards are rising in Canada as they are in the United States,<sup>20</sup> the Canadian Bureau of Competition has not regulated credit card interchange fees.<sup>21</sup>

On December 17, 2007, the Directorate General for Competition, the European Commission's antitrust authority, ruled that MasterCard Europe's interchange fees in cross-border, multilateral transactions were anti-competitive and illegal under the antitrust laws.<sup>22</sup> The concern was that the interchange fees were inflating bank revenues to the detriment of consumers and not fostering efficiencies in payment systems.<sup>23</sup> The European Commission gave MasterCard Europe six months to implement a rate structure that complied with EU law and, in early June, MasterCard Europe announced that it was temporarily eliminating interchange fees in cross-border, multilateral transactions while it studied how to make the fees competitive.<sup>24</sup> MasterCard Europe is continuing its appeal to the European Court of First Instance.<sup>25</sup>

Unlike MasterCard, Visa Europe had an exemption from the EU interchange rules that expired at the end of 2007.<sup>26</sup> In March 2008, the European Commission opened a formal antitrust investigation into two fundamental issues, relating to (i) Visa's "honour-all-cards rule," which requires merchants to accept all cards with the Visa logo regardless of the identity of the issuer, the type of card, and the type of transaction; and (ii) Visa's multilateral interchange fees for cross-border point-of-sale transactions at retail outlets within the European Economic Area.<sup>27</sup> Visa Europe hopes to strike a settlement with the European Commission.<sup>28</sup>

In Australia, the Assistant Governor of Financial Systems criticized Visa and MasterCard and threatened further regulation if the credit card industry raised fees.<sup>29</sup> He proposed reforms for EFTPOS (electronic funds transfers at point of sale), the Australian system for processing credit cards, debit cards, and charge cards, and he raised the possibility of allowing merchants to accept some cards

19. Gordon Schnell & Jeffrey Shinder, *The Great Canadian Debit Debate*, CREDIT CARD MGMT., May 2004, at 12, 14, 16, available at [http://www.constantinecannon.com/pdf\\_etc/TheGreatCanadianDebit.pdf](http://www.constantinecannon.com/pdf_etc/TheGreatCanadianDebit.pdf).

20. Barbara Pacheco & Richard Sullivan, *Interchange Fees in Debit and Credit Markets: What Role for Public Authorities?*, ECON. REV. (FED. RESERVE BD. KAN. CITY), Jan. 1, 2006, at 87, 95.

21. Balto & Marth, *supra* note 16, at 122.

22. *EC Ruling on MasterCard Interchange Could Foster Regulations in the U.S.*, *supra* note 17.

23. See Posting of Adam Levitin to Credit Slips, <http://www.creditslips.org/creditslips/2008/01/european-commis.html> (Jan. 10, 2008, 14:54 EST) ("European Commission Rules MasterCard's Interchange Fees Are Illegal").

24. *MasterCard Europe Repeals Cross-Border Interchange Fees Temporarily*, FORBES.COM, June 12, 2008, <http://www.forbes.com/afxnews/limited/feeds/afx/2008/06/12/afx5110091.html>.

25. *Id.*

26. *EU Opens In-depth Inquiry into Visa Europe's Interchange Fees*, FORBES.COM, Mar. 26, 2008, <http://www.forbes.com/afxnews/limited/feeds/afx/2008/03/26/afx4815619.html>.

27. *Id.*

28. *Visa Europe Ltd.*, WALL ST. J. (EUROPE), Apr. 3, 2008, at 7.

