Antitrust in the Modern Grocery Industry

How the 2023 Merger Guidelines Can Be Improved as Evidenced by the Kroger-Albertsons Proposed Transaction

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BLAW 550

April 14, 2025

Introduction

Antitrust has been a key aspect of the modern economy dating back to the Gilded Age. The United States government has strived to promote competition and protect consumers across various industries, from railroads to search engines. Changing to meet the demands of the modern world, the Federal Trade Commission (FTC) and Department of Justice (DOJ) has grappled with cases on increasingly complex industries. Even the grocery industry is rapidly changing with new technology and evolving consumer habits. However, rulings have not always demonstrated a perfect understanding of certain industries or markets.

This paper will outline key legislation and subsequent legal doctrines pertaining to antitrust as well as the tools used by courts in such cases. Next, it will review relevant changes to antitrust enforcement found in the 2023 Merger Guidelines. It will then examine a recent case that highlights room for improvement in the way the government approaches modern antitrust cases following the 2023 Merger Guidelines. The analysis will come to the following conclusion: antitrust regulation must continue to evolve to fit the requirements of our rapidly changing modern economy, as evidenced by details found within the Federal Trade Commission's recent blocking of a proposed Kroger-Albertsons merger.

Overview of Antitrust: From Sherman to 2023 Merger Guidelines

Antitrust laws exist to ensure fair business practices and govern activities such as mergers[1]. Broadly speaking, antitrust can be described as policy governing competition[2]. The current focus of the FTC in relation to antitrust is on "mergers, agreements among competitors, restrictive agreements between manufacturers and product dealers, and attempts by monopolists to thwart new competitors"[3]. Mergers, in the eyes of the law, can fall into one of two buckets: horizontal or vertical. Horizontal mergers refer to "mergers and acquisitions involving direct competitors", while vertical mergers are between suppliers and customers[4]. Antitrust legislation in the United States began at the state level, with the first federal antitrust legislation being signed in the late 1800's. It was followed by the Clayton Antitrust Act of 1914. These laws are enforced by both the DOJ and FTC[5].

The first antitrust laws were implemented at the state level during the Gilded Age[6]. Americans were threatened by monopolies that infringed on individual rights[7]. Industrialization following the American Civil War led to unfair competitive practices that involved dramatically lowering prices to eliminate competition. Once there were no longer competitors in each market, companies could set prices as they pleased[8]. This was often executed via companies colluding or consolidating with each other in the form of "trusts". Trusts became large and powerful, curbing the ability of individuals to compete and gaining the ability to "buy up political influence"[9]. Economic instability and inequality fueled public opinion towards antitrust legislation[10].

The Sherman Act was the first major federal antitrust legislation passed in the United States. It outlawed monopolies and any attempts to form a monopoly[11]. Violations of the Sherman Act could be either civil or criminal. This broad legislation was enforced by the DOJ at the time of its creation[12].

The courts, in the decades following Sherman, gradually introduced the doctrine of "rule of reason". This doctrine was first used in *Standard Oil Co of N.J. v. United States* in 1911[13]. This new doctrine allowed courts to weigh both the benefits and the harms caused by the business activity in question. Some activity, however, remained per se illegal[14].

Continued economic distress and formation of monopolies proved the Sherman Act to be insufficient[15]. Congress, in 1914, passed two laws to address further concerns: The Sherman Antitrust Act and the Federal Trade Commission Act. The Sherman Antitrust Act closed loopholes and outlined details pertaining to price discrimination, monopolies, and M&A activity among others[16]. It notably exempted trade unions and is enforced via civil penalties only[17]. The Federal Trade Commission Act established the Federal Trade Commission and banned "unfair methods of competition"[18]. Violations of the Sherman Act, per legal precedent, are also violations of the Federal Trade Commission Act. This allows the FTC to enforce both the Sherman Act and the Clayton Antitrust Act[19].

Legal theory surrounding antitrust has changed over the years since the passing of the Clayton Act. The Chicago school of economics emerged with an emphasis on consumer welfare, asserting that the government should allow business activity that benefitted the consumer with "the greatest number of goods to customers, reliably, at the lowest cost"[20]. This resulted in a significant drop in antitrust cases brought by the United States government during the 1980's and 1990's[21]. Present day thinking has shifted the pendulum slightly away from the Chicago school's dramatic emphasis on consumer welfare towards a renewed focus on market imperfections using economic analysis[22].

