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NEWSLETTER OF THE ADVERTISING, MARKETING & MEDIA PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

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FTC Greenlights Google-DoubleClick Merger

The Federal Trade Commission announced December 20 that Google's proposed $3.1 billion buyout of DoubleClick can proceed, despite concerns raised by privacy watchdogs and competitors.

The agency mulled over the deal for eight months. In announcing its decision, the FTC said the companies are not direct competitors in any relevant market. "The markets within the online advertising space continue to quickly evolve, and predicting their future course is not a simple task .... Because the evidence did not support the theories of potential competitive harm, there was no basis on which to seek to impose conditions on this merger," the FTC said in a statement.

The Commissioners voted 4-1 to approve the deal.

On December 19, Microsoft and entertainment media giant Viacom announced a $500 million advertising agreement that Google cited as evidence of a "highly competitive" market for online ads.

The search giant said it cannot formally close the deal until it gets clearance from the European Union, which is expected to announce its findings on April 2. The Australian Competition and Consumer Commission approved the deal in October.

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Both Google and DoubleClick have an online ad-serving business, although they operate in different segments of the market. Google's AdSense offers pay-per-click text ads generated from keyword searches. DoubleClick places banner ads on Web sites. It also operates an ad exchange, which matches advertisers and advertising networks with websites that sell ad space, and a search engine marketing business called Performix.

In reviewing the proposed deal, the FTC found that even if Google were successful in its efforts to enter the third-party ad-serving markets, there are a number of players in the industry and competition is likely to become fiercer.

It also found that DoubleClick lacks market power in third-party ad-serving markets. As a result, the FTC said, it's unlikely that Google could "manipulate DoubleClick's third-party ad-serving products" as a means to put Google's competitors at a disadvantage in the ad intermediation market.

FTC officials noted in their statement that consumer privacy issues are "not unique to Google and DoubleClick and extend to the entire online advertising marketplace." The agency said it lacks the legal authority to "require conditions to this merger that do not relate to antitrust," adding that "regulating the privacy requirements of just one company could itself pose a serious detriment to competition in this vast and rapidly evolving industry."

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FTC Offers Guidance on Behavioral Ads

The Federal Trade Commission has released a discussion paper containing proposed "self-regulatory" principles for behavioral advertising.

Behavioral advertising involves tracking a consumer's online activities – including searches conducted, web pages visited, and content viewed – to deliver ads targeted to the consumer's interests. The ideas outlined in the proposal include transparency and consumer control, limited retention of user data, and obtaining "affirmative" user consent before using "sensitive" data to target ads.

The proposal released December 20, "Behavioral Advertising: Moving the Discussion Forward to Possible Self-Regulatory Principles" aims "to encourage more meaningful and enforceable self-regulation to address the privacy concerns raised with respect to behavioral advertising," according to the FTC statement. The proposal states that behavioral

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OUR PRACTICE

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advertising provides benefits to consumers in the form of free content and personalized advertising but notes that this practice is largely invisible and unknown to consumers.

The proposal contains a number of specific suggestions as follows:

- To address the need for greater transparency and consumer control regarding privacy issues raised by behavioral advertising:

  Every website where data is collected for behavioral advertising should provide a clear, consumer-friendly, and prominent statement that data is being collected to provide ads targeted to the consumer and give consumers the ability to choose whether or not to have their information collected for such purpose.

- To address the concern that data collected for behavioral advertising may find its way into the hands of criminals or other wrongdoers, and concerns about the length of time companies are retaining consumer data:

  Any company that collects or stores consumer data for behavioral advertising should provide reasonable security for that data and should retain data only as long as is necessary to fulfill a legitimate business or law enforcement need.

- To address the concern that companies may not keep their privacy promises when they change their privacy policies:

  Companies should obtain affirmative express consent from affected consumers before using data in a manner materially different from promises the company made when it collected the data.

