

ANTITRUST TRADE AND PRACTICE

Expert Analysis

Is Antitrust Having Its '70s Moment? What History Tells Us About Reform

Antitrust was as relevant as it had been in recent memory. Over the prior two years, inflation had soared to its highest level in decades, and politicians on both sides of the aisle called for stronger antitrust enforcement as a means of slowing it. The Antitrust Division of the Department of Justice had recently made front page news when it brought a lawsuit against one of the biggest technology companies in the world. Publications like the *New York Times* marveled at the unusual attention antitrust was getting, noting the “new wave of anti-trustism” that had swept the country.

This was the state of play when the president delivered his State of the Union address. He exclaimed that his administration would strictly enforce federal antitrust laws—a rare instance of antitrust being mentioned in a State of the Union and emblematic of antitrust’s place in the public discourse. The president was Gerald Ford, and the year was 1976. About six months

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later, Ford signed the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) into law, fundamentally reshaping antitrust enforcement in the United States.

The political and economic backdrop for antitrust today is strikingly similar to the 1970s. The recent revival of antitrust as a topic of public interest, after a multi-decade lull, has been written about often. See, e.g., Eric Posner, “Antitrust is Back in America,” *Project Syndicate* (Mar. 12, 2021). Antitrust is one of the few political issues today that sees bipartisan support, largely framed as a way to take on the “big tech” companies that lead the American economy. Last year, the United States experienced its highest level of inflation since 1981, and once again politicians from both parties flagged antitrust reform as a way to combat rising prices. And the Antitrust Division recently brought

a highly publicized lawsuit against a major technology company, Google, just as it did against AT&T in 1974.

Last month, President Joe Biden became the first president to say the words “antitrust” in a State of the Union address since the 1970s. He did so by calling for Congress to pass legislation to strengthen antitrust laws specifically targeted at “big online platforms.” Nik Popli, “The Biggest Moments From Biden’s 2023 State of the Union Address,” *Time* (Feb. 7, 2023). Thus far, this type of proposed legislation has failed to gain political traction. But so too did the proposals that eventually made up the HSR Act prior to 1976. If history is any indication, we should expect politicians to ramp up the push for major legislative antitrust reforms if inflation maintains or rises above its current elevated levels, but continue to remain skeptical at this time of sweeping legislation.

Looking Back at the 1970s

After two decades of moderate inflation averaging around 2.5%, the consumer price index suddenly skyrocketed from 3.4% in 1972 to over 12% in 1974. Alan S. Blinder, “The Anatomy of Double-Digit Inflation in

the 1970s, in *Inflation: Causes and Effects*, “261, 262–64 (Robert E. Hall ed., 1982). Unsurprisingly, the issue consumed American politics. In his October 1974 address to a joint session of Congress—dubbed the “whip inflation now” speech—Ford laid out 10 areas for government action to address inflation. See President Gerald Ford, Address to the Joint Session of Congress (Oct. 8, 1974). One of these areas was antitrust enforcement, including a call by Ford to pass new legislation strengthening penalties for antitrust violations.

Administration officials, congressional leaders, and antitrust enforcers followed suit and began to link antitrust enforcement to the fight against inflation. Milton Handler, “Antitrust—Myth and Reality in an Inflationary Era,” 50 *N.Y.U. L. Rev.* 211, 214–15 (1975).

Perhaps nothing was more indicative of the new mood toward antitrust among politicians than the speed at which the “Antitrust Procedures and Penalties Act” was passed at the end of 1974. The bill had stalled to that point but was signed into law just six weeks after Ford’s October address. Ford heralded the bill—which increased the maximum penalties allowable for antitrust violations—as a new “tool” in the fight against inflation, but also expressed hope that it was only the beginning of legislative antitrust reform. Politicians took the cue. Throughout 1975 “cries for antitrust legislation of every variety were heard throughout the halls of Congress” from both Republicans and Democrats. The partisan divide was no longer whether to pass antitrust reform, but rather whose proposals could go further and

do more to—at least nominally—stop inflation. Among the proposals were three that eventually melded together to form the HSR Act.

Rep. Peter Rodino (D-NJ) proposed a “*parens patriae*” amendment to the Clayton Act that would allow state attorneys general to file federal antitrust actions on behalf of their citizens. Sens. Philip Hart (D-MI) and Hugh Scott (R-PA) proposed a wide-ranging bipartisan bill that, among other things, would increase the DOJ’s civil investigative authority and substantially broaden premerger notification requirements and processes. The lasting legacy of HSR has been

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its impact on the premerger review process. But at the time of passage, the *parens patriae* provision was the one that portended the most profound change in antitrust law. Much of the potential power of this provision was stripped away by the Supreme Court just one year later in its *Illinois Brick* decision—which disallowed indirect purchasers (on whose behalf *parens patriae* suits are typically brought) from suing for antitrust violations. See Andrew I. Gavil, “Antitrust Remedy Wars Episode I: *Illinois Brick* from Inside the Supreme Court,” 79 *St. John’s L. Rev.* 553, 568–70 (2005). But this legacy shift does not change

the significance of the statute’s initial passage; lawmakers capitalized on the wave of antitrust support to pass laws that seemed unthinkable in the preceding years. In fact, unsuccessful attempts to pass a broad premerger review regime dated as far back as the 1950s. Kelly Signs, “Milestones in FTC history: HSR Act Launches Effective Premerger Review, Federal Trade Commission” (Mar. 16, 2015).