29. See *POS Interchange Fee Income Soars Globally*, ASIAN BANKER, July 30, 2008, 2008 WLNR 13289666.

but decline others within the same credit card system.<sup>30</sup> The Australian Reserve Bank's Payments Systems Board will revisit the issue in August 2009 and will lower interchange fees from .50 percent of the transaction value to .30 percent of the transaction value if sufficient progress has not been made.<sup>31</sup>

### SINGLE EURO PAYMENTS AREA (“SEPA”)

The European banking industry created the European Payments Council (“EPC”) in 2002 to carry out the SEPA project, the EU's effort to integrate and harmonize electronic payments.<sup>32</sup> The EPC hopes to have a “domestic payments market” in place by the end of 2010 to enable customers to make non-cash payments in euros from a single bank account and with a single set of payment instruments to any beneficiary in the euros market.<sup>33</sup> Under SEPA, all retail transactions, whether by bank transfer, credit card, debit card, or direct debit, will be “domestic,” as if made within a single country.<sup>34</sup> On January 28, 2008, SEPA went live as banks launched their first SEPA payment instrument for the transfer of credit, with all credit transactions in euros processed the same way across Europe, although pricing will vary by bank a little longer.<sup>35</sup> Instruments should be available for direct debits by November 1, 2009.<sup>36</sup>

The EPC has suffered at least one disappointment. The EPC hoped that, in conjunction with the SEPA project, a small number of competing hubs—pan-European automated clearinghouse networks, or PEACHes—would emerge to settle all transactions within Europe.<sup>37</sup> Certain countries resisted such an approach

30. *Id.*

31. *Id.*

32. European Central Bank, Links on SEPA, <http://www.ecb.int/paym/sepa/html/links.en.html> (last visited July 11, 2008). All twenty-seven members of the EU have rules concerning payments between banking systems in different member states. The goal is to unify these systems and reduce the cost of moving capital across Europe. See *Agreement Reached on Cross-Border Banking*, RTE NEWS, Mar. 27, 2007, <http://www.rte.ie/news/2007/0327/banking.html>.

33. See *supra* note 32; see also European Payments Council, Towards Our Single Payment Area, About SEPA, SEPA Vision, [http://www.europeanpaymentscouncil.eu/content.cfm?page=sepa\\_vision](http://www.europeanpaymentscouncil.eu/content.cfm?page=sepa_vision) (last visited July 11, 2008). On a related note, the EU Commerce Commissioner is calling for rules that decrease the regulatory barriers to cross-border e-commerce transactions but still maintain consumer privacy. See Gareth Morgan, *EU Aims for More Cross-Border E-Commerce*, IT WEEK, June 20, 2008, <http://www.computing.co.uk/itweek/news/2219728/eu-aims-cross-border-commerce>.

34. See European Central Bank, Links on SEPA, <http://www.ecb.int/paym/sepa/html/links.en.html> (last visited July 11, 2008); European Commission, Internal Market, Payment Services, Single Euro Payments Area (SEPA), [http://ec.europa.eu/internal\\_market/payments/sepa/index\\_en.htm](http://ec.europa.eu/internal_market/payments/sepa/index_en.htm) (last visited July 11, 2008).

35. See Press Release, European Central Bank, Joint Statement by the European Commission and the European Central Bank Welcoming the Formal Launch of SEPA Payment Instruments by EU Banks (Jan. 28, 2008), <http://www.ecb.int/press/pr/date/2008/html/pr080128.en.html>; *SEPA: Easier Credit Transfers but Uncertain Cost Cuts*, EURACTIV.COM, Jan. 29, 2008, <http://www.euractiv.com/en/financial-services/sepa-easier-credit-transfers-uncertain-cost-cuts/article-169907>.

36. See *supra* note 35.

37. See Single Euro Payments Area, Infrastructure, <http://sepa.realex.colobank.com/about-sepa/infrastructure.html> (last visited July 15, 2008).

and, in the short term, other clearinghouse systems may continue if they can process "SEPA scheme transactions."<sup>38</sup>

### MOBILE PAYMENTS

A mobile payment, or m-payment, is a point-of-sale payment executed via a mobile device, such as a cell phone, smartphone, or personal digital assistant.<sup>39</sup> Consumers spent \$3.2 billion on mobile payments worldwide in 2003; that number is rising exponentially and was predicted to have been as high as between \$37 and \$55 billion in 2008.<sup>40</sup> Mobile-payment technology has been much slower to catch on in the United States than in Asia because of the following conditions here: (i) the large number of wireless providers (and the issue of interoperability between their different systems); (ii) a lack of cooperation among cell-phone service carriers, retailers, and banks; (iii) a lack of infrastructure for m-payment systems; and (iv) the prevalence of long-term contracts between consumers and cell-phone service providers.<sup>41</sup>

