

Dealscape

Microsoft attorney rails against Yahoo!-Google deal

Microsoft Corp.'s top outside antitrust adviser spoke at a conservative Washington legal think-tank about the proposed contract on search advertising between Google Inc. and Yahoo! Inc., saying the arrangement is illegal and should be stopped by the Justice Department.

It's not clear how much influence the lawyer, Rick Rule, who lead the antitrust division at DOJ under Reagan, will have. Antitrust lawyers note that Rule, a partner at Cadwalader, Wickersham & Taft LLP, is trying to sell the idea to several of his former colleagues. Rule is a former partner at Covington & Burling LLP, where he worked with Assistant Attorney General Tom Barnett, and two of Barnett's deputies: Deb Garza and Dave Meyer.

At the **Washington Legal Foundation** event Friday, Rule said the deal on the search advertising, which remains nonpublic, is illegal on its face, and should be condemned as being "per se illegal."

The number of matters antitrust law defines as per se illegal has dwindled in recent years as legal opinions have suggested economic rationales have proved some business decisions that once were condemned as being bad for competition can actually help consumers.

"We should be careful before we create a new per se category," Rule said. "But horizontal price fixing," is one of the inherently bad behaviors. Rule said the Yahoo!-Google agreement fits in this category.

Rule said the agreement sets a price floor based on Google's prices, which will harm advertisers, who will have to pay more.

Yahoo! announced the agreement with Google as it searched for alternative bidders after it spurned Microsoft's bid for the company.

Microsoft has testified on Capitol Hill about the arrangement as well, and a DOJ decision on the matter is not expected for weeks.

According to Mark Botti, who spoke at the same WLF event, the DOJ has to consider a range of issues and generally has been cautious about stopping competitor collaborations in advance before it was clear whether the activity would help or hurt consumers.

Botti is a partner at Akin Gump Strauss Hauer & Feld LLP and a former senior DOJ staff lawyer. - *Cecile Kohrs Lindell*