Democracy Dies in Darkness

Opinion Two grocery giants want to merge. Why is the FTC so concerned?

If Albertsons and Kroger can't join, the big winner might be Walmart.

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In Oregon, the Federal Trade Commission awaits a federal judge's ruling on its effort to block the merger of the nation's second- and fourth-largest food retailers, Kroger and Albertsons. If the merger proceeds, the FTC has warned, "the destruction of competition between these two head-to-head rivals risks raising prices, worsening services, and lowering quality." But if the aim is to encourage competition in grocery retailing, then FTC Chair Lina Khan's intervention might prove counterproductive.

In its request for an injunction against the merger, filed in February, the FTC contended that the relevant market for scrutiny is "the retail sale of food and other grocery products in traditional supermarkets and supercenters." This market definition is almost identical to the one the FTC used back in 2002, when it dropped its challenge to the merger of Albertsons and American Stores only after the two companies agreed to divest 144 supermarkets.

The grocery business, though, has changed a great deal since then. Since 2003, Walmart has sold more grocery-store items than any other U.S. retailer. Warehouse chain Costco ranks third. Amazon, which had no grocery business in 2002, has become a major player, selling online as well as in Whole Foods stores.

These companies take advantage of their size to build hyper-efficient distribution networks and demand lower prices from suppliers. As a result, they are often able to underprice traditional supermarkets. Achieving similar economies of scale is one reason Kroger and Albertsons want to join forces.

If the courts permitted the two to merge without selling off any stores, their combined sales of typical grocery-store merchandise would still be lower than Walmart's and, by some measures, lower than Amazon's. So what is the objection to their merger?

The FTC evaluates mergers within an industry using a gauge known as the Herfindahl-Hirschman Index. A merger that raises the HHI over a certain threshold — which the Kroger-Albertsons merger would do — is presumed to "substantially lessen competition," no matter how large the market shares of other firms.

Using the HHI disadvantages Kroger and Albertsons in two ways. First, the FTC has defined the market to exclude

many large food retailers, such as drugstore chains CVS and Walgreens, discounter Dollar General, and specialty stores such as Aldi and Trader Joe's. It thus underplays the actual level of competition among food sellers.

Second, the index is applied only to mergers. It does not flash alarms when Walmart gains a high share in a metro area by building new stores, whereas mergers set off red lights.

Undoubtedly, there are places where, in the absence of a nearby Target or Costco, the merged Kroger and Albertsons would dominate grocery sales. That's why the two companies have identified stores they would sell off if the merger is approved. The FTC has rejected their lists; it is rightly concerned that C&S Wholesale Grocers, the principal buyer-in-waiting, does not have a record of running supermarkets with success. It will also want to be sure that the buyer acquires enough stores in individual localities to be competitive.

But there is nothing novel about these obstacles, and they do not seem insuperable. If the two retailers are truly keen on joining forces, they should be able to come up with a list of divestitures that satisfies the FTC.

Why, then, is the FTC so concerned about this case? The answer may lie in the final section of its complaint, which asserts that the merger could lessen demand for labor — specifically union labor.

Between them, Kroger and Albertsons employ more than 700,000 workers, most of them represented by either the United Food and Commercial Workers or the Teamsters. Both unions have called for the FTC to block the merger on the grounds that it would eliminate their ability to play one company against the other. Unstated is a different concern: Over the past several decades, unions have found little organizing success in food retailing. If they shed members as Kroger and Albertsons combine stores, they will be unlikely to find new ones elsewhere.

Under Khan's leadership, the FTC has prominently elevated labor interests in its considerations. Although its April ban on most noncompete agreements has been blocked by a U.S. district court, the agency has barred several companies from enforcing such agreements under its legal authority to prohibit "unfair methods of competition." The FTC has similarly asserted that companies' treatment of gig workers might involve unfair competition. It recently signed an agreement to involve federal labor agencies in reviewing how proposed mergers could affect labor markets.

Paradoxically, applying labor-related considerations to mergers might not be helpful to either workers or unions. If the FTC succeeds in keeping Kroger and Albertsons from forming a more powerful competitor, Walmart, the behemoth of food retailing, is likely to be the big winner. It has a well-known history of refusing to recognize unions in its stores, warehouses and truck fleet. By blocking two heavily unionized supermarket operators from joining up, Khan might become Walmart's new best friend.