

FTC Accepts Remedy on Novel Future Markets Theory in Deal Between Media Ratings Monoliths, *in* ABA Section of Antitrust Law

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Daniel Fundakowski, an Associate in the Health Care and Life Sciences practice, in the Washington, DC, office, wrote an article titled "FTC Accepts Remedy on Novel Future Markets Theory in Deal Between Media Ratings Monoliths."

Following is an excerpt:

On September 20, 2013, the Federal Trade Commission ("FTC") accepted a remedy to settle charges alleging anticompetitive conduct in a market that does not yet exist. ?...

The FTC alleged that the proposed acquisition would harm competition in the product market of "national syndicated cross-platform audience measurement services. ?...

The majority in the consent order indicated that Nielsen and Arbitron are the best-positioned firms to eventually develop a national syndicated cross-platform audience measurement service. This is largely due to one key factor—the companies are the only firms that operate the expansive audience panels

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required for gathering the granular and demographically-representative audience data that media companies demand (subordinate companies are merely able to provide estimates of the same). Because the two companies control a key, and tremendously expensive, input in the audience panels that a prospective competitor would need to enter the market, the FTC required that Nielsen divest certain assets and technology to replace the competition that would be lost between the two firms if the technology ever became commercially available. ?...

While this article does not opine on the merits or legitimacy of the remedy imposed, the Nielsen consent order should be read to remove any doubt that the Commission will hesitate to interdict perceived anticompetitive acquisitions—even to a considerable degree of incipency. Notwithstanding the fact that the consent order will likely have an inconsequential effect on Nielsen business decisions, Commissioner Wright's comments on policy and posterity of consent orders cannot be understated. The fact that a firm is willing to acquiesce to a consent order, even if due to aversion to litigation and a desire to expedite a transaction, will still cause rippling effects and steer behavior for those interpreting the guidance and counseling clients on antitrust risk and clearance.