

The logo for the American Antitrust Institute (AAI) consists of the letters "AAI" in a bold, white, sans-serif font, enclosed within a white square. This square is positioned on the left side of a dark blue horizontal bar that spans the top of the page.

AAI

AMERICAN ANTITRUST INSTITUTE

THE STATE OF ANTITRUST ENFORCEMENT AND COMPETITION POLICY IN THE U.S.

SUMMARY OF MAJOR
CONCLUSIONS

APRIL 14, 2020

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- **DECLINING COMPETITION PRESENTS A POLITICAL-ECONOMIC DILEMMA IN THE U.S.:** The cumulative effects of decades of lax antitrust enforcement, coupled with a step-down in enforcement under the Trump administration, poses fundamental challenges for markets and the democratic values that undergird them. Long-term inaction has compromised the effectiveness of the U.S. antitrust laws, presenting a significant political-economic dilemma around the role of antitrust in solving the broader public policy problem of declining competition.
- **ANTITRUST ENFORCEMENT HAS DECLINED UNDER THE TRUMP ADMINISTRATION:** Key metrics indicate a decline in cartel enforcement under the Trump administration, as well as a falloff in second requests and merger challenges. And despite a few high-profile cases, there is no meaningful invigoration of monopolization enforcement. Recent agency actions to block some mergers involving highly concentrated markets reflect “emergency” merger control of the most egregiously anticompetitive transactions.
- **POLICY PRIORITIES AT THE ANTITRUST AGENCIES ARE MARKEDLY DIFFERENT:** The Trump DOJ has introduced major changes in government policy surrounding cartel and merger enforcement, the intersection of competition and intellectual property, and competition advocacy. Many of these policies could work against the interests of competition and consumers. The FTC has taken a more pro-active approach, with continued efforts to challenge the expansion of intellectual property to achieve anticompetitive objectives in pharmaceutical markets.
- **SHIFTS IN AGENCY ADVOCACY REFLECT MORE FEDERAL INTERVENTION BY DOJ IN PRIVATE ANTITRUST CASES:** The important role of antitrust agency advocacy has shifted markedly under the Trump agencies. The FTC’s competition advocacy, embodied in comments before federal and state agencies and amicus briefs, has fallen off dramatically. In contrast, the DOJ’s competition advocacy has increased but often stakes out positions that work against the interests of competition and consumers.
- **PRIVATE ENFORCERS CAN TAKE UP SOME OF THE SLACK IN FEDERAL UNDER-ENFORCEMENT AND SPUR POLICY CHANGE, BUT THEY FACE SIGNIFICANT CHALLENGES:** Key private antitrust cases have had positive impacts by obtaining compensation for victims, deterring future violations, and spurring public debate and state legislative reform. There are also opportunities for private challenges of

consummated mergers that have harmed consumers and workers. But challenges remain, with tightening judicial standards for showing collusion and other impediments that make it more difficult to bring, litigate, and win cases.

- **STATE ATTORNEYS GENERAL ARE BECOMING MORE ACTIVE BUT LIMITATIONS PERSIST THAT WILL DEFINE HOW MUCH THE STATES CAN DO IN RESPONSE TO FEDERAL INACTION:** State Attorneys General are stepping up efforts in response to weak federal enforcement. These include independent lawsuits to block illegal mergers and confront price fixing, a proactive stance on strengthening federal merger settlements, and investigations into the competitive practices of large digital technology companies. Resource limitations and a change in the tenor of coordination between the DOJ and the states, however, pose challenges.
- **LEGISLATIVE ANTITRUST REFORM IS NEEDED BUT PROPOSALS THUS FAR LACK A COMPREHENSIVE AND COORDINATED APPROACH:** Legislative efforts to reform the antitrust laws have accelerated in the 116th Congress and are at levels not seen since the early 1990s. These include comprehensive reform proposals and narrower initiatives targeting specific antitrust issues and particularly vulnerable sectors. Legislative reform is needed to strengthen and clarify the antitrust laws, but these efforts require a coordinated response to ensure that they promote enforcement, not inadvertently weaken it or cause confusion in the courts.
- **REVERSING DECLINING COMPETITION IS A PROBLEM THAT WILL REQUIRE A PUBLIC POLICY SOLUTION:** Change in the way the U.S. promotes competition and protects the market system is badly needed. Strengthening antitrust to promote more vigorous enforcement of the antitrust laws is part of a broader solution that should be complemented through the use of other tools, including social and economic regulation, standard-setting and interoperability, labor policy, and intellectual property law.