

## Blindside Deconcentration: Outsourcing, Power Retailers, and Antitrust

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Who would have guessed that deconcentration of the American economy would take hold not by splitting large vertically integrated companies into smaller integrated companies, but by outsourcing layer atop layer of operations to third parties and by ceding market power to major downstream customers?

Yet that is just what is happening, and the potential implications for antitrust analysis are jarring.

It has been widely reported that a procession of companies in the United States have begun outsourcing substantial segments of their operations, including not only such early castoffs as information technology and food service, but logistics, manufacturing and even product design.<sup>1</sup> The specter of the “hollow company”<sup>2</sup> is not yet ubiquitous in America, but it unmistakably is becoming more common and has been greeted with a mixture of uncertainty and alarm.<sup>3</sup>

At the same time, considerable attention is being paid to the growing influence of large retailers in the country.<sup>4</sup> Before the rise of national brands with nationwide advertising, retailers ranging from the fabled general store to Montgomery Ward wielded substantial sway over consumer purchasing decisions.<sup>5</sup> With the gathering strength of popular nationally-advertised brands throughout the 20th century, retailers lost ground to leading suppliers in the perennial tug-of-war for marketing leadership, with brand names becoming relatively more important. Today, retailers appear to be gaining ground again, with large retailers exercising growing influence over suppliers and creating their own powerful brands.<sup>6</sup>

Both of these phenomena have begun to dilute market power at the supplier level, making the real power of individual suppliers less concentrated than their market shares otherwise might suggest.

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<sup>1</sup> See, e.g., Jonathan D. Glater, *Offshore Services Grow in Lean Times*, N.Y. TIMES, Jan. 3, 2004, at C1; Enrico T. Polastro & Sonia Tulcinsky, *Outsourcing Research and Manufacturing—Toward a Redefinition*, American Pharmaceutical Outsourcing (2002); *Despite Market Maturity, IDC Forecasts Logistics BPO Market to Grow 12% to Reach \$276 Billion by 2007*, PR Newswire (Apr. 21, 2003).

<sup>2</sup> See Joel Popkin and Co., *Securing America’s Future: The Case for a Strong Manufacturing Base* 28 (2003).

<sup>3</sup> See Anne Fisher, *If All the Jobs Are Going to India, Should I Move to Bangalore?*, FORTUNE, Jan. 12, 2004, at 146; see also Claire Moore Dickerson, *Virtual Organizations: From Dominance to Opportunism*, N.Z. J. INDUS. REL. 35–46 (June 1998).

<sup>4</sup> See Steve Lohr, *Questioning the Age of Wal-Mart*, N.Y. TIMES, Dec. 28, 2003, at WK5, col. 4.

<sup>5</sup> JOSEPH C. PALAMOUNTAIN, *POLITICS OF DISTRIBUTION* 54 (1955).

<sup>6</sup> See, e.g., Anthony Bianco & Wendy Zellner, *Is Wal-Mart Too Powerful?*, BUSINESS WK., Oct. 6, 2003, at 100.

### Concentration's Conventional Wisdom

The conventional wisdom has long been that if parts of the economy become too concentrated, deconcentration would be accomplished through the divestiture of stand-alone businesses and the prohibition of mergers of competitors.<sup>7</sup> At the height of the “no fault monopolization” movement, proponents of proactive deconcentration advocated horizontal break ups of integrated companies into side-by-side competitors, much like the AT&T divestiture.<sup>8</sup> More recently, at the remedy phase of the *Microsoft* case, advocates of divestiture insisted on a horizontal break up into multiple integrated companies rather than a vertical break up among different levels of the business.<sup>9</sup> The rationale, in each instance, was that market power could be more effectively dissipated by breaking a dominant firm into several competing integrated firms standing alongside one another, rather than creating a stack of dominant firms, each with the same market power as before at its own level of production or distribution.

