Senator Kohl's Follow-Up Questions for Hearing on
"The Google-Yahoo Agreement and the Future of Internet Advertising"

For Brad Smith

1. *Proponents of the Yahoo-Google deal argue that we should not be worried about its effect on competition because it only deals with search advertising. But there are other forms of internet advertising, such as display advertising – the banner ads on web pages. Google has a very small market share of these types of ads. Doesn't the fact that advertisers have other ways to advertise on the Internet make it unlikely that this deal will cause ad prices to rise? If prices were to rise for search ads as you suggest would advertisers just switch to display ads?*

This argument is a bit like suggesting that Congress shouldn't worry about the high price of oil because there is still a lot of coal in the ground. While there undoubtedly is, it is of little relevance to someone backing their car out of the garage. In the same way, paid search advertising is a distinct and enormously important economic market, and other forms of online advertising do not substitute for it.

This issue was considered at length last year by the Federal Trade Commission ("FTC") when it considered Google's purchase of DoubleClick. The FTC applied longstanding DOJ/FTC guidelines, which define a "relevant market" to include all products that are in effect *substitutes* for one another in the face of a significant increase in price in one of the products.[1] The FTC determined that paid search advertising was a separate market because of its unique characteristics that separate it from other forms of advertising[2] (*i.e.*, advertisers will not switch to display advertising if the price of search advertising increased 10 percent, at least not in sufficient numbers to make the price increase profitable). Equally important, the FTC found that Google already dominates the search advertising market.[3] The FTC reached this conclusion after reviewing Google's internal documents and speaking with hundreds of industry participants; this is much the same universe of information that will be considered by the Department of Justice.

Moreover, advertisers view paid search advertising as unique from other forms of advertising, because it happens in real time and based upon the consumer's expression of intent. Unlike other advertising situations, the consumer is actively "searching for" information about a product or service as opposed to being "cold called" by an

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[1] The FTC reached its conclusions in its review of Google/DoubleClick by applying the Guidelines and well-established legal precedent. *See United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines*, revised April 8, 1997, *available at* http://www.usdoj.gov/atr/public/guidelines/hmg.htm.

[2] *Statement of the Federal Trade Commission Concerning Google/DoubleClick* at 3, FTC File No. 071-01700, dated December 20, 2007, *available at http://www.ftc.gov/os/caselist/0710170/071220statement.pdf* (" . . . the evidence shows that the sale of search advertising does not operate as a significant constraint on the prices or quality of other online advertising sold directly or indirectly by publishers or vice versa.").

[3] *Id.* ("Google, through its AdWords business, is the dominant provider of sponsored search advertising . . . .")

unsolicited ad. In that sense, paid search and display are very different (in antitrust parlance they are *complements* not substitutes), with advertisers using display to *create* demand and search being used to *fulfill* it.

The FTC's decision in Google/DoubleClick and the principles governing market definition generally also establish that contextual advertising is not in the same market as paid search but instead should be viewed as a *non-search* product.[4] Even if the paid search market included contextual advertising, the agreement still violates the antitrust laws because it reduces the competitive constraint of Google's closest competitor in the search *and* contextual advertising where Google and Yahoo! are the number one and two players.

2. *A decade ago, Microsoft held a dominant share of the personal computer operating system market (indeed, higher than Google's share of the search advertising business today) and faced an antitrust suit from the Justice Department. It defended itself by claiming it should have the "freedom to innovate." Don't Google and Yahoo! have the "freedom to innovate" in their Internet search advertising business, and why isn't this deal an example of the "freedom to innovate" that your company once so strongly championed?*

A decade ago Microsoft expressed concerns about potential legal restrictions on the ability of a single firm to improve its products by adding new features. In contrast, the agreement between Google and Yahoo does not provide any new search features for customers. All it does is add a mechanism that will enable Yahoo! to impose a price increase.

Both Google and Yahoo! already offer paid search advertising today. In the past they have innovated in competition with one another and should continue to do so. What makes the present agreement so noteworthy is that it entails direct competitors colluding, rather than competing, and doing so with respect to price, not product features. Antitrust policy has long been especially skeptical of agreements between direct competitors, especially those that lead to increases in consumer prices. Yet that is precisely what will result if the agreement between Google and Yahoo! takes effect. Indeed, this opportunity to raise prices is the reason the agreement was put together in the first place.

Indeed, Google and Yahoo! do not deny and in fact have stressed that there will be no operational integration between the companies. They are not going to jointly develop or create any new or innovative products. While the integration from mergers and joint ventures can lead to innovation, the creation of new products, and cost savings, straight agreements between competitors like this one do not create any of these benefits. In the absence any such benefits, the Google and Yahoo! are left with little more than a bare marketing and pricing agreement between head-to-head competitors that together control 90 percent of the marketplace.

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[4] *Id.* at 5-6 ("We therefore determined that contextually targeted ads do not constitute a separate [non-search] market; rather they are part of a broad market that includes all ads sold by intermediaries.")

While Microsoft's arguments from a decade ago obviously generated their own debate, this new agreement is far afield from these issues. And while Microsoft definitely acknowledges that Google and Yahoo! have each innovated in the past and separately from each other, they should not be permitted to entrench their position through collusive agreements or other artificial means that undermine competition and hurt consumers.