



# Decision to rescind exclusion of Yahoo! Inc.

1 December 2014

## Introduction

The exclusion of Yahoo! Inc. from investment by KLP and the KLP Funds is rescinded with effect from 1 December 2014.

Yahoo! Inc. (Yahoo) was excluded in December 2005 for violating the human rights stipulation in KLP and the KLP Funds' guidelines for responsible investment.

Yahoo was excluded for complicity in the violation of the right to freedom of expression, as set out in Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Other relevant norms are laid down in Principles 1 and 2 (on human rights) of the UN Global Compact, and Chapter IV of the OECD's guidelines for multinational companies.

Yahoo handed over user information to the Chinese authorities, which resulted in a ten-year prison term for a Chinese journalist. The journalist had forwarded information to foreign websites about a secret decree in which the authorities described how they intended to prevent demonstrations on the fifteenth anniversary of the Tiananmen Square massacre. Yahoo handed over information that linked the email to the journalist's IP address and physical location. At the time, Yahoo asserted that the company was obliged to comply with the local authorities, despite the fact that the online transmission of so-called state secrets could incur the death penalty in China.

KLP's decision to exclude Yahoo was based on a report and recommendation from GES.

## Dialogue

Over the years, KLP Kapitalforvaltning has engaged in a continuous dialogue with Yahoo. Since the incident, the company has introduced a number of measures to prevent anything similar from happening again – though not in China.<sup>1</sup> In 2005, after the incident occurred, Yahoo acquired approx. 40 percent of the shares in Alibaba.com (Alibaba). Furthermore, Yahoo merged its operations in China with Alibaba's through the joint venture, Yahoo China, with Alibaba as operator.<sup>2</sup> As a non-controlling shareholder, with 40 percent of the shares but only 35 percent of the voting rights in Alibaba, Yahoo explained that its ability to implement wide-ranging measures

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<sup>1</sup> Conversation with Yahoo (12 January 2011).

<sup>2</sup> "Yahoo to invest US \$1 billion in Chinese e-commerce site", *The New York Times* (11 august 2005). URL: <http://www.nytimes.com/2005/08/11/business/worldbusiness/11iht-web.0811yahoo.html> (last visited, 6 October 2014).



to protect the identity of Yahoo China's users was limited.<sup>3</sup> However, Yahoo China has issued a warning to users of both email and web browsers that use of the service is subject to Chinese law.<sup>4</sup>

## Description of the incident – history and development

- 2004** The Chinese journalist Shi Tao is arrested after forwarding an email from the Chinese authorities instructing him not to cover any commemoration of the Tiananmen Square massacre.
- 2005** Yahoo acquires a 40 percent stake in Alibaba.com. Yahoo's operations in China are merged with Alibaba's. Alibaba takes over as operator of the joint venture, Yahoo China.<sup>5</sup>
- 2007** Yahoo enters into a settlement with the families of the journalists Shi Tao and Wang Xiaoning.<sup>6</sup> Both journalists were jailed after Yahoo handed over user information to the Chinese authorities, and the families had filed a claim for compensation against the company through the US court system. Yahoo undertakes to set up a fund in support of human rights activists.<sup>7</sup>
- 2013** The Snowden leaks reveal that several US IT companies, including Yahoo, have supplied information to the US National Security Agency (NSA).<sup>8</sup>
- Yahoo's Chinese operations, through the joint venture with Alibaba, are discontinued. As a result, Yahoo is represented in China only via its shareholding in Alibaba.<sup>9</sup>
- 2014** The US Foreign Intelligence Surveillance Court of Review upholds Yahoo's demand to publish hitherto classified documents associated with the litigation Yahoo brought against the US government in 2007-2008. The company had contested the NSA's request to hand

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<sup>3</sup> Conversation with Yahoo (12 January 2011).

<sup>4</sup> Ibid.

<sup>5</sup> "Yahoo to invest US \$1 billion in Chinese e-commerce site", *The New York Times* (11 august 2005). URL: <http://www.nytimes.com/2005/08/11/business/worldbusiness/11iht-web.0811yahoo.html> (last visited, 6 October 2014).