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Rarely did anyone champion the notion of breaking up companies by offloading particular layers of functionality or ceding more decision making to retailers as a means of diluting market power.<sup>10</sup> Yet that is precisely what is happening today. Without any prodding from either government investigations, litigation, or bankruptcy proceedings, company after company voluntarily is restructuring its own vertical integration through outsourcing, and redefining its vertical relationships with suppliers and customers—raising the question of how to factor these phenomena into antitrust analysis.

### Outsourcing

Companies never have demonstrated any inclination to initiate deconcentration by spontaneously splitting themselves into competing entities. (Divesting non-core businesses in non-adjacent markets does not count, nor does a break up under pressure, such as AT&T.) However, companies today are rushing to embrace outsourcing as a means of reducing costs, and in the process some may be radically altering their very essence as competitors and their ability to wield the same degree of market power in the future that they did in the past. A “hollowed company” may continue to have the same market share as it did before outsourcing, but does it have the same market power?

<sup>7</sup> *E.g.*, *Standard Oil Co. v. United States*, 221 U.S. 1, 77–78 (1911); *United States v. Am. Tobacco Co.*, 221 U.S. 106, 187–88 (1911); *United States v. AT&T*, 552 F. Supp. 131, 223 (D.D.C. 1982), *aff'd sub nom*, *Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. IBM*, 86 F.R.D. 504, 505 (S.D.N.Y. 1980). See Nat'l Comm'n for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General, 121, 158–59 (1979) [hereinafter No-Fault Monopolization Report]; MARK J. GREEN, *THE CLOSED ENTERPRISE SYSTEM* 292, 294 (1972).

<sup>8</sup> See No-Fault Monopolization Report, *supra* note 7, at 158.

<sup>9</sup> See Plaintiffs' Memorandum in Support of Proposed Final Judgment at 31–35, *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000) (Nos. 98-1232, 1233), available at [http://www.usdoj.gov/atr/cases/ms\\_remediespapers.htm](http://www.usdoj.gov/atr/cases/ms_remediespapers.htm); Remedies Brief of Amici Curiae at 8, 46–56, *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000) (Nos. 98-1232, 1233) (advocating for “full divestiture” of Microsoft into three identical companies), available at <http://aei-brookings.org/admin/pdffiles/brief.pdf>; see also Robert E. Litan & William D. Nordhaus, *Effective Structural Relief in U.S. v. Microsoft* (May 2000), available at <http://www.aei-brookings.org/admin/authorpdfs/page.php?id=165>. For the opinion granting conditional approval to the final consent decree between the government and Microsoft, see *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C. 2002).

<sup>10</sup> There have been exceptions, such as the divestiture of Western Electric by AT&T to create Lucent Technologies. *AT&T*, 552 F. Supp. at 142; see also Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 *Or. L. Rev.* 109, 181–84 (2001). Also, in vertical merger cases, such as *Ford Motor Co. v. United States*, the remedy sought was to require divestiture of an input source (for sparkplugs and other electronics). 405 U.S. 562, 564–65 (1972) [hereinafter *Ford/Autolite*].

In *General Dynamics*<sup>11</sup> the Supreme Court recognized that current market shares teach little about tomorrow's market power where a company's strength is based on advantages that are not sustainable. On the surface, this may appear to have little applicability to the outsourcing phenomenon, because a powerful competitor that cuts costs through outsourcing without diminishing the demand for its products or services is likely to become even more successful. In this respect, the adoption of outsourcing should have no impact on market power analysis.