Several analytical tools are used during antitrust cases, especially those dealing with horizontal mergers. Two of these tools that economists and courts use are the Hypothetical Monopolist Test (HMT) and the Herfindahl-Hirschman Index (HHI). The HMT is used to define a market while the HHI is used to measure the potential impact of a merger.

The HMT, per the 2023 Merger Guidelines, asks whether the proposed business activity would likely impose "at least a small but significant and non-transitory increase in price ... or other worsening of terms…for at least one product in the group"[23]. Defining the market is a critical part in antitrust cases.

The HHI is calculated, according to the DOJ Antitrust Division, "by squaring the market share of each firm competing in the market and then summing the resulting numbers"[24]. This calculation shows how concentrated a given market is while taking into consideration the size of the companies participating[25]. The higher the HHI index, the more concentrated a market is. Antitrust activity is measured by the post-merger HHI as well as the change in HHI from before and after the merger.

The DOJ outlines updates to the Hypothetical Monopolist Test and revised thresholds for HHI in guidelines released as the department sees fit. The most recent updated guidelines came in 2023.

The DOJ and FTC have published several Merger Guidelines, starting with the 1968 Merger Guidelines[26]. They provide direction on how the two Agencies interpret mergers. As of 2025, eight Merger Guidelines have been released. Each update changes, sometimes dramatically, how antitrust cases are handled[27]. These guidelines help both businesses and the courts understand how the Agencies presently view potential mergers. They specifically provide guidance on sections governing merger activity in the Sherman Act, Clayton Antitrust Act, and the FTC Act[28].

The Agencies released an updated version of the Merger Guidelines in 2023. The 2023 Merger Guidelines called for a stricter approach towards enforcing antitrust law relating to mergers. These guidelines were released under a Biden Administration that campaigned on antitrust reform as a response to public concerns towards increasing monopoly power[29]. The 2023 Merger Guidelines outlined changes ranging from rebuttals to common defense arguments to addressing serial acquisitions. The guidance lowered different thresholds for tools like HHI and defining markets. There was also a heavier emphasis on the impact of workers and labor markets than had been seen in prior guidelines[30].

Critics of the 2023 Merger Guidelines have noted that it is written with ambiguity, causing it to fail to choose between an emphasis on consumer welfare or not[31]. It does not provide clarity on whether consumer harm needs to be present for a merger to be deemed anticompetitive and illegal[32]. Also, it has been noted that the language provides more room for interpretation than prior guidelines. In previous versions, the Agencies outlined criteria for mergers that “would” (as in, definitively) constitute illegality. The 2023 Merger Guidelines change the verbiage to outlining criteria that “could” (as in, potentially) constitute illegality. This lack of clarity seems to be at odds with the general tightening of antitrust thresholds and aggressiveness towards mergers[33].

The 2023 Merger Guidelines have already played a role in court decisions. One of the earliest, if not the first, applications of the 2023 Merger Guidelines was in the Kroger-Albertson blocked merger.

Kroger-Albertsons Proposed Transaction

The macroeconomic environment and status of the grocery industry at the time of the proposed merger is important to consider when analyzing this case. Following the 2020 COVID pandemic, the United States faced high levels of inflation. Increasing prices at grocery stores ushered in a public debate surrounding price fixing. Politicians and consumers alike pointed at large grocery stores with claims of illegal price fixing. The cause of inflation is still subject to debate, however data shows that grocery gross margins did not significantly increase during this time of inflation[34]. This suggests that factors like supply chain disruptions might be to blame. Price fixing is illegal per se under the Clayton Act[35] and it should be noted that the FTC did not accuse Kroger or Albertsons of price fixing. Understanding the public sentiment towards price fixing at the time of the merger proposal, however, is important to understand for full context. The public discourse on grocery prices, combined with a Presidential Administration already focused on cracking down on big business, established conditions leading towards the FTC challenging what could have been the largest grocery store merger in U.S. history.

