Dissenting Statement of Commissioner Joshua D. Wright
In the Matter of Nielsen Holdings N.V. and Arbitron Inc.

FTC File No. 131-0058

September 20, 2013

The Commission has voted to issue a Complaint and Decision & Order ("Order") against Nielsen Holdings N.V. ("Nielsen") to remedy the allegedly anticompetitive effects of Nielsen's proposed acquisition of Arbitron Inc. ("Arbitron"). I dissented from the Commission's decision because the evidence is insufficient to provide reason to believe Nielsen's acquisition will substantially lessen competition in the future market for national syndicated cross-platform audience measurement services in violation of Section 7 of the Clayton Act. I want to commend staff for conducting a thorough investigation. Staff has worked diligently to collect and analyze a substantial quantity of documentary and testimonial evidence, and has provided thoughtful analysis of the transaction's potential effects. Based upon this evidence and analysis, I conclude there is no reason to believe the transaction violates Section 7 of the Clayton Act.[1] It follows, in my view, that the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

I. Predicting Competitive Effects in Future Markets

Nielsen and Arbitron do not currently compete in the sale of national syndicated cross-platform audience measurement services. In fact, there is no commercially available national syndicated cross-platform audience measurement service today.[2] The Commission thus challenges the proposed transaction based upon what must be acknowledged as a novel theory—that is, that the merger will substantially lessen competition in a market that does not today exist. The Commission asserts that, in the absence of the merger, Nielsen and Arbitron would invest heavily in the development of national syndicated cross-platform audience measurement services, and that the products ultimately yielded by those efforts would compete directly against one another to the benefit of consumers. The Commission therefore has required Nielsen to license Arbitron's television audience measurement service to a third party in hopes of

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[1] 15 U.S.C. § 21(b) (2006) ("Whenever the Commission . . . vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect . . . .").

[2] Complaint ¶ 10, Nielsen Holdings N.V., FTC File No. 131-0058 (Sept. 20, 2013).

allowing the third party to one day offer national syndicated cross-platform measurement services in competition with Nielsen.

A future market case, such as the one alleged by the Commission today, presents a number of unique challenges not confronted in a typical merger review or even in "actual potential competition" cases. For instance, it is inherently more difficult in future market cases to define properly the relevant product market, to identify likely buyers and sellers, to estimate cross-elasticities of demand or understand on a more qualitative level potential product substitutability, and to ascertain the set of potential entrants and their likely incentives.[3] Although all merger review necessarily is forward looking, it is an exceedingly difficult task to predict the competitive effects of a transaction where there is insufficient evidence to reliably answer these basic questions upon which proper merger analysis is based.[4] Without these critical inputs, our current economic toolkit provides little basis from which to answer accurately the question of whether a merger implicating a future market will result in a substantial lessening of competition.

The Commission of course already routinely engages in predictive merger analysis that seeks to compare present competitive activities to future market conditions.[5] For instance, the Horizontal Merger Guidelines ("Merger Guidelines") call

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[3] Somewhere between typical merger cases and future market cases are "actual potential competition" cases. Competitive effects in such cases typically are less difficult to predict than in future market cases because the Commission at least can identify the relevant product market and interview current buyers and sellers. Nevertheless, competitive effects in actual potential competition cases still are more difficult, on balance, to assess than typical merger cases because the agency must predict whether a party is likely to enter the relevant market absent the merger. It is because of this uncertainty and the potential for conjecture that the courts and agencies have cabined the actual potential competition doctrine by, for instance, applying a heightened standard of proof for showing a firm likely would enter the market absent the merger. *See e.g.*, B.A.T. Indus., 104 F.T.C. 852, 926-28 (1984) (applying a "clear proof" standard). The Majority asserts the parties are actual potential entrants under the relevant legal standard. I have not seen evidence sufficient to support the assertion that the parties satisfy even the least stringent standard for evaluating actual potential competition in the alleged national syndicated cross-platform audience measurement services market. The absence of such evidence is unsurprising because, as discussed below, that market does not exist today.

[4] *See* Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and The Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1, 15-17 (2012) (describing some difficulties associated with further incorporating dynamic analysis into merger review).