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However, the "hollowing" of companies through outsourcing may have a profound impact on the ease of entry into particular markets and the influence of potential competition.<sup>12</sup> When an appreciable number of companies turn to independent third parties to supply inputs—from routine laundry service for hotels and customer support for catalogue companies, to complex data processing for banks and the design and manufacturing of brakes for automobile makers—there is a greater likelihood of healthy competition arising within expanding markets for supplying those inputs. Specialized suppliers can often furnish inputs at a lower initial cost than otherwise could be achieved, and a proliferation of such suppliers can make such cost savings widely available. This, in turn, should make it easier for outsiders to engage in *de novo* entry into the original market. Essentially, outsourcing is the polar opposite of a vertical acquisition (barring the emergence of exclusivity restrictions, of course, which can prevent suppliers from contracting with more than one company in the same industry). Therefore, just as vertical acquisitions historically have raised concerns about the deterrence of new entry by forcing newcomers to enter at multiple levels of functionality in order to compete against vertically integrated incumbents,<sup>13</sup> outsourcing should have the opposite effect by allowing newcomers to enjoy cost savings that they would not soon be able to achieve on their own.

For example, if an increasing number of widget makers outsource warranty repair services to third parties on a non-exclusive basis, resulting in a thriving market for widget repair services, it should become easier for a newcomer to enter into the widget-making business because there will be a ready source of warranty repair services available without the need to invest in replicating that part of the business.

Likewise, if there exist an ample number of third parties offering the various layers of inputs needed to put together a widget-manufacturing business itself, potential competition in the widget market would be strengthened even if few other widget makers already were operating. To borrow a term, the "contestability"<sup>14</sup> of the widget market would become greater by the presence of the third-party input suppliers. Of course, the strength of that impact would depend not only on the quality and capacity of those third-party suppliers, but the countervailing importance of such

<sup>11</sup> *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 509 (1974).

<sup>12</sup> This is particularly so in the sense of easing entry by reducing startup costs. Outsourcing would only reduce entry barriers in the longer term in particular circumstances, such as where incumbents continuously could foreclose new entrants from gaining access to the same inputs through other means (such as vertical integration) or where outsourcing provides scale economies that the entrants could not achieve on their own, and where the cost of the outsourced inputs accounts for a substantial share of the cost of the downstream product or service.

<sup>13</sup> See, e.g., *Ford/Autolite*, 405 U.S. at 571; *Brown Shoe Co. v. United States*, 370 U.S. 294, 323–24 (1962) ("The primary vice of a vertical merger . . . is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a 'clog on competition.'" (internal citation omitted)). See also U.S. Dep't of Justice Non-Horizontal Merger Guidelines, 49 Fed. Reg. 26,823, 26,834 (June 14, 1984), available at <http://www.usdoj.gov/atr/public/guidelines/2614.htm>.

<sup>14</sup> For further discussion of "contestable markets," see generally Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. ON REG. 111 (1984); William J. Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, Address Delivered at the Ninety-Fourth Meeting of the American Economic Association (Dec. 29, 1981), in 72 AM. ECON. REV., 1–15 (1982).

factors as reputation and brand loyalty, which can take time to match, and innovation, which cannot necessarily be outsourced. The potential for third-party input suppliers to dilute the market power of incumbent market leaders will vary from market to market, depending on the nature of the product and the relative importance of these various market forces.

*The question will be whether the incumbents really possess as much market power as their current shares might indicate, where readily available outsourcing poses an immediate threat of new competition.*

The Merger Guidelines of the Department of Justice and Federal Trade Commission<sup>15</sup> provide a useful template for examining how the presence of outsourcing should impact the measurement of market power. The Guidelines address the ease of entry of potential competitors, asking whether entry would be “timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.”<sup>16</sup> In making this determination, the Guidelines focus on how long entry would take to achieve, whether entry would be profitable, and whether entry would be sufficient. In examining timeliness, the availability of outsourcing for major components of a new business should make it possible, in many instances, to enter more quickly. In assessing profitability, outsourcing should make initial entry less costly, and therefore potentially more profitable. In analyzing sufficiency, the availability of input suppliers not bound to exclusivity restrictions should open the possibility for multiple entry, bearing in mind the warning in the Guidelines that “[e]ntry may not be sufficient, even though timely and likely, where the constraints on availability of essential assets, due to incumbent control, make it impossible for entry profitably to achieve the necessary level of sales.”<sup>17</sup> In markets in which outsourcing has spawned a cadre of freely available third-party input suppliers, such concerns should be diminished, and it is more likely that entry should be sufficient because it can be achieved more economically than starting from scratch.

