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THE EC'S REJECTION OF THE KESKO/TUKO MERGER: LEADING THE WAY TO THE APPLICATION OF A "GATEKEEPER" ANALYSIS OF RETAILER MARKET POWER UNDER U.S. ANTITRUST LAWS

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INTRODUCTION

In the traditional analysis of antitrust matters in the United States, the primary focus is on deterring one party (or a combination of parties) from obtaining a dominant or monopolistic position with respect to the exercise of market power[1] in the subject relevant market.[2] In assessing whether such market power exists, American antitrust

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[1] Market power is a comprehensive concept which refers to the ability of a party to exercise economic control over other actors within a given market. A more precise definition of market power is difficult to develop outside of a given context. Market power has been defined as "the ability of a firm to increase its profits by reducing output and charging more than a competitive price for its product," "the power to control prices," and "the power to raise prices without losing so many sales that the price increase is unprofitable." HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 3.1 (1985).

[2] The identification and definition of a relevant market is a critical element of antitrust analysis. The definition of a relevant market precedes the determination of an assessment of whether undue market power can be exercised. As the 1992 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines note, "[a] merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly defined and measured." 1992 U.S. Department

laws traditionally have been interpreted as protecting competition with reference to the impact of the exercise of market power on the consumer and competitors. In that vein, in assessing both horizontal and vertical restraints,[3] enforcement authorities have focused on the implications of the proposed merger—or subject practice—on the cost the consumer pays for products or the ability of actual (or new entry) competitors to compete effectively in the marketplace.

As market dynamics change, the definition of relevant markets, as well as the determination of what constitutes the exercise of market power, must change. U.S. antitrust laws, as interpreted and enforced, however, have not yet accounted for certain changes that have taken place in the domestic retail marketplace. In contrast, the Commission of the European Communities ("EC"),[4] in assessing the proposed mer-ger of two Finnish supermarket firms—Kesko Oy ("Kesko") and Tuko Oy ("Tuko")—has recently recognized certain significant developments in the nature of the relationship between suppliers and large retailers. It also acknowledged the importance of accounting for the

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of Justice and Federal Trade Commission Horizontal Merger Guidelines, ANTITRUST LAWS AND TRADE REGULATION: PRIMARY SOURCE PAMPHLET 109 § 1.0 (2d ed. 1997) [hereinafter 1992 Guidelines].

In that context, the 1992 Guidelines state that

> [a] market is defined as a product or group of products in a geographic area in which it is produced or sold such that a hypothetical profit maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area, likely would impose at least a "small but significant and non-transitory" increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and geographic area that is no bigger than necessary to satisfy the test.

Id.

[3] Market restraints generally either take the horizontal or vertical form. Horizontal restraints involve an agreement among competitors to exercise market power within the same tier in the market (e.g., manufacturers colluding with other manufacturers). Vertical restraints involve businesses that operate at different levels of distribution within the market jointly exercising market power (e.g., a manufacturer colluding with a retailer). *See generally* JULIAN VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION §§ 11.01, 13.01, 18.01 (1998) [hereinafter ANTITRUST LAWS].

[4] The Commission on the European Communities ("EC") was embryonically formed in 1951 as a result of the Treaty of Paris. In general, the EC's function is to monitor and manage the economic union between the participant European countries. In terms of the merger regulations, the EC is responsible for controlling restrictive business practices and prohibiting abuses of dominant market power. *See* WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS §§ 16.2–16.4 (1996). The EC is comprised of representatives from a number of European union countries. The EC has three primary functions. Among its functions is the responsibility to act as a guardian and enforcer of European Union treaties concerning competition policy. In that role, the EC has the responsibility as it did here, to oversee and rule upon proposed merger activity. For more information on the EC, see generally <http://europa.eu.int/com> (visited Mar. 4, 1999).

implications of these developments in its antitrust analysis of the proposed merger.[5] Indeed, these changes recognized by the EC are not unique to Finland or the European market, rather, they reflect retailer practices and dynamics which are also prevalent in U.S. retail markets. Like their EC counterparts, federal enforcement authorities should address these changes in retailer market power while evaluating suspect mergers and practices within these markets.

In evaluating the proposed Kesko/Tuko merger, the EC recognized at the outset that, in assessing the potential emergence of a powerful retailer, its definition of the relevant markets needed to include the effect on the market for the retailer's procurement of daily consumer goods—i.e., the effect of the merger on manufacturers and suppliers as well as the effect on consumers and competitors.[6] This recognition is significant, both because it (a) reflects a departure from the traditional focus on consumer and competitor markets and (b) acknowledges a fundamental change in the dynamic between the powerful retailer and its suppliers. It also recognizes that the powerful retailer in today's market wields extraordinary control over, at a minimum, all but the largest and most prominent brand name product suppliers.[7]

In analyzing the powerful retailer's potential exercise of market power in the procurement market, the EC recognized that large retailers perform a "gatekeeper" function by determining who has access to both the procurement and consumer marketplace.[8] As a "gatekeeper," a retailer has the ability to exercise market power to determine the extent of a producer's access to the retail marketplace and the terms on which such access will be made available. This role affords large retailers significant leverage over producers and suppliers. It also has

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[5] The *Kesko/Tuko* decision has been appealed to the European Court of Justice (Case T-134/97). The appeal is pending. A differing outcome in the *Kesko/Tuko* appeal will not affect the thesis of this Article as the retail market power problems recognized by the EC will continue to develop in both Europe and the United States, and will require careful scrutiny by antitrust and competition authorities. It is notable that the changes recognized by the EC in the *Kesko/Tuko* decision also were recognized in *The Green Paper on Vertical Restraints* in *EC Competition Policy*, Catalogue No. CB-CO-96-742-xx-C (last visited Mar. 4, 1999) <http://europa.eu.int/en/comm/dg04>.

[6] The EC defined the "market for procurement of daily consumer goods" as involving "the sale of daily consumer goods by producers of such goods to customers such as wholesalers, retailers and other enterprises." *See* Commission Decision, Case No. IV/M. 784, *Kesko/Tuko*, 1997 O.J. (L 110), 53, 57–58, ¶¶ 33–35. The analysis of the market, the EC found, involved an assessment of the impact of the "increased buying power" of the combined Kesko/Tuko entity. *See id.*

[7] *See infra* notes 140–55 and accompanying text.

[8] *See infra* notes 31–41 and accompanying text.

cognizable implications for the consumer market, given the vertical integration between the markets.[9] The EC also recognized that the emergence of private label marketing by large retailers[10] creates further avenues for the enhanced exercise of market power because of the retailer's dual role as customer and competitor in both the procurement and consumer markets. Although the elements of powerful retailer dynamics which the EC noted in the *Kesko/Tuko* decision have been present for some time, the recognition of their existence and implications for antitrust analysis of retailer mergers and ongoing practices is a significant development.

In the United States, with the continuing consolidation of the food retail markets and the persistent growth of dominant mass merchandise retailers, the issues identified by the EC in *Kesko/Tuko* warrant serious consideration.[11] Wal-Mart, for example, has emerged over the last several years as one of the nation's largest grocers and, although the top five U.S. grocery retailers account for about twenty percent of the overall market, there has been significant growth in concentration in regional grocery retail markets.[12] This concentration has created a dynamic which affects both the consumer and supply markets.[13] Notably, even first-tier and recognized brand manufacturers have become dependent upon dominant retailers whose decisions affect both their operations and viability.[14]

The EC's acknowledgement of these changing dynamics in the *Kesko/Tuko* decision should encourage U.S. antitrust enforcement authorities to re-evaluate their current modes of analysis. *In re Toys-R-*

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[9] The term "vertical integration" refers to the manner in which market power can be exercised at varying levels of the market (i.e., the combined Kesko/Tuko entity could exercise market power at both the supply and retail markets). *See* JULIAN VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION: DESK EDITION § 4.05[6] (1998) [hereinafter DESK EDITION].

[10] Private label marketing refers to the practice by retailers of manufacturing or distributing products with a store brand or other "private labels." *See* PHILIP FITZELL, PRIVATE LABEL MARKETING IN THE 1990's (1992); *More Shoppers Bypass Big Name Brands and Steer Carts to Private Label Products*, WALL ST. J., Oct. 20, 1992, at B1. These private label products are in direct competition with the brand-name products that retailers might otherwise stock. *See Kesko/Tuko*, *supra* note 6, at 67–68, ¶¶ 106–10; *see also infra* notes 42–48 and accompanying text.

[11] While the growth of large dominant retailers across a variety of markets is a developing phenomenon in the United States, this Article will focus on the increasing concentration in the food retail and mass merchandise markets. These markets were selected as exemplars for analysis both because they parallel the markets the EC was analyzing in *Kesko/Tuko* and because of the rapid and apparent nature of consolidation in these markets.

Similarly, given that the *Kesko/Tuko* decision arose in a merger context, this Article will primarily focus on a comparison to the U.S. treatment of retailer power in the merger context.

[12] *See infra* notes 140–55 and accompanying text.

[13] *See infra* notes 140–55 and accompanying text.

[14] *See infra* notes 140–55 and accompanying text.

Us, discussed in this Article, is a strong first step in this direction.[15] U.S. antitrust enforcement authorities, as well as legislators, also must endeavor to examine closely the exercise of the existing large retailers' power in the procurement market, the implications of their emerging "gatekeeper" function[16] and private label competitor status.

Absent this examination, the increasing consolidation in the retail marketplace, coupled with the growth of supercenters like Wal-Mart, creates the genuine possibility that powerful retailers will widely exercise market power to constrain and control the supply market while, at the same time, exercising significant control over consumer options and costs. Although this situation may not be perceived as alarming in the current market dynamic, the potential for dominance and monopolization in both marketplaces is significant, should the growth of powerful retailers continue unabated. The decision by the EC in *Kesko/Tuko* clearly depicts how these problems develop and why they warrant attention by U.S. antitrust regulators before they result in concentrated market power for dominant retailers.

