

Regulatory Issues for Global E-Tailers: Marketing Implications

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EXECUTIVE SUMMARY

Traditional "brick and mortar" U.S. based retailers have recently entered the e-commerce foray with e-tailers such as Amazon.com. After significant inroads in retail markets at home, traditional retailers are now attempting e-commerce opportunities abroad. One of their most daunting challenges is one that has received very little attention so far – the regulatory issues involved. The legal framework for Internet transactions is at present incomplete and often unclear or contradictory.

The Internet presents itself as an ideal vehicle to reach the global marketplace reflecting a confluence of styles, taste and products. There however, are a number of key marketing and regulatory issues facing e-retailers in the U.S., as they consider expanding their markets from their own backyard to become global players. In this paper, the regulatory factors in the EU and the U.S. will be analyzed and compared for their impact on e-tailers and their customers within the framework of marketing challenges. Suggestions will be provided for more effective marketing initiatives and strategies in the foreseeable future.

Regulatory Issues

Several key issues regarding the regulation of e-commerce can be identified that are both controversial and are mostly unresolved. Small wonder that the respective positions of the U.S. and the EU on these issues differ significantly.

Three main regulatory concerns drive the general positions taken by the U.S. and the EU. These include, 1) the extent of self-regulation within the industry, 2) single market rules and 3) jurisdiction. Clearly on all of these issues the U.S. government has, so far, favored as much self-regulation by e-commerce as possible. The industry is leading the charge. There are some consumer groups and other critics who have raised some concerns, but they have, so far, been overwhelmed by the advocates for self-regulation. The U.S. government has been amenable to allow acceptable international bodies to be created in instances where self-regulation is unpractical, e.g. international registration of domain names. The EU and its member states are tilting the other way - towards more regulation, especially to protect consumers (However, there is a determined effort underway by European e-commerce to allow for more self-regulation).

A single market with one set of rules for all, open to competition with a minimum of regulation is one of the cornerstones of the EU. In contrast to the U.S., the creation of a single EU market is still a work in progress. The advent of e-commerce has by its very nature created a unique opportunity to accelerate this process. Unfortunately, the initial consumer and business adoption in the EU has generally been slower than that of the U.S. Hence serious regulatory efforts are off to a late start and have also been hampered by differences between member states. The U.S., however, is experiencing its own discord between the different states and because of its generally pro-deregulation stance has itself been slow to address key regulatory issues.

Regulatory Policy

The issues referred to above have surfaced in a number of specific regulatory policies. Perhaps, most prominent is privacy. The EU has adopted a directive on data protection that sets strict privacy standards. Any firm that wants to use personal information, must first explain to the individual what the information will be used for and then obtain the individual's permission. To conform with this EU directive, American firms, both e-commerce and traditional, are

required to adjust their (consumer) privacy policies to those of the EU if they want to collect and use consumer data there. This has led to tension between the U.S. and the EU which eventually resulted in a "safe harbor" agreement, providing for "voluntary" compliance by U.S. firms. However, the Bush administration wants to revisit this agreement.

Taxation is also treated differently in the U.S and the EU. The U.S. has declared a moratorium on the imposition of new and discriminatory taxes on Internet purchases until October 2001. This is often incorrectly perceived as meaning that NO sales taxes can be levied on e-commerce transactions. Such taxes may indeed be imposed, just as they may be applied to other direct marketing transactions such as catalog sales. However, due to a Supreme Court decision, enforcement of tax collections outside the firm's home state, are unenforceable. By contrast, the EU does allow, apply and enforce such taxes through its value added or VAT system. For re- and e-tailers this presents a number of problems since tax rates differ between the member states as do product and service categories. For American e-tailers the ultimate question is whether they are liable for these European taxes. Ultimately this boils down to whether such firms have a permanent establishment (presence) or "nexus" within the EU, something which is not always easy to determine.

Fraud, both by consumers and business, is still a major concern. So are espionage of company data and sabotage, e.g. massive assaults on web sites. Both are caused by unauthorized access or "cracking" (technically speaking not "hacking"). The main U.S. concern is with the latter, especially those initiated by (foreign) terrorists, hence the administration's concern about the use of encrypted data and its wish to have a "key" for each encryption. This flies in the face of privacy requirements by both business and consumers. Also, the EU is less concerned about such, with the possible exception of the U.K. For now, it seems that such regulation is unlikely to be introduced in either the U.S. or the EU.

Determining liability for e-commerce cases, is another policy area that is partly uncharted. Is an e-retailer from one state with a web site presence in another, liable in its or the consumer's site if the latter files a suit, e.g. about a defective product or an offensive advertisement? A tentative standard seems to be evolving in the U.S. where key standards are the degree of interactivity of the web site and whether a sale took place. In the EU, a recent directive stipulates that the seller's home state will determine jurisdiction. This still leaves the international jurisdictional issue of e-tailing between the U.S. and the EU unresolved.

