DraftKings/FanDuel: Adventures in Challenging a Merger Using an Effects-Driven Approach

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The U.S. Supreme Court has long held that defining “the relevant market is a necessary predicate to a finding of a violation of [Section 7 of] the Clayton Act . . . .”1 Controlling Supreme Court precedent also dictates that, once product and geographic markets are defined, mergers are presumptively illegal if they (1) create a combined company with undue market share and (2) result in a significant increase in market concentration.2 Not surprisingly, when a proposed merger meets these criteria, the U.S. Federal Trade Commission3 (FTC or Commission) typically includes that argument in the complaint.4 Nevertheless, defendants in several recent merger challenges have criticized the Commission for allegedly relying solely or primarily on the structural presumption of illegality and what those defendants viewed as “artificially defined” relevant markets.5 Antitrust scholars have also questioned the assumed relationship between high market shares and reductions in consumer welfare underlying the presumption.6

Alleging that a merger meets the structural presumption does not mean that the Commission relied solely—or even predominantly—on the presumption when deciding whether to challenge the merger.7 To the contrary, the complaints filed in recent merger challenges reflect an approach that emphasizes competitive effects, while also defining relevant markets and stating whether the proposed merger meets the structural presumption of illegality.8


3 The FTC and the Antitrust Division of the U.S. Department of Justice (DOJ) share jurisdiction over the review of mergers.

4 See Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance, 80 ANTITRUST L.J. 201, 210 (2015) (“If the FTC, the Antitrust Division, or the occasional private plaintiff can define the relevant market and show that the market shares of the firms proposing to merge [meet the relevant criteria], then it would be folly for the plaintiff not to base its primary argument upon the [structural] presumption.”).


7 Sections 6 and 7 of their Merger Guidelines indicate that the FTC and DOJ contemplate an analysis of competitive effects beyond any structural presumption that a merger may meet. See U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines §§ 6, 7 (2010) [hereinafter Merger Guidelines].

The Commission’s complaint challenging the merger of DraftKings and FanDuel, two providers of daily fantasy sports (DFS) contests, provides a good example of a case that may appear superficially to rely on the structural presumption but reflects an effects-driven approach to merger analysis. Although the proposed merger clearly satisfied the conditions necessary to meet the presumption of illegality, the investigation and complaint focused on the anticompetitive effects that the proposed merger would have caused and, in particular, the elimination of the intense and pervasive head-to-head competition between the merging parties.

Nevertheless, the merging parties criticized the Commission for defining the relevant product market too narrowly and relying on the structural presumption when deciding to block the proposed merger. For example, in their answers to the federal court complaint, DraftKings and FanDuel claimed:

"The underlying premises of the Complaint . . . reflect an unnecessarily rigid and uninformed application of the antitrust laws to an underdeveloped, nascent industry, and largely ignore rigorous economic analysis . . . . Plaintiffs' challenge to the proposed transaction is not rooted in what has long been emphasized by the Horizontal Merger Guidelines, which is that the antitrust analysis of any given transaction should favor economic analysis of likely competitive effects and harm over simple market structure wherever possible." 10

Joshua Wright, a former FTC Commissioner whose law firm represented FanDuel, also criticized his former agency, arguing on Twitter that the Commission defined the market "too narrowly" because there were "important constraints outside DFS," which he viewed as "a good example of 1960s structural shortcuts suppressing economics." In Professor Wright’s view, "shouting ‘2 to 1’ in DFS is a poor substitute for economic analysis." Despite this criticism, DraftKings and FanDuel abandoned the transaction about one month after the Commission voted to block the merger and before the district court had ruled on the FTC’s motion for a preliminary injunction.

While there may be a tension between what the relevant statutes and case law require (i.e., market definition) and the effects-focused Merger Guidelines, that tension does not necessarily lead to different enforcement outcomes. Quite the opposite. As evidenced by the DraftKings/FanDuel investigation and litigation, market definition is just one factor in the Commission’s decisions of whether to challenge mergers—the focus is on competitive effects.

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11 https://twitter.com/ProfWrightGMU/status/883466511939117056.

12 https://twitter.com/ProfWrightGMU/status/883445608220049409; see also Joshua D. Wright, Whither Conservative Merger Policy?, N A T ’ L R E V. (Jan. 24, 2018), http://www.nationalreview.com/article/455728/donald-trumps-antitrust-enforcement-conservative-merger-policy (“The FTC’s decision to block the DraftKings/FanDuel merger is heavily reminiscent of an Obama-era trend that too often prioritized adventurous theories over economically sound ones.”).

13 https://twitter.com/ProfWrightGMU/status/883466511939117056.