The Introduction of this Article examines the EC's recognition of the emerging market power by powerful retailers over manufacturers and suppliers with respect to the procurement of consumer goods and considers how U.S. antitrust authorities might likewise take account of these factors in their analysis of mergers and other practices.[17] Part I of this Article examines the EC's decision in the *Kesko/Tuko* matter, particularly its recognition of (a) the existence of a relevant antitrust market for the procurement of consumer goods, (b) the "gatekeeper" function of these retailers and (c) the ability of dominant retailers to use the marketing of private label products to compete both in price and information—notably information with respect to consumer behavior and competitors' marketing strategies.[18] Part II describes the manner in which retailer mergers and practices traditionally have been examined under U.S. antitrust law principles.[19] Part III examines the changing marketplace dynamics in the U.S. market for food and mass

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[15] *See In re* Toys-R-Us, Inc., Final Order, Opinion of Commission, F.T.C. No. 9278, at 5 (Oct. 13, 1998), *available in* <http://www. ftc.gov/as/1998/9810/toyrsinord.htm> (visited Mar. 4, 1999). In *Toys-R-Us*, the FTC found, *inter alia*, that Toys-R-Us ("TRU"), which had a significant but not monopolistic or monopsonistic market share in the toy market, exercised its market power to cause suppliers to treat certain competitors of TRU in a discriminatory fashion. This decision is discussed at *infra* notes 124–39 and accompanying text.

[16] *See infra* notes 31–41 and accompanying text.

[17] *See supra* notes 1–16 and accompanying text.

[18] *See infra* notes 22–50 and accompanying text.

[19] *See infra* notes 51–139 and accompanying text.

merchandise retailers.[20] In particular, it focuses on changing marketplace dynamics in those U.S. markets which are developing in a similar fashion to those recognized by the EC in the *Kesko/Tuko* decision. Finally, the Conclusion suggests that appropriate development and assessment of U.S. antitrust law enforcement is warranted so that these matters can be addressed prospectively.[21] Failure to examine these matters now will burden U.S. antitrust enforcement authorities by requiring them to address the "gatekeeper" function and private label advantages of dominant retailers only after they have become firmly entrenched.

I. The *Kesko/Tuko* Decision: Recognizing Changes in the Retail Market Dynamic and the Exercise of Market Power by Powerful Retailers

The May 1996 merger announcement of two Finnish food retailers, Tuko and Kesko, led to a watershed event in the analysis of retailer market power. In November 1996, the EC determined that the concentration of the Finnish market that would have been created by the acquisition of Tuko, a supermarket enterprise, by Kesko, a competing supermarket, was incompatible with the merger regulations of the common market concerning concentration of control.[22] In so holding, the EC analyzed the merger's antitrust implications in the traditional manner—i.e., from the perspective of the consumers and competitors of the merging entities. The EC, however, also analyzed the implications of the merger from a new perspective—that of the manufacturers who supplied goods to the merging entities. Ultimately, the developments in antitrust analysis, as reflected in the EC decision, have wide-ranging implications for both European and U.S. entities.

A. *A Relevant Antitrust Market for the Procurement of Consumer Goods*

On May 27, 1996, Kesko, a Finnish company that operates supermarkets selling consumer and specialty goods, acquired a majority of the shares of Tuko, a Finnish company that operates supermarkets also selling consumer and specialty goods, and also sells wholesale goods.[23]

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[20] *See infra* notes 140–55 and accompanying text.

[21] *See infra* notes 140–55 and accompanying text.

[22] *See Kesko/Tuko, supra* note 6, at 76, ¶ 173. As noted, the Decision has been appealed to the European Court of Justice. *See id.* (*appeal docketed,* Case T-134/97 (E.C.J.)). The regulation at issue was Regulation EEC 4064/89 on the Control of Concentrations between Undertakings. *See id.* at 53, ¶ 1.

[23] *Id.* at 53–54, ¶¶ 3–7. In terms of market share, it was estimated that a combined

When it undertook its analysis, the EC identified markets in which the merger could potentially have the most significant impact. The EC analyzed the retail market for daily consumer goods from both the traditional perspective of consumer protection and restriction of market power vis-à-vis competitors. The novel element of its analysis involved the market for procurement of daily consumer goods. Under this analysis, the EC focused on the implications of (a) the merger for access by suppliers to the marketplace and (b) the private label operations of Kesko and Tuko for their exercise of market power with respect to their suppliers.

In defining the relevant product market for "procurement of daily consumer goods," the EC noted that such markets involve "the sale of daily consumer goods by producers of these goods to customers such as wholesalers, retailers, and other enterprises."[24] In assessing the product market, the EC noted that "from the demand side, corporate customers such as large supermarket chains will probably attempt to obtain the best possible conditions for their purchases of individual products."[25] It was not necessary to assess the market on an individual product basis because "the impact of the increased buying power brought about by the new demand structure" would be spread across the whole range of daily consumer goods.[26] Further, although the EC acknowledged that distribution channels other than supermarkets existed for producers of non-food items, it concluded that these were not significant alternatives and therefore, should not affect its assessment of the proposed supermarket merger.[27]

The EC determined that the merger could seriously harm suppliers of the emerging powerful retailer. The EC acknowledged that the position that a combined Kesko/Tuko would have in the retail market for consumer goods would create a dominant position for the combined entities in the procurement markets.[28] Conversely, the EC noted

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Kesko/Tuko would account for at least 55% of all retail sales of daily consumer goods in Finland. *Id.* at 71, ¶ 136.

[24] *Id.* ¶ 33.

[25] *Id.* ¶ 34

[26] *Id.*

[27] *See Kesko/Tuko, supra* note 6, at 58, ¶ 35.

[28] *See id.* ¶ 38 (finding that the position in the procurement market afforded the combined entity with market power vis-à-vis suppliers of the daily consumer goods). The EC commonly defined dominance as constituting "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition . . . by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers." Case 27/76, United Brands v. Commission, 1978 E.C.R. 207, 277, [1978] 1 C.M.L.R. 429, 486–87 (1978).

that, since the procurement and retail markets were "vertically interconnected,"[29] the merged entity's position at the procurement level would significantly affect its competitive advantage at the retail level.[30] Effectively, the EC found that the merged entity's market power expanded their control over both customers and suppliers.

1. The "Gatekeeper" Function of Dominant Retailers

With respect to the advantages that would be realized from increased buying power, the EC acknowledged that, following the acquisition of Tuko, a supplier would have to deal with Kesko in order to get access to Finnish supermarkets. This would create a "unique purchasing power in the hands of Kesko."[31] In essence, the EC noted that Kesko, as a dominant retailer, would perform a "gatekeeper" function in the entire Finnish marketplace.[32]

As the "gatekeeper," the post-merger entity would have the ability to exercise market power to determine the extent of a producer's access to the retail marketplace as well as the terms on which such access could be obtained.[33] This "gatekeeper" effect, the EC stated, would "be further increased by the combination of the successful Kesko and Tuko private label products, which could be used as a further negotiating tool, *vis-à-vis* suppliers, to achieve additional concessions on, *inter alia*, reduced prices or increased marketing support."[34] Kesko's increased purchasing power and "ability to obtain lower prices from producers," the EC recognized, would also serve as a barrier to entry and allow Kesko to act "to a significant extent" independently of its competitors in the retail market.[35] The increased market power over procurement was found to create both an unfair advantage for Kesko and barriers to Kesko's competitors' ability to actively compete against Kesko.[36]

The EC's recognition of the implications of the proposed transaction from an antitrust perspective went far beyond the traditional

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[29] *Kesko/Tuko, supra* note 6, at 58, ¶ 38.

[30] *Id.*

[31] *Id.* at 71, ¶ 133.

[32] *Id.* The EC concluded that Kesko's dominance of the retail distribution channels "guarantees Kesko an extremely powerful negotiating position vis-à-vis the producers of daily consumer goods." *Id.* at 72–73, ¶ 146.

[33] *See id.* at 71, ¶¶ 133–35.

[34] *Id.* ¶ 133.

[35] *Kesko/Tuko, supra* note 6, at 71, ¶¶ 134–35.

[36] *See id.*

analysis of market implications for competitors and consumers. Viewing the transaction from the suppliers' perspective, the EC found that the majority of suppliers, including multi-national enterprises, depended on Kesko and Tuko for sales in Finland.[37] Analyzing this finding, the EC stated that "the dependency of different suppliers will differ according to the nature and size of the business and consumer perception regarding their products."[38] With the exception of very large producers of high name-recognition products, who might have some countervailing market power, the EC concluded that small- and medium-sized producers and suppliers would be dependent upon Kesko/Tuko and would need to maintain their sales through Kesko/Tuko.[39] In contrast, Kesko/Tuko, as a powerful retailer, would not be dependent on any individual supplier to the same extent.[40] For any one product group, the EC acknowledged, Kesko would normally be able to switch from one supplier to another. The producers, in contrast, would not have a similar ability to switch to alternative retailers, since no alternative retailers would have the capacity or access to the consumer that would match the producers' or suppliers' current production capacity.[41]

2. The Ability of a Dominant Retailer to Use Private Label Products to Compete and to Exercise Market Power

The EC observed that certain developments in the retail marketplace have created a dynamic that will enhance the buying power of larger retail entities, including the proposed Kesko/Tuko merged entity.[42] In particular, the EC noted that the development of private label products is "a key element in the power wielded by retailers vis-à-vis branded daily consumer-goods producers."[43]

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[37] *See id.* at 73, ¶ 150.

[38] *Id.*; *see also Green Paper on Vertical Restraints*, *supra* note 5, ¶ 233.

[39] *See Kesko/Tuko*, *supra* note 6, at 73, ¶ 150.

[40] *See id.* ¶ 151.

[41] *See id.* While there is no question that a manufacturer has no specific right to retail distribution of its products, the significant point made in *Kesko/Tuko* is the ease with which a powerful retailer can eliminate a manufacturer's access to consumers. The powerful retailer effectively governs access by manufacturers to a particular segment of consumers (and, likewise, the consumers' access to that manufacturers' products) and thus is able to deny the manufacturers access to that segment of the consumer population. It is this ability of the powerful retailer that warrants a recognition by antitrust enforcement authorities of the reality that criteria and dynamics different from the traditional analyses apply to the evaluation of market power by large retailers.

[42] *Id.* ¶ 152.

