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ECommerce News

November 30, 2000

SPOTLIGHT ON EUROPEAN DEVELOPMENTS

This edition of ECommerce News is devoted to developments across the Atlantic that are relevant (or will soon be relevant) to US businesses.

Internet penetration. The percentage of households using the Internet in the EU has risen to 28% (from 18% in March 2000). In three countries, Denmark, Sweden, and the Netherlands, penetration is over 50% (higher than the US level of 40%). About 70% of small and medium-sized businesses are online. Last year, European ecommerce revenue was $5.4 billion, about a sixth of US ecommerce revenue.

Jurisdiction. On November 30, the EU passed a controversial law (the Brussels Regulation) that would allow EU consumers to sue online companies in their home states. Although the text of the Regulation is not yet available, press reports indicate that it will affect all global web sites unless the site specifically indicates that it does not wish to deal with citizens of a particular country. EU officials have argued that the consumer's ability to sue in his or her home country is essential to the growth of ecommerce. Critics have noted that the law will subject anyone selling online to the laws of each of the EU's 15 member states, even if the online retailer hasn't specifically targeted any of those states. Taken in concert with a French court's ruling on November 20 ordering Yahoo! Inc. (located in Santa Clara, California) to prevent French users from accessing Nazi material, it appears that assertions of local jurisdiction over the global Internet are likely to increase.

European perspective on Safe Harbor. Beginning on November 1, US companies can self-certify their compliance with the Safe Harbor privacy principles. (For information about how to self-certify, see www.export.gov/safeharbor.) So far, European member states' authorities have not been involved in any data transfers to the US requiring state authorization according to the safe harbor principles. Data protection authorities in Germany have developed guidelines for dealing with cases, and have set up an organization called the "Düsseldorfer Kreis," in which each state authority is represented, to discuss and resolve legal issues in German privacy law.

Back in July 2000, the European Commission initiated a reform effort directed at its data protection directive applicable to electronic privacy (suggesting, among other things, that spam be prohibited unless users have opted in to its receipt — something not required by US law). Recently, a Working Party charged with providing advice on this reform issued a report suggesting that the scope of the directive be broadened to apply to workplace intranets as well as the Internet — and to free services as well as services that must be paid for. Their report also proposed that hardware and software manufacturers be obliged to design their

products so that they process as little personal data as possible and facilitate the exercise of the data subject's rights. Finally, the report suggested that providers be obliged to inform users of the purposes for which they generate, collect, or store clickstream data. This Working Party report signals that significant amendments to the data protection directive may be adopted.

The European Commission has published a draft model contract for use by companies transferring data from the EU to other countries. Financial services businesses in the US, which are not covered by the self-certification Safe Harbor regime, will need to use contracts to cover the transfer of personal data from the EU to "third countries that do not provide an adequate level of protection for the processing of personal data" — including, from the European perspective, the US.

Tax. Member states of the EU have been debating the proposed reform of the value-added tax ("VAT") regime applicable to electronically delivered services. One of the goals of this reform is to get non-EU suppliers that supply EU customers (e.g., companies operating from the US) to pay VAT in the EU. Recently, some member states have suggested that such suppliers should identify themselves for VAT purposes to a centralized body, instead of having to register with the VAT administration of each of the fifteen member states. No consensus has been reached with respect to the VAT exemption for small-scale sales by non-EU suppliers to EU customers not subject to VAT. Both the principle and the threshold below which such transactions would be VAT-exempt, set at EUR 5.000 by the latest proposal, are still being debated. With regard to the scope of the reform, some member states would like the services covered by the proposal to be exhaustively listed. The member states have not reached any agreements on these issues and have invited national negotiators to reach consensus on an amended proposal by 30 June 2001.

Online ADR. An EC research center has announced that it plans to launch a pilot project to test the interoperability, accessibility, and security of online mediation systems — with the goal of resolving business to consumer ecommerce disputes. At the moment, EC policy does not allow companies to require consumers to resolve their disputes through binding ADR (and waive their right to go to court). Using online mediation to resolve consumer disputes may be a way to avoid this policy. The research center (called the "Joint Research Center," or JRC) will be using a platform developed by eResolution, a Montreal dispute resolution company. (On November 27, the Federal Trade Commission released a report summarizing its June 2000 workshop on online dispute resolution — see www.ftc.gov/bcp/altdisresolution/summary.htm.)

Local loop unbundling. The "local loop" refers to the circuit that links a telecommunications subscriber to the local switch of the telecommunications operator. Unbundling of the local loop means allowing other operators to use all (or part) of the incumbent's local loop — which will allow (among other things) the installation of broadband services. On October 3, 2000, representatives of the EU member states approved the EC's proposal for unbundling the local loop. The proposal, which is part of a group of reforms designed to support competition in the European telecommunications market, must be implemented by January 1, 2001. Lack of telecommunications competition has been identified as a key obstacle to the development of ecommerce in Europe.