Precautionary Checklist

It is obvious from the preceding analysis, that the regulatory challenges facing U.S. e-tailers marketing to the EU are complex, unclear and often unresolved. To successfully conduct business under these circumstances requires careful planning aided by proper advice. Both business and legal issues have to be considered. As a starting point, the following short list of precautions is presented to enhance these e-tailers' marketing efforts.

1. Choose web sites (server location), warehouse locations and any other possible manifestations of nexus carefully. Weigh the pros of improved customer service against the cons of greater liability and taxation.
2. Select countries with zero or low VAT rates if you are likely to be taxed by the nature of your product or service e.g. digitized software, music, data etc. For instance, the U.K. for hardcover books (no VAT) and Luxembourg various products (lowest rates for many products).
3. Insure data protection for customers in a secure way. Get their permission to disclose information. Obtain self-certification of compliance with the safe harbor to the U.S. Commerce Department or join an online privacy-seal program such as TRUSTe.org or BBBOnline.com.
4. Carefully review and monitor the content and promotions on your web site. Encourage free flow of information via advertisements to the web visitor but ensure that advertisers agree to abide by your rules of conduct. Provide only essential information as web site content. Display any sponsorship and also give details of where the provider is based.
5. Clearly state to customers the terms and conditions upon which business is trading and place the contractual offer in a highly visible location of the web-site if the customer is making a purchase. For example, requiring a click on an icon as signal of acceptance and requiring a second click as confirmation or to cancel transaction.
6. Use a jurisdictional clause in your e-contract on your web site to spell out which country's laws and courts will apply in legal disputes with your customers.

7. Evaluate delivery options carefully, usually U.S. and/or foreign (local) common carriers and perhaps also self-shipping. Consider the trade-off between greater customer satisfaction and possible larger liability and tax exposure by using local shippers.
8. Try to make the content on your different web sites as consistent and as compliant with the most common regulations as possible. Make special adjustments only for the countries with different, especially stricter, regulations if you have nexus or at least an interactive web site in such countries. If you are not sure of your status, obtain professional advice from established legal counsel in such countries.
9. Ensure that all your marketing practices in countries where you are “vulnerable” to local regulations, comply with local laws. This applies not only to the web site itself but to all other marketing activities, e.g. price discounts, promotional deals, and non-web advertising.
10. Ensure that proper security systems are installed to protect the customer from fraud and theft, e.g. of credit card information.

CONCLUSION

The Internet provides new opportunities for both e-tailers and traditional brick and mortar e-tailers to market goods and services across international boundaries. In the past, exporting required significant investment in outlets and logistics. To engage in business with European countries it was necessary to adhere to numerous local laws and regulations. Although e-commerce has eased some of these constraints, a viable entry strategy into the EU still demands cautious deliberation given newly emerging laws and practices. Such forethought may perhaps reduce the risk in unwanted legal entanglements.

REGULATORY ISSUES FOR GLOBAL E-TAILERS: MARKETING IMPLICATIONS

The Internet's commercial potential for e-tailers is growing steadily despite a competitive environment that fails to show signs of sustained profitability. For the year 2000, however, the U.S. Census Bureau reports net sales totaled \$25.8 billion, a 67% increase from the year before (Census Bureau 2001). More reluctant traditional retailers have only recently realized that as their revenues increase they gain new efficiencies through their newly implemented e-commerce channels. Expanding global opportunities through e-commerce appears especially inviting when traditional brick and mortar channels are too expensive or prohibitive due to numerous foreign country restrictions. This may especially be the case if the retailer can reduce costs in their global supply chain, enhance global customer relationships or build a stronger and more consistent global brand (Vida, Reardon & Fairhurst 2000).

Large U.S. retailers such as Wal-Mart, the discount general merchandiser, Costco the warehouse club or Circuit City, the electronics superstore often bring important advantages over competitors such as dominant brand equity, large fulfillment operations, supply chain management capability and customer service. These advantages may be applied to their retail Web operations as well. At the same time, service providers such as Yahoo and AOL are enablers for many small and medium-sized businesses that may offer products and services globally (Berthon, Pitt and Katsikeas 1999). For example, U.S. small businesses are also embracing the Internet and have generated \$33.1 billion in retail sales in 1999, and are expected to increase (U.S. Small Business Administration 2000). For U.S. retailers of all sizes, the European market is attractive given its growing interest and use in e-commerce.

The Internet online universe for e-tailers is increasing after a slow start. The number of Europeans with Internet access is about 14 million households or a 9 percent penetration rate in the 15 European Union (EU) nations compared to a fifty percent penetration rate in the U.S. Members from the EU, however are expected to reach a 31% penetration rate level by 2003, while the U.S. rate is expected to double (Forrester 2000). Notably, online users in the Netherlands, Germany, France and U.K. offer the most promising developments for consumer goods with their high income and savvy technology populations.