[43] *Kesko/Tuko*, *supra* note 6, at 73, ¶ 152. The EC also noted that both Kesko and Tuko,

The "private labeling" practice by large retailers gives them an advantage over their suppliers, competitors and customers. The power the EC identified as created by private label products—with respect to pricing, access to consumer behavior and competitor marketing information—is profound. Private label products, the EC found, afford powerful retailers "the ability to price a greater proportion of its sales without having the need to take into account the reaction of its competitors in the same way as with branded products."[44] The development of private label brands by large retailers, the EC also noted, "enables retailers, who are inevitably privy to commercially sensitive details regarding the branded goods producers' product launches and promotional strategies, to act as competitors, as well as key customers of the producers. This privileged position increases the leverage enjoyed by retailers over branded-goods producers."[45] The EC also found that power retailers' direct access to information about consumers' preferences—thereby enabling targeted advertising and marketing to individual consumers—also enhances such retailers' position of power over branded-goods producers. This access to specific consumer behavior information, which is not generally available to producers, the EC found, "will enhance their negotiating power *vis-à-vis* producers, who do not enjoy the same immediate access to information on consumer behaviour."[46]

The EC concluded that the increased buying power of Kesko/Tuko, enhanced by the private label leverage that they would have over suppliers, would reinforce the post-merger entity's dominant position in the retail marketplace. In addition to creating leverage over suppliers, the EC noted, Kesko/Tuko would have, by virtue of its buying power, the ability to employ different strategies. The long-term effects of these strategies would weaken the position of its competitors and increase its market power, vis-à-vis the competitors and the consumer, as well as producers and suppliers.[47] Moreover, the EC found that the enhanced "gatekeeper" effect, coupled with private labeling, is likely to foreclose the entry of new competitors into the retail market. In

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pre-merger, according to brand name producers, used their private label products as negotiation tools. *See id.* at 70, ¶ 129.

[44] *Id.* at 70, ¶ 130.

[45] *Id.*

[46] *Id.* at 73, ¶ 152.

[47] *See id.* at 74, ¶ 153. The marketing of private label products may also cause the disappearance of less prominent brand manufacturers which would limit choice and create opportunities for the large retailers to increase consumer costs.

assessing the potential for competition to enter the marketplace, the EC noted that there had not been "new entry to any of the markets discussed," and that the likely cause was that Kesko (even before the acquisition of Tuko) enjoyed a strong buying position "as the most important customer of the majority of all producers of daily consumer goods."[48] The post-merger increase in Kesko's buying power, the EC found, would constitute one of the most significant barriers to entry, because one of the key questions for any potential entrant would be its ability to secure access to consumer goods at prices that would permit effective competition with the dominant entity.[49] The EC found that Kesko/Tuko had the ability to exert market power over the procurement marketplace, with significant repercussions for consumers and competitors. This market power in the procurement marketplace, the EC concluded, was one of the "most significant barriers" to potential competitors' entry into the market.[50]

The market power that dominant retailers exercise over suppliers, consumers and competitors which the EC recognized in *Kesko/Tuko* is significant to the evaluation of the conduct of dominant retailers and retailer mergers and practices. The lessons from the EC's recognition of these evolving areas of market power are of particular importance, given the developing market concentration among retailers. These lessons are ones which, as discussed in the following sections of this Article, should be heeded by U.S. antitrust enforcement authorities.

II. Comparative Analysis of the Assessment of Retailer Mergers and Practices Under Traditional U.S. Antitrust Law Principles

The antitrust laws in the United States grow out of a profound preference for the operation of a free market as opposed to government regulation of the marketplace.[51] The philosophy of the antitrust laws assumes that desirable results will be achieved in the free market, except in instances where an individual party can obtain significant market power that would allow it to operate unchecked by general, free market restraints.[52] The principal federal statutes concerning the enforcement of antitrust laws with respect to merger activities—the

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48 *Kesko/Tuko*, *supra* note 6, ¶ 154.

49 *See id.* ¶ 158.

50 *Id.*

51 *See* von Kalinowski, Desk Edition, *supra* note 9, § 1.01.

52 *See id.*

Sherman Act[53] and the Clayton Act[54]—reflect the preference for less government involvement in the marketplace.

A. *The Sherman and Clayton Acts*

The Sherman Act, stating in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal," prohibits various forms of agreements designed to restrain trade as well as efforts to monopolize a portion of the market by a single entity.[55] In broad terms, under the Sherman Act, a company engages in illegal monopolization when it has monopoly power—which is the power to control prices or to exclude competition—and that power has been unfairly obtained or is being used unfairly.[56]

The Clayton Act embodies the same philosophy as the Sherman Act, but bestows upon the relevant enforcement agencies[57] the ability to enforce the antitrust laws both on a prospective and retrospective basis.[58] It states in pertinent part that

> [n]o person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any parts of the assets of another person engaged also in commerce or in any activity affecting commerce, in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[59]

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[53] 15 U.S.C. §§ 1, 2 (1994). The passage of the Sherman Act in 1890 came about largely as a result of concerns about mass industrialization in the late 19th century and the increasing power of corporate entities and trusts. For a more detailed discussion on the Sherman Act, *see* VON KALINOWSKI, ANTITRUST LAWS, *supra* note 3, § 9.02.

[54] *See* 15 U.S.C. § 18-9 (1994). The passage of the Clayton Act in 1914 was largely the result of the Congress's concerns about the Sherman Act's inability to deal with particular forms of anticompetitive practices. *See* VON KALINOWSKI, ANTITRUST LAWS, *supra* note 3, § 9.03.

[55] 15 U.S.C. §§ 1, 2.

[56] *See* United States v. Grinell, 384 U.S. 563, 570–71 (1966); *see also* United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 391 (1956).

[57] The enforcement agencies generally involved in antitrust matters are the Antitrust Division of the United States Department of Justice, an executive branch agency, and the Federal Trade Commission, an independent government organization. Enforcement of antitrust laws, as more fully discussed *infra*, is also conducted by state attorneys general. Private enforcement of antitrust laws, while an available option under U.S. antitrust laws, is not a focus of this Article.

[58] *See* VON KALINOWSKI, ANTITRUST LAWS, *supra* note 3, § 9.03 [1][b].

[59] 15 U.S.C. § 18.

One prospective element of that enforcement is the review of business mergers prior to their implementation.[60] To a considerable degree, this review parallels the review undertaken by the EC with respect to the Kesko/Tuko merger.

Properly implemented, the Sherman Act and the Clayton Act could effectively address changing dynamics in the retail marketplace. They have not been utilized to that effect. At times, in the analysis of retail mergers pursuant to the Sherman and/or Clayton Acts, the Supreme Court has recognized the existence of retailer buying power,[61] the potential for the exercise of market power by a retailer that also functions as its own supplier[62] and the detrimental potential of undue concentration in the grocery retail marketplace as situations that antitrust laws were meant to deter.[63] Their valuable guidance warrants further enhancement and assessment in light of the retail market dynamics recognized by the EC in *Kesko/Tuko* and which are impending realities in the U.S. market.[64]

Other provisions of the Clayton Act address vertical restraints—situations where a manufacturer or other entity higher up in the distribution chain implements certain requirements or restrictions on a retailer or other entity lower down in the distribution chain.[65] This

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[60] *See* 15 U.S.C. §§ 18–19.

[61] *See, e.g.*, United States v. Griffith, 334 U.S. 100, 108 (1947) (noting that although "[l]arge-scale buying is not, of course, unlawful per se . . . . [i]t may not, however, be used to monopolize or to attempt to monopolize interstate trade or commerce. Nor . . . may it be used to stifle competition . . . ."). The Court also notes in *Griffith* that "size is of course an earmark of monopoly power." *Id.* at 107, n.10.

[62] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 301, 332–34 (1962) (noting that the "necessary corollary" of the trends of acquiring manufacturers to become sources of supply for acquired retailers "is the foreclosure of independent manufacturers from markets otherwise open to them" and that the "trend toward vertical integration . . . may foreclose competition").

[63] *See* United States v. Von's Grocery Co., 384 U.S. 270, 277–79 (1966) (rejecting a merger of two large grocery stores and noting that "[t]he facts of this case present exactly the threatening trend toward concentration Congress wanted to halt . . . [t]his rapid decline in the number of grocery store owners moved hand in hand with a large number of significant absorption of the small companies by the larger ones."). The Supreme Court further noted that the Clayton Act

> requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future . . . . It is enough for us that Congress feared that a market marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers would slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed.

Id. at 278; *see also* ANTITRUST LAWS AND TRADE REGULATION: PRIMARY SOURCE PAMPHLET, *supra* note 2, at 109.

[64] *See infra* notes 140–55 and accompanying text.

[65] *See* 15 U.S.C. § 14 (1994). Analytically, the Clayton Act approaches vertical restraints from the perspective that the manufacturer or supplier has the facility to exercise market power over its retailer or dealer. *See also* Moore v. Jas. H. Matthew's & Co., 550 F.2d 1207, 1214 (9th Cir. 1977)

Article will primarily address U.S. horizontal merger guidelines because they closely parallel the EC merger regulation standards at issue in the *Kesko/Tuko* opinion. It is noteworthy, however, that the traditional contemplation of vertical restraints as involving an entity higher up in the distribution chain exercising market power over an entity lower in the distribution chain is inverted somewhat by the *Kesko/Tuko* analysis. The EC in the *Kesko/Tuko* opinion recognized that entities lower in the distribution chain can and do engage in restraints on competition with respect to entities higher in the distribution chain.

B. *The Robinson-Patman Act*

A third antitrust enactment, the Robinson-Patman Act,[66] was a response to the rise of supermarket chains and their ability to exercise greater buying power (relative to suppliers), to the detriment of small, local retailers. It states in part that

> [i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.[67]

(noting that elements of the Sherman and Clayton Acts' vertical restraints provisions are "virtually identical"). The Clayton Act's vertical restraints provisions lack the facility to address the emergence of dominant retailer and its exercise of market power over the manufacturer and supplier and thus are not a focus of this Article. *See generally* 2 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 304 (1995) [hereinafter ANTITRUST I] (Sherman and Clayton Act standards coalesce). Although the elements of proof are virtually identical, the Sherman Act language, though it has not been utilized to address the emerging exercise of market power by large retailers, is certainly broad enough to provide the foundation for antitrust enforcement authorities to address retailer-imposed vertical restraints.