This is an area where developments in the law have lagged behind technological innovation; in the EU, the SEPA project might help bridge this gap. M-payment infrastructures vary among European countries.<sup>42</sup> But generally, this is another payment system that is becoming increasingly electronic in Europe at a quicker rate than in the United States—perhaps because of privacy concerns in the United States that are stronger than those in Europe.<sup>43</sup>

Asia—South Korea in particular—has had the most success with its m-payment infrastructure and consumers using m-payments.<sup>44</sup> It is projected that there were 28 million mobile payment users in Pacific Asia in 2008, amounting to 85 percent

38. *See id.*

39. Gavitec AG, Mobile Payment, Overview, [http://www.mobiledigit.com/mobile\\_payment.html](http://www.mobiledigit.com/mobile_payment.html) (last visited July 11, 2008).

40. Angela Angelovska-Wilson & Jaimie Feltault, *M-Payments: The Next Payment Frontier—Current Developments and Challenges in International Developments of M-Payments*, 22 J. INT'L BANKING L. & REG. 575, 575–76 (2007). It is expected that the m-payments market will grow to more than \$600 billion by 2012. *Mobile Payments to Hit \$600B by 2013*, RCR WIRELESS NEWS, Sept. 9, 2008, at 22. One of the greatest obstacles to more widespread use of mobile payments is consumer distrust. *See Global Security Fears Remain a Drag on Mobile Banking and Payments*, DIGITAL TRANSACTIONS, June 12, 2008, <http://www.digitaltransactions.net/newsstory.cfm?newsid=1814>. For example, in a recent survey, 71 percent of U.S. respondents answered that they would not use a mobile device to bank or shop, and only 13 percent answered that they would. *Id.* The same distrust exists abroad. *Id.*

41. Angelovska-Wilson & Feltault, *supra* note 40, at 581.

42. *Id.* at 582–83. In the United Kingdom, YourRail, a technology firm, and Chiltern Railways are developing an m-payment system for consumers to use in buying rail tickets. In France, MasterCard is sponsoring collaboration between a bank (Credit Mutuel) and a wireless operator (NRJ) to develop an m-payment infrastructure. In Austria, residents can make all of their ordinary daily purchases with m-payments. *Id.* at 583.

43. But banking with mobile phones is beginning to take off in the United States, with 5 million users near the end of 2008 that could grow to 42 million by 2012. *See Yasmin Ghahremani, Cash, Credit, or Cell Phone?*, CFO, Oct. 2008, at 31.

44. *See* Angelovska-Wilson & Feltault, *supra* note 40, at 583–85. *See also* Arnold S. Rosenberg, *Better than Cash? Global Proliferation of Payment Cards and Consumer Protection Policy*, 60 CONSUMER FIN. L.Q. REP. 426, 438 (2006).

of the users worldwide.<sup>45</sup> Experts attribute this success to the following: (i) Asia's relatively small number of wireless providers; (ii) close cooperation among cell-phone service providers, banks, and retailers; (iii) the receptivity of Asian cultures to m-payments technology; and (iv) the high rate of cell-phone penetration in many Asian countries.<sup>46</sup> Even to the extent that other countries can duplicate this success, one of the huge barriers to mobile payments is the ability to develop cross-border technologies (outside the EU) that can function globally.