The Internet presents itself as an ideal vehicle to reach the global marketplace reflecting a confluence of styles, taste and products. There however, are a number of key marketing and regulatory issues facing e-retailers in the U.S., as they consider expanding their markets from their own backyard to become global players. Most notable are those encountered by the increasing number of non-U.S. Internet users. These issues are becoming more prominent as more e-tailers develop local and foreign web sites with their attendant problems relating to content, language and technology. Clearly, foreign customers are more likely to buy a product if its benefits are communicated to them in their own language and cater to local tastes. Beyond localization and personalization issues other global challenges are leveraging company assets to include which products and services to employ, brand strategy, and good web site design and administration (Smith, Bailey and Brynjolfsson 2000; Gulati and Garing 2000; Novak, Hoffman, and Yung 2000). Notwithstanding, there are considerable regulatory and jurisdictional barriers to these fundamental marketing practices (Richards 1997; Miyzaki & Fernandez 2000). These include: privacy, taxation, security and liability to name only a few. These legal and environmental issues are the focus of this paper.

Recent academic research of e-commerce has focussed on consumer behavior issues to provide insight to marketing strategy (Hoffman and Novak 1996; Alba, Lynch, Weitz, Lutz, Sawyer and Wood 1997, Bakos 1997, Szymanski and Hise 2000). Retailers' primary objectives are to attract customers to their web site and encourage people to buy (Griffith & Krampf 1999). Once a consumer arrives at the web site, however, problems arise with navigation, finding products or simply completing the purchase (Lohse and Spiller 1998; Burke 1997; Burke 1999; Palmer and Griffith 1998; Hogue and Lohse 1999). It is essential that e-tailers have a clear understanding of the role of the Internet in their retail mix (products and services provided, promotion and so on) while their brick-and-mortar counterparts need to fully integrate their Internet strategies with their traditional store offerings (Cowles, Kiecker and Little 2001).

The authors acknowledge that while the focus on the marketing practices described above are important, the concomitant regulatory and jurisdictional issues affecting marketing strategy and practices in reaching global markets have been given little attention. In this paper, the regulatory factors in the EU and the U.S. will be analyzed and compared for their impact on e-tailers and their customers within the framework of marketing challenges. Suggestions will be provided for more effective marketing initiatives and strategies in the foreseeable future. Finally, future research directions for academic research are identified.

Regulatory Issues

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A single market with one set of rules for all, open to competition with a minimum of regulation is one of the cornerstones of the EU. In contrast to the U.S., the creation of a single EU market is still a work in progress. The advent of e-commerce has by its very nature created a unique opportunity to accelerate this process. Unfortunately, the initial consumer and business adoption in the EU has generally been slower than that of the U.S. Hence serious regulatory efforts are off to a late start and have also been hampered by differences between member states. The U.S., however, is experiencing its own discord between the different states and because of its generally pro-deregulation stance has itself been slow to address key regulatory issues. Both the U.S. and the EU also have to cope with the tug-of-war between pro-business and pro-consumer groups. These developments have created an uncertain environment for e-tailers in both entities (Tucker & Eaglesham 1999).

The issue of how to determine jurisdiction in e-commerce cases, presents a unique challenge. The U.S. is trying to follow "traditional" laws as much as possible. As with other direct marketing cases, the home state of the *purchaser* (usually the consumer) normally has jurisdiction in laws regulating such transactions. In contrast, the EU, until recently, has been emphasizing the so-called "home-country control" principle. According to the latter, the *seller's* home country has jurisdiction. Now, a EU directive requires each country to harmonize certain regulatory laws relating to e-commerce. This means that all fifteen member states will have to incorporate this rule in their respective laws within eighteen months of the date the directive was issued. When suing a seller, U.S. customers can usually sue in their own states. In the EU this is also the case if the e-tailer was "directing its activities" into the customer's member state. It has been left to the courts to this phrase (*Business Europe* 1999; *Financial Times* 1999; Waldmier 1999; Maquire 2001). This topic will be explored in more detail in the Marketing Implications section of this paper.

Regulatory Policy

The issues referred to above have surfaced in a number of specific regulatory policies, which are analyzed below. The positions for each area taken by the U.S. and the EU, respectively, are compared with marketing challenges presented to firms considering a global e-commerce strategy. Table 1 presents regulatory *positions* of direct relevance to e-retailers. When comparing the *positions* of the EU and U.S. administrations on these areas, the greatest difference is to be found on safeguarding consumer privacy.

TABLE 1
Specific Regulatory Positions Taken by U.S. and EU Affecting E-Commerce Trade

Areas	U.S.	Positions	EU
Privacy	self regulation safe harbor	regulation	regulation for non-compliant countries
Tax - sales	moratorium	VAT - differs between states	
Tax - income	existing tax principles with modifications	under EU review	
Security	permanent establishment	permanent establishment?	
Liability	mainly traditional law plus new regulations	uncertainty, varies, state of flux	
	tentative standard for jurisdiction: degree of interaction	EU directive: consumer home state (some interpretation problems)	
Marketing practices	Consumer state regulations?	uncertainty, controversy - see liability above	

Privacy & Transfer of Data

A particularly sensitive issue has arisen in the area of consumer privacy law. The EU has adopted a directive on data protection that sets strict privacy standards. Any firm that wants to use personal information, must first explain to the individual what the information will be used for and then obtain the individual's permission. It must also undertake not to use the information for any other purpose without the person's consent. In addition such individuals have the right to scrutinize such information, to correct or even delete it and to file suit for data abuse. Businesses from countries with less stringent regulations may face legal sanctions if they do not comply with the EU rules. The U.S. with its emphasis on self-regulation, and on placing the onus or obligation on consumers to request denial of data use, is such a country. Hence, to conform with this EU directive, American firms, both e-commerce and traditional, are required to adjust their (consumer) privacy policies to those of the EU if they want to collect and use consumer data there. This may include allowing inspections by European investigators of European databases stored in their American head offices, e.g. Citigroup (Simnett 1999; Reidenberg 1999; Baker, Johnson & Echikson 1998).