[66] *See* 15 U.S.C. § 13 (1994). The Robinson-Patman Act was passed in 1936. For a more detailed discussion of the history of the Robinson-Patman Act, see VON KALINOWSKI, ANTITRUST LAWS, *supra* note 3, § 9.04.

[67] 15 U.S.C. § 13.

The Robinson-Patman Act's primary thrust is to prevent manufacturers and suppliers from providing discriminatory prices to, and from acceding to demands of, dominant retailers. Although the Robinson-Patman Act would also appear to be intended to address the more recent developments in the retail marketplace identified by the EC—namely, the emergence of dominant retailers as "gatekeepers" to the marketplace, as well as competitors to manufacturers—it does not effectively do so. The Robinson-Patman Act prohibits price discrimination,[68] not price differentiation, and numerous defenses are available under the statute to justify differentiating between the prices offered to, and treatment of, various retailers. Moreover, its focus is on protecting smaller retailers as opposed to protecting the supply market and thus, as currently constituted, it is an unsuitable vehicle to address the issues raised by the *Kesko/Tuko* decision.[69] Further, the so-called Fred Meyer Guidelines, which interpret the Robinson-Patman Act, although advisory and amended as recently as 1990, do not address any of the implications of the dual role of the dominant, private-label retailer as a "customer" as well as a "seller."[70]

In enacting the Robinson-Patman Act, Congress was responding to a change in the dynamic of the 1936 marketplace, driven by the emergence of large retailers. Specifically, Congress noted: "A vivid idea of the enormous bargaining power embodied in chain store purchases may be gained from the fact that the Great Atlantic and Pacific Tea Company makes purchases of merchandise amounting to over $800,000,000 annually and other large chains make purchases in proportionate amounts."[71]

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[68] VON KALINOWSKI, ANTITRUST LAWS, *supra* note 3, § 9.04[4].

[69] Conventional wisdom has often been that enhanced "buying power," so long as it withstands scrutiny under the Robinson-Patman Act, ought not enter the realm of consideration in appraising retailer mergers. *See, e.g.*, 5 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 1104 (1980 & Supp. 1996) [hereinafter ANTITRUST II] (noting that such cases are likely to be far too rare to warrant the assessment of the exercise of market power by buyers).

[70] *See* 16 C.F.R. § 240 et seq. (1998). The Fred Meyer Guidelines were established by the FTC to provide guidance for compliance with the Robinson-Patman Act. *See id.* § 240.1 They provide definitions of terms generally used in the Robinson-Patman Act as guidance with respect to the application of the Act to certain sales transactions situations. *See id.* § 240.3 et seq.

[71] H.R. REP. No. 2287, pt. 1, at 3 (1936) (1936 Prohibition on Price Discriminations). The Robinson-Patman Act was designed to address this perceived inequality by prohibiting discrimination in price between purchasers where such discrimination could not be shown to be justified. *Id.* at 7.

While perhaps the supporters of the Robinson-Patman Act did not recognize that they were dealing with a dynamic that would grow and change dramatically over the years, the ability of retailers as private label operators to exert market power was not lost on opponents of the legislation. For example, the minority report countered:

> What is to prevent, for example, a large company like the Atlantic and Pacific Tea Co. from letting down the bars and selling [their] private brands of coffee and tea and other goods, heretofore limited to their own stores, to all independent grocers? What is to prevent them from going into actual wholesaling?[72]

The minority report, while not focusing on the retailer's ability to exercise market power through private label marketing in its own stores, did recognize the potential power embodied in private label marketing and supply. The minority report, furthermore, recognized the potential for large retailers to function as "gatekeepers" in the market. In that regard, the minority report noted: "What is to prevent a large distributor from increasing his own manufacturing facilities vertically until he directly distributes from the factory door to the consumer door?"[73]

While these potential transformations of the marketplace were thus recognized by the Robinson-Patman Act, in the sixty-plus years since its enactment, this marketplace dynamic has never been directly addressed in the enforcement of the Robinson-Patman Act or, for that matter, in the enforcement of the Sherman and Clayton Acts.

C. *The Federal Trade Commission Act*

A fourth significant antitrust statute, the Federal Trade Commission Act ("FTC Act"),[74] prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[75] The prohibition of unfair methods of competition extends beyond those practices that would violate the other

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[72] *Id.*, pt.2, at 17.

[73] *Id.*, pt.2, at 18.

[74] *See* 15 U.S.C. §§ 41–58 (1994). The Federal Trade Commission Act was passed in 1914. As a result of concerns with the efficacy of the Sherman Act to achieve Congress's goals, it created a commission with true regulatory powers and vested it with the authority to define and prohibit a broad spectrum of unfair methods of competition and deceptive business practices. *See* von Kalinowski, Antitrust Laws, *supra* note 3, § 9.03[1].

[75] 15 U.S.C. § 45.

antitrust laws, and thus has been used to fill gaps left by those laws. It also has been applied to preclude standard antitrust offenses such as horizontal and vertical price-fixing, anti-competitive group boycotts, exclusive dealings, monopolization, attempted monopolization and conspiracies to monopolize.

The FTC Act is, along with the Sherman Act, an appropriate vehicle for addressing the undue exercise of market power in the procurement market by powerful retailers. *In re Toys-R-Us*, for example, reflects reliance on the FTC Act to address the exercise of market power as a powerful retailer. The utilization of the FTC Act to address the exercise of such potential market power by a powerful retailer portends that the FTC Act (and the Sherman Act) will provide the foundation for a re-evaluation of the approach by U.S. antitrust enforcement authorities to the exercise of retailer market dominance.[76] The extent to which the changing retail market dynamic can be addressed by these statutes—and the degree to which legislative and regulatory evaluation is suggested—are discussed in the following sections of this Article.[77]

D. *U.S. Antitrust Law Enforcement Guidelines*

While considerable case law has developed concerning the Sherman and Clayton Acts' provisions in the merger context, written guidelines issued by the enforcement authorities have been the primary source of interpreting the current state of U.S. antitrust laws. Those guidelines, although revised in recent years, continue to focus on the traditional elements of market power concerns—protecting competition by reference to the impact of the exercise of market power on the consumer and the direct competitor. As such, they do not presently address the market power of the dominant retailer as either a "gatekeeper" or a dual customer and competitor.[78]

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[76] *See In re* Toys-R-Us, F.T.C. No. 9278, Final Order, Opinion of Commission, at 5 (Oct. 13, 1998) *available at* <http://www.ftc.gov/as/1998/9810/toyrsinord.htm> (last visited Mar. 4, 1999).

[77] *See supra* notes 78-155 and accompanying text.

[78] The failure of the Guidelines to address the effect of the dominant retailer in the marketplace is largely a function of the fact that the Guidelines appear to be drafted on the primary premise that the mergers addressed will involve manufacturers of goods, rather than retailers or service providers.

1. The U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines

In 1992, the United States Department of Justice and the Federal Trade Commission ("FTC") jointly issued guidelines concerning the analysis of horizontal mergers ("1992 Guidelines").[79] These guidelines are of general applicability and do not focus on any particular industry or market sector. The 1992 Guidelines are predicated upon a deference to free market controls and an emphasis on the protection of the consumer and actual or potential competitors. The 1992 Guidelines' definition of markets and the exercise of market power is rooted in that framework. Accordingly, the 1992 Guidelines are not oriented toward addressing the more complex market dynamics raised by the EC's analysis of the powerful retailer's exercise of market power in the procurement marketplace.[80]

In evaluating the potential for the exercise of market power, the 1992 Guidelines specifically state that the focus, with respect to the potential profit of the merging firms, should be on evaluating how likely it is that a potential monopoly would impose at least a "small but significant and non-transitory increase in price."[81] In describing the price to be examined in retail markets, the 1992 Guidelines specifically state that "in a merger between retailers, the relevant price would be the retail price of a product to consumers."[82] The 1992 Guidelines

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[79] The 1992 Guidelines were amended in 1997 to address the manner in which efficiencies obtained through a horizontal merger would be assessed. See 1992 Guidelines, *supra* note 2, § 4 (amended 1997).

[80] *See id.* § 0.1. The 1992 Guidelines do address broader concerns about misallocation of resources and suppression of production which, by extension, bear on the broader issue of the need to address the emergence of powerful retailers in the grocery and mass merchandise markets and their ability to exercise market power at differing levels. The 1984 Department of Justice Merger Guidelines ("1984 Guidelines") did, to some degree, address non-horizontal mergers and the potential role of parties as participants in various vertically integrated markets. *See* 1984 Merger Guidelines, § 4, 49 Fed. Reg. 26823, 26834 (1984). The 1984 Guidelines deemed such so-called "vertical" or "conglomerate" mergers while "not invariably innocuous," to be far less likely to create competitive problems. *Id.* In assessing vertical integration to the retail level, the guidelines considered adverse competitive consequences to be "unlikely unless the upstream market [supply market] is generally conducive to collusion and a large percentage of the products produced there are sold through vertically integrated retail outlets." *Id.* § 4.221, 49 Fed. Reg. at 26836.

The reluctance to perceive the potential antitrust implications identified in the *Kesko/Tuko* decision, reflected in the language of the 1984 Guidelines, underscores the need, more fully discussed in the text, for a re-evaluation by U.S. antitrust enforcement authorities of their approach to these issues.

[81] 1992 Guidelines, *supra* note 2, § 1.1.

[82] *Id.* § 1.1, n.11.

define market power as the ability of a seller to profitably "maintain prices above competitive levels for a significant period of time," noting that market power may also lessen competition on dimensions such as product quality, service or innovation.[83] The result of such an exercise of market power, the 1992 Guidelines note, "is a transfer of wealth from buyers to sellers or a misallocation of resources."[84]

Although the 1992 Guidelines focus primarily on the ability of sellers to exercise market power and direct that this be the primary focus in retailer mergers, they also recognize the potential for buyers to exercise market power. The 1992 Guidelines envision buyers exercising market power as single monopolists or a coordinated group, thereby depressing the price paid for a product to a level that is below the competitive price and depressing production.[85] Neither the broader implications of the exercise of market power by powerful retailers in the procurement market, nor its implications in other markets, is addressed. The exercise of market power over suppliers by merging buyers has been identified by U.S. antitrust enforcement authorities as within the realm of possibility. Recognition of such buyer dominance by federal antitrust enforcement authorities, however, has been exceedingly rare.[86] Unlike their EC counterparts, U.S. antitrust enforcement authorities, while recognizing potential problems in principle, have elected to treat the buyer market power of retailers as a yet unimportant issue. As market consolidation and concentration continues, the need to recognize and analyze emerging buyer power and the "gatekeeper" role will require a re-assessment of this approach.