As the technology has improved, mobile payments have grown rapidly in developing countries—especially in high-crime areas—because the risk of carrying cash or payment cards is high and the credit and debit card infrastructure is less sophisticated.<sup>47</sup> With an increase in the use of cell phones in southern Africa, vendors there are beginning to accept payments initiated by cell-phone transfer.<sup>48</sup> In the Caribbean, many economies are opting for m-payments over the more traditional debit and credit cards because of the lack of landline technologies.<sup>49</sup> An Indian bank has created a “mobile electronic wallet” for its clients, but it is geared particularly toward the affluent.<sup>50</sup>

#### EUROPEAN CONVENTION ON HUMAN RIGHTS

The Council of Europe implements the European Council on Human Rights, to which forty-seven member states are signatories (more than the twenty-seven countries in the EU).<sup>51</sup> The justice ministers of these member states identified consumer debt as a significant human rights concern (because of the negative effect of overindebtedness on human dignity) and asked the Council of Europe to consider harmonized solutions to the problem.<sup>52</sup> The specialists examining the problem issued a report in January 2007, and they found, among other things, the following: (i) overindebtedness is an international problem, and member

45. Carol Ko, *Mobile Payment Users to Soar*, Gartner, ITWORLDCAN., Apr. 30, 2008, <http://www.itworldcanada.com/a/Voice-Data-and-IP/9bdfd50e-be92-4042-9a2a-651e2d9b3652.html>.

46. See *id.*; Angelovska-Wilson & Feltault, *supra* note 40, at 583. There are also cultural factors contributing to the success of m-payments in Asia. For example, there is strong peer pressure to use m-payments in Korea, and the Korean language is amenable to m-payments because of its simplicity. *Id.* It is also possible that in some countries m-payments are encouraged by the relative lack of alternative systems, such as credit cards and checking accounts, that are common in the United States. See, e.g., Rosenberg, *supra* note 44, at 457–58.

47. Angelovska-Wilson & Feltault, *supra* note 40, at 438. Barriers to the development of m-payment technology include the high cost per minute of cell phone use (often from a lack of competition among wireless carriers), a low rate of mobile phone penetration, and poor wireless technologies. *Id.*

48. *Id.* at 437.

49. Angelovska-Wilson & Feltault, *supra* note 40, at 585.

50. Rosenberg, *supra* note 44, at 438. Wireless carriers elsewhere are making “digital wallets” available to consumers, which obviates the need for consumers to carry cash or credit cards. Angelovska-Wilson & Feltault, *supra* note 40, at 579–80.

51. See Council of Europe, About the Council of Europe, Member States, [http://www.coe.int/T/E/Com/About\\_Coe/Member\\_states/default.asp](http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp) (last visited July 14, 2008).

52. See Posting of Jason Kilborn to Credit Slips, [http://www.creditslips.org/creditslips/2007/04/consumer\\_debt\\_r.html](http://www.creditslips.org/creditslips/2007/04/consumer_debt_r.html) (Apr. 6, 2007, 8:56 EST) (“Consumer Debt Relief, Harmonization, and Human Rights”).

states should share statistics and collaborate to address the problem; (ii) financial and lending institutions, in addition to individual debtors, share responsibility for consumer debt; (iii) there is a need for greater financial literacy and access to understandable legal and financial advice; (iv) member states should encourage voluntary solutions (non-judicial settlements of debt); (v) in judicial processes, there is a need to respect the dignity of debtors, including their essential assets; (vi) member states should recognize and enforce payment plans or judgments by “foreign competent authorities”; (vii) the total or partial discharge of debt available in some member states should continue to be explored as a solution when all other means of settling consumer debt have proven ineffective; and (viii) when considering a partial or total discharge of a consumer’s indebtedness, member states should pay attention to the possibility of recidivism and the psychological causes of the overindebtedness (i.e., other social problems).<sup>53</sup> Europe’s emphasis on debt as a human rights concern is also noteworthy because the United States recently moved in the opposite direction, placing more responsibility on the individual debtor in BAPCPA, as a response to the very high rates of consumer bankruptcy filings.<sup>54</sup>

#### OTHER INSOLVENCY ISSUES

Effective January 1, 2007, Sweden eliminated credit counseling as part of the first step of its bankruptcy system (moving in the opposite direction from the United States).<sup>55</sup> Debtors are no longer required to get counseling (found in Sweden

53. COUNCIL OF EUR., FINAL ACTIVITY REPORT OF THE GROUP OF SPECIALISTS ON SEEKING LEGAL SOLUTIONS TO DEBT PROBLEMS (CJ-S-DEBT) 7–9 (Jan. 28, 2007), [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/steering\\_committees/cdcj/cj\\_s\\_debt/CJ-S-DEBT%20\\_2006\\_%206%20e%20Final%20-%20web%20version.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/cj_s_debt/CJ-S-DEBT%20_2006_%206%20e%20Final%20-%20web%20version.pdf).