It is customary to address concentration and deconcentration in terms of market share, but in a real sense, the more important concept is deconcentration of market power. As the case law and economic literature recognize, market share is only a surrogate for market power,<sup>18</sup> and not always the most accurate indicator.<sup>19</sup> Outsourcing holds the prospect for real tempering of market power even in instances where there is no immediate change in market share, and should be properly accounted for in any modern analysis of market power. This means that in merger analysis, the market power of incumbents may need to be discounted in markets where widespread outsourcing exists, to account for the constraints that outsourcing may place on the ability of the merging parties to raise prices, since new entry will be made easier. Likewise, in monopoly and other cases, the market power of the defendants will need to be evaluated in light of the availability of outsourcing and the likelihood that such availability will give rise to new competitors. In each instance, the question will be whether the incumbents really possess as much market power as their current shares might indicate, where readily available outsourcing poses an immediate threat of new competition.

<sup>15</sup> U.S. Dep’t of Justice and Federal Trade Comm’n, Horizontal Merger Guidelines, 57 Fed. Reg. 41, 552 (1992), available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>.

<sup>16</sup> *Id.* § 3.0.

<sup>17</sup> *Id.*

<sup>18</sup> See generally *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97 (2d Cir. 1998); *Ball Mem’l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1334–35 (7th Cir. 1986); PHILIP AREEDA ET AL., *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRICIPLES AND THEIR APPLICATION* § 531, at 187 (2d ed. 2002).

<sup>19</sup> See, e.g., *General Dynamics*, 415 U.S. at 498; *Tops Markets*, 142 F.3d at 97; *Ball Memorial*, 784 F.2d at 1335.

The bottom line is that the outsourcing phenomenon may not have as direct an impact on the concentration of market power as would an old-fashioned horizontal divestiture but, in particular instances, it may result in genuine dilution of market power.

### Rising Distributor Influence

Deconcentration of market power also can be fostered by the shift of market power from one vertical level of distribution to another. Although there were powerful retailers throughout the 20th century, including Montgomery Ward, Sears, Roebuck, and A&P (which, in antitrust lore, prompted passage of the Robinson-Patman Act almost by itself),<sup>20</sup> most of the focus of antitrust market power analysis was on leading manufacturers, such as Standard Oil, American Tobacco, and Microsoft.<sup>21</sup> While there have been cases involving strong retailers in years past,<sup>22</sup> only recently, in cases like *Staples*,<sup>23</sup> *Toys “R” Us*<sup>24</sup> and *Cardinal Health*,<sup>25</sup> have courts begun to apply a more sophisticated analysis to the market power of large-scale retail chains and other powerful distributors.

The influence of major distributors can take many forms. Large retailers naturally are important customers for manufacturers and, increasingly, have been able to demand that manufacturers assume the expense of such functions as warehousing, inventory control, delivery tracking, and the stocking of shelves and displays (including, in some instances, paying slotting allowances and playing the role of “category captain”<sup>26</sup>). All of these transfers are themselves forms of outsourcing, except that instead of the manufacturer shifting functions to third parties, retailers are shifting functions to the manufacturer. (The manufacturer, in turn, may itself choose to outsource some of these tasks to third parties.)

Manufacturers need to compete against one another in furnishing these services in order to keep their products on the shelves of major retailers, and whatever market power each manufacturer may possess by virtue of its market share and the strength of its brand often will be offset to some extent by the power of the retailer. The retailer’s relative strength, in turn, is a function of its volume of traffic and the loyalty of its customers within each particular category of products. If a retail chain accounts for a sizable percentage of total retail sales in a category, suppliers may have little choice but to meet its demands. As a consequence, whatever power leading brands once may have had to dictate terms to retailers, today such power is subject to being dissipated by the countervailing power of major retail chains.