<sup>6</sup> Catherine Rampell, "Yahoo settles with Chinese families", *Washington Post* (14 November 2007). URL: <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/13/AR2007111300885.html> (last visited, 2 October 2014).

<sup>7</sup> Ibid.

<sup>8</sup> Leo Kelion, "Q&A: NSA's Prism internet surveillance scheme", *BBC News* (25 June 2013). URL: <http://www.bbc.com/news/technology-23027764> (last visited, 6 October 2014).

<sup>9</sup> Michael Kan, "Yahoo's China page closes following gradual phase out", *IT World* (2 September 2013). URL: <http://www.itworld.com/internet/371188/yahoos-china-page-closes-following-gradual-phase-out> (last visited, 6 October 2014).



over information, but had lost the case and had been ordered to keep details of the NSA's program and the litigation secret.<sup>10</sup>

Alibaba completes an initial public offering on the New York Stock Exchange. Yahoo sells 140 million shares in the company, bringing its shareholding in Alibaba down to around 15 percent.<sup>11</sup>

Since September 2013, Yahoo's interests in China have been managed through its non-controlling shareholding in the Chinese company Alibaba, originally 40 percent.<sup>12</sup> However, in September 2014, this was reduced to approx. 15 percent after Alibaba's IPO.<sup>13</sup> As a result, Yahoo has in practice very little influence over Alibaba's activities.

## Company initiatives

### 1. Global Network Initiative

Yahoo was among the first members of the Global Network Initiative (GNI), an industry initiative to promote freedom of expression and privacy in the ICT sector.<sup>14</sup> In its 2010 annual report, the GNI started requesting information from the companies themselves about their compliance with the organization's principles on freedom of expression and privacy.<sup>15</sup> In 2014, the GNI published its first independent report on its members' compliance with GNI principles, though without any details of the companies' hand-over of information to the NSA.<sup>16</sup>

### 2. Human rights "due diligence"

Yahoo implements a "due diligence" of the human rights risks associated with all new operations. For example, Yahoo elected to relocate its Vietnamese-language servers from Vietnam to

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<sup>10</sup> Dominic Rushe, "Yahoo \$250,000 daily fine over NSA data refusal was set to double 'every week'", *The Guardian* (12 September 2014). URL: <http://www.theguardian.com/world/2014/sep/11/yahoo-nsa-lawsuit-documents-fine-user-data-refusal> (last visited, 3 October 2014).

<sup>11</sup> Benjamin Snyder, "Yahoo earned a \$9.4 billion windfall from selling shares in Alibaba's IPO", *Fortune* (30 September 2014). URL: <http://fortune.com/2014/09/30/yahoo-earned-a-9-4-billion-windfall-from-selling-shares-in-alibabas-ipo/> (last visited, 6 October 2014).

<sup>12</sup> Michael Kan, "Yahoo's China page closes following gradual phase out", *IT World* (2 September 2013). URL: <http://www.itworld.com/internet/371188/yahoos-china-page-closes-following-gradual-phase-out> (last visited, 6 October 2014).

<sup>13</sup> Benjamin Snyder, "Yahoo earned a \$9.4 billion windfall from selling shares in Alibaba's IPO", *Fortune* (30 September 2014). URL: <http://fortune.com/2014/09/30/yahoo-earned-a-9-4-billion-windfall-from-selling-shares-in-alibabas-ipo/> (last visited, 6 October 2014).

<sup>14</sup> Global Network Initiative. URL: <https://globalnetworkinitiative.org/gnitags/gni> (last visited, 3 October 2014).

<sup>15</sup> Global Network Initiative, *Principles*. URL: <https://www.globalnetworkinitiative.org/principles/index.php> (last visited, 6 October 2014).

<sup>16</sup> Global Network Initiative, *Public Report on the Independent Assessment Process for Google, Microsoft, and Yahoo* (January 2014), p. 5. URL: <https://globalnetworkinitiative.org/sites/default/files/GNI%20Assessments%20Public%20Report.pdf> (last visited, 6 October 2014).