This policy can affect U.S e-tailers and other marketers in the following way. For example, Amazon.com is noted for personalizing communications with their customers after a recent book purchase. Such information acquired from customers during a purchase allow e-tailers to mine captured customer profiles and target the customer for future marketing promotions. However, this type of data gathering, transfer and use by U.S. e-tailers in the EU is subject to stringent privacy provisions. Violations can result in lawsuits filed by customers or other injured parties and EU governments may impose sanctions. Since U.S. law does not mandate this and since most U.S. e-tailers are not oriented to seek the customer's permission first, such firms face a difficult choice. They can elect to comply with the EU rules, most likely under the proposed "safe harbor" provisions explained. This means that U.S. firms agree "voluntarily" to comply with certain minimum rules as regards privacy so that they may be allowed to operate in the EU and export data about EU consumers. This is the result of a compromise worked out between the EU and the U.S. in March 2000. However, the Bush administration regards the agreement as unduly burdensome and wants to delay its introduction if not renegotiate the deal. If the U.S. firms, e.g. e-tailers, do not have a strong presence, e.g. a local (EU) full-service web site or local permanent presence (nexus), they may choose to "chance it" and follow American home-country rules. If and when the "safe harbor" provision is formally implemented, this option maybe eliminated. Of course, U.S. e-tailers may also decide not to collect and use such data, but that is ill-advised since this process is a key element in their global marketing strategy (Simnett 1999; Reidenberg 1999; Baker, Johnson & Echikson 1998).

Taxation & Pricing

Taxation is also treated differently in the U.S and the EU. The U.S. has declared a moratorium on the imposition of new and discriminatory taxes on Internet purchases until October 2001. This is often incorrectly perceived as meaning that NO sales taxes can be levied on e-commerce transactions. Such taxes may indeed be imposed, just as they may be applied to other direct marketing transactions such as catalog sales. Most vendors cannot be forced to collect these taxes if they have no permanent establishment or nexus in the purchaser's state. As a result, the practical effect for all direct marketers,

including e-tailers, is that they are usually not required to collect any sales taxes. In such cases consumers are usually supposed to pay a user tax, but in practice compliance and enforcement are negligible. A congressional advisory commission has recently submitted its final report to congress on this and other e-commerce issues but was too divided to make any formal recommendations (Maguire 1999; Schwarz 2000; Smiegowski 2000, Rohan 2001).

The EU, in contrast, does tax sales albeit differently, by using the value-added-tax (VAT) system whereby an item is taxed at each stage of its production or distribution on the value added. Such taxes are, as a rule, included in the final sale price to the consumer without any breakdown or other reference to the tax component. Since European consumers are used to the system and are also familiar with paying tax on all purchases, this is not controversial. This includes purchases obtained through catalogs and the Internet - although the use of both is still limited compared to the U.S. The problem here is the different VAT rates between the member states and the different interpretations regarding categories. For instance, in the UK, the VAT on the sale of hard cover books is zero but if sold as a web download, a service, its VAT rate is 17.5 per cent. (EU rates vary between 15 and 25 per cent). Understandably, this has created a great deal of unresolved uncertainty, especially for retailers. For instance, consider the formidable challenge for Amazon.com, the major player in the electronic-marketing of products such as books and videos to the EU. To facilitate local shipping, it maintains warehouses in the UK and Germany. Such activities create potential tax liabilities for income, consumption and value-added taxes.

Another particularly complex and confusing issue regarding the VAT has to do with whether a particular non-EU firm marketing through the web is liable to pay VAT on its sales. This is determined by whether it has a permanent establishment (presence) or nexus in an EU state. This in turn, raises the question of what constitutes such an establishment; e.g. do its warehouses and/or local, EU, web sites qualify? Different interpretations and applications of the rules by different EU countries only compound the problem. (Maguire 1999; DuFon 1999; Barlow 1999; Schwarz 2000).

There is no proper mechanism in place to deal with non-EU suppliers which means that the smaller, low profile U.S. e-tail competitors of Amazon.com are likely to ignore such taxes. This gives them a significant cost advantage, not only through the tax savings but also by saving the costs of compliance. U.S. e-tailers marketing services via downloads to the EU, currently enjoy the benefit of not being subjected to VAT. Hence U.S. providers of downloads of say CDs - products marketed by suppliers such as Amazon.com, enjoy similar tax and cost advantages. The European Commission is trying to eliminate this loophole but it has run into problems. In short, it is unlikely that any changes to the current VAT law will be made in the next few years (DuFon 1999; Barlow 1999); Kiland & Barlow 2001).