The grocery industry was also changing at the time of the proposed transaction. Due to inflation, customers emphasized savings by switching to private label or cheaper retailers like Aldi[36]. E-commerce also experienced unprecedented growth, with double digit growth since the start of the pandemic[37]. Increasing grocery sales boosted growth of retailers that sell both grocery and non-grocery items, such as Costco and Walmart[38]. Kroger and Albertsons sought to increase share by their prosed transaction, citing increased competition as a justification.

The FTC cited three major factors in their initial challenge to the Kroger-Albertsons transaction: “inadequate divestiture offering”, “harm to consumers”, and “harm to workers”[39]. They requested a preliminary injunction, which was granted.

Preliminary Injunction Briefing

The following is a briefing of the preliminary injunction for the FTC complaint regarding the Kroger-Albertson’s proposed transaction, using the “IRAC” format as a framework:

Issue: The issue in this case is the legality of the proposed transaction between Kroger Co. and Albertsons.

Rule: The court analyzed whether the transaction violated antitrust legislation, specifically Section 1 and 2 of the Sherman Act, Section 7 of the Clayton Antitrust Act, and Section 5 of the FTC Act.

Application: The court used the following guidelines from 2023 Merger Guidelines outlined by the FTC and DOJ to interpret the legislation:

- Guideline 1 states that “mergers raise a presumption of illegality when they significantly increase concentration in a highly concentrated market”. Specifically, the latest guidelines lower the threshold of post-merger HHI as well as the threshold for post-merger market share. The threshold became stricter in both cases. The HHI threshold moved from 2,500 to 1,800. The threshold for market share was set to 30%. This demonstrates a tightening of the merger rules[40]. The change in HHI threshold was lowered from 200 to 100. The calculated post-merger HHI for Kroger-Albertsons was 2,621[41]. This number is close to the threshold prior to the 2023 Merger Guidelines, but far from the current threshold. The court saw no reason to use the prior standard for this case[42]. A significant factor in this calculation is market definition, which in this case excluded retailers like Costco and Walmart[43].

- Guideline 2 states that "mergers can violate the law when they eliminate substantial competition between firms"[44]. Kroger and Albertsons attempted to avoid violating this guideline with their proposed divestiture of hundreds of stores in highly concentrated markets.
- Guideline 10 states that "when a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers, creators, suppliers, or other providers"[45]. The focus in this case was on the impact towards workers. The court ruled that it would have a negative impact on the unionized workers, asserting that the labor market for union labor is separate from the labor market for nonunion labor[46].

Conclusion: The U.S. District Court for the District of Oregon halted the transaction between The Kroger Company and Albertsons Companies, Inc. It is important to note that the deal was also challenged by the State of Washington and the State of Colorado. The Washington case focused on State law and local impact. Colorado's case focused on employment issues[47]. The federal decision, alongside the State of Washington's ruling the same day, effectively ended the proposed transaction[48].

Need for Modernized Market Definitions in Grocery (and Beyond)

Defining markets has been a challenge faced by the courts since the advent of antitrust law[49]. As technology and industries become increasingly complex, defining markets becomes more and more difficult. The market definition set by the court is the foundation of the entire case and can often be the difference between a merger being found to be anticompetitive or not. The US. District Court for the District of Oregon provided a market definition that excluded retailers like Costco, Walmart, and Aldi and we not convinced that the merger would allow the combined firms to better compete against these retailers[50]. This, however, is not consistent with modern grocery trends and shopper behavior. These retailers are growing grocery revenue and gaining share rapidly[51]. Inflation and economic uncertainty are causing customers to shop in bulk stores (like Costco) and budget stores (like Aldi and Walmart)[52]. While market definition is only one of several factors in this decision, the narrowness and controversy surrounding the court's definition demonstrates a need for clarity. It also raises several questions. If Costco and Walmart do not compete in the same market as Kroger and Albertsons, what market do they participate in? Are those markets highly concentrated?

The Kroger-Albertsons case highlights the complexity of the grocery industry, which is far from a new industry. However, many industries old and new are rapidly evolving in the 21st century. Emerging technologies, as evidenced by companies like Google and Meta, are creating entirely new markets that are constantly changing. Defining markets will only get more complex as businesses continue to innovate and attempt to gain share in their respective spaces. One recommendation is for the DOJ and FTC to work with industries proactively to define specific markets or at least a concise methodology for defining modern markets that leaves less room for interpretation. Providing a better framework would benefit both business and courts in navigating potential activity.