54. See *supra* notes 6–11 and accompanying text; Gary D. Hammond, Jeffrey E. Tate & Alvin C. Harrell, *Selected Issues and Developments in Consumer Bankruptcy, and the Impact of the 2005 Bankruptcy Code Amendments*, 59 CONSUMER FIN. L.Q. REP. 398, 399 & nn.1, 5 (2005) (citing bankruptcy filing statistics indicating the relatively high volume of case filings through 2005).

The United States exceeds Japan in per-capita credit card spending by more than three times. See Posting of Bob Lawless to Credit Slips, [http://www.creditslips.org/creditslips/2006/11/brits\\_against\\_d.html#more](http://www.creditslips.org/creditslips/2006/11/brits_against_d.html#more) (Nov. 28, 2006, 16:27 EST) (“UK Conservatives Speak Out Against Consumer Debt”). Australia and Canada are much closer to the United States in the amount of per-capita credit card use. See *id.* The growth of per-capita consumer credit in the United Kingdom far outstripped that in the United States between 2003 and 2006 despite the greater emphasis in Europe on the social causes of overindebtedness. See *id.* In U.S. dollars, as of mid-2006, consumer credit per capita was \$6,900 in the United Kingdom compared to \$7,300 in the United States. *Id.*

Credit card use has even risen in countries such as Turkey, despite the stigma of debt in that country. Turkey has more than 38 million credit cards and, in 2006, Turkey passed a law placing limitations on credit card marketers in response to high credit card debt, sky-high interest rates, and stories of suicides by credit card holders who had accumulated massive debt. See Mark Lander, *Credit Cards Tighten Grip Outside U.S.*, N.Y. TIMES, Aug. 10, 2008, at A1. The Turkish experience illustrates the growing exportation of credit cards from the United States and the cultural shift worldwide toward the acceptance of debt.

55. Jason J. Kilborn, *Out with the New, In with the Old, As Sweden Aggressively Streamlines Its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?*, 80 AM. BANKR. L.J. 435, 457–58 (2006).

to be time-consuming and a waste of effort) and, in addition, the non-judicial KFM<sup>56</sup> now has binding authority to enter, modify, and dismiss payment plans, with both debtors and creditors having a right to appeal KFM decisions to the courts.<sup>57</sup> The Dutch legislature streamlined the bankruptcy process in the Netherlands and, effective January 1, 2008, eliminated much of the judiciary's discretion over what is a "fair and reasonable plan" by requiring courts to use a set formula to determine the income to be left to debtors after they file for insolvency.<sup>58</sup> The Swedish system had moved toward similar time- and cost-saving uniformity, even before its reforms.<sup>59</sup> The German Bundesrat passed a bill in 2007 that requires German debtors with "insufficient projected nonexempt income" to cover court costs to make monthly payments toward the minimum costs of the interim and permanent trustees; if debtors cannot make these payments with exempt income, discharge is denied.<sup>60</sup> The bill is still pending in the Bundestag but is likely to pass.<sup>61</sup>

### CONSUMER PRIVACY

In the wake of significant security breaches in the United Kingdom ("UK"), the EU began to look seriously at security breach notification legislation. Despite many attempts,<sup>62</sup> the United States did not enact federal anti-spyware legislation in 2008, while the EU considered toughening its anti-spyware laws.

### DATA SECURITY BREACH AND NOTIFICATION

In November 2007, the UK government lost two computer discs containing the personal data of all families with a child under the age of sixteen (all child

56. The KFM, or Kronofogdemyndigheten, is a freestanding agency in Sweden that acts as the primary enforcer of private and public obligations. The agency decides whether consumers qualify for insolvency relief, and for any consumer who does, the agency applies budgetary guidelines established by the Tax Service to set up a payment plan in which the consumer pays all of his or her excess income to creditors, usually over a period of five years. *See id.* at 440.