Singapore after the Vietnamese authorities announced tighter rules for the online expression of regime-critical views.<sup>17</sup>

### ***3. Litigation to fight demands for the hand-over of information to the USA's PRISM surveillance program***

The Snowden leaks revealed that Yahoo has supplied information to the NSA's online surveillance program PRISM. Nevertheless, Yahoo has recently been able to confirm that the company refused to voluntarily hand over information to PRISM, and initiated legal proceedings against the US government in the Foreign Intelligence Surveillance Court (FISC). Yahoo lost the case and was forced to comply with the NSA's demands in order to avoid a substantial fine.<sup>18</sup> In 2013, Yahoo again applied to the FISC for permission to publish the legal documents relating to the 2008 case. Yahoo's request was upheld in September 2014, and the company has since published over 1,500 pages of legal documents on its website.<sup>19</sup> The Electronic Frontier Foundation, an independent NGO, writes that Yahoo deserves praise for fighting for users' rights even when it was unable to publicize this fact.<sup>20</sup>

## **Assessment**

KLP assesses the four criteria for inclusion as follows:

### ***1. The incident has ended.***

No information has emerged to indicate that Yahoo has been involved in any similar incident since the cases of Shi Tao and Wang Xiaoning, and the company has reached a settlement with the families of the two journalists.

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<sup>17</sup> Douglas MacMillan, "Yahoo's delicate dance in Vietnam", *Bloomberg Businessweek* (28 May 2009). URL: [http://www.businessweek.com/technology/content/may2009/tc20090528\\_660986.htm](http://www.businessweek.com/technology/content/may2009/tc20090528_660986.htm) (last visited, 6 October 2014).

<sup>18</sup> Dominic Rushe, "Yahoo \$250,000 daily fine over NSA data refusal was set to double 'every week'", *The Guardian* (12 September 2014). URL: <http://www.theguardian.com/world/2014/sep/11/yahoo-nsa-lawsuit-documents-fine-user-data-refusal> (last visited, 3 October 2014). Ron Bell, "Shedding light on the Foreign Intelligence Surveillance Court (FISC): Court findings from our 2007-2008 case", *Yahoo! Global Public Policy* (11 September 2014). URL: <http://yahoopolicy.tumblr.com/post/97238899258/shedding-light-on-the-foreign-intelligence-surveillance> (last visited, 6 October 2014).

<sup>19</sup> Dominic Rushe, "Yahoo wants Fisa objections revealed", *The Guardian* (11 July 2013). URL: <http://www.theguardian.com/technology/2013/jul/11/yahoo-wants-fisa-objections-revealed> (last visited, 6 October 2014); Ron Bell, General Counsel, "shedding light on the Foreign Intelligence Surveillance Court (FISC): Court findings from our 2007-2008 case", *Yahoo! Global Public Policy* (11 September 2014). URL: <http://yahoopolicy.tumblr.com/post/97238899258/shedding-light-on-the-foreign-intelligence-surveillance> (last visited, 6 October 2014).

<sup>20</sup> Mark Rumold, "Yahoo's fight for its users in secret court earns the company special recognition in Who Has Your Back survey", *Electronic Frontier Foundation* (15 July 2013). URL: <https://www.eff.org/deeplinks/2013/07/yahoo-fight-for-users-earns-company-special-recognition> (last visited, 6 October 2014).

The Snowden leaks nevertheless revealed that the company has handed over user information to the NSA in the United States,<sup>21</sup> though it is impossible to determine the potential consequences for the individual users or, indeed, who they are. Such state-sanctioned demands for user information in a democratic society are always problematic. There is no reason to believe that the information has been used by the US authorities to hinder freedom of expression, but as long as details of the case are classified, it is impossible to be certain. In any case, the company's actions in the matter, and its recourse to litigation to fight the NSA's demands, show that Yahoo has a critical attitude to the PRISM program's wholesale gathering of user information.

**2. *The company has handled the matter in a responsible manner.***

Yahoo has reached a settlement with the affected parties' families,<sup>22</sup> and has implemented new measures to protect users' privacy and freedom of expression based on the lessons learned in China.<sup>23</sup>

**3. *Systems and routines are in place to prevent anything similar from happening again.***

Yahoo was one of the first members of the Global Network Initiative (GNI), and has thereby pledged to comply with the GNI's principles with respect to freedom of expression and privacy.<sup>24</sup> In 2013, the company began publishing a "transparency" report, in addition to an explanation of Yahoo's routines for dealing with requests for user information from the authorities.<sup>25</sup> Furthermore, Yahoo has established human rights "due diligence" procedures for new business areas.