- To address the concern that sensitive data – medical information or children's activities online, for example – may be used in behavioral advertising:

  Companies should only collect sensitive data for behavioral advertising if they obtain affirmative express consent from the consumer to receive such advertising.

  FTC staff also seeks comment on what constitutes "sensitive data" and whether the use of sensitive data should be prohibited, rather than subject to consumer choice.

The agency is seeking information about whether tracking data is being used for purposes other than behavioral advertising and whether such uses, if they occur, merit some

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form of heightened protection.

The FTC is seeking comments on the proposed principles, including the costs and benefits of offering choice for behavioral advertising. Comments can be sent to BehavioralMarketingPrinciples@ftc.gov.
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U.S. To Compensate E.U. for Online Gambling Ban

The United States will give the European Union new trade concessions in mail services and warehousing as part of a deal over Washington's refusal to lift its Internet gambling ban, the European Union said December 17.

The agreement also includes new U.S. market opportunities for European companies offering testing and analysis services, as well as in research and development, Brussels said in a statement.

The postal and courier concessions will affect how Germany's DHL, the express and logistics division of Deutsche Post World Net AG, competes with U.S.-based companies FedEx Corp. and United Parcel Service Inc., EU officials said.

The overall trade valuation of the package is believed to fall far short of the $100 billion European online gambling sites had claimed the United States owed. EU officials could not immediately say how much the deal was worth.

Last year, Congress voted to ban U.S. banks and credit card companies from processing payments to online gambling businesses outside the country. The decision shut the door on the most lucrative region in a growing market currently worth about $15.5 billion. About half of the world's online gamblers are in the U.S.

In March, the World Trade Organization delivered a final ruling that the U.S. ban was illegal. It found that the U.S. had the right to prevent offshore betting as a means of protecting public order and public morals. But it said the U.S. was breaking trade law by targeting online gambling without equal application of the rules to American operators offering remote betting on horse and dog racing.

The WTO is expected to rule in the coming weeks on a request by Antigua and Barbuda to impose $3.4 billion in commercial sanctions against the U.S. for its failure to comply with the ruling. The tiny Caribbean nation, the smallest ever to win a WTO dispute, has threatened to target U.S. patents and trademarks.

After losing the case, Washington sought to fix the problem by rewriting its obligations under the WTO's treaty on trade in services. That allowed Canada, Costa Rica, India, Macau, Japan and the EU to file compensation claims.

EU officials said their deal creates new U.S. market opportunities for European companies seeking to expand investment and trade in the international mail business.

Washington also agreed to ease access to European providers of research and development in the natural sciences, social sciences and humanities, and companies offering technical testing and analysis services. The commitments do not cover programs funded by the U.S. government, according to the EU's Geneva mission.

The U.S. and Canada are thought to be close to finalizing a deal as well.

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Milk Board Takes PETA to Task Over Ad

The California Milk Processor Board is up in arms over a campaign by activist group People for the Ethical Treatment of Animals that riffs on the board's trademarked "Got Milk?" ad slogan.

The campaign that says, "Got pus? Milk does," has included print, broadcast, and out-of-home. PETA is also selling t-shirts, coffee mugs, and hats bearing the tagline and features it on its Web site, MilkSucks.com.

In a letter sent earlier this month, CMPB demanded that PETA, which promotes a dairy-free diet among other things, cease using the slogan. It also ordered PETA to turn over any merchandise bearing the slogan, along with profits. If PETA fails to comply, the milk board will sue, the letter said.

PETA contends that pus in milk results from an inflammation of cows' mammary glands called mastitis—a condition that occurs in some milk cows. Antibiotics used to treat the problem then wind their way into milk, PETA claims.

PETA has indicated that it has no plans to comply with the board's demands. In a written response to the CMPB, counsel for PETA said, "As part of its mission to educate consumers about the industry's practices, PETA has, among other things, parodied the 'Got Milk?' slogan that the milk industry uses to market milk. Such parodies include PETA's 'Got Zits?,' 'Got Heart Disease?,' 'Got Breast Cancer?,' 'Got Sick Kids?,' 'Got

Diabetes?,' and 'Got Veal?' campaigns as well as the 'Got Pus? Milk Does' campaign at issue here. PETA launched each of these campaigns to draw attention to the fact that drinking milk is linked to these various health ailments, as well as [being linked] to support for the veal industry."

