



... with Phil Weiser

In this edition of CPI Talks we have the pleasure of presenting an interview with Colorado Attorney General Phil Weiser. Thank you, Mr. Weiser for agreeing to this interview with CPI.

1. Is there a new drive to redefine antitrust rules for the contemporary digital economy? What in your view should the thrust of these rules be? Do you foresee further legislative reform in the U.S., along the lines of developments in Europe and elsewhere?

A central problem, as I have explained previously (including in this congressional testimony),¹ is that the courts have put too much emphasis on the risks of over-enforcement, while neglecting the risks of under-enforcement. Because the courts have undermined effective antitrust enforcement, with cases like *Amex* and *Qualcomm* elevating theoretical justifications for business conduct over rigorous empirical analysis, both legislators and enforcers need to respond. With respect to the digital economy, there are unique challenges when dominant Internet platforms acquire substantial market power and maintain it through anticompetitive means. In addition to enforcement actions, I also believe that legislative action is justified to oversee the conduct of such platforms and to require non-discriminatory access arrangements, as I explain in this letter to Congress.²

2. Technological innovation appears to be accelerating, particularly in certain spaces such as mobile, search, and social media. How can enforcers keep pace? Last year you launched (another) high-profile antitrust suit against Google in the mobile space. What have been your learnings from this experience so far?

I am proud that 38 Attorney Generals filed the lawsuit in December 2020 to challenge Google's anticompetitive conduct that impacts desktop and mobile search users alike. In considering how to proceed, I kept in mind what I learned in watching Assistant Attorney General Joel Klein lead the antitrust case against Microsoft in the late 1990s. That case involved a dynamic technological environment and the need to move quickly to bring a case to trial. In our case against Google, I am in the position of working to do my best to follow Joel's example — building a high-quality team, thinking rigorously and carefully about the relevant competitive harms, and preparing for a trial on a relatively quick timetable. It is too early to look back on our Google case for any lessons learned except, perhaps, this one: The protection of consumers requires strong action to stop monopolistic conduct. I would also add that taking on this challenge has underscored the enormity of what Joel and the team of those who worked on that original case against Microsoft were able to accomplish.

3. What do you see as some necessary steps to modernize merger enforcement? You recently issued a joint set of comments with the AG of Nebraska on steps necessary to modernize the horizontal merger guidelines. Can you provide an overview of what you see as the most important aspects of those comments, and what concrete changes in approach you would like to see emerge?

Attorney General Peterson and I co-chair the National Association of Attorneys General Antitrust Committee and decided that it was important to provide a bipartisan comment to offer guidance and our perspective on the updating of the Merger Guidelines. For me, this was also a bit of *déjà vu*, as I was closely involved in the last update of those guidelines in 2010. The team who worked on our comments did a tremendous job, highlighting a number of key issues, including that the elimination of nascent (or new) competition that threatens to oust long-standing companies needed to be addressed more specifically in the Guidelines.³

¹ <https://coag.gov/blog-post/attorney-general-weiser-testimony-before-the-u-s-house-of-representatives-subcommittee-on-antitrust-commercial-and-administrative-law-march-18-2021/>.

² <http://coag.gov/app/uploads/2022/06/AG-Weiser-letter-re-American-Innovation-and-Choice-Online-Act.pdf>.

³ <https://coag.gov/app/uploads/2022/04/CO-and-NE-Comments-on-Merger-Enforcement.pdf>.

We also emphasized, as I noted in my testimony to Congress referenced earlier, that the Chicago School's influence on antitrust policy has led to a “miscalculate[ion] of the error cost equation and given undue weight to the costs of false negatives in merger enforcement.” Notably, when looking at many markets, the level of competition has declined and the likelihood of anticompetitive harms has increased. We therefore encouraged our federal colleagues to update the Guidelines to better address the challenges of today's modern economy, including providing for a closer and more effective evaluation of the non-monetary price harms that occur in the digital economy.

4. The U.S. Senate recently passed the State Antitrust Enforcement Venue Act of 2021 (albeit slightly amended from the original House proposal). This proposal reflects a series of bipartisan efforts to reform antitrust enforcement, in this case with a particular focus on the important role to be played by State AGs. Assuming it is passed by the House, what would be the key implications of this law?

One point I have made repeatedly, including in our recent comments on the proposed update of the Merger Guidelines, is that it is critical to view state enforcers on a par with federal antitrust enforcers. When Congress authorized State Attorneys General to bring actions on behalf of their citizens, it set up a system of cooperative federalism, as I explained in this article.⁴ That model envisions that states should be given latitude to bring cases even when the federal government declines to do so. It follows naturally that states should be given the same prerogative that the federal government has to select the appropriate forum and not to be transferred into a multi-district litigation. I am proud that Colorado members of Congress — Representatives Joe Neguse and Ken Buck, from opposing parties — came together to champion this legislation. And 52 State Attorneys General supported this reform.⁵

5. Do you foresee a strengthened role for State AGs in light of this and other proposals?

The strengthened role of State AGs is on account of the increased commitment that AGs have made to engaging in antitrust enforcement. This is, in a way, back to the future. In the early 1900s, the National Association of Attorneys General was founded — and had an early meeting here in Denver — because of concerns with the trusts and the need for states to work together to address this rising threat. We are also living in a time of increased corporate concentration, declining levels of competition, and greater opportunities for anticompetitive harm. There is thus ample opportunity for State AG action to protect consumers and enforce the antitrust laws. And the venue bill is an acknowledgement of that important role.

6. What are the implications for antitrust rules of the rise of cryptocurrencies? How can antitrust law enforce a rules-based system in a decentralized environment such as the crypto space?

Antitrust law has long adapted to new technologies. Cryptocurrencies will indeed create new issues for enforcers, but my belief is that the principles of sound antitrust enforcement will continue to be relevant. To be sure, we have much to learn about these emerging markets that are evolving and implicate both competition and consumer protection issues. Nonetheless, whether it was the railroads, the telephone, or the Internet, the antitrust laws have risen to the challenge of adapting to new technologies and protecting competition and consumers.

7. With the caveat that no crystal ball is available, what do you think is next for antitrust? Competition rules began with the railroads; then there was telecoms and subsequently iterations of the tech industry. How do you see it evolving going forward?

What I will add here, and have discussed previously, is that we need to do more work on the remedial side. This was a core part of my letter to Congress related to the American Online and Innovation Act, echoing my earlier writing on this topic.⁶

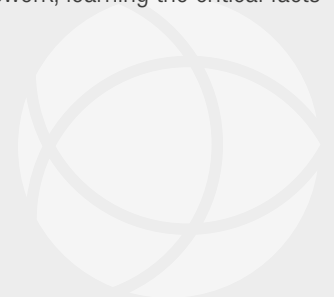
8. If there is anything else you would like to discuss, please do so here.

Many have suggested that antitrust law is having an important moment. I agree that we have important work to do to protect consumers. When you look at cases like *Steves & Sons, Inc.*, which involved a successful private challenge to a consummated merger, what haunts me is the following question: how many markets that we don't know about have become unduly concentrated and given rise to price hikes to consumers and the exclusion of rivals? Particularly in this environment, we need to be vigilant as enforcers, doing our homework, learning the critical facts of industry life, and not be afraid to take cases to court.

⁴ https://www.luc.edu/media/lucedu/law/students/publications/lj/pdfs/vol-52/issue-1/7_Weiser.pdf.

⁵ <https://www.naag.org/policy-letter/naag-endorses-state-antitrust-enforcement-venue-act-of-2021/>.

⁶ <https://scholar.law.colorado.edu/articles/454/>.



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