As far as books are concerned, U.S e-tailers are not bound by suggested retail prices that are still binding on traditional retailers in some EU countries such as Germany and France. This gives Amazon.com and other e-tailers an advantage over their local, traditional competition, though not over local e-tailers such as Bertelsmann On-Line (BOL). Also, this advantage may be short-lived due to the European Commission's more aggressive antitrust policies against price fixing (Utton 2000).

Security

Fraud, both by consumers and business, is still a major concern. So are espionage of company data and sabotage, e.g. massive assaults on web sites. Both are caused by unauthorized access or "cracking" (technically speaking not "hacking"). In addition, some governments, in particular the U.S., are quite concerned about national security. Traditional laws are not always adequate necessitating some new regulations. Effective security measures will rely heavily on new or improved technology applications. Unfortunately some of these measures may work at cross-purposes. A controversial case in point is the encryption of data by e-commerce for protection. The U.S. is concerned that terrorists and other enemies of the state may use encrypted data to endanger the national security. Therefore, the possibility was raised that the administration would be pushing for the right to have access (a "key"), to all encryptions. Not surprisingly, business has balked since they feel that it gives government too much access to its data. It is pushing for the right to have access (a "key"), to all encryptions. Some also question the effectiveness of this measure since enemies of the state may be located outside the country and are anyhow not likely to comply. Currently, it seems that the U.S. (Department of Commerce) is taking a more relaxed approach through the granting of some export licenses for highly sensitive security systems with no restrictions attached. The EU also has similar concerns but the encryption and national security issues are not as

prominent in most countries. A notable exception is the UK. As with many of the other issues, there is variation among countries and some uncertainty about eventual EU directives (*Country Monitor* 1998; DuFon 1999; Bowden 1999).

In the security area the encryption issue brings to the fore the question of open standards versus the need for government intervention on grounds of national security. Open or inter-operable standards mean that such technology will be available to all users such as the JAVA system. This certainly aids the unimpeded development of the Internet although it may harm the intellectual property rights of some firms. The U.S. favors both open standards and intervention in the case of encryption. This position could potentially be in conflict with that of the EU where there seems to be more sympathy for government intervention in general and for the protection of intellectual property rights. The position of both needs further clarification (Lemley 1999; Bowden 1999). Security will likely continue to be a primary law enforcement concern for interactive marketing in both the U.S. and EU.

Consumer Liability

Determining liability for e-commerce cases, is another policy area that is partly uncharted. Is an e-retailer from one state with a web site presence in another, liable in its or the consumer's site if the latter files a suit, e.g. about a defective product or an offensive advertisement? A tentative standard seems to be evolving in the U.S. where key standards are the degree of interactivity of the web site and whether a sale took place. In cases where the site is purely informational, for instance, the company would most likely have to be sued its own home state, but if a sale was made the consumer's home state would most likely be the venue. Earlier mention has already been made of the interpretation problem in the EU as to whether the seller has directed its activities into the customer's EU state. (*Business Europe* 1999; *Financial Times* 1999; Tucker & Eaglesham 1999, Maguire 2001).

Consider an EU customer that orders a large selection of perishable treats for the holidays from an U.S. e-tailer's web site. The treats arrive late and are also spoiled due to the delay. The e-tailer denies liability and the customer decides to sue. Where should the suit be filed? Whose law applies? If there was no jurisdictional clause in the contract that specified such, the issue is murky. In the U.S. the courts are beginning to look at the degree of interactivity of the web site and especially whether the sale actually took place on this site (i.e. full-service or close to it). If the sale were concluded on site, the customer's home state laws and courts would probably apply. Whether the same holds true if the customer is a resident of the EU, is unclear. If it was an EU e-tailer, the customer's home state laws would also apply, according to an EU directive. However, the international jurisdictional issue of consumer contracts involving both the U.S. and the EU has not yet been clarified. E-tailers have to design and locate their web sites with such contingencies in mind (*Financial Times* 1999; Tucker & Eaglesham 1999).

From the above it is clear that there are still a number of unresolved questions regarding regulations for e-commerce, both in the U.S. and in the EU. This makes it even more difficult to assess the situation for marketing practices in general since the answers to many of these questions will, in effect, determine how such practices will be regulated. For now, the U.S. seems to be relying as much as possible on present local, state and federal regulations and laws. Again, the more established regulatory framework for "traditional" direct marketing activities provides a helpful but incomplete basis. In the EU, with its different sovereign states, there is as yet less consensus, less prior experience and, not surprisingly, more uncertainty (Christensen & Tedlow 2000.)