Although the "got milk" tag has been appropriated numerous times since it was created in 1995, the CMPB is taking action against PETA because its use infringes on categorical use, that being dairy, according to a CMPB spokesman.
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U.K. Says Kid Junk Food Ad Ban Is Working

U.K. advertising regulator Ofcom has announced the results of its first study of the effectiveness of its kid junk food TV ad ban, with data indicating a 20% drop in food and drinks ads shown to kids aged 15 and under.

The mostly positive data, which covers the first six months since Ofcom began the phased initiation of junk food ad restrictions, will boost an ad industry that is battling calls for more drastic measures.

Ofcom said that, overall, ads for all food and drinks products to kids – not just those high in fat, sugar, and salt – has "declined in line with predicted forecasts."

A comparison of the period from April to September in 2005 and 2007 showed that the number of commercial impacts – the viewing of one ad, one time, by one person – among four to 15 year old children of food and drink ads has decreased by 20%. There has also been a 59% decline just within children's airtime, Ofcom found. More than half the decrease took place between 2006 and 2007, when the rules were introduced.

"It is still too early to come to any firm conclusions about the success or otherwise of the new rules," said Ofcom. "There are clear signs that the new rules are having the intended effect on reducing the amount of food and drink advertising that children are exposed to on television."

Ofcom added that food and drink ads around children's programming have fallen to "negligible levels" and is "declining markedly" on dedicated children's channels. For instance, commercial impacts on channels such as Nickelodeon have fallen by 49% from 2005 to 2007, more than the reduction required by Ofcom. However, Ofcom admitted there has been a 26% increase since 2005 in the number of ads seen by four to 15 year old children during "adult" airtime.

Ofcom will conduct a full review of the TV ad restrictions next year, in conjunction with the U.K.'s Department of Health and the Food Standards Agency's review of the nutrient profiling model.

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Food Marketers to Ban Kid Junk Food Ads in Europe

Eleven global food companies announced plans to stop advertising junk food to kids under 12 throughout Europe by the end of next year.

The self-imposed ban, which follows a similar move by soft drink companies last year, comes after Markos Kyprianou, the European Union's health and consumer affairs commissioner, urged food companies to voluntarily stop advertising junk food and drink to children or face legislation.

The companies signing on to the "EU Pledge" are: Burger King, Coca-Cola, Danone, Ferrero, General Mills, Kellogg, Kraft, Mars, Nestle, PepsiCo, and Unilever.

Food companies say they want to demonstrate to the EU that they are making a credible effort to limit advertising sugary and fatty foods to kids in TV, print, and on the Internet. Each firm will set its own guidelines for what kinds of foods may not be marketed to kids, but will base these guidelines on national or international nutrition standards. Independent bodies will monitor compliance. Companies will also stop marketing foods and drinks in primary schools, unless they get approval from school authorities.

Kyprianou is also drafting minimum food labeling standards, though plans have been delayed by internal infighting. A proposed "made in EU" label drew fire, as did a proposal that all meat should carry the place of birth, death, and slaughter.

According to a leaked copy of the law, now expected early next year, it will require that a breakdown of calories, fat, saturates, sugar, and salt be placed prominently "in the field of vision" of the viewer reading the name of the product and with a minimum font size of eight. "Small print size is one of the main causes of consumer dissatisfaction with food labels," the paper says.

Beverage makers are concerned about a requirement that drinks with more than 1.2% alcohol content list the number of calories. They will also have to provide a more complete list of ingredients. In addition, drinks other than tea or coffee that are high in caffeine content will have to say so prominently.

A spokeswoman for Kyprianou said the legislation could be further amended before publication next year. It will then have to be approved by governments and the European parliament.

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