Conclusion

Economic, political, technological, and societal conditions today mirror those of the Gilded Age which ushered in the nation's first federal antitrust legislation. Despite high levels of political polarization following the Civil War, there was a broad consensus against the rise of trusts that threatened competitiveness and individual liberty. Today, United States politics are highly divided. There exists little common ground between the major political parties. Yet, there are bi-partisan populists concerns over big business and increasing consolidation of wealth. Technology today is rapidly changing and presents existential threats to labor and certain industries, not unlike the vast evolution that occurred during the Gilded Age. Like the introduction of antitrust law with the Sherman Act, the 2023 Merger Guidelines demonstrate a desire to reel in anticompetitive behavior. Updated guidelines from the DOJ and FTC demonstrate the Agencies' understanding of the need for constant evolution. They can and should go even further. A clearer framework for defining markets should be considered by the Agencies in future Merger Guidelines, as demonstrated by the U.S. District Court for the District of Oregon's blocking of the proposed Kroger-Albertsons transaction.

Citations

[1] Federal Trade Commission, *Competition Counts* (published May 2015) https://www.ftc.gov/system/files/attachments/competition-counts/pdf-0116_competition-counts.pdf

[2] Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective*, Harvard Business School Working Paper, No. 19-110 (Published May 2019)

[3] Federal Trade Commission, *Competition Counts* (published May 2015) https://www.ftc.gov/system/files/attachments/competition-counts/pdf-0116_competition-counts.pdf

[4] Thurman Arnold Project at Yale School of Management, *Modern Antitrust Enforcement* (accessed April 10, 2025) https://som.yale.edu/centers/thurman-arnold-project-at-yale/modern-antitrust-enforcement

[5] Cornell Legal Information Institute, *Antitrust Laws* (visited April 10, 2025) https://www.law.cornell.edu/wex/antitrust_laws

[6] David K. Millon, *The First Antitrust Statute*, 29 Washburn L. J, 141 (1990)

[7] *Id*. at 144
[8] Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 Fordham L. Rev. 2279, 2280 (2013)

[9] David K. Millon, *The First Antitrust Statute*, 29 Washburn L. J, 141, 144 (1990)

[10] *Id*. at 143

[11] Cornell Legal Information Institute, *Sherman Antitrust Act* (visited April 10, 2025) https://www.law.cornell.edu/wex/sherman_antitrust_act

[12] *Id*.
[13] Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective*, Harvard Business School Working Paper, No. 19-110 (Published May 2019)

[14] *Id*.
[15] David K. Millon, *The First Antitrust Statute*, 29 Washburn L. J, 141 (1990)

[16] Corporate Finance Institute, *Clayton Antitrust Act* (visited April 2, 2025) https://corporatefinanceinstitute.com/resources/wealth-management/clayton-antitrust-act/'

[17] *Id*.
[18] Federal Trade Commission, *History* (accessed April 1, 2025) https://www.ftc.gov/about-ftc/history

[19] *Id*.

[20] Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective*, Harvard Business School Working Paper, No. 19-110 (Published May 2019)

[21] Thurman Arnold Project at Yale School of Management, *Modern Antitrust Enforcement* (accessed April 10, 2025) https://som.yale.edu/centers/thurman-arnold-project-at-yale/modern-antitrust-enforcement

[22] Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective*, Harvard Business School Working Paper, No. 19-110 (Published May 2019)

[23] U.S. Department of Justice & Federal Trade Commission, *2023 Merger Guidelines* (December 18, 2023) https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf

[24] Department of Justice, *Herfindahl-Hirschman Index* (January 17, 2024) https://www.justice.gov/atr/herfindahl-hirschman-index

[25] *Id.*

[26] Alexander Raskovich, *Conflict or Continuity? An Analysis of the 2023 Merger Guidelines*, 31 George Mason L. R. 1043 (2024)

[27] *Id.* At 1044

[28] U.S. Department of Justice & Federal Trade Commission, *2023 Merger Guidelines* (December 18, 2023) https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf

[29] American Bar Association, *Biden administration steps up antitrust enforcement* (Accessed April 2, 2025) https://www.americanbar.org/news/abanews/aba-news-archives/2021/11/antitrust-enforcement/