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[83] *Id.* § 0.1.

[84] *Id.*

[85] *See id.*

[86] *See* AREEDA & TURNER, ANTITRUST LAWS II, *supra* note 69, § 965 (citing United States v. Pennzoil Co., 252 F. Supp. 962 (W.D. Pa. 1965) (citing *Pennzoil* "as the only case of which we are aware in which a violation of section 7 [of the Clayton Act] was predicated solely on buyer concentration"). Notably, the *Pennzoil* case involved the proposed merger of producers and refiners, as opposed to retail operations. *See id.*; *see also* VON KALINOWSKI, ANTITRUST LAWS, *supra* note 3, § 25.06 (noting the relatively few cases considering the exercise of so-called "monopsony" power by buyers). Monopsony power has been viewed as arising in very limited circumstances. *See, e.g.*, United States v. Syufy Enters., 903 F.2d 659, 663 n.4 (9th Cir. 1990) (citing RICHARD G. LIPSEY ET AL., ECONOMICS 976 (7th ed. 1984)) (defining monopsony as a market situation where a single buyer or a group of buyers make joint decisions); *In re* Beef Indus. Antitrust Litig., 907 F.2d 510, 514 n.1 (5th Cir. 1990) (citations omitted) (defining monopsony as a situation where there is only one buyer). In *United States v. Syufy Enterprise*, the Justice Department alleged that the defendant, a movie theater operator, exercised monopsony power against its suppliers. 903 F.2d at 661–62. In *In re Beef Industry Antitrust Litigation*, cattlemen brought private claims against meat packers. 907 F.2d at 511–12. In both instances, the claims were found factually insufficient. The recognition of potential monopsony power by a party like *Syufy*, with a dominant retail

Driven by market realities, the 1992 Guidelines do acknowledge that mergers can effect benefits to the economy by enhancing the efficiency of the merged entities. The 1992 Guidelines thus recognize that some mergers that might otherwise be challenged may be justified by the achievement of certain net efficiencies.[87] The notable efficiencies that are identified include economies of scale, lower overall costs and reductions in general selling and other expenses. Although appearing to address the ability to reduce the cost of supplies and other expenses as benefits, the 1992 Guidelines separately recognize that the monopolist is assumed to pursue maximum profits, and not to pass savings along to the consumer.[88] The 1992 Guidelines do not, however, take the step of integrating those concerns so as to recognize that through its "gatekeeper" function, the dominant retailer can exercise market power to control the supplier price and simultaneously maximize profits to the detriment of the consumer.

2. National Association of Attorneys General Horizontal Guidelines

The 1993 Horizontal Merger Guidelines adopted by the National Association of Attorneys General ("NAAG Guidelines") follow a similar approach to the 1992 Federal Guidelines.[89] The NAAG Guidelines identify the transfer of wealth from consumers to firms that can exercise market power by profitably maintaining prices above competitive levels for a significant period of time as "the major evil" designed to be addressed by the Clayton Act.[90] This wealth transfer orientation, the NAAG Guidelines note, is similarly embodied in the Sherman Act provisions.[91]

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position over its suppliers, reflected a promising start. The skepticism with which monopsony claims have been viewed, however, leaves little promise that a focus on monopsony power, in addressing the growing market power of emerging power retailers, is likely.

[87] *See* 1992 Guidelines, *supra* note 2, § 4 (amended 1997).

[88] *See id.* § 1.11.

[89] The NAAG Guidelines reflect the general enforcement policy of the state and territorial attorneys general with respect to horizontal acquisitions and mergers under the Clayton and Sherman Acts, as well as analogous provisions of certain states' antitrust laws. The state attorneys general are the primary, exclusive public enforcer of antitrust laws in most states. *See* ANTITRUST LAWS AND TRADE REGULATION: PRIMARY SOURCE PAMPHLET 281, § 1 (2d ed. 1997). While it is unlikely, in the case of a dominant retailer, that the state attorney general would be the sole or primary enforcement authority, the NAAG Guidelines are instructive for the insight they provide on U.S. antitrust enforcement authorities' perspective on horizontal merger issues, particularly as they relate to the issue of dominant retailers and the exercise of market power by dominant retailers with respect to their procurement activities.

[90] NAAG Guidelines, *supra* note 89, § 2.11.

[91] *See id.*

A primary focus of the NAAG Guidelines remains the implications for the consumer in light of the potential for a merger to raise the cost of merging parties' competitors. In particular, the NAAG Guidelines recognize that a merger could increase the power of a firm to affect the prices that its competitors must pay for products and supplies. Accordingly, the Guidelines note that "if the market structure is such that these increased costs can be passed on to consumers, then the prevention of this effect is consistent with the goals of anti-trust laws."[92] With regard to efficiencies obtained through the merger of competitors, the NAAG Guidelines recognize that "[g]oals such as productive and allocative efficiency are generally consistent with, though subsidiary to, the central goal of preventing wealth transfers from consumers to firms possessing market power."[93] The NAAG Guidelines acknowledge, however, that although productive efficiency may cause firms in highly competitive industries to "pass on some of the savings to consumers in the form of lower prices," to the extent that a merger increases market power for the resulting entity, there is less likelihood that productive efficiencies will be passed along to the consumer.[94]

The NAAG Guidelines also consider the implications of the existence of powerful or sophisticated buyers in the marketplace.[95] Its perspective, however, differs from that of the EC. The NAAG Guidelines focus on the fact that collusion can be frustrated by the presence of powerful and sophisticated buyers who are "appropriately situated to force firms in the primary market to negotiate secretly or offer substantial concessions for the large purchasers."[96] Although in most circumstances, the NAAG Guidelines conclude, the presence of such buyers is unlikely to prevent anticompetitive effects from occurring, the NAAG Guidelines focus exclusively on these buyers' ability to restrain the exercise of market power by others (i.e., competitors), as opposed to their ability to exercise market power by forcing manufacturing and supply firms in the primary market to negotiate secretly or offer concessions to the powerful and sophisticated buyer.

The Guidelines do recognize that "if some, but not all of the buyers in the market are powerful and sophisticated, the former may be able to achieve price concessions while the less powerful buyers

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[92] *Id.* § 2.14.

[93] *Id.* § 2.

[94] *Id.*

[95] The term "powerful or sophisticated buyers" is one utilized in the NAAG Guidelines. NAAG Guidelines, *supra* note 89, § 5.4. The Guidelines do not provide a definition for that term.

[96] *Id.* § 5.4.

would not."[97] In those instances, the NAAG Guidelines provide that the merger should be evaluated in terms of its impact on the less powerful buyers.[98] This analysis reflects traditional concerns for the impact of the exercise of market power on competitors. Consideration of the ability of powerful and sophisticated buyers to achieve price concessions at the expense of the suppliers—most of whom cannot afford not to maintain commercial relations with these retailers—is however, not addressed. Moreover, the implication of the broader role of such buyers is not considered.

E. *Application of U.S. Antitrust Law and Guidelines in Retailer Mergers*

The guidelines are just that, guidelines. They are not static documents from which the enforcement authorities cannot depart as circumstances warrant. It is certainly clear from both the 1992 Guidelines and the NAAG, however, that the predominant concern of the enforcement authorities is whether merging retailers have the ability to (a) increase the cost to the consumer and (b) dominate their competitors. The enforcement authorities, however, have shown varying degrees of recognition and response to the developments in the retail marketplace that were identified by the EC in the *Kesko/Tuko* decision.

The approach of U.S. enforcement authorities to Kesko/Tuko issues is revealed in their discussions of policies for analyzing retail mergers and, *inter alia*, their handling of two recently proposed mergers in the retail marketplace. A review of their respective analyses will permit an assessment of the potential for U.S. antitrust enforcement authorities to address the role of the dominant retailer in the procurement marketplace and its antitrust implications.

1. Policy Perspective

The FTC is well aware of the emergence of mass merchandisers in the food market and the increased retail marketing of private labels.[99] The FTC has acknowledged that wholesale clubs and certain mass

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[97] *Id.* § 5.4, n.49.

[98] *See id.* § 5.4.

[99] *See* Federal Trade Commissioner Christine A. Varney, Ensuring Competition in the Food Marketing Industry, Prepared Remarks before the Food Marketing Institute (June 6, 1995), *available in* 1995 WL 395992, at *1. While the published version of these remarks reflects that they are those of Commissioner Varney and not of the FTC or other individual commissioners, they are reflective of a typical view of the marketplace and an identification of certain changing dynamics in food and mass merchandise marketing.

The FTC is an independent commission headed by five commissioners, nominated by the President and confirmed by the Senate, each serving a seven-year term. The President chooses merchandisers are entering the arena of full service supermarkets and, to some degree, giving the supermarkets "a run for their money."[100] The 1992 Guidelines form the basis of the FTC's analysis of the supermarket mergers.[101] In defining the market, the focus is usually on particularly large supermarkets.[102] One view espoused by the FTC is that, while all circumstances must be analyzed, it would be a unique circumstance where a mass merchandiser's or warehouse club's market penetration into food retailing would be so deep and established that their offerings might compete against traditional supermarkets.[103]

The FTC assesses grocery retail market concentration and the ability to exercise market power by use of a simple calculation of market share percentage for supermarkets of like size in accordance with the Herfindahl-Hirschmann Index[104] ("HHI") discussed in the Guidelines, which transfers market concentration levels into numeric form.[105] Barriers to entry and likelihood of anticompetitive effects are analyzed on the basis of how easy it is for a new entrant to set up a

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one Commissioner to act as Chairman and no more than three Commissioners can be of the same political party.

The FTC enforces a variety of federal antitrust and consumer protection laws. The Commission seeks to ensure that the nation's markets function competitively and are vigorous, efficient and free of undue restrictions. Within that realm of responsibility, the Commission has, *inter alia*, oversight responsibility with respect to proposed mergers and the ability to pursue injunctive relief to restrict or foreclose mergers which it believes will have anticompetitive results. For more information on the FTC, see generally Federal Trade Commission, *Working for Consumer Protection and a Competitive Marketplace* (visited Mar. 4, 1999) <http://www.ftc.gov>.