Marketing Practice

Certain promotional restrictions apply in some EU countries that do not apply in the U.S. One such example is Germany where EU booksellers are not allowed to offer large discounts on local web sites. The different EU member states have their own often different restrictions on advertising and content for a web site. Determining which laws apply in each EU country is potentially prohibitive and costly to any retailer promoting their products or services across borders. Fortunately, a new directive by the EU establishes that if companies comply with their home-country rules, they can offer their services online anywhere in the EU without the risk of breaking any other member country's laws. It has to be noted that in this case the "home country" is determined by the location of the main (technical) support activity for a web site that may not coincide with the country where the firm maintains its head office. The directive further specifies that such web sites must provide information on any sponsorship and on where the provider is based. This directive is to be incorporated into law by all member states by the end of 2001.

How might this affect a U.S. e-tailer? As in so many of these cases, it is not very clear. If the firm has no (main) web site in the EU, this directive may not apply at all, or if is deemed applicable by local governments, than its U.S. (home country) rule should apply. If the e-tailer does have a main web site in the EU, it is more likely that it will be subject to EU rules. Of course, such laws are not in effect yet, which still begs the question as to whether local laws apply. There are no clear or easy answers here but it seems likely that the more permanent the e-tailer's presence is, e.g. through web sites and nexus, the more likely it is that it will be treated as if it were an EU firm.

Self-policing and scrutiny of web content by providers is essential. For example, a French court in Paris required Yahoo to pay a fine for hosting auctions of Nazi-related paraphernalia, that was illegal in France, even though it was posted only on its U.S. site and not on its French site. More significantly, Yahoo was given a deadline to make their U.S. site inaccessible to French web users. In another case in France, however, the court rendered that another ISP could *not* be held responsible for a U.S. web site with similar content. Although these cases pertain to ISPs and not e-tailers per se, the implication is that *any* provider or supplier of web site information *anywhere* may be held liable for its contents (*Telecom 2000*). Whether this is enforceable, is another matter.

International marketing practices resulting from e-commerce between the EU and the U.S., will be subject to different regulations in the different countries. If a web site is used for more than one country, this may cause problems for the seller. Either web sites have to be modified to conform, or the countries will have to come to some agreement on their differences. Some of these may eventually be resolved by an international body (*Financial Times 1999*).

