

**U.S. Senate Committee on the Judiciary Subcommittee on
Competition Policy, Antitrust, and Consumer Rights**

**Hearing: “Examining the Competitive Impact of the Proposed
Kroger-Albertsons Transaction”**

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Statement for the Record

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Chair Klobuchar, Ranking Member Lee, and distinguished members of this subcommittee, I am honored to testify today and look forward to participating in the discussion.

I am a Professor of Economics at the University of Maryland College Park, and my academic research has addressed a number of antitrust topics, including the effects of horizontal mergers and the tools agencies can use to assess them. I served as Director of the Bureau of Economics at the Federal Trade Commission in 2020. In that position, I oversaw investigations of horizontal and vertical mergers in a number of industries, including retail, and I advised the Commission when it was making enforcement decisions.

Economics provides an analytical framework for assessing mergers, and, in combination with other types of evidence, it plays a critical role in helping to identify how a merger, or a merger remedy, is likely to affect the incentives of market participants, and either benefit or harm consumers. It can also help us to understand how the changing features of an industry, such as the growing importance of home delivery or of data, should be accounted for when analyzing a merger.

However, the methods that agencies use to assess mergers can always be improved by new learning. For this reason, I was also proud to be involved in the revamping of the FTC's Merger Retrospective program.¹ While no two mergers are ever perfectly alike, carefully done retrospectives help to improve today's enforcement decisions by telling us what happened after earlier consummated transactions. Retrospective research by FTC economists (e.g., Hosken et al. (2018) looking at several U.S. mergers) and academics (Allain et al. (2017) looking at a large merger in France, Argentesi et al. (2021) looking at a large merger in the Netherlands) has shown that some grocery chain mergers and acquisitions, especially those in concentrated markets, have raised prices and affected assortment, but that there are also mergers that have been associated with falling prices, suggesting that significant efficiencies are sometimes realized.

The retrospective program, by collecting research from across the globe, also aims to help the U.S. agencies learn about which tools are most helpful in identifying anticompetitive mergers, and to learn from what agencies in other countries are doing. In my comments today, I will draw, in particular, on the UK Competition & Markets Authority's (CMA) 2019 inquiry into a proposed merger between Asda and Sainsbury's, two nationwide supermarket chains with over 2,000 stores.

The FTC staff's assessment of the Kroger/Albertsons transaction will depend on confidential facts and data. As my knowledge of this transaction is limited to what I have read in the press, I cannot say what the FTC will, or should, decide. Instead I want to talk about some issues that appear relevant, where I believe learning from past experience and the practices of other agencies would be especially valuable.

¹ <https://www.ftc.gov/policy/studies/merger-retrospective-program>.

In-store retail grocery is a classic example of a local, differentiated industry, where both store locations and store formats, including store size, the breadth of assortments and whether retailers use everyday low pricing or discounts, can determine where a consumer chooses to shop.

Economics predicts that, after a horizontal merger, the incentive of the merged firm to raise prices will be positively related to what is called “diversion” between the merging chains. In this setting, suppose that the quality-adjusted price at an Albertsons’s Safeway store was to increase. Some Safeway consumers would switch to other supermarkets, and the relevant diversion would reflect the proportion of these switching consumers who would choose to go to nearby Kroger stores.

The calculation of anticompetitive incentives, and subsequent enforcement decisions, relies on accurate measures of diversion. For example, in the Asda/Sainsbury’s merger, the CMA identified that their estimates of diversion implied that there were 537 local areas where the proposed merger would have caused what the CMA viewed as a “substantial lessening of competition,” and, partly because this number was so large, the CMA blocked the transaction. Estimates of local diversion can also be used to determine which stores may need to be divested.

Accurate estimates of diversion are therefore critical. In some settings, existing market share data can be used to imply likely diversion rates between chains. In grocery, loyalty card data can sometimes be used to determine the other chains that a household visits. Internal firm documents may also contain estimates of the other chains where their customers shop. However, as noted by some respondents to the 2022 FTC and Department of Justice Request for Information on Merger Enforcement (e.g., Conlon and Mortimer (2022)), using these data can sometimes produce misleading estimates of diversion and anticompetitive effects, depending on why people currently use different stores. For example, I often visit both Safeway and Whole Foods, but this does not necessarily mean that I would switch more of my spending to Whole Foods, rather than Kroger, if Safeway prices increased.

