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CTFN Analysis: With FTC challenge of ACI/KR likely, various theories of harm possible

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by Alex Wilts

The US Federal Trade Commission will likely challenge Kroger's proposed acquisition of Albertsons, many in the antitrust community expect, and the agency appears poised to raise theories of harm that it traditionally has not pursued in previous supermarket merger cases.

It is unclear at this point what sort of remedy plan has been submitted to the FTC, or whether the commission has entertained such a fix. However, the parties' merger agreement and their subsequent actions make it clear that a remedy will be forthcoming, even if only to show a judge that effort was made to resolve antitrust issues should the matter reach a courthouse.

There is speculation that the FTC's complaint could include allegations about how the transaction would affect product and food suppliers as well as workers. As *CTFN* has reported, FTC staff have had several discussions with unions about the Albertsons/Kroger deal. Some of those labor leaders have said they expect a decision from the commission around September.

CTFN spoke with a number of antitrust practitioners with experience with grocery mergers to gather their expectations as to what a lawsuit may look like. Below is a rundown of the most likely theories that could be deployed by the FTC should it bring a lawsuit to block the transaction.

Buyer-power theory

Former FTC attorney Amanda Lewis, who is now a partner at Cuneo Gilbert & LaDuca, said the emphasis on buyer power issues in the US antitrust agencies' recent draft merger guidelines indicates that the FTC is likely to focus on how the combination of two grocery store operators will increase their power over suppliers, in addition to consumers.

In a letter to the FTC in February, the American Antitrust Institute argued that the Albertsons/Kroger merger would enhance Kroger's ability and incentive "to exercise enhanced buyer power, to the detriment of input suppliers, with adverse knock-on effects on smaller, independent rival grocers".

The organization said Walmart, Kroger, Costco and Albertsons are the four largest firms in a broad national retail-food market, holding respective market shares of 35%, 14%, 12% and 8%. This means that Kroger and Albertsons would have a 22% market share.

According to a former FTC official with experience with grocery deals, it is difficult to see a strong case based on an alleged buyer-power theory in a nationwide market. With only a 22% market share, Albertsons/Kroger would unlikely be able to exert undue influence over nationwide suppliers and manufacturers, such as PepsiCo, the former official said.

But the former official added that the buyer-power theory may hold more water if suppliers for products such as meat and produce are more local or regional, since it might be possible that the merged firm could have a bigger local or regional presence and potentially exercise buyer power. This remains an untested theory in a supermarket case.

Labor-market theory

Diana Moss, vice president and director of competition policy at the Progressive Policy Institute, said the FTC could define a labor market and "also other markets, including input-supply markets and grocery-supermarket markets".

"The question is: what [do] those labor markets look like, and what is their scope?" Moss said.

As part of its investigation, the FTC would examine where else workers could go for employment if they face a more powerful merged buyer of their labor, Moss explained. She said the agency could consider whether these employment options include other non-grocery retailers where employees could redeploy skills gained from working at a grocery store.

Another question is whether the labor markets would have the same geographic dimensions as the consumer-facing markets, Moss added.

Lewis, of Cuneo Gilbert & LaDuca, noted that academic work analyzing how mergers have had an impact on labor markets have mainly centered around effects in the healthcare industry and on a more specialized workforce. While the effects may be greater for specialized workers, however, the evidence shows that non-specialized workers like cashiers are subject to monopsony power and harmed by it as well.

In the grocery store context, butchers and bakers could be considered more specialized positions since those types of workers likely would face more difficulty finding similar jobs at nearby retail establishments such as Dollar General, which also sell groceries but do not have a deli department or bakery.

Remedy questions

Even if the FTC were to pursue labor- and buyer-power theories of harm, the crux of the Albertsons/Kroger case could still hinge on the agency's market definition for supermarkets and whether proposed divestitures resolve antitrust concerns.

C&S Wholesale Grocers, backed by SoftBank Group, is in talks to buy grocery stores that Kroger and Albertsons are divesting, *Bloomberg* reported on September 5.

C&S, which primarily supplies rather than operates grocery stores, was the approved divestiture buyer in the FTC's review of a merger of supermarket operators in the US Northeast. In November 2021 the agency under chair Lina Khan required The Golub Corp, which owns the Price Chopper chain, and Tops Market to divest 12 Tops stores to C&S to address concerns that the merger could be anticompetitive in 11 local markets in upstate New York and Vermont.

C&S being a proposed divestiture buyer in Albertsons/Kroger could bolster the merging parties' case before a judge. Counsel might cite the commission's previous vetting and acceptance of C&S as a buyer as evidence for why the wholesale supplier, which also owns the Piggly Wiggly and Grand Union brands, would be a suitable buyer of divested Albertsons/Kroger stores.

Key evidence could be how the stores that C&S acquired through the Price Chopper and Tops deal have performed following the divestiture.

Other potential divestiture buyers could also emerge for Albertsons/Kroger, including store operators that the FTC would typically not define as supermarkets. In its complaint against the deal between Price Chopper and Tops, the FTC defined the term “supermarket”, stating that such stores “provide a distinct set of products and services and offer consumers convenient one-stop shopping for food and grocery products”.

“Supermarkets base their food and grocery prices primarily on the prices of food and grocery products sold at other nearby competing supermarkets,” the agency said. It also indicated that convenience stores, specialty-food stores, limited-assortment stores, hard-discounters, and club stores were not included in the relevant product market since supermarkets “do not regularly conduct price checks of food and grocery products sold at” these other types of retailers.

According to an attorney familiar with grocery-store divestitures, when analyzing mergers of grocers, FTC staff has a history of focusing on local geographic markets to determine which stores compete. When considering divestitures, the agency aims to make sure that divested stores are sold “to a similar kind of operation” as the merging parties.

Whether a company — like Aldi — “would satisfy the commission as a buyer depends on how close they can be described as operating what is considered a normal full-service grocery-retail operation”, the attorney familiar with divestitures said.

The attorney added that it also appears to have become more difficult to find suitable divestiture buyers for transactions involving larger grocery chains.

“If you have to duplicate an operation beyond simply local markets, then you have to look for a buyer” that has the scale that can do this, the attorney said, noting that “there are fewer and fewer” of these buyers due to consolidation among grocers.

There is also an argument that certain regional grocery chains could expand into new markets by taking on the divested Albertsons/Kroger stores. If one of these chains — such as Giant, which operates in Pennsylvania, Maryland, Virginia and West Virginia — expressed interest in doing this and had the financial backing, it would need to convince the agency that the divested stores under its ownership would be successful. “That’s a huge undertaking,” the attorney said.

Another development in the grocery sector that could affect the Albertsons/Kroger matter is Aldi's acquisition of Winn-Dixie and Harveys Supermarket, announced on August 16. As *CTFN* previously reported, Aldi — as well as Trader Joe's, Lidl and Amazon-owned Whole Foods — have not been included in the FTC's market definition in the agency's last enforcement actions in the grocery sector.

A second former FTC official with experience with grocery store mergers said presumably the same FTC staff conducting the Albertsons/Kroger deal would look into the Aldi transaction.

"If those two investigations are going on at the same time, what they're learning about the product market will certainly inform the analysis for [both]," the second former official said.

The second former official added that if staff were to learn from the Aldi transaction that Aldi is "competing much more closely with traditional grocery stores in certain markets, then that could certainly inform the market analysis" for Albertsons/Kroger.

Aldi said it expects its transaction to close in the first half of 2024, subject to regulatory approval and other customary closing conditions.

Albertsons and Kroger have said they expect to close their deal in early 2024.