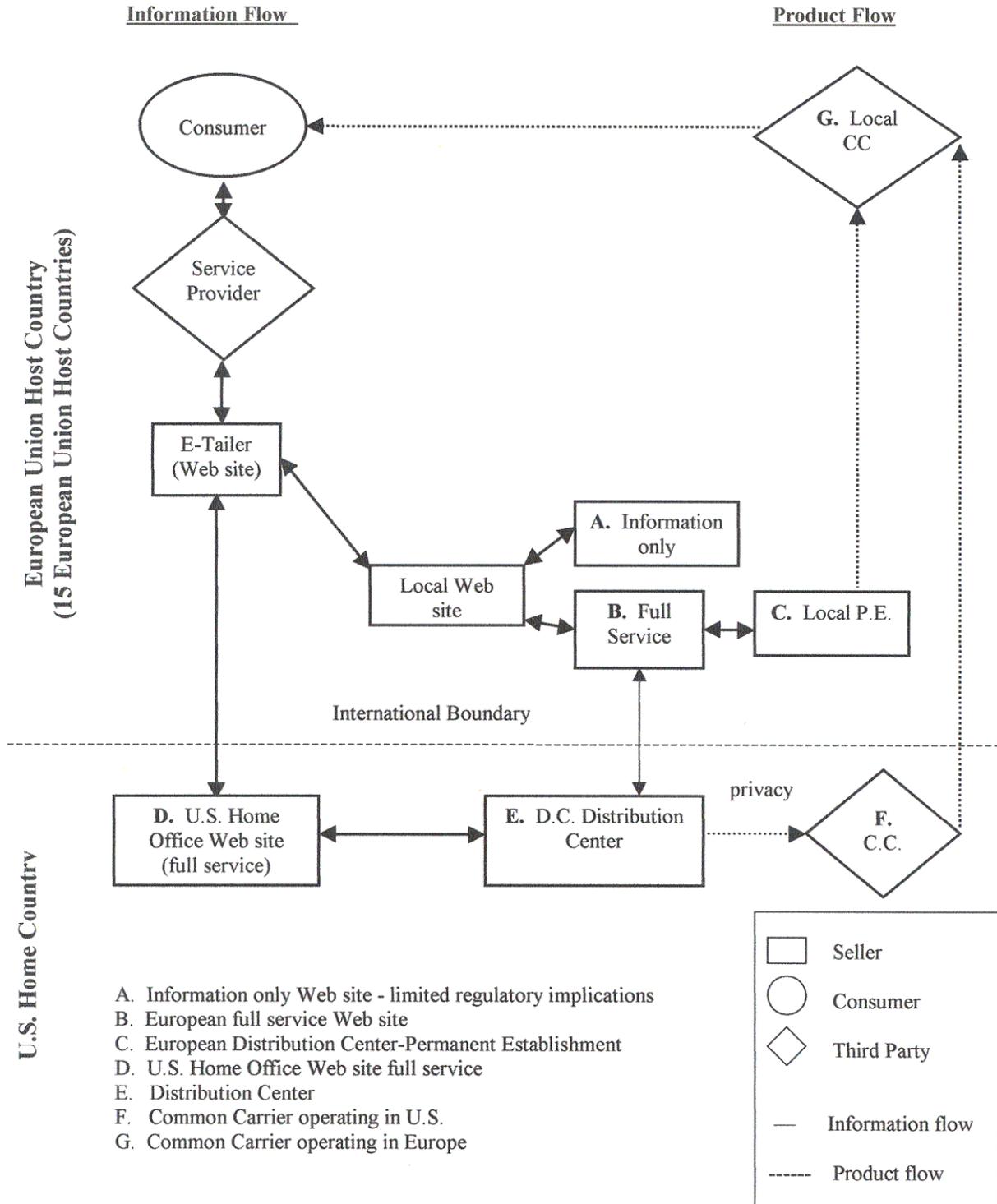
DISCUSSION OF MARKETING IMPLICATIONS

Recent evidence (Amit and Zott 2000, Hamilton 2000) suggests there are at least three fundamental ways that lead to online profitability for web marketers. Salient characteristics of this emerging e-commerce model that may apply to traditional retailers, include the following marketing practices:

1. Achieving efficiencies in marketing, fulfillment, and customer service through economies of scale such as catalogue retailers (e.g. Lands' End or large specialty retailers with logistics advantages such as Office Depot and Amazon.Com);
2. Using banner advertising or online mall transactions to generate revenues and profit streams through an immense customer database (e.g. Yahoo or AOL);
3. Creating new means of commercial transactions such as auctions (e.g. Ebay).

Our focus here is to evaluate the suitability of marketing practices of U.S. retailers engaged in e-commerce as they decide to enter the EU and how regulatory issues impact these decisions. Figure 1 represents such in the form of a flow model for information and products. According to this model, the European consumer may visit an e-tailer's web site in any given EU host country where it has such sites or the firm's home-country web site may be contacted. In Figure 1 these sites are respectively represented by (A), (B), and (D). (This model is fairly simplified to keep it within reasonable bounds and is aimed at illustrating the main issues involved.) If it is type (A), then the consumer can use it only to gather information through a product search, perhaps enter a chatroom/forum or simply view advertisements. At this point, there are limited regulatory implications for the U.S. retailer in the EU. For example, if there is misleading advertising, it *may* be subject to EU and/or local country jurisdiction. Consumer feedback would be limited to the telephone or e-mail responses. Such communication may provide some useful consumer data to correct promotional problems or improve the Web site for the U.S. e-tailer. Since no actual transactions can be effected on such sites, the legal implications in the EU are limited. Note that the U.S. e-tailer's actual legal exposure resulting from these actions is vague at best. This applies to both EU and U.S. laws that may be applicable. In some cases a specific jurisdiction may be specified, e.g. consumer contracts containing a jurisdictional clause.

FIGURE 1
International E-Retailing Flow Model of Information and Products



Another option for the European consumer in our model is to visit the U.S. e-tailer's European full-service local web site (B). A full-spectrum marketing strategy allows the consumer to gather information, purchase a product or service and

receive accompanying customer service. However, such operations will most likely subject the e-tailer to local European regulations. This would include requiring prior permission from the customer to obtain, use and disseminate any personal data and to inform the individual of such use. Furthermore, if the e-tailer has a local Permanent Establishment (C), e.g. ships from a local (European) warehouse, it would likely be subject to VAT and income taxes due to local nexus.

Initially, e-tailers will need to attract customers to their site but will also need to build loyal or returning customers to maintain profitability. This must be done without major sacrifices in the form of large reductions in price and substantially higher expenses. To achieve these ends, online promotions may typically include the use of limited-time coupons, free shipping with volume purchases, gifts with purchases and sweepstakes to attract and maintain customers. These activities enable the on-line retailer to generate income by referring customers to other sites and tracking customer behavior and purchases. Therefore, the promotion and the customers it generates become the basis for future segmentation strategies.

Since the U.S. is currently less stringent regarding promotions and privacy issues, our e-tailer from Figure 1 may be more comfortable selling to customers in the EU through its home-country web site (D). Although this will make it less likely that EU rules will apply, this possibility cannot be ruled out entirely. Due to the unresolved international issues between the U.S. and the EU, some EU rules might still be applied, e.g. through the "safe harbor" agreement on data privacy. The e-tailer may also be sued by a European customer in an EU member state court for a contractual dispute if jurisdiction in such a court was specified in the contract. Ultimately, most e-tailers will eventually have little choice but to rely mostly on web sites within the EU adapted for local language, preferences, etc. if they want to remain competitive.