100 *See* Varney, *supra* note 99, at *1 n.2 (citing PHILIP FITZELL, *supra* note 10; David Mills, Private Labels and Countervailing Power in Retail Distribution (1992) (unpublished theoretical work, University of Virginia) (on file with authors)); *see also More Shopper Bypass Big Namė Brands and Steer Carts to Private Label Products*, *supra* note 10, at B1. In the area of private labels, a view expressed is that, while private label products are being increasingly pushed by traditional supermarkets, this development is positive since it has generally led to lower prices for consumers. This view does not address, *inter alia*, the impact of private labels on the exercise of market power by powerful retailers against both suppliers and consumers and the potential concomitant impact on overall price decreases from suppliers and increases to consumers.

101 Varney, *supra* note 99, at *2. (while noting that the speech is an expression of Commissioner Varney's opinion, the text purports to discuss how the FTC staff reviews supermarket mergers).

102 *See id.* (noting that the FTC has found that full-line self-service supermarkets with annual sales volume of $2 million or more represent a relevant product market).

103 *See id.* While the cited speech does not address the point, it is noteworthy that Wal-Mart, the largest mass merchandiser, which is rapidly becoming the nation's largest grocer, also owns Sam's Club, a leading warehouse club.

104 The Herfindahl-Hirshmann Index ("HHI") is the sum of the squares of the market shares of all firms operating within the relevant market. For example, a market with four 20% firms and two 10% firms has an HHI of 1800. For a history of the discussion of the early use of the index, see Albert O. Hirshmann, *The Pattern of an Index*, 54 AM. ECON. REV. 761 (1964).

105 *See* Varney, *supra* note 99, at *3.

supermarket in a given area in two years or less, with a primary focus on how developers and realtors view the ability to establish a new store.[106]

Although the traditional approach to the supermarket marketplace has been advocated by members of the FTC,[107] the view of the enforcement authorities on these issues is not static. The emergence of mass merchandisers in the food retailing marketplace, the development of the "gatekeeper" function for large mass merchandisers and other dominant food retailers and the facility to exercise power through private label marketing, although not new developments, are clearly within the purview of the FTC. Its views on these matters are (and, as the EC exemplified, should be) subject to change based on the dynamics of the market.[108]

2. Recent Retailer Merger Analyses

Two recent examinations of proposed retailer mergers illustrate the traditional analysis, pursuant to the federal guidelines, of the potential creation of powerful retailers, focusing primarily on the consumer perspective.[109] Elements of the analyses of these proposed mergers, however, also reveal a growing recognition of the need to account for emerging dynamics in the subject retail markets.

a. *RiteAid/Revco*

In April of 1996, the FTC announced that, as a result of an investigation conducted in conjunction with six state attorneys general,[110] it intended to seek an injunction barring the merger between

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[106] *See id.* at *4.

[107] *See id.* That the enforcement authorities have not recognized the implications that the EC recognized in terms of the market dynamics or the retail marketplace in the United States should not be viewed as foreclosing the recognition of those issues in future analyses of retail market mergers and practices.

[108] The FTC is mindful of the need to adapt its enforcement process and policies to changing market dynamics. *See* Federal Trade Commission, *Anticipating the 21st Century*, Apr. 1997, *available in* 1997 WL 174936, at *1 (noting that "[b]ecause so many sectors of the economy are changing—and changing rapidly—the FTC enforcement process must be a dynamic one," and that, accordingly, the FTC "must constantly reexamine its law enforcement policies . . . .").

[109] While the proposed Rite-Aid/Revco and Staples/Office Depot mergers are chosen as subjects for an evaluation of the manner in which enforcement authorities view merger transactions among large retailers, it is beyond the scope of this Article's thesis to comment on the merits of each of those proposed acquisitions or the enforcement agencies' actions.

[110] Section 5 of the Federal Trade Commission Act proscribes "unfair methods of competition." 15 U.S.C. § 45. The FTC is authorized by section 5(a) of the FTC Act to investigate and challenge alleged anti-competitive mergers and acquisitions. *See id.* § 45(a)(2). Upon finding a

RiteAid Corporation and Revco D.S. Inc., a merger that would have created a combined firm with nearly 5000 drugstores.[111] In determining that the proposed RiteAid/Revco merger would have negative antitrust implications, the FTC examined the effect of the transaction on price to the consumer.[112] The FTC, however, departed from the traditional analysis of the consumer as the cash-paying customer.[113] Instead, the FTC recognized that the market for prescriptions had evolved to the point that the primary affected party was not the cash-paying customer, but rather was the managed care provider who provided pharmacy benefits to its patients and was dependent, to a significant degree, upon access to low-cost chains to serve its network of patients. Accordingly, the FTC concluded that these providers would be subject to price increases if two low-cost chains were to merge. Facing FTC opposition, RiteAid and Revco ultimately withdrew their merger plans.

Although the FTC's analysis does not reflect a departure from the traditional antitrust merger standards, it does consider a significant change in the manner in which enforcement authorities have traditionally viewed retail markets. The RiteAid/Revco scenario shows that enforcement authorities[114] are prepared to shift their substantive focus from the guideline parameters to the competitive facts in a particular marketplace, and then to apply the guideline parameters to the facts of the particular transaction. This type of developing analysis may foster U.S. antitrust enforcement authorities' recognition of the implications of the changing retail market dynamics that the EC recognized in *Kesko/Tuko*.

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violation of section 5, the FTC may file an administrative complaint to be tried before an administrative law judge ("ALJ"). *See id.* § 45(b). If a violation of law is found by the ALJ, a cease and desist order will issue which may be appealed to the United States Court of Appeals and, ultimately, the United States Supreme Court. *See id.* § 45(c); *see also* VON KALINOWSKI, ANTITRUST LAWS, *supra* note 3, § 29.03[3].

[111] *See FTC Will Seek to Block RiteAid/Revco Merger: Deal Could Lead to Higher Prescription Prices in Numerous Metro Areas Along East Coast and in the Midwest, Agency Alleges*, F.T.C. File No. 9610020, Apr. 17, 1996, *available in* 1996 WL 181411, at *1.

[112] *Id.*

[113] *See id.*; George Cary, Deputy Director for Mergers, Bureau of Competition of the Federal Trade Commission, Staying Ahead of the Merger Wave, Prepared Remarks before the 15th Annual Corporate Counsel Institute (Dec. 12, 1996) *available in* 1996 WL 715630, at *3.

[114] The enforcement authorities in the RiteAid/Revco matter were the FTC and 6 states' attorneys general. *See* Cary, *supra* note 113.

b. *Staples/Office Depot*

In the proposed Staples/Office Depot merger, the enforcement authorities followed the traditional tack of focusing purely on the impact of price to the consumer. The proposed merger of Staples and Office Depot endeavored to create approximately 1000 retail office supply stores. Arguing that the proposed merger would increase the retail price to the consumer, the FTC sought to enjoin the transaction.[115] In contesting the Staples/Office Depot merger, the FTC stated that "[i]n evaluating the legality of a merger, the antitrust laws essentially require a prediction as to whether the deal is likely to lead to less competition, and consequently, to higher prices for consumers."[116]

The FTC, in concluding that a challenge to the transaction was warranted, predicted that the merger would cause significant consumer harm by increasing the costs that small businesses and consumers would pay for office supplies.[117] In evaluating the dynamic between the Staples and Office Depot operations and other sellers of office supplies, the FTC found that the nature of the Staples and Office Depot superstores and the combination of price, convenience and product offerings were such that office superstores ought to be evaluated as a separate product market, rather than as part of a general office supply retailer product market.[118] In passing, the FTC observed that both Staples and Office Depot have been "able to leverage their huge volumes into price concessions from their suppliers."[119] The FTC's pleadings also note without any significant discussion that Staples and Office Depot drove thousands of independent stationers out of business and eliminated rivals who sought to compete in the office superstore market.[120]

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[115] *See* Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(B) of the Federal Trade Commission Act, *Federal Trade Commission v. Staples, Inc.*, 970 F. Supp. 1066 (D.C. 1997) (No. 97-CV00701) *available at* Federal Trade Commission (last visited Mar. 15, 1999) <http://www.ftc.gov/os/1997/9704/pubbrief.htm>; Plaintiff's Memorandum, *Federal Trade Commission v. Staples, Inc.*, 970 F. Supp. 1066 (D.C. 1997) (No. 97-CV00701) *available at* Federal Trade Commission (visited Mar. 15, 1999) <http://www.ftc.gov/os/1997/9704/pubbrief.htm>.

[116] *See* Plaintiff's Memorandum, Preliminary Statement, *Federal Trade Commission v. Staples, Inc.*, 970 F. Supp. 1066, (No. 97-CV700701).

[117] *Id.*

[118] *Id.*, Argument, pt.III. The use of the term "product market" with reference to a retail operation is indicative of the focus of U.S. antitrust enforcement authorities on product or goods manufacturers over the last 50 years. The term, however, as reflected, *inter alia*, in the Staples/Office Depot and Revco/Rite Aid matters is applicable to the description, from an antitrust perspective, of retail and service markets.

[119] *Id.*, Argument, pt.5.

[120] *Id.*, Preliminary Statement; *see also* FTC Commissioner Robert Pitofsky, Staples and Boeing: What They Say About Merger Enforcement at the FTC, Speech to Business Development

On June 30, 1997, the United States District Court for the District of Columbia issued an order enjoining the Staples/Office Depot merger and, consequently, that merger was not consummated.[121] Although identifying the office superstore as a submarket of the overall office supply market, the court primarily focused on the traditional analysis of the impact on the price charged consumers.[122] In its conclusion, the court noted that superstores effected price decreases because "the superstores have increased their buying power, forcing manufacturers and suppliers to implement efficiencies in their own businesses in order to compete in the sale of their products."[123] The propriety of the application and use of this market power, however, was not addressed by the court.

In its analysis of the Staples/Office Depot merger, the FTC and the court employed the traditional guidelines' focus on the consumer. The respective analyses of superstores as a separate market, however, may foreshadow a willingness of the enforcement authorities to grapple with changes in market dynamics. Moreover, implicit in the analysis was the recognition that large retailers can and do exert market power over their suppliers. The issue remains, however, whether U.S. antitrust enforcement authorities will eventually pursue the analysis to its logical conclusion.