All of this was done under the auspices of combatting inflation, despite there being little-to-no empirical evidence that the laws would do so. A leading antitrust scholar at the time rhetorically asked if “our leaders, acting on the basis of myths” were merely “making politically popular assumptions which [could not] withstand objective analysis.” Handler, *supra*, at 223. It goes to show that the political winds of the era might matter more than the actual efficacy of the proposed laws when it comes to antitrust reform. A notable lesson in today’s climate.

Proposals for Legislative Antitrust Reform Today

Any political issue that has managed to find common ground between Sens. Amy Klobuchar (D-MN) and Ted Cruz (R-TX) is worth a closer look. Last year, the two were among the co-sponsors of the Competition and Transparency in Digital Advertising Act (DAA), which would aim to break up vertical integration in the digital advertising industry. Keach Hagey, “GOP-Led Legislation Would Force Breakup of Google’s Ad Business,” *The Wall Street Journal* (May 19, 2022).

The narrative that antitrust could be used to take on large technology companies has existed for years and cut across party lines. The DOJ and FTC pursued active enforcement in the technology industry toward the end of the Trump administration. A high-profile investigation by Congress into Google, Apple, Amazon and Facebook featured a televised hearing with the companies' CEOs and culminated with a report by the House Judiciary Committee's Democratic leadership in 2020 that likened the four companies to the "oil barons and railroad tycoons" that dominated the economy a century ago. Cecilia King and David McCabe, "House Lawmakers Condemn Big Tech's 'Monopoly Power' and Urge Their Breakups," *The New York Times* (Oct. 6, 2020).

A year later, as inflation jumped to the highest levels since the early 1980s, politicians once again called for antitrust enforcement and legislative reform. See Karen Hoffman Lent and Kenneth Schwartz, "President Biden Calls for Antitrust Enforcement To Combat Rising Inflation," *New York Law Journal* (Feb. 8, 2022). In 2022, several antitrust and competition reform bills were proposed, often achieving bipartisan support. Two stick out, as either one, if enacted, would be the most significant legislative antitrust or competition reform in the United States since the HSR Act was passed nearly a half century ago.

The first—the DAA—would amend the Clayton Act for the first time since the HSR Act and essentially require the breakup of vertically integrated players in the digital ad industry like Google. The other—the American

Innovation and Choice Online Act (AICO)—would give antitrust enforcers brand new tools when pursuing claims against large tech companies. Co-sponsored by seven Senate Democrats and six Senate Republicans, the AICO would prevent online platforms from giving preference on the platform to their own products over their competitors' products, restrict online

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platforms' ability to impede competing businesses from accessing the platform, and limit online platforms' ability to use the nonpublic data they collect from the operation of their businesses. American Innovation and Choice Online Act, S.2992, 117th Cong. (2022). Republicans Chuck Grassley and Ken Buck made a spirited defense of the bill in a *Wall Street Journal* opinion, notably asserting that while Americans "are paying the price for inflation," small businesses and consumers suffer the most, and the bill represents an effort to protect them. Chuck Grassley and Ken Buck, "Making Markets Work for More than Big Tech," *The Wall Street Journal* (June 21, 2022). In last month's State of the Union address, Biden called for passage of the AICO.

Thus far, these bills have not gathered any meaningful momentum toward passage, with neither one even

making it to a full floor vote in 2022. Republicans have since gained control of the House in a divided government, and the Biden administration's antitrust enforcement agencies have suffered several high-profile trial losses. Perhaps legislative antitrust reform has lost some of its sheen, and these proposals were just momentary headlines of rare bipartisanship in today's political environment.

But while inflation remains elevated and the Federal Reserve struggles to fully curtail it, the prospect of high prices and economic pain for consumers in 2023 looms. See Editorial Board, "Inflation Proves Stubborn in January," *The Wall Street Journal* (Feb. 14, 2023). As the 1970s taught us, an economic crisis can give politicians low hanging fruit in the shape of antitrust reform. And they can seize the moment to rescue proposals that seemed unlikely to succeed a short time ago. While it feels like a stretch to link inflation to, say, the digital advertising industry, the same could be said about tying it to the lack of a premerger review regime in 1976.

Time will tell if history will soon repeat itself.