57. *See id.* at 458.

58. See Jason J. Kilborn, *Two Decades, Three Questions, and Evolving Answers in European Consumer Insolvency Law: Responsibility, Discretion, and Sacrifice* 12 (Dec. 17, 2007), available at [http://papers.ssrn.com/abstract\\_id=1080252](http://papers.ssrn.com/abstract_id=1080252) [hereinafter "Kilborn, *Two Decades*"]. The new Dutch law also eliminates "payment plans" that provide little benefit to creditors. *Id.* at 17. These developments reflect, to some extent, the increased objectivity of the BAPCPA means test and the U.S. Bankruptcy Code disposable income provisions. See 11 U.S.C. §§ 707(b), 1325(b) (2006). The U.S. and European provisions may indicate a broad movement toward greater consistency in insolvency proceedings.

59. See Kilborn, *Two Decades*, *supra* note 58, at 13.

60. *Id.* at 18. For an excellent survey and comparison of the consumer insolvency laws of European countries, see generally JASON J. KILBORN, *COMPARATIVE CONSUMER BANKRUPTCY* (2007).

61. E-mail from Jason Kilborn, Assistant Professor, John Marshall Law School, to Gregory M. Duhl, Associate Professor, William Mitchell College of Law (July 14, 2008, 10:36 EST) (on file with *The Business Lawyer*).

62. See L. Elizabeth Bowles, *Survey of State Anti-Spyware Regulation*, 63 *BUS. LAW.* 301, 303 & n.15 (2007).

benefit recipients, or 25 million people).<sup>63</sup> The discs were lost while in transit from HM Revenue & Customs (“HMRC”) to the National Audit Office.<sup>64</sup> This incident amounted to the biggest loss ever of personal data in Europe and the second biggest loss of data worldwide by a government body.<sup>65</sup> Although there was no evidence of misconduct or a crime, the Independent Police Complaints Commission found that the data loss was avoidable.<sup>66</sup> HMRC never recovered the disc but, since the catastrophic breach, has been committed to enacting forty-five recommendations to improve data security.<sup>67</sup> The loss of the discs was not the only security breach that plagued the UK government. On January 9, 2008, the Ministry of Defense reported the theft of a laptop from a Royal Navy officer with the information of 600,000 recruits and other persons who expressed an interest in joining the Armed Services.<sup>68</sup> Also in the early part of 2008, the National Health Service lost information on hospital patients.<sup>69</sup> The government was criticized for still maintaining data on computer discs, and many questioned whether the government could maintain the database necessary for compulsory identification cards with such poor security precautions in place.<sup>70</sup>

About thirty-four different European jurisdictions (and all countries within the EU) have some type of law protecting individual privacy.<sup>71</sup> However, despite the increasing number of security breaches in Europe, legislative remedies in European countries and the EU have lagged behind those in the United States (which have largely been enacted by the states),<sup>72</sup> unlike in the area of data security, where the EU has generally been on the regulatory forefront.<sup>73</sup> Furthermore, despite the

63. *UK Families Put on Fraud Alert*, BBC News, Nov. 27, 2007, [http://news.bbc.co.uk/1/hi/uk\\_politics/7103566.stm](http://news.bbc.co.uk/1/hi/uk_politics/7103566.stm).

64. *Id.*

65. American Bar Association, ABA Section of Business Law, 2008 Global Business Law Conference, Data Security Breach Incidents: The Law in the E.U., U.S. and Globally and How Businesses Should Prepare for the Crisis (May 29, 2008), <http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=premium&role=cl&url=/buslaw/mo/premium-cl/programs/gblc08/13.pdf> [hereinafter “Data Security Breach Incidents”].

66. HM Revenues & Customs, Chancellor’s Statement on HMRC Data Loss and Acting Chairman’s Comment, <http://www.hmrc.gov.uk/news/hartnett-poynter-icc.htm> (last visited July 12, 2008).