**4. *Points 1–3 have been verified.***

Information presented in points 1 and 2 has been confirmed by independent news sources as well as the GNI's independent assessment of Yahoo's compliance with the GNI principles (point 3).

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<sup>21</sup> Dominic Rushe, "Yahoo \$250,000 daily fine over NSA data refusal was set to double 'every week'", *The Guardian* (12 September 2014). URL: <http://www.theguardian.com/world/2014/sep/11/yahoo-nsa-lawsuit-documents-fine-user-data-refusal> (last visited, 3 October 2014).

<sup>22</sup> Catherine Rampell, "Yahoo settles with Chinese families", *Washington Post* (14 November 2007). URL: <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/13/AR2007111300885.html> (last visited, 2 October 2014).

<sup>23</sup> Global Network Initiative, *Public Report on the Independent Assessment Process for Google, Microsoft, and Yahoo* (January 2014). URL: <https://globalnetworkinitiative.org/sites/default/files/GNI%20Assessments%20Public%20Report.pdf> (last visited, 6 October 2014).

<sup>24</sup> *Ibid.*, p. 15.

<sup>25</sup> *Ibid.*, p. 15. See also, Marissa Mayer, CEO and Ron Bell, General Counsel, "Our commitment to our users' privacy", *Yahoo!* (17 June 2013). URL: <http://yahoo.tumblr.com/post/53243441454/our-commitment-to-our-users-privacy> (last visited, 6 October 2014).



The weak point in meeting the inclusion criteria is point 1, since the Snowden leaks reveal that Yahoo has handed over user information to the NSA in the United States. However, this happened after Yahoo had filed an appeal with the FISC, contesting the NSA's demand, and lost. Furthermore, all industry players located in the United States have had to hand this type of user information to the NSA – and Yahoo has perhaps gone the furthest in opposing the NSA's demands.<sup>26</sup> In any case, KLP finds it compelling that if Yahoo were currently part of KLP's investment portfolio, a recommendation to exclude the company would not be deemed appropriate under these circumstances.

Yahoo acknowledges that the incident which formed the original grounds for exclusion was worthy of criticism, and has introduced a number of measures to strengthen users' right to privacy.<sup>27</sup> In some areas, Yahoo may actually be described as an industry leader.<sup>28</sup> Nevertheless, up to now KLP has been critical of the lack of action in the company's operations in China, which are managed through its shareholding in Alibaba. Yahoo's shareholding in Alibaba is now so low that it would be unreasonable to hold Yahoo accountable for Alibaba's actions.

## **Conclusion and recommendation**

The exclusion of Yahoo from KLP and the KLP Funds' investment portfolio is rescinded with effect from 1 December 2014.

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<sup>26</sup> Leo Kelion, "Q&A: NSA's Prism internet surveillance scheme", *BBC News* (25 June 2013). URL: <http://www.bbc.com/news/technology-23027764> (last visited, 6 October 2014). That other companies may have taken similar steps against the NSA cannot be ruled out, since the relevant legal documents may be classified.

<sup>27</sup> Douglas MacMillan, "Yahoo's delicate dance in Vietnam", *Bloomberg Businessweek* (28 May 2009). URL: [http://www.businessweek.com/technology/content/may2009/tc20090528\\_660986.htm](http://www.businessweek.com/technology/content/may2009/tc20090528_660986.htm) (last visited, 6 October 2014) ("We've learned tough lessons as pioneers in the emerging markets, and we've also taken that and tried to be a leader in business and human rights...").

<sup>28</sup> See for example, Dominic Rushe, "Yahoo \$250,000 daily fine over NSA data refusal was set to double 'every week'", *The Guardian* (12 September 2014). URL: <http://www.theguardian.com/world/2014/sep/11/yahoo-nsa-lawsuit-documents-fine-user-data-refusal> (last visited, 3 October 2014) which explains Yahoo's opposition to the US authorities' demands under the controversial PRISM surveillance program).