3. Recent FTC Enforcement Analysis

a. *Toys-R-Us*

Recent FTC enforcement actions provide some answer as to whether the FTC will recognize that large retailers exert market power over suppliers and other entities. In administrative litigation against Toys-R-Us ("TRU"), the FTC seemed willing to acknowledge changes in these market dynamics.[124] In the complaint against TRU, the FTC

Associates, Washington, D.C., (Sept. 23, 1997), *available in* Federal Trade Commission speeches (last visited Mar. 15, 1999) <http://www.ftc.gov/speeches/pitofsky/STAPLESspc.htm> (stating that the *Staples* action and product market definition that "[i]n effect the Commission argued that office supply superstores are to small office supply outlets as super market food chains are to independent groceries . . . ."). In so noting, the FTC Chairman cited to *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), which rejected a supermarket merger and ordered divestiture, noting that a merger of this sort violates the Clayton Act when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors. *See* Pitofsky, *supra*.

[121] *See* Order and Redacted Memorandum Opinion, *Federal Trade Commission v. Staples, Inc.*, 970 F. Supp. 1066 (No. 97-701), at 1069.

[122] *See, e.g., id.* at 1075-78.

[123] *Id.* at 1093.

[124] *See In re* Toys-R-Us, Inc., Complaint, F.T.C. No. 9278, (May 22, 1996), *available in* <http://www.ftc.gov/os/1998/9810/toyrsinord.htm> (last visited Mar. 4, 1999).

alleged that the nation's largest toy retailer used its market power to keep toy prices high by extracting exclusionary agreements from major toy manufacturers concerning sales to warehouse clubs.[125] The action, brought pursuant to the FTC Act, alleged that TRU's "importance as a provider of distribution to manufacturers of toys and related products has given it the ability to exercise market power over those manufacturers . . . ."[126] In discussing the TRU matter, the FTC stated that the acquiescence of manufacturers to the demands of a major retailer constitute "buyer power."[127]

On September 25, 1997, the Administrative Law Judge ("ALJ") issued an initial decision in the FTC's favor, affirming the FTC's expressed position regarding the exercise of "buyer power."[128] Among other conclusions reached, the judge stated that "TRU exerts its dominance as a buyer of toys. TRU also exercises market power as a seller of toys. TRU's power as a buyer and seller are related."[129]

On this basis, the ALJ concluded that TRU had created both a vertical agreement by enforcing an anticompetitive policy which restrained manufacturers from supplying warehouse clubs, and also created a horizontal conspiracy among manufacturers.[130] TRU was able to orchestrate this activity, the judge concluded, because it "exercises market power as a buyer and seller of toys."[131] In determining whether such market power exists, the ALJ held that

> [m]arket power exists if Toys-R-Us can exert leverage over the manufacturers. Leverage exists when the manufacturer cannot find a ready substitute. A retailer has sufficient bargaining power to cause anti-competitive effects, when the retailer (1) has "hard-to-replace distribution skills or facilities;" (2) "is a multibrand retailer that could threaten to drop one brand in favor of another;" or (3) "accounts for such a large volume of business that his replacement would involve substantial disruption that would not be outweighed by retaining a smaller complained-against dealer."[132]

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[125] *Id.* ¶¶ 7–9, 12.

[126] *Id.* ¶ 4.

[127] *See* William J. Baer, Report from the Bureau of Competition, Prepared Remarks before the American Bar Association Antitrust Section (Spring 1997) *available in* 1997 WL 192443, at *14.

[128] *See Toys-R-Us, Initial Decision*, F.T.C. No. 9278, *available in* <http://www.ftc.gov/os/1998/9810/toyrsinord.htm> (last visited Mar. 4, 1999).

[129] *Id.*, Findings, ¶ 421.

[130] *Id.* at 101–02.

[131] *Id.* at 112–13.

[132] *Id.* at 113 (citing to Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 476 n.23 (1992); *In re* California Dental Ass'n., F.T.C. No. 9259, at 30 VII (March 25, 1996).

The ALJ also found that TRU, as "the leading retailer of toys in the United States, has power as a purchaser of toys from manufacturers" and that these manufacturers "would have difficulty finding alternative buyers to replace TRU."[133] In this capacity, TRU has "leverage over the manufacturers," and can "cause serious financial harm to manufacturers."[134]

On October 13, 1998, the FTC issued a final order affirming the ALJ's decision. In that order and in the opinion supporting the order, the FTC recognized the significance of its decision with respect to other large retailers, stating that "[i]f a large toy retailer can engage in the actions pursued by TRU, then any large retailer in any sector of retailing could do the same, foreclosing competition in what has been over the years the highly competitive, open and efficient retailing sector of the United States economy."[135]

In reviewing the ALJ's finding, the FTC reiterated its concerns with TRU's market power, noting that TRU buys about thirty percent or more of the large traditional toy company's total output[136] and that the large percentage share understates TRU's actual market power.[137] The FTC concluded that, although TRU was "not a monopolist or a monopsonist,"[138] it "enjoys a dominant position in buying and selling toys."[139] As a result, the FTC found that suppliers were dependent on TRU and that, while TRU could choose between different manufacturers and suppliers, the manufacturers could not find another retailer to make up for TRU's market share should TRU decide to terminate its relationship with them. The power that was recognized in the *TRU* opinion is, in many ways, a development towards a recognition of many of the factors that the EC recognized in *Kesko/Tuko*.

The FTC's and the ALJ's recognition of the existence of "buyer power" in the TRU context shows the potential for a more compre-

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[133] *In re Toys-R-Us Inc.*, F.T.C. No. 9278, Initial Decision, Findings, ¶¶ 422–23.

[134] *Id.*, Findings, ¶¶ 428, 437 (noting, *inter alia*, that a small video company put itself up for sale after TRU dropped its line). The decision also notes that TRU was able to impose a "Most Favored Nation Clause" that afforded TRU a lower price if, after a TRU purchase, a TRU competitor obtained a lower price for a product, and was also able to obtain a disproportionate share of "hot product." *Id.*, Findings, ¶¶ 511, 519.

[135] *In re Toys-R-Us, Inc.*, Final Order, Opinion of the Commission, F.T.C. No. 9278, at 1 (Oct. 13, 1998).

[136] *Id.* at 4.

[137] *Id.* at 37.

[138] It has been said that the mirror image of "monopoly" is "monopsony." A monoponist is a monopoly buyer rather than seller. *See* HOVENKAMP, *supra* note 1, § 1.2; *see also supra* note 86 and accompanying text.

[139] *Toys-R-Us*, Final Order, Opinion of the Commission, F.T.C. No. 9278, at 37 (Oct. 13, 1998).

hensive assessment by the FTC of the emerging retail market dynamics discussed in *Kesko/Tuko*. It also portends greater utilization of the FTC Act as a vehicle to evaluate and address market power concentration and utilization by powerful retailers.

III. The Changing Marketplace Dynamics Recognized by the EC Are Realities in the U.S. Market

The evolving market dynamics identified by the EC in *Kesko/Tuko* are present in our domestic U.S. marketplace. The application of the *Kesko/Tuko* principles to the evaluation of mergers and practices by U.S. antitrust authorities can be predicated in the food and mass merchandise marketplace in the United States. In this manner, the Finnish marketplace is not an anomaly.

The *Kesko/Tuko* decision is the first decision to recognize the antitrust implications of the emergence of powerful retailers and their control of the marketplace through (1) their "gatekeeper" function and (2) their dual status as private label competitor and customer. Retail trade publications, however, have focused on the emergence of powerful retailers and their ability to exercise significant power in the U.S. marketplace. Those publications have recognized that the consolidation of supermarket chains and the emergence of dominant retailers—such as Wal-Mart and others—have transformed the retail marketplace and consolidated the "gatekeeper" role in the modern U.S. retailing market in the hands of an increasingly smaller number of parties.[140]

The emergence of powerful retailers and their growing ability to serve as "gatekeepers" to the marketplace is aided by the active consolidation of grocery retailers.[141] Compounding this effect in the food retail market is the entry of large mass merchandisers into grocery marketing. Using the superstore concept, these mass merchandisers

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[140] *See infra* notes 141–46. As discussed in note 11, *supra*, the grocery and mass merchandise markets are discussed in this Article as examples of retail consolidation and the growth of powerful retailers. While retail power in other markets is apparent, as exemplified by the Toys-R-Us, Staples and Rite Aid/Revco scenarios, these markets are chosen as topics for this Article's analysis, given the rapid consolidation and apparent growth they are experiencing.

[141] While the top five U.S. grocery retailers only account for about 20% of the overall market, on a regional basis, there has been significant growth in concentration in the grocery retail market. *See* Steven J. Hoch, *How Should National Brands Think About Private Labels?*, 37 Sloan Management Rev. 89 (1996); *Food Industry Merger Activity Rises*, Supermarket Bus., Feb. 1995, at 13 (reporting that about 40 mergers and acquisitions in the supermarket industry occurred in the prior year); William H. Borghesani, Jr. et al., Food For Thought: The Emergence of Power Buyers and Its Challenge to Competition Analysis 1, 6–9 (Keller & Heckman LLP, Washington D.C. 1997).

have the ability to achieve, and are achieving, significantly greater concentration in grocery retailing.[142] The entry of so-called "supercenters" has the potential to create market "superpowers" that will radically alter the food industry.[143] The emergence of powerful retailers in the grocery retail business has conventional supermarket operators,[144] many of whom have high levels of regional market concentration, "petrified" of their perceived buying disadvantage.[145] The exercise of such buying power, either by the mass merchandisers or the consolidated regional supermarket operations, is already a reality in the current U.S. market.[146] This power, whether or not used punitively, has the potential to give a few merchandisers significant power over suppliers, smaller competitors and the consumer market.

Although the U.S. market's concentration does not, by any measure, match the concentration that would have been achieved in Finland by the Kesko/Tuko merger, market indicators reflect a U.S. trend toward increased concentration, particularly with the entry of mass merchandisers into grocery retailing. Rather than waiting until the

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[142] *See* Borghesani, et al., *supra* note 141, at 6–30 (discussing, in detail, the emergence of power buyers and their ability to use their market power to alter market dynamics and exercise greater power and control over the dynamic of the procurement and consumer markets).