14 DraftKings and FanDuel announced that they had agreed to merge in November 2016. The Commission’s investigation culminated in the filing of a complaint in June 2017. The merging parties announced that they had abandoned the transaction in July 2017.
Competitive Effects Alleged by the Commission in DraftKings/FanDuel

In a unilateral effects case, the key issue is the closeness of competition between the merging parties. As explained in the complaint, DraftKings and FanDuel were not only the two largest DFS providers (by far), they were each other’s closest competitor. They competed across a variety of price and non-price dimensions, and the competition between them benefited customers. The merger would have enhanced market power by eliminating competition and its benefits. The qualitative evidence described in the public version of the complaint and summarized below, some of which the merging parties contested, was corroborated by robust economic analysis.

DraftKings’ CEO believed that “[t]here is only one competitor of consequence—FanDuel” and FanDuel, likewise, viewed DraftKings as its “most significant competitor.” The competition between the merging parties was so intense that DraftKings’ senior executives described the “usual” form of competition with FanDuel as fighting tooth and nail to attract customers—to “smash them,” to put a “foot on [FanDuel’s] throat and press down hard,” and not to “let up until they stop breathing.”

This heated head-to-head competition spanned both price and non-price dimensions. On price, the merging parties were each other’s primary constraint. The commission rate (i.e., the portion of entry fees that a DFS provider keeps for itself) is essentially the “list price” a DFS provider charges the user for entering a contest. The actual price paid by DFS users is largely a function of the commission rate and any discounts or acquisition, referral, and retention bonuses given by DFS providers.

DraftKings and FanDuel benchmarked their prices against each other to make sure that they did not set their commission rates higher than the other’s rates. They each feared that comparatively higher rates would drive users (particularly professional users) to shift their business to the other party. At the same time, however, DraftKings and FanDuel set their commission rates so that they were in parity with the other’s rates. Neither party engaged in similar conduct with respect to other DFS providers. In fact, the merging parties did not even track the commission
rates of other DFS providers with any consistency.28 DraftKings and FanDuel also sought to match or beat each other’s acquisition, referral, and retention bonuses.29 This head-to-head competition on all aspects of price led to lower prices than would otherwise have prevailed, which directly benefited customers of DraftKings and FanDuel.30

Non-price competition between the merging parties was also intense and ubiquitous. One of the most important components of non-price competition among DFS providers is predetermined contest size (i.e., how much prize money is at stake).31 From the users’ perspective, larger contests are typically more attractive (all else being equal); however, it is riskier for DFS providers to offer larger contests. This is because many DFS contests are “guaranteed,” meaning they will occur regardless of whether the contest fills. As a result, even if a contest does not attract the maximum number of entries, the DFS provider still must pay the prize pool to the contest’s winners. In some situations, total entry fees can be less than the total prize pool, resulting in the provider running the contest at a loss. Thus, DFS users benefit from larger contests because (1) the amount of money they could win is larger and (2) the contest has the potential not to fill, which would reduce the effective commission rate for all entries into that contest and give each lineup a better chance of winning. Larger contests are riskier for DFS providers for the same reason: they are more likely not to fill, which reduces providers’ revenue and may result in offering contests that lose them money. DraftKings and FanDuel competed aggressively to offer the largest contests and frequently matched or exceeded the size of each other’s contests.32 This rivalry led both DraftKings and FanDuel to take on the risk of offering increasingly large contests.33 This is quintessential quality competition.

Other areas of non-price competition between DraftKings and FanDuel included the development of new products and features, including the number of sports in which they offered contests.34 This innovation derived directly from head-to-head competition between the parties.35 As with price competition, DraftKings and FanDuel monitored each other’s product features and used the results to determine which features they lacked and to prioritize their product development efforts.36 In response to each other’s changes in product features or sports offerings, DraftKings and FanDuel frequently improved their own product features or expanded their sports offerings.37 In one instance, DraftKings’ CEO told his product development team that DraftKings should “outright steal [a FanDuel product feature] but let’s give it our own name!”38

28 Id. ¶ 70.
29 Id. ¶ 73.
30 Id. ¶¶ 73–75.
31 For most DFS contests, users pay an entry fee. The majority of those entry fees go towards a prize pool paid out to the contest winners. DFS providers generate revenue by retaining a portion of the entry fees as their commission.
32 Public Complaint, supra note 9, ¶¶ 78–80.
33 Id.
34 See id. ¶¶ 82–87.
35 See id.
36 Id. ¶¶ 83–84.
37 Id. ¶¶ 83, 87.
38 Id. ¶ 87.
FanDuel introduced new sports to keep pace with DraftKings’ offerings and to retain users’ entry fee volume.  