If our EU consumer from Figure 1 wants to make a direct e-purchase, she will have to use either web site (B) or (D) since (A) is not full service. In either case, the order will have to be delivered by common carriers, e.g. UPS or the local mail service. (Theoretically, e-tailers may also use their own transportation services but this option is not explored here.) Hence, a third-party logistics service provider (F) or (G) would be used or even a combination of both. It is assumed here that common carrier (G) only operates in the EU and (F) only in the U. S. and between the U.S. and the initial EU delivery point. Clearly, length of delivery and other logistical costs such as tracking information for customers will affect the overall price, as will taxes. If a Distribution Center (E) is used rather than (C) in the EU, U.S. tax laws are likely to apply and not those of the EU, although as noted, there is some controversy about this. If something goes wrong with the shipping due to the fault of the (F) such as damage or late delivery, the seller may be liable but under which law - U.S. or EU host country? Neither is it much clearer where the jurisdiction will lie if the carrier was European (G). Also, (F) is subject only to U.S. laws regarding competitive shipping practices or delivery times when in the U.S. but would probably become subject to the laws of the EU host country once the international boundary line is crossed into the EU. The key here is to select suitable or reliable CCs.

This model can of course be expanded to make it more realistic by adding features such as different domain names, web sites and logistical facilities in different countries. Such an extension would certainly accentuate the complexity of the problems involved.

Precautionary Checklist

It is obvious from the preceding analysis, that the regulatory challenges facing U.S. e-tailers marketing to the EU are complex, unclear and often unresolved. To successfully conduct business under these circumstances requires careful planning aided by proper advice. Both business and legal issues have to be considered. As a starting point, the following short list of precautions is presented to enhance these e-tailers' marketing efforts.

1. Choose web sites (server location), warehouse locations and any other possible manifestations of nexus carefully. Weigh the pros of improved customer service against the cons of greater liability and taxation.
2. Select countries with zero or low VAT rates if you are likely to be taxed by the nature of your product or service e.g. digitized software, music, data etc. For instance, the U.K. for hardcover books (no VAT) and Luxembourg various products (lowest rates for many products).

3. Insure data protection for customers in a secure way. Get their permission to disclose information. Obtain self-certification of compliance with the safe harbor to the U.S. Commerce Department or join an online privacy-seal program such as TRUSTe.org or BBBOnline.com.
4. Carefully review and monitor the content and promotions on your web site. Encourage free flow of information via advertisements to the web visitor but ensure that advertisers agree to abide by your rules of conduct. Provide only essential information as web site content. Display any sponsorship and also give details of where the provider is based.
5. Clearly state to customers the terms and conditions upon which business is trading and place the contractual offer in a highly visible location of the web-site if the customer is making a purchase. For example, requiring a click on an icon as signal of acceptance and requiring a second click as confirmation or to cancel transaction.
6. Use a jurisdictional clause in your e-contract on your web site to spell out which country's laws and courts will apply in legal disputes with your customers.
7. Evaluate delivery options carefully, usually U.S. and/or foreign (local) common carriers and perhaps also self-shipping. Consider the trade-off between greater customer satisfaction and possible larger liability and tax exposure by using local shippers.
8. Try to make the content on your different web sites as consistent and as compliant with the most common regulations as possible. Make special adjustments only for the countries with different, especially stricter, regulations if you have nexus or at least an interactive web site in such countries. If you are not sure of your status, obtain professional advice from established legal counsel in such countries.
9. Ensure that *all* your marketing practices in countries where you are "vulnerable" to local regulations, comply with local laws. This applies not only to the web site itself but to all other marketing activities, e.g. price discounts, promotional deals, and non-web advertising.
10. Ensure that proper security systems are installed to protect the customer from fraud and theft, e.g. of credit card information. Consult expert opinion as to the feasibility and legality of using encryption. If feasible and legal, consider the use of encryption. Reassure the customer and other web users. Have such systems monitored and updated on a regular basis.

CONCLUSIONS AND FUTURE RESEARCH

The Internet provides new opportunities for both e-tailers and traditional brick and mortar e-tailers to market goods and services across international boundaries. In the past, exporting required significant investment in outlets and logistics. To engage in business with European countries it was necessary to adhere to numerous local laws and regulations. Although e-commerce has eased some of these constraints, a viable entry strategy into the EU still demands cautious deliberation given newly emerging laws and practices. Such forethought may perhaps reduce the risk in unwanted legal entanglements. Unfortunately, applicable regulations are often difficult to identify due to uncertainty and controversy, both in the U.S. and in the EU. In fact, at present some areas do not appear to be covered at all

The biggest challenge for U.S. e-tailers in all this is probably to determine which laws apply to a specific operation and to what extent it should pursue this quest. For instance, how far should it go to determine nexus given that in some cases different authorities in different and sometimes even within the same country may give different opinions on the matter? The next big challenge is how to formulate and implement marketing strategies that deal with these challenges in the most effective way.

Further research in this area is warranted as laws, treaties and court decisions evolve, especially privacy issues. Also, studies are recommended on the regulatory implications of American B2B firms and service providers trying to enter the EU. Studies should document the role of customer support, logistics, fulfillment and order processing in EU countries. Finally, research on all types of marketing strategies involving international ventures of e-commerce are sorely needed as the Web extends its global reach e.g. Asia, Latin America. For example, an examination of the importance of global brand messages by U.S. retailers in emerging economies or to compare the effects of mobile phone usage vs. the use of personal computers and related customer satisfaction in various countries.

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