[143] *See* Stephen Bennett, *Mighty Merchandisers*, PROGRESSIVE GROCER, Oct. 1995, at 69 (discussing the development of Wal-Mart and other supercenters with over 200,000 square feet of merchandising space and their entry into grocery retailing).

[144] Wal-Mart total sales exceeded $100 billion in 1996, $16.7 billion of which was in grocery sales—making Wal-Mart the third largest grocer in the United States. *See* Borghesani et al., *supra* note 141, at 9–12; *see also* Wal-Mart, *Data Sheet*, April 1997 (on file with authors). In 1997, Wal-Mart sales exceeded $117 billion with earnings growth "fueled by" the strong performance of Wal-Mart supercenters. *See* Wal-Mart, *1998 Year-End Earnings Fact Sheet*, Feb. 24, 1998 (on file with authors); *Data Sheet*, Dec. 8, 1998 (on file with authors). Wal-Mart opened its first supercenter store in 1988 and currently operates 445 Wal-Mart supercenters. *See* Wal-Mart, *Wal-Mart Reports February Sales*, Mar. 5, 1998 (on file with authors). Ninety-seven supercenters opened in the fiscal year ended January 31, 1998. *Wal-Mart Reports Record Sales and Income for the Fourth Quarter*, Feb. 24, 1998 (on file with authors). By the year 2000, Wal-Mart expects to be "on track to be America's largest grocer." Wal-Mart, *Newsroom Press Kit*, Apr. 1997 (on file with authors). Some reports, currently, list Wal-Mart as the second largest U.S. grocer. *See* Pennyl Gill & Jules Alberd, *Wal-Mart: The Supply Chain Heavyweight Champ*, SUPPLY CHAIN MGMT REV. 12, 18 (Spring 1997). Wal-Mart is not alone in the foray by supercenter operators into grocery sales. *See* Borghesani et al., *supra*, at 13.

[145] *The Inside Story: How Wal-Mart Buys*, SUPERMARKET NEWS, May 4, 1992, at 1, 13. Wal-Mart notes that the supercenters have been characterized "as the most powerful concept in retailing today and position Wal-Mart as a retail leader of the future." Wal-Mart, *Newsroom Press Kit*, *supra* note 144. Wal-Mart also boasts that its supercenters "maintain their low price structure through aggressive buying." Wal-Mart, *Newsroom Press Kit*, *supra*.

[146] *See* Borghesani et al., *supra* note 141, at 9–13; *see also* Matthew Schifrin, *The Big Squeeze*, FORBES, Mar. 11, 1996, at 45 (discussing how first-tier and recognized brand manufacturers have become dependent upon dominant retailers whose decisions can greatly effect their operations and viability).

concentration reaches monopsony levels, antitrust enforcement authorities and lawmakers ought to take guidance from the *Kesko/Tuko* decision—not to mention the realities recognized in the *Toys-R-Us* decision—in their consideration and analysis of the roles of such "gatekeeper" entities in the U.S. market.[147] The lessons of the *Kesko/Tuko* decision are equally applicable to the analysis of merger and growth activities of powerful retailers.

Similarly, the role of private brands has been widely recognized in the U.S. grocery industry as the means of increasing the bargaining leverage of powerful retailers in their dealings with producers and suppliers.[148] Private label brands currently account for slightly less than fifteen percent of total dollar sales in U.S. supermarkets and private labels are the dominant brands in about twenty percent of the more than 350 product categories that most supermarkets carry.[149] Moreover, in today's market, most national brand manufacturers think of private labels as being just as competitive as national brands.[150] Recently, one commentator remarked that national brands have to think of private labels differently "if for no other reason than that private label (or at least the organization that sells it) is both competitor and customer."[151] Trade publications have commented on both the competitive role that private labels play and the implications of private labels on the "gatekeeper" role that these retailers play. One publication noted that "when sales come at the expense of the private label, national brands may need to tread more carefully; they could be shooting the very horse that transports their product to the consumer."[152] Industry ana-

[147] For constructing an appropriate framework for analyzing retailer power, in addition to the *Kesko/Tuko* decision and the EU Green Paper, there are a number of instructive analyses that have been performed on this issue in the EC context. *See, e.g.*, Paul W. Dobson & Michael Waterson, Vertical Restraints and Competition Policy, UK Office of Fair Trading (Dec. 1996) [Research Paper No. 12]; The Public Policy Implications of Increasing Retailer Power (the University of Nottingham School of Management and Finance) (1996) (Discussion Papers).

[148] *See infra* notes 149–55. Traditionally, the existence of private brands has been viewed in antitrust analysis as either benign or beneficial to competition and to consumers. In *United States v. Topco Associates, Inc.*, 405 U.S. 596, 599 n.3 (1972), the Supreme Court commented that "[i]t is obvious that by using private-label products, a chain can achieve significant cost economics in purchasing, transportation, warehousing, promotion and advertising." These economies may afford the chain opportunities for offering private-label products at lower prices that other brand-name products. The Court, in part, recognized one aspect of the private label dynamic which, when viewed in the context of a consolidating retail marketplace and the emergence of dominant powerful retailers, is likely to be far from benign. As the Court noted, private label marketing provides the advantages of "enabling a chain to bargain more favorably with national-brand manufacturers . . . ." *Id.*

[149] See Hoch, *supra* note 141, at 89.

[150] *Id.* at 90.

[151] *Id.*

[152] *Id.*

lysts have recognized that the existence of private labels gives retailers "extra bargaining leverage with national brand manufacturers."[153]

The ability of U.S. retailers to utilize private label brands as vehicles to exercise market power over the procurement market, both from their "gatekeeper" and competitor perspective, is actual.[154] This exercise of market power threatens to jeopardize the survival of all but the most prominent brand name manufacturers.[155] The disappearance of less prominent brand-name manufacturers would limit consumer choice and create opportunities to increase consumer costs. The application of the *Kesko/Tuko* analysis concerning retailers exercising market power through their private labels is, accordingly, warranted by the current market dynamics in the United States. This is all the more so, given the recognized possibility that aggressive use of this market power could result in the suppression of the procurement market, with the resulting disappearance of all but the so-called first-tier manufacturers and suppliers and the concomitant implications of these developments for the vertically interconnected consumer market.

Conclusion

In rejecting the proposed merger of the Kesko and Tuko supermarket companies, the EC brought to the forefront issues concerning the dynamic of the modern retail marketplace. Although the decision itself was issued in the context of a proposed merger of the two largest Finnish supermarket operations, the issues identified by the EC were discussed in a broader context—one that transcends market bounda-

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[153] Ryan Mathews, *How Important Are Store Brands?*, PROGRESSIVE GROCER, Nov. 1995, at 79 (noting that retailers are also positioning themselves to, and do, manufacture their own private labels to gain both leverage and incremental manufacturing margins).

[154] *See* Michael J. O'Connor, *Power Shift*, SUPERMARKET BUS., Mar. 1995, at 58 (noting that the growth of private labels has created a "tectonic change" in the relationship between grocery manufacturers and retailers which will likely result in the so-called "second and third brands," the products of small manufacturers disappearing from grocery shelves); Robert Sgarlata, *How Retailers Can Make The Most Of Private Label*, CHAIN DRUG REV., Aug. 16, 1993 (noting that "the large category-dominating retailers are running the show," and that in the "reality of today's retailer-driven marketplace" most suppliers cannot afford to say no to the likes of Wal-Mart and K-Mart).

[155] In *Power Shift*, as in the *Kesko/Tuko* decision, O'Connor recognizes the harsh reality that powerful retailers' exercise of their market power creates the strong possibility that smaller producers without countervailing market power will be eliminated. *See* O'Connor, *supra* note 154, at 61; *see also Green Paper on Vertical Restraints in EC Competition Policy*, *supra* note 5, ¶ 233-35 (noting, *inter alia*, that "products which are not in a number one or two position increasingly run the risk of being de-listed and replaced by large retailers' own brands").

ries. These issues have wide-ranging implications for the manner in which both the European Union and the United States address the emergence of powerful and dominant retailers with the ability to exercise market power at varying levels of the marketplace. The predominant features of emerging powerful retailers' market power include their position as "gatekeepers" to the marketplace with extraordinary leverage over suppliers to the market and their dual status as competitors and customers of these various suppliers in their capacity as private label marketers and, in some instances, manufacturers. The EC recognized that these new functional roles of retailers have changed the dynamic of the marketplace dramatically.

The analysis of supermarket and other retail mergers in the United States, under current antitrust laws and the prevailing guidelines, does not adequately address this emerging dynamic. While the "gatekeeper" role creates significant potential for the exercise of market power over consumers and competitors, interpreting U.S. antitrust laws as protecting the consumer and, secondarily, the competitor, does not suffice to address the emerging "gatekeeper" role of powerful retailers at varying levels of the marketplace. Further, the Acts designed to address the dynamic between the retailer and the supplier, notably the Robinson-Patman and the Clayton Acts, focus primarily on protecting competitors or the exercise of vertical restraints by the supplier on the retailer. A proactive approach to these issues under the FTC Act, Sherman Act and the merger guidelines can serve to remedy or address the potential exercise of undue market power by the large retailers.

The *Kesko/Tuko* decision reflects a new appreciation by European antitrust authorities of the emerging reality of the retail market for consumer goods. U.S. antitrust authorities, however, have overlooked this appreciation outside the recent *Toys-R-Us* decision. This new reality has significance not only for merger analysis, but also for antitrust assessment of the growth of individual retailers. As powerful retailers, large regional supermarkets and ever-emerging mass merchandisers such as Wal-Mart, continue to exercise greater market power over their suppliers and consumers, thereby enhancing their "gatekeeper" function, U.S. antitrust authorities will need to adopt new approaches that are sensitive to the market. The *Kesko/Tuko* decision serves as an analytical paradigm for domestic antitrust authorities to re-evaluate their approach to these matters prospectively. Otherwise, they will be in the position of belatedly trying to remedy the effects of powerful retailers' exercise of market power once their "gatekeeper" functions and private label dominance are further entrenched. Finally, the *Kesko /Tuko* decision should also serve as motivation to assess whether further legislative or regulatory changes are warranted to address the impending retail market dynamic.