One way to try to get a more accurate view of diversion is to use consumer surveys that are designed to elicit the form of diversion that is most relevant for merger analysis. The UK CMA has been a pioneer in its use of surveys, and its Asda/Sainsbury’s inquiry used over 20,000 interviews conducted when shoppers were exiting stores as the basis of its predictions of diversion. These responses were particularly useful in assessing how far consumers were willing to travel to different chains and how many consumers were likely to switch from traditional supermarkets to chains with more limited selection, but typically lower prices, such as Aldi and Lidl.

While surveys need to be carefully designed and carefully interpreted, I believe that the US agencies could usefully expand their use of large scale customer surveys to measure diversion, especially in mergers that involve local retail competition.

While I am obviously not aware of exactly how the FTC staff are assessing diversion in the current transaction, my experience suggests agencies may be reluctant to commission surveys for four reasons: first, surveys can be time-consuming and difficult to complete within the time frame

allowed for the agencies to decide whether to challenge a merger; second, commissioning surveys from independent research firms can be more expensive than working with data released by the parties or third parties; third, agencies are concerned that they currently lack some of the expertise required to interpret survey results in exactly the right way; and fourth, it is unclear how much weight a U.S. court would give to a survey in litigation, and hiring specialized experts who could testify to the quality of any survey used in litigation would be very expensive.

I know that many members of this subcommittee have actively advocated for the agencies to receive additional funding. I believe that additional resources would allow the economics groups within the agencies to develop their expertise in using new tools, such as surveys, to guide better enforcement decisions. Even if courts are skeptical of new tools, enforcement decisions and the design of divestiture packages are often based on modeling that might not play a significant role in litigation, so I do not find this concern to be a compelling reason not to invest.

Additional resources could also put the agencies in a stronger position when deciding what enforcement decisions to take, and what type of divestiture package to require. As noted by a 2019 FTC Office of the Inspector General report, expert witness costs in merger cases can be high, and, in my experience, they may be especially high when, to be able to testify, an expert must have conducted a competitive effects analysis for many local markets. Additional resources would ensure that both the parties and the agencies know that the agencies will be able to go to court, without sacrificing other priorities, if they need to.

While traditional in-store retail is clearly a critical part of this transaction, assessing the effects of the merger on online competition for delivered groceries, and the types of digital advertising opportunities that the online channel offers, will also be important.

Assessment of the online channel will likely raise a distinct set of market definition issues, such as whether there is a clearly distinct market for delivered groceries, and, if so, how competition is affected by firms such as Amazon, and whether chains with stores or distribution centers that are further away from a consumer's home should be counted as effective rivals. These are questions which surveys could also address, and in fact, the CMA used an online survey of over 30,000 consumers to assess competition for delivered groceries in its Asda/Sainsbury's inquiry.

The CMA also suggested that a different type of competitive effect may be present in the online channel. For traditional in-store grocery, there are so many products and prices that one might view chains as being unlikely to coordinate. On the other hand, the CMA took the view that for delivered groceries, delivery charges and the availability of different types of delivery timeslots are highly visible strategic choices, and that coordination on these terms between the chains that offer delivery might have become more likely after the merger that the CMA was evaluating. While economists have only a limited set of tools for quantifying the likelihood of coordinated effects, I expect that FTC staff will be looking carefully at how grocery chains make these types of strategic choices.

The FTC staff will also be looking carefully at whether any efficiencies that might be associated with greater scale in the online channel, whether in the form of physical volumes or greater data, are really merger-specific, in the sense that they can only practically be realized through the proposed merger, or whether they could be achieved through more organic growth. More broadly, the assessment of claimed efficiencies will rely on determining whether they reflect real reductions in resource costs, or whether instead they might reflect some loss of competition in either input or output markets.

This brings me to my final point, which is on the design of any divestiture package. In 2017 the FTC published a report which assessed the remedies it had required in merger cases between 2006 and 2012. One important and practical finding of the 2017 study was that divestitures are more likely to be successful, in the sense of maintaining the pre-merger level of competition, when an entire on-going business is divested, rather than a more limited set of assets that might lead to continuing dependence on other firms.

In the current case, this finding suggests that an appropriate divestiture may not only involve divesting a large number of stores where the merger might reduce local competition, but also distribution centers, trademarks and manufacturing plants for private label products, and a set of digital assets, possibly including data. The evaluation of any divestiture package should also account for the fact that the success of any new business is uncertain, and that the degree of risk to be borne by consumers should be appropriately limited.

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