

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

October 2, 2008

The Honorable Thomas Barnett
Assistant Attorney General
Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Assistant Attorney General Barnett:

On July 15, 2008, the Senate Antitrust Subcommittee conducted a hearing titled, "*The Google-Yahoo Agreement and the Future of Internet Advertising.*" to examine the search advertising agreement between Google, Inc. ("Google") and Yahoo!, Inc. ("Yahoo") to learn if the contemplated arrangement is consistent with our nation's antitrust laws. I write to summarize the findings of our investigation into this matter.

Under the terms of the Google-Yahoo agreement, Yahoo will contract with Google for Google to provide a portion of the advertising displayed when the Yahoo search engine is used. Google and Yahoo will split the proceeds when a computer user clicks on a Google advertisement that is presented on a Yahoo search results page. However, the amount of advertising outsourced will remain entirely at Yahoo's discretion. Yahoo predicts that it will generate between \$250 and \$800 million a year in additional revenue from this agreement. Yahoo states that these funds will be used to restructure and improve its search business, thereby attracting additional internet users and increasing search advertisement sales.

This contemplated agreement, between the two largest platforms for search advertising, presents a number of antitrust questions which require an examination.¹ These issues include: whether this agreement will lead to higher advertising prices; whether search and display advertising are interchangeable and substitutable; and whether this transaction will strengthen Yahoo as a competitor or perpetuate its decline and even exit from this market; and whether there are significant barriers to entry impeding new competitors in this market.

The information and testimony that the Subcommittee has gathered clearly shows that many advertisers, competitors and industry experts are concerned about Google's potential to control the dominant share of the search advertising market. These critics fear the transaction will lead to higher advertising prices and create unfair market conditions. In addition, many interested parties are also apprehensive that if the transaction is consummated, Yahoo will have less incentive to compete against Google, as it will rely upon its main competitor for a significant increase in its revenue. Therefore, critics contend that an advertiser will have an incentive to bypass Yahoo entirely and only bid for Google advertisements since an advertisement purchased with Google could be placed on both Yahoo and Google's search result pages. Opponents further

¹ Google and Yahoo are the two leading competitors for internet search advertising. Google is the dominant competitor in this market, with a market share estimated to be approximately 70%. Yahoo's share is estimated to be approximately 20%. Microsoft is the third major competitor with a market share of less than 10%.

argue that as Yahoo increases its revenues by placing Google's advertisements on Yahoo's search result pages, Yahoo will only seek to expand this activity. As a result, some argue that over time Yahoo will no longer be a significant competitor in the internet advertising market.

Yahoo strongly denies that these scenarios will occur. Yahoo insists that it will continue to operate its own search engine business, and that this transaction will enable it to become, over time, a stronger competitor in the marketplace. Specifically, Google and Yahoo argue that this is a commercial agreement, not a merger, and Yahoo retains full control as to when Google advertisements will be placed on Yahoo's search results pages. They also contend that search engine providers do not exclusively control the price of advertisements since they are sold at auction. Google and Yahoo also note that there are other forms of internet advertising, such as display advertising, which are substantially unaffected by this proposed agreement. Moreover, the parties assert the transaction is in the advertisers' best interests since it will create a more efficient marketplace.

While we have conducted a careful review of this transaction, we do not have the benefit of the confidential business information supplied by the companies to the Department nor the economic models necessary to predict consumer and advertiser behavior. Determining the competitive effects of this transaction, moreover, requires us to predict the future of a young and dynamic market. Nonetheless, we conclude that important competition issues are raised by this transaction. Should the amount of advertising outsourced by Yahoo to Google grow significantly, we believe the threat to competition will also increase.

Recognizing the nascent and fast-changing nature of this marketplace, we encourage the Department to continue to monitor the state of competition in this industry, whatever the outcome of its current investigation. If, over time, you determine that Google is gaining a dominant market position as a result of the Google-Yahoo agreement, then we would encourage the Justice Department to intervene to protect competition. Even should you conclude at present that this deal is not contrary to antitrust law, the Department must be sure that this deal never in the future crosses the line into an unacceptable, anti-competitive collaboration among competitors which will harm consumers and advertisers.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Herb Kohl", written over a horizontal line.

HERB KOHL

Chairman

Subcommittee on Antitrust, Competition Policy
and Consumer Rights