[5] *See id.* at 8-10 (identifying areas in the merger context where the antitrust agencies have been able to predict confidently effects on future competition).

upon the antitrust agencies to take into account efficiencies claimed by the parties, the likelihood of successful entry, and the possibility of a failing firm defense.[6] Significantly, however, each of these predictions about the evolution of a market is based upon a fact-intensive analysis rather than relying upon a general presumption that economic theory teaches that an increase in market concentration implies a reduced incentive to invest in innovation.[7] For example, when parties seek to show that a proposed transaction has efficiencies that mitigate the anticompetitive concerns, they must provide the agencies with clear evidence showing that the claimed efficiencies are cognizable, merger-specific, and verifiable.[8] Similarly, when assessing whether future entry would counteract a proposed transaction's competitive concerns, the agencies evaluate a number of facts—such as the history of entry in the relevant market and the costs a future entrant would need to incur to be able to compete effectively—to determine whether entry is "timely, likely, and sufficient."[9] Likewise, to prove a failing firm defense successfully, the parties must show several specific facts, such as an inability to meet financial obligations in the near future or to reorganize in bankruptcy, to allow the agencies to predict that the firm would fail absent the merger.[10]

I believe the Commission is at its best when it relies upon such fact-intensive analysis, guided by well-established and empirically grounded economic theory, to predict the competitive effects of a proposed merger.[11] When the Commission's antitrust analysis comes unmoored from such fact-based inquiry, tethered tightly to robust economic theory, there is a more significant risk that non-economic considerations, intuition, and policy preferences influence the outcome of cases.

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[6] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §§ 9-11 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html [hereinafter 2010 MERGER GUIDELINES].

[7] The link between market structure and incentives to innovate remains inconclusive. *See, e.g.*, Ginsburg & Wright, *supra* note 4, at 4-5 ("To this day, the complex relationship between static product market competition and the incentive to innovate is not well understood."); Richard J. Gilbert, *Competition and Innovation*, *in* 1 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 577, 583 (W. Dale Collins ed., 2008) ("[E]conomic theory does not provide unambiguous support either for the view that market power generally threatens innovation by lowering the return to innovative efforts nor the Schumpeterian view that concentrated markets generally promote innovation.").

[8] 2010 MERGER GUIDELINES, *supra* note 6, at § 10.

[9] *Id.* at § 9.

[10] *Id.* at § 11.

[11] *See generally* Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Evidence-Based Antitrust Enforcement in the Technology Sector (Feb. 23, 2013), Remarks at the Competition Law Center *available at* http://www.ftc.gov/speeches/wright/130223chinaevidence.pdf.

Consequently, in merger cases where only limited or ambiguous evidence exists upon which to base our predictive conclusions, I believe the Commission will be best served by acknowledging these institutional limitations rather than challenging the transaction. Although future market cases may warrant investigation under certain circumstances, the inherent difficulties associated with analyzing the competitive effects of a transaction where the market does not yet exist, and the present inability of economic theory and evidence to support confident and reliable prediction, each suggest such cases typically will not warrant an enforcement action.

II. The Evidence Does Not Provide a Reason to Believe the Transaction Will Result in a Substantial Lessening of Competition in the National Syndicated Cross-Platform Audience Measurement Market

At the outset, it is important to recognize that our task is not simply to assess whether Nielsen and Arbitron are the firms best positioned today to develop national syndicated cross-platform audience measurement services. They very well may be when compared to other options available today. However, our task is decidedly different and requires us to evaluate instead whether the merger will result in a substantial lessening of competition in a relevant product market. I have not been presented evidence sufficient to provide a reason to believe the proposed merger will substantially reduce future competition in the sale of national syndicated cross-platform audience measurement services. My decision is based primarily upon the absence of answers to key questions that are necessary to draw reliable conclusions about the merger's likely competitive effects.

For example, we do not know whether each of the parties could and would develop a cross-platform product for the relevant market (however defined) absent the merger. For instance, if syndication ultimately is required for a successful cross-platform service, we do not know whether this is something both parties could offer. Furthermore, if the parties were to develop cross-platform products, we do not know the ultimate attributes of these products and whether, and to what extent, they would be substitutable by consumers. For example, we do not know if the parties would offer daily ratings or monthly ratings, and whether consumers would consider monthly and daily ratings to be complements or substitutes. Finally, we also do not know how the market will evolve, what other potential competitors might exist, and whether and to what extent these competitors might impose competitive constraints upon the parties.

Further, because cross-platform products are at best at the nascent stages of development, it is difficult even to define the relevant product market.[12] Indeed, the investigation has uncovered that "cross-platform services" means very different things to different industry participants. As with likely competitive effects from the transaction, there are also a number of questions we simply cannot reliably answer at this time with respect to defining the future market in which the competitive effects will allegedly occur. For example, across how many platforms must the product provide audience measurement in order to be competitive? Does the product need to be syndicated or do cross-platform products impose competitive constraints upon one another irrespective of syndication? Does the product truly need to be national and to what extent? Will customers require Nielsen's "currency" measurement to be a component or will something less suffice? Will radio audience measurement be a necessary component for a cross-platform audience measurement service to be successful? Depending upon the answers to these questions, the proper relevant product market unsurprisingly may be defined quite differently than it is defined in the Commission's Complaint.