Monthly Update: Issues Facing the New US Administration

Internet Taxes. Perhaps the most pressing issue facing the new Administration and Congress with respect to ecommerce is Internet taxation. The Internet Tax Freedom Act, which Congress passed in 1998, is due to expire in October 2001. The Act imposed a moratorium on multiple and discriminatory taxes on ecommerce as well as taxes on Internet access.

The Internet Tax Freedom Act does not directly address the most contentious issue in the debate — sales taxes on products purchased electronically. There are at least 7,500 tax jurisdictions in the United States. Many believe that the cost of

compliance with such a broad patchwork of taxing authorities will derail ecommerce.

Two U.S. Supreme Court opinions, *Quill v. North Dakota (1992)* and *National Bellas Hess v. Dept. of Revenue of Ill (1967),* limit states in their ability to compel out-of-state businesses to collect their sales taxes. Businesses that do not have a "nexus" with a state do not have to collect that state's sales taxes. Any proposal to extend the Internet tax moratorium will meet with strong opposition from states and local governments as well as traditional retailers unless it also addresses the sales tax issue.

Earlier this year, Sen. Byron Dorgan (D-ND) introduced legislation (S. 2775) to extend the moratorium on discriminatory access charges for four years, and to allow states to form compacts to compel out-of-state businesses with over $5 million in gross sales to collect sales taxes. A compact would have to include a minimum of twenty states with a simplified tax regime. Sen. McCain criticized the proposal, saying that the Internet must remain tax-free for an extended period and that Sen. Dorgan's proposal would amount to a "back-door" tax.

Broadband deployment. Another issue that will arise early in the next session of Congress is the deployment of broadband services. Reps. Rick Boucher (D-VA) and Bob Goodlatte (R-VA) introduced legislation (H.R. 1686) that would relieve the regional Bell operating companies from 1996 restrictions that prevent them from carrying data outside their regions. Rep. Billy Tauzin (R-LA), Chairman of the House Commerce Telecommunications Subcommittee, offered a similar bill (H.R. 2420), where it faced the opposition of the Commerce Committee Chairman, Rep. Tom Bliley (R-VA). Chairman Bliley believes that Congress should not weaken the Bells' incentives to open up their markets by allowing them to carry data traffic across boundaries. However, the dynamic will change considerably with Chairman Bliley's retirement at the end of the current Congress. Reps. Tauzin and Mike Oxley (R-OH), both of whom wish to succeed Chairman Bliley on the Commerce Committee, are closely associated with the so-called Baby Bells and are expected to support legislation to deregulate high-speed data services.

Government contracts. Also high on the agenda for Congressional leaders, depending on who ultimately wins the presidency, could be legislation to block regulations that many in the technology community refer to as "blacklisting." In 1997, Vice President Gore (in a speech to labor unions) agreed to change proposed Federal Acquisition Regulations that would require businesses to meet certain ethics standards before winning government contracts.

This is of particular concern to the technology industry because the federal government is the largest single purchaser of high-tech goods and services. Opponents of the regulations do not want to give such power and responsibility to government contracting officers, who they are not equipped to determine whether a contractor has used questionable business practices. There is wide speculation that a Bush administration would abandon the proposed rules.

Privacy. Congress's failure to enact a bill establishing a privacy commission to study privacy legislation, which would have put off the issue for the eighteen months of the commission's existence, puts the matter back squarely with Congressional committees. The industry has been split between those who believe the best strategy would be to work with legislators and those who prefer to head off legislation of any kind.

Among the privacy bills that will be discussed by the next Congress is The Consumer Internet Privacy Enhancement Act (S. 2928) authored by Senator John McCain (R-AZ), Chairman of the Senate Commerce Committee, and co-sponsored by Commerce Committee Member Senator John Kerry (D-MA). The legislation would require website operators to post notice of their practices with respect to the collection of personally

identifiable information, and would preempt state law. Competing proposals by other high-profile Members of Congress include S. 2606 by Sen. Ernest Hollings (D-SC) and H.R. 3321 by Rep. Edward Markey (D-MA), both of which would require notice and opt-in.

WCP'S EU COMMUNICATIONS, MEDIA, AND E-BUSINESS PRACTICES

Wilmer, Cutler & Pickering maintains a leading practice in the area of EU regulation of communications, media, and ebusiness. We advise fixed and mobile network operators, broadcasters, Internet and other service providers, Internet portals, hardware and software manufacturers, and suppliers of content.

WCP has been at the forefront of advice on EU communications deregulation. Over the years, we have been involved in many of the most significant competition cases concerning Internet and traditional telecommunications businesses, including BT/AT&T, WorldCom/MCI, Vodafone-Airtouch/Mannesmann, WorldCom/Sprint, and AOL/Time Warner.
We advise clients in connection with legislative proposals and business opportunities in media and ecommerce areas, including EU harmonization of copyright law, electronic contracting, privacy, encryption, and taxation of Internet access and ecommerce.

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ECommerce News is a publication of WCP's EGroup.