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<sup>20</sup> See *PALAMOUNTAIN*, *supra* note 5, at 196.

<sup>21</sup> See *Standard Oil*, 221 U.S. at 30–47; *American Tobacco*, 221 U.S. at 155–74; *Microsoft*, 231 F. Supp. 2d at 150–51.

<sup>22</sup> See, e.g., *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 84–85 (1979); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 612 (1972); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212–13 (1959).

<sup>23</sup> *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1092–93 (D.D.C. 1997).

<sup>24</sup> *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 936–37 (7th Cir. 2000).

<sup>25</sup> *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 52–61 (D.D.C. 1998).

<sup>26</sup> Federal Trade Comm’n, *Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry: A Report by Federal Trade Commission Staff* 46–57 (Feb. 2001), available at <http://www.ftc.gov/bc/slotting/index>. See also Federal Trade Commission Staff Study, *Slotting Allowances in the Retail Grocery Industry: Selected Case Studies in Five Product Categories* (Nov. 2003), available at <http://www.ftc.gov/opa/2003/11/slottingallowance.htm>.

<sup>27</sup> For a discussion of the market power inherent in brand control, see Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 *CASE W. RES. L. REV.* 283, 325 (2001) (discussing branding and “brand equity” as potentially the assets most valuable to a company).

Retailers and other distributors also can offset manufacturers' market power by controlling brands themselves.<sup>27</sup> This can take several forms. Traditionally, retailers have carried "private label" or "store" brands, which they source from suppliers of their choosing, including, in some instances, the same suppliers that furnish brand name products. This affords retailers the freedom to replace one manufacturer with another (often in a different country) almost seamlessly, without attracting the ire—or even the attention—of consumers, so long as the same quality is maintained. Retailers and other distributors also generally will have the right to strike exclusive arrangements with valued suppliers, to assure that a trusted supplier will not provide comparable products to any competitor.<sup>28</sup>

The key for the distributor is the ability to control the use of the trademark. Some trademarks have been popularized by retailers, such as Sears' well known "Craftsman" brand. Other widely recognized trademarks have been licensed on an exclusive basis, such as K-Mart's license to use the "Martha Stewart" trademark exclusively for certain products and Target's arrangement with Michael Graves. Some of these brands have become highly popular and have won appreciable consumer loyalty.<sup>29</sup> Perhaps the most celebrated illustration of the importance of control over a trademark was the distribution of a food processor made by a French company, Robot-Coupe. The U.S. distributor owned the trademark, "Cuisinart," and when there was a falling out between the two companies the distributor found another supplier in Asia without missing a beat, while Robot-Coupe was left trying to convince puzzled consumers to continue buying its products.<sup>30</sup> The rest is history.

In short, where the distributor controls the brand—either by creating it or by holding an exclusive license—the distributor can exert considerable control over manufacturers. (In the case of licensed trademarks, the trademark owner too will need to exercise quality control in order to protect the integrity of its mark, of course, but the licensed distributor still will hold considerable sway over the manufacturers that supply it.) Accordingly, whatever market share such nameless manufacturers enjoy cannot be equated with an equivalent degree of market *power*, since they serve entirely at the pleasure of the distributor that controls the brand. Moreover, even manufacturers of name brand products in the same categories will face added pressure since their ability to negotiate with the retailer will be diminished by the retailer's ability to bring comparable products to market under its own trademarks.