It is true that the same concerns arising from predicting future anticompetitive effects also provide a challenge to predicting any cognizable efficiencies arising from the transaction. However, even assuming away the uncertainty discussed above, the evidence suggests that any anticompetitive effects arising from the transaction would be relatively small. One reason for this is that the alleged relevant market would constitute a small fraction of the value of the overall deal. Indeed, there is no reason to believe the prospect of supracompetitive profits in the national syndicated cross-platform audience measurement services market motivated the transaction. A substantial fraction of the potentially cognizable efficiencies from the transaction arise in markets that already exist—that is, outside the alleged relevant market. While out-of-market efficiencies are generally discounted by the agencies, the Merger Guidelines' analysis rejects the view that form should trump substance when assessing competitive effects. Indeed, the Merger Guidelines suggest that the Commission will consider out-of-market efficiencies when they are "inextricably linked" with the transaction as a whole and are likely to be large relative to any likely anticompetitive effects.[13] This appears to be precisely such a case. To be clear, I do not base my disagreement with the Commission today on the possibility that the potential efficiencies arising from the

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[12] Although the Merger Guidelines provide that the agencies need not begin their merger analysis by defining the relevant product market—that is to say, defining the relevant product market before assessing effects, the Merger Guidelines do not dispense with market definition because it is important to understanding where those effects ultimately might occur.

[13] 2010 MERGER GUIDELINES, *supra* note 6, § 10 n. 14.

transaction would offset any anticompetitive effect. As discussed above, I find no reason to believe the transaction is likely to substantially lessen competition because the evidence does not support the conclusion that it is likely to generate anticompetitive effects in the alleged relevant market.

For these reasons, I dissent from the Commission's conclusion that there is reason to believe the proposed transaction will substantially lessen competition in the alleged relevant market.

III. Ensuring Consent Agreements are in the Public Interest

Nielsen and Arbitron have agreed to certain concessions in a Consent Agreement with the Commission despite the lack of evidence supporting the conclusion that the proposed transaction will result in a substantial lessening of competition in the market for national syndicated cross-platform audience measurement services. Some may conclude that there can be no harm in the Commission entering into a consent agreement and issuing a Complaint and Order imposing a remedy with sophisticated and willing parties. That of course need not be true. Nor does that view logically follow from the Commission's mission to prevent anticompetitive conduct and to promote consumer welfare.

Whether parties to a transaction are willing to enter into a consent agreement will often have little to do with whether the agreed upon remedy actually promotes consumer welfare. The Commission's ability to obtain concessions instead reflects the weighing by the parties of the private costs and private benefits of delaying the transaction and potentially litigating the merger against the private costs and private benefits of acquiescing to the proposed terms.[14] Indeed, one can imagine that where, as here, the alleged relevant product market is small relative to the overall deal size, the parties would be happy to agree to concessions that cost very little and finally permit the deal to close. Put simply, where there is no reason to believe a transaction violates the antitrust laws, a sincerely held view that a consent decree will improve upon the post-merger competitive outcome or have other beneficial effects does not justify imposing those conditions. Instead, entering into such agreements subtly, and in my view harmfully, shifts the Commission's mission from that of antitrust enforcer to a much broader mandate of "fixing" a variety of perceived economic welfare-reducing arrangements.

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[14] *See* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, *in* 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE – LIBER AMICORUM 177, 179-80 (2012).

Consents can and do play an important and productive role in the Commission's competition enforcement mission. Consents can efficiently address competitive concerns arising from a merger by allowing the Commission to reach a resolution more quickly and at less expense than would be possible through litigation. However, consents potentially also can have a detrimental impact upon consumers. The Commission's consents serve as important guidance and inform practitioners and the business community about how the agency is likely to view and remedy certain mergers.[15] Where the Commission has endorsed by way of consent a willingness to challenge transactions where it might not be able to meet its burden of proving harm to competition, and which therefore at best are competitively innocuous, the Commission's actions may alter private parties' behavior in a manner that does not enhance consumer welfare.[16] Because there is no judicial approval of Commission settlements, it is especially important that the Commission take care to ensure its consents are in the public interest.[17]

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[15] *See, e.g.*, Deborah L. Feinstein, Bureau of Competition Dir., Fed. Trade Comm'n, The Significance of Consent Orders in the Federal Trade Commission's Competition Enforcement Efforts, Remarks at GCR Live, 4-5 (Sept. 17, 2013), *available at* http://www.ftc.gov/speeches/dfeinstein/130917gcrspeech.pdf.

[16] *See* Ginsburg & Wright, *supra* note 14, at 179.

[17] 15 U.S.C. § 45(b) (2006); *see also* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Consent Decrees: Is the Public Getting Its Money's Worth (Apr. 7, 2011), Remarks at the XVIIIth St. Gallen International Competition Law Forum, *available at* http://www.ftc.gov/speeches/rosch/110407roschconsentdecrees.pdf (stating that "we at the Commission are responsible for conducting our own public interest inquiry before accepting proposed consent decrees, and this inquiry operates as a check on the 'wide discretion' that we otherwise wield to combat methods, acts and practices that violate the antitrust and consumer protection laws").