67. *Id.*

68. Press Release, European Digital Rights, Personal Sensitive Data Keeps on Being Lost in UK (Jan. 30, 2008), <http://www.edri.org/edriagram/number6.2/uk-losing-personal-data>.

69. *Id.*

70. *See id.*; *UK Families Put on Fraud Alert*, *supra* note 63.

71. Data Security Breach Incidents, *supra* note 65. Not all European countries have adopted the main European Community Directive on consumer privacy, the Data Protection Directive (95/46/EC) (the “Directive”). *Id.* In addition, many countries had consumer privacy legislation before the Directive. *Id.* Many countries that have adopted the Directive have adopted “additional data security obligations.” *Id.*

72. *See id.* For a discussion of some of these state laws, see Patricia Covington & Meghan Muselman, *Recent Developments Affecting Privacy in 2007*, 63 *BUS. LAW.* 639, 639–46 (2008) (in the 2008 Annual Survey).

73. *See* Daniel B. Garring & Rebecca Wong, *International Spyware: A Global Privacy Concern*, 61 *CONSUMER FIN. L.Q. REP.* 125, 125 (2007).

calls for new legislation, European countries have used existing legislation to confront data security breaches.<sup>74</sup> Additionally, mandatory reporting provisions (for disclosure of personal data without consent) are much more prevalent under state law in the United States than in Europe.<sup>75</sup>

On November 13, 2007, the European Commission adopted a proposal for a directive to amend the Directive on Privacy and Electronic Communications (Directive 2002/58/EC) (“ePrivacy Directive”)<sup>76</sup> to add a data security breach notification provision. This draft provision is supported by the European Data Protection Supervisor (“EDPS”)<sup>77</sup> and requires the provider of “publicly available communications services” to notify any subscriber concerned and the national regulatory authority of any destruction, alteration, or loss of “personal data.”<sup>78</sup> While an improvement, the draft extends only to “subscribers” and not to all individuals affected by a data security breach, and does not extend to *all* providers of information technology services. On June 25, 2008, the European Parliament’s Standing Committee on Civil Liberties, Justice and Home Affairs asked the European Commission, within two years, to draft legislation that includes individuals’ IP addresses as “personal data” that should be protected when collected in combination with other personal information.<sup>79</sup>

#### SPYWARE

Spyware is software placed on a user’s computer without consent that gathers information about the user while he or she accesses the Internet.<sup>80</sup> A survey by the International Data Corporation identified spyware as the third greatest threat to organizational security.<sup>81</sup> During the same week that TJX Companies, Inc., announced one of the biggest data losses in recent memory,<sup>82</sup> Nordea, a Swedish bank, reported what McAfee described as the “biggest ever” online bank heist.<sup>83</sup> Allegedly, a group of Russian organized criminals targeted bank customers with e-mails. The customers were tricked into downloading spyware that

74. *Id.* at 125.

75. *See id.*

76. *See* Council Directive 2002/58, 2002 O.J. (L 201) 37 (EC).

77. *See* Press Release, Europa, EDPS Opinion on ePrivacy Directive: Overall Positive, but Further Improvements Should Be Considered (Apr. 14, 2008), <http://europa.eu/rapid/pressReleasesAction.do?reference=EDPS/08/03> [hereinafter “EDPS Press Release”].

78. For the text of the proposal, see COMM’N OF THE EUROPEAN CMTYS., PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (2007), [http://ec.europa.eu/information\\_society/policy/ecommm/doc/library/proposals/dir\\_citizens\\_rights\\_en.pdf](http://ec.europa.eu/information_society/policy/ecommm/doc/library/proposals/dir_citizens_rights_en.pdf).

79. Press Release, European Digital Rights, EPrivacy Directive Debated in the EP’s Civil Liberties Committee (July 2, 2008), <http://www.edri.org/edriagram/number6.13/e-privacy-review-ep>.

80. Bowles, *supra* note 62, at 301.

81. *See* Garring & Wong, *supra* note 73, at 125 & n.4.

