CPI TALKS…

…with Colorado Attorney General Phil Weiser

In this month's edition of CPI Talks… we have the pleasure of speaking with Mr. Phil Weiser, Attorney General for the State of Colorado, Hatfield Professor of Law and Telecommunications, former Executive Director and Founder of the Silicon Flatirons Center for Law, Technology, and Entrepreneurship, and Dean Emeritus at the University of Colorado Law School.

Thank you, Mr. Weiser, for sharing your time for this interview with CPI.

1. **Colorado, along with 46 other States and territories has initiated an investigation of Facebook for potential antitrust violations, and has joined 50 States and territories in an investigation into Google. In parallel, the FTC has launched its own investigations into Facebook's and Amazon's practices, while the DOJ is stepping up its investigation into Google. As you recently noted in the merger context, "[t]he states are independent enforcers of the antitrust laws. It's up [to] the courts, not a federal agency to decide the lawfulness of a merger." Is there need for better coordination between individual States and the agencies in this regard?**

A strength of the American model of governance is our Federalism. Under this model, States have independent authority and the responsibility to enforce the antitrust laws. This dynamic is also the situation in the international arena, where there is a need for coordination and harmonization. With respect to state-federal coordination, the general rule is that we work very well together, sharing information, documents, and analyses, enabling us to reach better results. Where we end up pursuing different paths, as happened last year in Colorado in a merger between United Health and DaVita Medical Group, that coordination can still hold. The real exception is where the federal government takes umbrage at the possibility that states would go in a different direction and makes the claim that it has the ability to occupy the field, excluding states from exercising their independent authority. In the *Sprint/T-Mobile* case, where the federal government made such a claim, it was appropriately rejected by the court, as I explained in the address you referenced.

2. **More generally, is litigation the correct means to resolve potentially anticompetitive conduct in high tech sectors, such as social media? Or is a multi-pronged regulatory and litigation-based approach necessary, given that the margin of maneuver of the agencies (and the lower courts) is limited by the relatively restrictive federal case law with respect to certain key antitrust doctrines? Given the high velocity of tech markets, and the relatively slow pace of litigation, is there a risk that industry developments will outpace any evolution in the case law?**

There are a couple of questions in this one, so let me take them in turn. First, with respect to the development of antitrust doctrines, I believe that they are supple and, in the face of compelling facts and well-reasoned economic theories of harm, thoughtful judges can adapt to meet new challenges. The *Microsoft* case stands as a powerful case in point. Second, on the point about antitrust remedies, there is indeed a challenge with respect to dynamic industries. This concern was captured well by Judge Posner after his stint as a special master in the *Microsoft* case: "The real problem [facing antitrust law] lies on the institutional side: the enforcement agencies and the courts do not have adequate technical resources, and do not move fast enough, to cope effectively with a very complex business sector that changes very rapidly." There are, however, powerful responses to this concern and for addressing a pattern of conduct that achieves lasting anti-competitive harm. I have discussed strategies for developing remedies both in my scholarly work (see here and here) and as an antitrust enforcer (see here and here).

3. **On a related note, certain players (notably Facebook) have called for government "regulation" of certain aspects of their businesses (notably the dissemination of harmful content). In theory, a similar initiative could apply to competition principles. In parallel, international reports into the digital sector, notably the UK's 2019 Furman Report, have called for industry codes of conduct to forestall potential antitrust violations. Is there a risk in adopting industry-sponsored initiatives (either in the form of government regulation or "codes of conduct")? Do such initiatives risk creating a mere smokescreen, or, worse, regulatory capture? How can any "knowledge gap" between industry and the private sector be breached?**

This is an important challenge to keep in mind with respect to regulation generally, whether overseen by an administrative agency or through audited self-regulation (or co-regulation, as it called in Europe). I do believe that codes of conduct can play a constructive role where there are checks on the concern of capture and the development of a regulatory capacity to operate effectively. For a longer discussion of this promise, see this article.

4. **The DOJ is currently reviewing its Vertical Merger Guidelines. There appears to be growing recognition among regulators that vertical mergers are not always as benign as had previously been presumed (notably in light of the recent experience of the *Live Nation/Ticketmaster* merger remedies, and the DOJ's attempt to block *AT&T/Time Warner*). In your view, what are the key reforms that ought to be implemented, both in terms of substantive review of vertical mergers and potential remedies? Should agencies and courts adopt a more imaginative approach to the design of behavioral remedies for vertical mergers (despite the DOJ's stated preference for structural remedies wherever possible)?**

This past February, Colorado led a coalition of states that filed comments with the federal agencies on how to approach vertical mergers. (I discussed those comments here.) With respect to key lessons, a starting point is to recognize that, in a range of scenarios, vertical mergers can be anticompetitive and therefore merit close scrutiny. One such scenario is where a vertical merger may remove the most likely potential rival to an incumbent firm. Another scenario is where a dominant firm seeks to undermine an upstart rival by gaining control of a critical input. This was the circumstance in the *United/DaVita* merger I mentioned earlier, where we took action to protect competition in the Medicare Advantage market. As for behavioral remedies, we discussed the appropriate role for them in our comments, explaining that "[i]f employed to eliminate harm, conduct remedies must be adequate to address identified risks, subject to practicable monitoring by the Agencies, and capable of being effectively enforced in a timely manner." In the case of the *United/DaVita* merger, we identified and implemented this very form of relief, ending an exclusive contracting arrangement that facilitated United's dominant market position.

5. **In the absence of legislative reform at the Federal level, to what extent should State legislatures fill the legislative gap? The Colorado legislature, in particular, has been active in enacting bipartisan legislation to combat anticompetitive practices. Please outline the major reforms introduced at the State level in Colorado. What further work needs to be done, and what can other States (and Congress) learn from Colorado's experience?**

One of the advantages of states is that they can be, as Justice Brandeis put it, laboratories of democracy. To that end, the Colorado General Assembly charged our office with investigating the rise of insulin prices. Between 2012-2016, notably, such prices doubled. In normal competitive markets, we don't see such behavior. As such, we are now undertaking a study of what dynamics are taking place in this market, whether there are measures for addressing them, and how we can protect those who depend on insulin. After we publish our report this fall, we look forward to contributing to the national debate on this important issue. The Colorado General Assembly also recently addressed the Attorney General's authority to challenge mergers, adopting the vision that I described earlier: Colorado has independent sovereign authority to review mergers in parallel with, but independent of, federal agencies and we are committed to using that authority appropriately.

6. **The Colorado AG's office recently concluded separate settlement agreements with the Mortenson Company and Trammell Crow for alleged violations of the state's Antitrust Act concerning tainted bidding processes for the expansion of the Colorado Convention Center. Aside from a financial settlement, in a novel development, Mortenson will be required to contribute in-kind construction services to help the COVID-19 pandemic efforts. Do you foresee a broader role for such hybrid settlements (whereby companies contribute to public works) beyond the COVID-19 crisis? Do such settlements bring other benefits (e.g. in enhancing public and corporate awareness of antitrust rules)?**

The ability to craft creative remedies and sanctions is an opportunity we will continue to develop. In the bid rigging case you note, it was important to our office to take actions that would spur reflection and engagement around ethics and compliance on the part of the companies who participated in the wrongful action. We also welcomed Mortenson's interest and commitment in taking on a construction project that would address an element of the COVID-19 crisis. Going forward, we will continue to be open to creative arrangements and use opportunities to develop innovative remedies that supplement more traditional ones, including those that provide for a broader public good.

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