



...with Nebraska Attorney General Doug Peterson

In this edition of CPI Talks we have the pleasure of speaking with Mr. Doug Peterson, the 33rd and current Attorney General of the State of Nebraska.

Thank you, Mr. Peterson, for taking this time to talk to CPI.

1. Antitrust enforcement involves, by necessity, coordination between federal and State agencies. What, in your view, should be the approach to interagency cooperation in a contemporary context? How can States and Federal agencies better coordinate in the 21st Century?

Coordination between federal and state agencies is critical to ensure that we efficiently deploy our limited resources. Traditionally, there was an approach, particularly in smaller states, in which states followed the lead of our federal counterparts. There was very little appetite to independently investigate and litigate large antitrust cases — with a few notable exceptions, like *Microsoft*. That trend has been changing with recent actions against some large technology companies.

There is no single, ideal model of interagency cooperation. State enforcers, much like our federal counterparts, have a limited set of resources to tackle competition issues. As a result, our model for cooperation will depend upon how specific investigations or cases relate to state priorities.

Interagency cooperation can be broadly captured in two categories. There is the historical model of cooperation in which state enforcers join investigations and cases managed by federal enforcers. In this model, state enforcers contribute our resources, localized knowledge and relationships, and our intellectual horsepower to cases led by the U.S. Department of Justice or the Federal Trade Commission. Deploying this model allows state enforcers to pursue investigations and cases of interest to our states while relying upon the resources and experience of federal enforcers. More recently, states have developed an alternative mode of cooperation, which allows us to cooperate closely with the federal agencies while managing parallel investigations and cases. In doing so, states have greater autonomy to pursue additional claims, make strategic litigation decisions, or pursue additional remedies; however, these cases are resource intensive. As a result, states must decide which cases warrant this newfound form of coordination.

2. What should be the enforcement priorities of antitrust agencies in the 21st Century? Is the technology sector rightly the focus of enforcement priorities? What other sectors merit particular scrutiny?

Our enforcement priorities should be guided by how to mitigate private entities from securing and maintaining undue power through anticompetitive methods in our modern economy. When the Sherman Act was passed in 1890, the legislative record was populated with comments concerning the coercive effect of power — not just market power. It has become clear to me from my time as Attorney General that certain companies, particularly companies participating in our digital economy, hold an incredible amount of power over consumers, competitors, and other businesses that rely upon their services. These companies have become ubiquitous for consumers and a necessity for other companies to reach consumers. Therefore, it is right that these companies come under scrutiny for their impact on our economy and citizens and serve as a priority for antitrust enforcers throughout the country.

Of course, companies operating in more traditional industries also deserve scrutiny. These priorities are often set by local factors. For example, as Attorney General of Nebraska, our office has heard significant concerns from constituents about consolidation and conduct in the agricultural sector, which has become a priority for us locally. To be sure, there are other priorities set by individual agencies based upon constituent needs, but dominant companies in the digital economy have proven to be the one area that has garnered attention from attorneys general across the country and from federal enforcers, making it a prominent national priority.

3. What should be the focus of merger scrutiny in the contemporary economy? Are there particular sectors that merit specific scrutiny in terms of their impact on consumer welfare?

The antitrust laws have been described as “common-law statutes,” which provide courts with the ability to incorporate judicial and economic learning to determine what is, and what is not, anticompetitive. This flexible approach to competition law provides courts with malleable standards to apply to evolving market dynamics. Moreover, antitrust cases tend to be fact intensive, which further justifies flexible competition laws. I fear that more rigid rules in competition enforcement could lead to rigid standards that can neither keep up with the changing economy or accommodate the unique facts to each case.

I am also concerned about representations parties make during merger reviews that are left unfulfilled. There are instances in which parties make representations about how the companies will operate once the merger is consummated that are unsatisfied once the merger is cleared. Enforcement agencies need remedies available to them if the parties fail to comply with their promises during the merger process.

4. How, in your view, is coordination working between State and Federal antitrust enforcers? You have raised specific concerns relating to certain industries, e.g. meat packing and food distribution. How can State and Federal enforcers better coordinate to ensure effective enforcement in such key industries?

Our office has had a tremendous experience coordinating with federal antitrust enforcers across industries. This includes working both with the U.S. Department of Justice and the Federal Trade Commission on a range of matters.

Perhaps most critical to improving coordination is continuing to build relationships with staff and decision makers in both agencies. The need for strong relationships is always highlighted at the outset of a new administration. A new administration will always bring with it new decision makers, priorities, and staff. The most recent transition has been particularly difficult because of challenges brought about by the COVID-19 pandemic, which has prevented the usual face-to-face meetings that would allow the enforcement community to make introductions and exchange ideas.

Most of these difficulties will resolve themselves naturally as the new administration finishes installing new decision makers to open posts and in-person meetings resume as COVID restrictions are lifted across the country.

5. You are taking the lead in an antitrust lawsuit against Google, along with several other States. Please outline the key concerns you have identified with Google’s conduct. Are these concerns distinct from those raised by other States in a parallel suit, or by the Department of Justice in its lawsuit against Google?

It is worth noting that our case against Google is wholly consistent with the case brought by the U.S. Department of Justice and their state co-plaintiffs. Our complaint builds and expands upon their case in three notable ways.

First, our case includes allegations that Google has foreclosed specialized vertical providers, like Expedia and Yelp, from the most valuable portions of the search results page and deprived them of critical user traffic to their websites. While not direct competitors to Google’s general search services, specialized vertical providers offer a competitive threat to some of the most valuable queries conducted on Google, such as travel or local services, and Google has undertaken a concerted effort to discriminate against these companies it perceives as a threat.

Second, our case alleges that Google forecloses Microsoft Bing from advertising dollars by creating inoperability between their product, SA360, and Microsoft Ads to the detriment of Bing and advertisers alike.

Third, our complaint includes more specific concerns about Google's effort to dominate additional search access points, such as automobiles, to make their search product even more ubiquitous.

Our complaint comprehensively examines how Google achieved, fortified, and continues to expand its dominant position in general search and corresponding advertising markets. In crafting our complaint, we thought it was not only important to establish how Google established its monopoly but also how it intends to fortify its monopoly for generations to come. In doing so, our complaint presents a broad range of remedies that we could deploy to restore competition to the market, if we succeed.

6. More generally, what, in your view, should be the role of State Attorneys General in enforcing antitrust law? How do you see the role of State-level enforcers as they elaborate their role with respect to Federal level enforcers?

State attorneys general have a significant role in antitrust enforcement that has been recognized by Congress and the courts and codified into law. States enforcers have some obvious areas of focus such as intrastate anticompetitive conduct uncovered in small communities and bid-rigging and price-fixing against state purchasers. While these cases and investigations are not frequently found on the front page of the newspapers, they are nevertheless impactful to our local communities and taxpayers. We should never forget that.

More broadly, state attorneys general hold critical resources necessary for vigorous antitrust enforcement. Antitrust enforcement is under-resourced, with market concentration rising and competition concerns multiplying. It is therefore critical that state attorneys general supplement the resources available at the federal level with our own staff. Staff working in state attorneys general offices can offer localized knowledge and relationships that are valuable to inject into national antitrust matters. By bringing additional intellectual horsepower to antitrust enforcement, state attorneys general help ensure our nation's competition laws are vigorously enforced and consumers are protected against the consolidation of power by private entities in the economy.



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