82. For a discussion of the TJX Companies, Inc., security breach, see Covington & Musselman, *supra* note 72, at 641.

83. *See* Data Security Breach Incidents, *supra* note 65.

transmitted their account details to the criminals.<sup>84</sup> Nearly 250 customers were affected, and the criminals allegedly swindled 800,000 euros over a period of fifteen months.<sup>85</sup>

In the United States, various states regulate spyware but have different approaches to a security threat that transcends borders (and demands a national, or even international, solution).<sup>86</sup> No federal law has been enacted to address specifically the threat posed by spyware, and the three laws applicable to spyware, the Computer Fraud and Abuse Act, the Stored Wire and Electronic Communications and Transactional Records Act, and the Wiretap Act, all have limitations in the context of regulating spyware.<sup>87</sup>

In 2002, the EU adopted the ePrivacy Directive, part of which targets spyware.<sup>88</sup> The ePrivacy Directive requires organizations seeking to access an individual's "terminal" (e.g., computer or mobile phone) to disclose the purpose for seeking access and to give the individual the right to withhold consent.<sup>89</sup> This is not as effective as an earlier version of the ePrivacy Directive that required opt-in rather than opt-out.<sup>90</sup>

On June 25, 2008, the European Parliament's Standing Committee passed a series of amendments to the European Commission's proposal to amend the ePrivacy Directive; those amendments would require "publicly accessible private telecommunications systems" to obtain user consent (opt-in rather than opt-out) before accessing individuals' personal data.<sup>91</sup> An individual gives his or her consent by setting his or her browser to accept cookies.<sup>92</sup> While the current proposal to amend the ePrivacy Directive gives a private right of action to indi-

84. *Security Breach in Nordea—Hackers Loot US \$1 Million*, SPAMFIGHTER, Jan. 24, 2007, [http://www.spamfighter.com/News-7560-Security-Breach-In-Nordea-%E2%80%93Hackers-Loot-US\\$-1-Million.htm](http://www.spamfighter.com/News-7560-Security-Breach-In-Nordea-%E2%80%93Hackers-Loot-US$-1-Million.htm).

85. *Id.*

86. Bowles, *supra* note 62, at 302–03.

87. See Garring & Wong, *supra* note 73, at 131.

88. See *id.* at 129.

89. *Id.* Article 5 reads, in part:

Member States shall ensure that the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned is provided with clear and comprehensive information in accordance with Directive 95/46/EC... about the purposes of the processing, and is offered the right to refuse such processing by the data controller. This shall not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network, or as strictly necessary in order to provide an information society service explicitly requested by the subscriber or user.

Council Directive 2002/58, art. 5, 2002 O.J. (L 201) 37 (EC). Article 5 binds service providers outside the EU if they seek to access the terminal of an individual in the United States. *Id.*

90. See Garring & Wong, *supra* note 73, at 129. The ePrivacy Directive exempts the use of cookies to facilitate the provision of information services. See *id.* at 130.

91. See *MEPs Adopt Draft "E-Privacy Directive" Reforms*, HEISE ONLINE, June 28, 2008, <http://www.heise.de/english/newsticker/news/110110>.

92. See *id.*

viduals against those who infringe the directive's anti-spam provisions, the EDPS is calling on the European Commission to extend a right of action to individuals against those who infringe all provisions of the ePrivacy Directive, including the anti-spyware provisions.<sup>93</sup>

## CONCLUSION

Consumers worldwide face much uncertainty and anxiety in the midst of the global economic crisis. In Europe, there is a trend toward innovation, unification, and consumer protection in many areas of consumer financial services law. In the United States, there continues to be a hodgepodge of federal and state consumer protection statutes, judicial decisions, and regulatory actions.<sup>94</sup> One of the challenges that the economic crisis holds is how both federal and state regulators in the United States can work with, and learn from, other countries in implementing long-term global policies to balance the interests of consumers and financial institutions.

93. See EDPS Press Release, *supra* note 77.

94. See, e.g., Donald C. Lampe, Fred H. Miller & Alvin C. Harrell, *Introduction to the 2009 Annual Survey of Consumer Financial Services Law*, 64 *Bus. Law.* 465 (in this *Annual Survey*).