Innovation and non-price competition between DraftKings and FanDuel has continued since they abandoned the merger. For example, in October 2017, DraftKings entered a partnership to integrate live and on-demand audio on its platform; a move that FanDuel made in May 2017. Non-price competition persisted throughout the investigation as well, including FanDuel’s introduction of golf DFS contests to compete directly with DraftKings’s golf offering in March 2017. Similarly, FanDuel began offering WNBA DFS contests in May 2017, and DraftKings followed shortly thereafter in July 2017.

This evidence of intense and pervasive head-to-head competition was consistent with the Commission’s economic analysis showing that the merger was likely to enhance market power by eliminating competition. The ordinary course evidence, investigatory testimony, and data analysis all pointed in the same direction: the proposed merger would be bad for consumers.

Daily Fantasy Sports as a Relevant Product Market

Supreme Court precedent and the Merger Guidelines both continue to include market definition as a key aspect of any Section 7 case. In addition to pleading the strong evidence that a merger between DraftKings and FanDuel would have anticompetitive effects, the Commission also defined a relevant product market. The substantial evidence of head-to-head competition and the parties’ almost singular focus on each other suggested that DFS was the appropriate relevant product market, and the Commission’s close analysis of the products at issue corroborated that conclusion.

The merging parties competed primarily against other DFS providers (mostly each other). There was scant evidence of competition against any non-DFS products, including season-long fantasy sports. Indeed, the evidence showed that DraftKings and FanDuel focused their competitive energies almost exclusively on each other, which strongly suggested a DFS-only product market. In addition, statements like DraftKings’ CEO’s assertion that “[t]here is only one com-

39 Id.


42 A relevant product market does not necessarily include all potential substitute products. As expressed in the Merger Guidelines and the case law, a relevant product market is the smallest set of products over which a hypothetical monopolist could impose a small but significant non-transitory price increase. See, e.g., Merger Guidelines, supra note 7, § 4.1.1 (“Groups of products may satisfy the hypothetical monopolist test without including the full range of substitutes from which customers choose. The hypothetical monopolist test may identify a group of products as a relevant market even if customers would substitute significantly to products outside that group in response to a price increase.”); United States v. H&R Block, Inc., 883 F. Supp. 2d 36, 54 (D.D.C. 2011) (“[W]hile providers of all tax preparation methods may compete at some level, this ‘does not necessarily require that [they] be included in the relevant product market for antitrust purposes.’”) (quoting FTC v. Staples, Inc., 970 F. Supp. 1066, 1075 (D.D.C. 1997)). Nevertheless, in this instance, the evidence indicated little competition between DFS and other entertainment options.

43 “Evidence of competitive effects can inform market definition . . . .” Merger Guidelines, supra note 7, § 4.
petitor of consequence—FanDuel” are inconsistent with any claim that the market was broader than DFS. If there were “importan[t] constraints outside DFS,” neither DraftKings nor FanDuel was concerned about them in the ordinary course of business. As if to confirm the Commission’s view of the market, after the parties abandoned the merger, DraftKings’ Chief Marketing Officer stated that “DraftKings has led the way in innovation and breakthrough ideas creating the game inside the game that only daily fantasy sports can provide.” These and similar statements, in addition to a mountain of ordinary course evidence from the merging parties and third parties, indicated that the industry viewed DFS as a distinct market.

In addition to the competitive dynamics between the parties, the Commission identified abundant evidence that DFS was distinct from other products, most notably season-long fantasy sports. The most important qualitative differences were the draft structure and the duration of DFS contests; other differences were derivative of those two unique qualities. For example, using a salary cap draft (rather than the snake or auction drafts used in season-long) allowed DFS contests to be exponentially larger in terms of both the number of users who could enter (because any user could draft any athlete) and, relatedly, the total amount of money at stake (more users in a given contest meant larger payouts, all else being equal). Similarly, running DFS contests on a daily or weekly basis permitted users to enter a contest on almost any day of the year rather than waiting an entire sports season (i.e., six months or more) to find out the results of a contest.

These functional differences also drove—and were reflective of—users’ motivations for playing. For example, the structure of DFS gave users the opportunity to win life-changing amounts of money in a way that season-long did not. In fact, for some users, DFS was a profession—a phenomenon not seen in season-long fantasy sports, which users typically play for social reasons. DFS also offered instant gratification to users who may otherwise have to wait until the end of a sport’s regular season to find out who won a contest.