[30] U.S. Department of Justice & Federal Trade Commission, *2023 Merger Guidelines* (December 18, 2023) https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf

[31] Daniel Francis, *The 2023 Merger Guidelines and the Arc of Antitrust History*, 39 Journal of Economic Perspectives 3 (2025)

[32]*Id.*at 4

[33] *Id.*at 4

[34] Alina Selyukh, *Grocery price inflation: Is corporate greed to blame?*, NPR (September 9, 2024) https://www.npr.org/2024/09/09/nx-s1-5103935/grocery-prices-inflation-corporate-greedflation

[35] Corporate Finance Institute, *Clayton Antitrust Act* (visited April 2, 2025) https://corporatefinanceinstitute.com/resources/wealth-management/clayton-antitrust-act/'

[36] JLL, *Grocery Report 2025* (February 18, 2025) https://www.jll.com/en-us/insights/market-perspectives/grocery-tracker

[37] *Id*.

[38] International Supermarket News, *The State of U.S. Supermarkets: Market Share, Mergers, and the Future of Grocery Shopping* (November 7, 2024) https://internationalsupermarketnews.com/archives/16860

[39] Press Release, Federal Trade Commission, *FTC Challenges Kroger's Acquisition of Albertsons* (February 26, 2024) https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons

[40] Bass Berry Sims, *New Merger Guidelines Unveiled, Broadening Scrutiny and Impact on Business Transactions* (January 18, 2024) https://www.bassberry.com/news/new-merger-guidelines-unveiled-broadening-scrutiny-and-impact-on-business-transactions

[41] Melanie Canales and Aaron Johnson, *Understanding the Impact of the Proposed Kroger-Albertsons Meger in the Grocery Market Competition in the Northwest* (August 7, 2024) https://grocerygapatlas.rafiusa.org/posts/kroger-albertsons-merger

[42] Statement of Chair Lina M. Khan, Federal Trade Commission, *In the Matter of The Kroger Company and Albertsons Companies, Inc.* (January 2, 2024) https://www.ftc.gov/system/files/ftc_gov/pdf/2025.01.02-statement-of-chair-lina-m.-khan-in-the-matter-of-the-kroger-company-and-albertsons-companies-inc.-final.pdf

[43] Wilson Sonsini, *Seeing Double: Kroger/Albertsons Merger Blocked by Federal and State Courts* (December 19, 2024) https://www.wsgr.com/en/insights/seeing-double-krogeralbertsons-merger-blocked-by-federal-and-state-courts.html

[44] U.S. Department of Justice & Federal Trade Commission, *2023 Merger Guidelines* (December 18, 2023) https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf

[45] *Id*.

[46] Wilson Sonsini, *Seeing Double: Kroger/Albertsons Merger Blocked by Federal and State Courts* (December 19, 2024) https://www.wsgr.com/en/insights/seeing-double-krogeralbertsons-merger-blocked-by-federal-and-state-courts.html

[47] Lindsey Toomer, *Colorado's Trial Over Kroger-Albertsons Grocery Merger Wraps Up*, Colorado Newsline (October 25, 2024) https://coloradonewsline.com/2024/10/25/colorado-trial-kroger-albertsons-grocery-merger/

[48] Statement of Chair Lina M. Khan, Federal Trade Commission, *In the Matter of The Kroger Company and Albertsons Companies, Inc.* (January 2, 2024) https://www.ftc.gov/system/files/ftc_gov/pdf/2025.01.02-statement-of-chair-lina-m.-khan-in-the-matter-of-the-kroger-company-and-albertsons-companies-inc.-final.pdf

[49] Elizabeth G. Pontikes, *Borders and Boundaries in Markets: A Sociocognitive Approach for Market Definition and Implication for Antitrust*, 2023 U. Chi. Legal F. 217 (2024)

[50] Troutman Pepper Locke, *Two Courts Block Kroger-Albertsons Merger* (December 12, 2024) https://www.troutman.com/insights/two-courts-block-kroger-albertsons-merger.html

[51] JLL, *Grocery Report 2025* (February 18, 2025) https://www.jll.com/en-us/insights/market-perspectives/grocery-tracker

[52] NielsenIQ, *Key Grocery Trends for 2025* (January 9, 2025) https://nielseniq.com/global/en/insights/education/2025/grocery-trends/