Alternatively, retailers can have branded products created for them exclusively. For example, in *Toys "R" Us*, a large retailer was able to prevail upon leading manufacturers of name brand toys to make varieties of their products exclusively for that chain.<sup>31</sup> Although the Federal Trade Commission issued a cease and desist order in that case, which was upheld on appeal, the order specifically preserved the right of the retailer to contract for exclusive product varieties from manufacturers.<sup>32</sup> More recently, retailers of recorded music have struck exclusive deals to distribute particular albums, such as Best Buy's deal with the Rolling Stones and Target's deal with Bon

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<sup>28</sup> See, e.g., *Determined Prods., Inc. v. R. Dakin & Co.*, 514 F. Supp. 645, 648 (N.D. Cal. 1979).

<sup>29</sup> Constance L. Hays, *Kmart Still Has Martha Stewart, But Wal-Mart Has Its Mainstays*, N.Y. TIMES, Dec. 30, 2003, at C1.

<sup>30</sup> See *Cuisinarts, Inc. v. Robot-Coupe Int'l, Corp.*, 509 F. Supp. 1036, 1037–38 (S.D.N.Y. 1981) (detailing the at-odds commercial relationship of the two companies).

<sup>31</sup> 221 F.3d at 931–32.

<sup>32</sup> See *Toys "R" Us, Inc.*, 126 F.T.C. 618, 620 (1998), available at <http://www.ftc.gov/os/1998/10/toysrsinord.htm>.

Jovi.<sup>33</sup> Each of these is an example of a retailer exercising its power to convince a manufacturer to cut a special deal, exposing once again the vulnerability of the manufacturers' market positions in the current retail environment.

The latest source of retailer power is the gift card, which enjoys huge popularity during the Christmas season. Billions of dollars of gift cards go into circulation within a few weeks at the end of the year,<sup>34</sup> and to the extent that those cards are redeemable at only one chain (as many are) they place still greater control over consumers' purchasing decisions in the hands of the retailer.

The one trend potentially running counter to the growing power of retail chains has been the rise of Internet retailing.<sup>35</sup> To the extent that a manufacturer can achieve nationwide market penetration directly through the Internet, without investment in "bricks and mortar," it can compete against the largest chains and temper the power that those chains otherwise would be able to exercise. However, experience is fast teaching that some products are far better suited to e-commerce than others, and in many categories, e-commerce will have little prospect for making an impact. Moreover, a manufacturer that already depends upon traditional retailers may hesitate to compete against them, since those retailers may respond by choosing to drop or de-emphasize that manufacturer's brand in favor of others.<sup>36</sup> Moreover, some of the large chains are themselves already among the most successful e-tailers, and may present the best avenue for capturing Internet sales. For example, such chains as Barnes & Noble and Best Buy make a substantial portion of their sales over the Internet.<sup>37</sup>

Buyer power has been recognized as a countervailing factor in assessing suppliers' market power,<sup>38</sup> but sometimes only grudgingly,<sup>39</sup> and rarely in the context of suppliers and distributors.<sup>40</sup> Nevertheless, to the extent that powerful retailers and other distributors offset the power of man-

<sup>33</sup> Ian Austen, *Big Stores Make Exclusive Deals to Bring in Music Buyers*, N.Y. TIMES, Dec. 29, 2003, at C1.

<sup>34</sup> See Tracie Rozhon, *Results Mixed, Stores Await a Final Burst of Shopping*, N.Y. TIMES, Dec. 26, 2003, at C1 ("gift cards . . . now make up \$17 billion of holiday retail spending").

<sup>35</sup> See generally Federal Trade Commission Public Workshop, *Possible Anticompetitive Efforts to Restrict Competition on the Internet* (Oct. 2002), available at <http://www.ftc.gov/opp/e-commerce/anticompetitive/index.htm>; Richard M. Steuer, *Retailing on the Internet*, ANTITRUST, Summer 1998, at 50–52.

<sup>36</sup> See Ashish Agarwal, *Statutory and Contract Barriers to the Sale of Products Over the Internet* (Nov. 5, 2003) (citing Doug Bartholomew, *E-Commerce Bullies* (Sept. 4, 2000), at industryweek.com, and Robert Atkinson, *The Revenge of the Disintermediated* 14 (Jan. 2001) (report of the Progressive Policy Institute), at <http://www.ppionline.org/documents/disintermediated.pdf>.