Of course, the existence of other forms of sports-related entertainment, including season-long fantasy sports, may theoretically constrain DFS pricing at some level. The key question for market definition, however, was whether season-long and other potential alternatives were sufficiently close substitutes for DFS to constrain a small, but significant, increase in DFS pricing after the pro-

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45 Public Complaint, supra note 9, ¶ 60.
47 See Public Complaint, supra note 9, ¶¶ 45, 48.
49 In a snake draft, the order of selection reverses in each round (i.e., the user who picks first in round one picks last in round two and the user who picks last in round one picks first in round two). In an auction draft, users have a predetermined fictional budget that they use to bid on players until they fill their rosters.
50 DFS contests frequently had thousands or tens of thousands of entries, while the limit of entries into season-long contests was usually no more than 10 to 20, depending on the sport.
51 See Public Complaint, supra note 9, ¶¶ 20, 31, 42.
52 Cf. H&R Block, 833 F. Supp. 2d at 57 (noting that most taxpayers would switch to pen-and-paper if the price of digital-do-it-yourself and assisted products were raised to $1 million per tax return); United States v. Aluminum Co. of Am., 148 F.2d 416, 426 (2d Cir. 1945) (Even a monopolist must moderate its exertion of pricing power).
posed merger. The answer was no. Season-long fantasy sports were not a meaningful substitute for DFS. This conclusion was driven, in part, by the very economic analysis that the Commission supposedly "ignore[d]" or "suppress[ed]." For example, historical price increases showed that, at least in the past, a DFS product market satisfied the hypothetical monopolist test. In 2015 and 2016, DraftKings and FanDuel each raised their commission rates, but DFS users did not respond by substituting away from DFS to season-long fantasy sports (or to any other activity) in substantial numbers. In fact, neither DraftKings nor FanDuel observed a meaningful decrease in demand and, as a result, each saw increased revenue.

Within a DFS product market, DraftKings and FanDuel were the two dominant competitors. DraftKings and FanDuel admitted as much, describing the market as a "duopoly." According to DraftKings' CEO, "As everyone knows, the vast bulk of the industry is DraftKings and FanDuel." In the ordinary course of business, DraftKings and FanDuel estimated that together they controlled at least 90 percent of DFS entry fees. Regardless of how that 90 percent broke down between the parties, the post-merger DFS market would be highly concentrated (with an HHI of at least 8,100) and it was clear that the change in HHI would well exceed 200 points. As a result, the DraftKings/FanDuel merger was presumptively illegal under the Merger Guidelines and the relevant case law. This evidence corroborated, but did not replace, a rigorous analysis of the competitive effects of the proposed merger. As the Merger Guidelines dictate, market structure is only a starting point, and it does not answer the key question of closeness of competition. The investigative record, however, left little doubt: DraftKings and FanDuel were, far and away, each other's most significant competitor.

**Conclusion**

The Commission’s investigation of the DraftKings/FanDuel merger exemplified the effects-focused nature of the Merger Guidelines. Consistent with the case law on Section 7 violations, the complaint alleged a relevant product market. It would be a mistake to presume that the structure of a complaint necessarily reflects the Commission's decision-making process. A complaint is a litigation document; its fundamental purpose is to frame the evidence and arguments in accordance with the controlling case law. As here, the Commission’s investigations follow the framework of the

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54 *See Public Complaint, supra note 9, ¶ 48.*

55 *Id.*

56 *Id.*

57 *See id. ¶ 3; *see also* Affidavit of Gregory B. Karamits, Vice President of Analytics, DraftKings ¶ 5 (Nov. 23, 2015), filed in *People v. DraftKings, Inc.*, No. 453054/2015, Doc. No. 102 (N.Y. Sup. Ct. Nov. 24, 2015) (testifying that DraftKings and FanDuel were the “[c]urrent market leaders” in DFS).


59 *See Public Complaint, supra note 9, ¶ 55 (citing the parties’ ordinary course business documents showing that DraftKings and FanDuel estimated that they controlled between 93–95% of the DFS market); COM-000000197, Bain & Co., *Falcon Interim Update-49* (Mar. 2, 2015), filed in *People v. DraftKings, Inc.*, No. 453054/2015, Doc. No. 84 (N.Y. Sup. Ct. Nov. 23, 2015) (providing an estimate from a consulting firm hired by FanDuel that “[FanDuel] and Draft Kings [sic] have ~96% market share”).

60 *See Public Complaint, supra note 9, ¶ 56.*

61 *See id. ¶¶ 57–58; Merger Guidelines, supra note 7, § 5.3; Philadelphia National Bank, 374 U.S. at 363.*
2010 Merger Guidelines, which emphasize that “[t]he Agencies’ analysis need not start with market definition” and “[e]vidence of competitive effects can inform market definition . . . .”

It is also no surprise that the Commission will go into court with its best evidence, which will typically include the structural presumption when it is met. Allegations of high market shares hardly indicate that the Commission or its staff “ignore[d]” or “suppress[ed]” economic or competitive effects evidence. As Professor Wright has noted elsewhere, “When career econ[omist]s, lawyers, and [a] unanimous FTC reach the same conclusion on an issue perhaps its [sic] not an ideological conspiracy?”

62 Merger Guidelines, supra note 7, § 4.
63 https://twitter.com/ProfWrightGMU/status/880416302413762563.