<sup>37</sup> See, e.g., *Barnes & Noble Raises Bid on Remainder of Internet Unit*, N.Y. TIMES, Jan. 9, 2004, at C3; *Best Buy Offers MusicNow's Download Service*, N.Y. TIMES, Nov. 11, 2003, at C6.

<sup>38</sup> See, e.g., *FTC v. Tenet Health Care, Corp.*, 186 F.3d 1045, 1052 (8th Cir. 1999); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 986 (D.C. Cir. 1990); *Cardinal Health*, 12 F. Supp. 2d at 58 ("Although the courts have not yet found that power buyers alone enable a defendant to overcome the government's presumption of anti-competitiveness, courts have found that the existence of power buyers can be considered in their evaluation of an anti-trust case, . . ."); *United States v. Country Lake Foods*, 754 F. Supp. 669, 674 (D. Minn. 1990); *B.F. Goodrich Co.*, 110 F.T.C. 207 (1988). These cases should be distinguished from cases addressing the exercise of monopsony power, where a dominant buyer purchases less of a good in order to drive the price down. Note that the presence of power buyers also may constitute a structural factor diminishing the likelihood of collusion among suppliers. See, e.g., *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

<sup>39</sup> See Mary Lou Steptoe, *The Power-Buyer Defense in Merger Cases*, 61 ANTITRUST L.J. 493, 504 (1993) (concluding that speculative evidence of a "power" buyer should not so easily counter government evidence of a merger's probable anticompetitive effect). For a related viewpoint on the problems of excessive buyer power, see Robert Pitofsky, *Thoughts on "Leveling the Playing Field" in Health Care Markets*, Remarks Before the National Health Lawyers Ass'n Twentieth Annual Program on Antitrust in the Health Care Field (Feb. 13, 1997), available at <http://www.ftc.gov/speeches/pitofsky/nhla.htm>.

<sup>40</sup> Some exceptions are *Cardinal Health*, 12 F. Supp. 2d at 61, and *Country Lake Foods*, 754 F. Supp. at 674. See also *United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1990).

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ufacturers, they are, in a real sense, deconcentrating that power—not by increasing the number of suppliers but by increasing the power on the other side of the negotiating table to pit one supplier against another more aggressively. To map the dynamics of any market, it is necessary to understand not only who is inhabiting that market, but who is in control and by how lopsided a margin. Only then can one determine how much market power each participant really possesses. In cases in which a retailer genuinely has the option of switching suppliers or making a product itself, the balance of power may tend to shift toward the retail side, and suppliers may well have less market power than their present shares would suggest. Likewise, where a retailer is strong enough to insist on being furnished with special products, or where a retailer has access to legions of club members or gift card holders, these are signs that the market power of suppliers may need to be discounted to take this into account. The key to measuring market power in each instance is to recognize the changing dynamics of the relationships between manufacturers, wholesalers and retailers, and determine where the real power lies.

### **Conclusion**

Antitrust's conventional wisdom may have been blindsided by the emergence of outsourcing and power retailers, but the principles of antitrust analysis are up to the job of accounting for them. Although horizontal factors, such as market share and unilateral effects, have become central to understanding the basis of market power, today's vertical factors, such as the availability of outsourcing and the emergence of retailer power, now demand consideration as well. This means that we need a new way of looking at concentration—one that accounts for the limits that these new realities impose on the exercise of market power. The good news is that the guiding principles for assessing the impact of these vertical factors are familiar ones—that market share is not necessarily the same as market power, and that the market power of yesterday is not necessarily the same as the market power of tomorrow. With these principles in mind, factoring the impact of outsourcing and power retailers into market power analysis should be a piece of cake. ●