

No slam dunk for FTC lawsuit against DraftKings-FanDuel merger

ftcwatch.com

It took about five months for the Federal Trade Commission under acting Chairman Maureen Ohlhausen to bring its first merger challenge — a lawsuit to block the tie-up of DraftKings and FanDuel, two daily fantasy sports firms — and the litigation quickly prompted second-guessing.

The case even takes on more visibility at a time when Ohlhausen clearly would like President Donald Trump to pick her to be the permanent chairman — a point that means her every move is scrutinized for how it might affect her prospects.

And this case is no slam dunk — unless the court buys the FTC's market definition of daily fantasy sports (DFS) that would give the merged firm a whopping 90 percent share, rather than the broader online gambling market of fantasy sports of which it has a far smaller cut.

"At a minimum, it does seem like a sort of aggressive [move]," Geoffrey Manne, executive director of the International Center for Law & Economics, said in an interview. "Admittedly it is just one merger challenge, but it is one that is based on a very narrow market definition with two [companies that are] essentially start-ups, neither of whom have ever turned a profit who are battling, if you accept a broader market definition, these giant companies like ESPN and Poker Stars and Yahoo."

"They didn't have to bring a case," he added. "Why this one and why now? It is surprising."

Some others who follow this issue also expressed surprise. "There are other more valuable or more important industries that are facing potential antitrust issues," Aaron Swerdlow of Gerard Fox Law and a former general counsel to a boutique sports agency, told *FTC:WATCH*. "Part of this is driven by the high amount of publicity that the [gambling] industry and the two companies receive."

But Tad Lipsky, acting director of the FTC's Bureau of Competition, who has scolded the Obama administration for failing to make economic analysis a central factor in its antitrust enforcement, apparently had no problem pulling the trigger on this case as the first merger challenge on his watch.

"This merger would deprive customers of the substantial benefits of direct competition between DraftKings and FanDuel," Lipsky said in a statement. "The FTC is committed to the preservation of competitive markets, which offer consumers the best opportunity to obtain innovative products and services at the most favorable prices and terms consistent with the provision of competitive returns to efficient producers."

Lipsky's tough talk and the agency's willingness to litigate demonstrate that "certain mergers will be challenged and perhaps even successfully challenged even under a Republican administration — this Republican administration," Steven Cernak, of counsel at Schiff Hardin, noted in an interview.

“That should not come as a surprise, but I think there was too much talk immediately after the election that, ‘Oh my, none of the antitrust laws will be enforced and mergers will sail through,’” he added.

Court documents show that the commission, joined by the attorneys general in California and the District of Columbia, is seeking a preliminary injunction against the merger, charging that the companies would create a single provider with by far the largest market share for paid daily fantasy sports contests in the US.

In addition, the commission issued an administrative complaint alleging that the proposed merger violates Section 5 of the FTC Act and Section 7 of the Clayton Act.

The firms agreed to an order issued by the US District Court for the District of Columbia not to consummate the deal until at least five business days following the court’s decision on the preliminary injunction.

DraftKings CEO Jason Robins and FanDuel CEO Nigel Eccles issued a joint statement responding to the FTC’s challenge, saying, “We are disappointed by this decision and continue to believe that a merger is in the best interests of our players, our companies, our employees and the fantasy sports industry. We are considering all of our options at this time.”

Those following the case are quick to note that the two companies are struggling.

“You are talking about two companies that are running in the red and need an infusion of cash or extreme cost savings,” Swerdlow said, adding that DraftKings has had an operating loss of half a billion dollars since 2015.

“Both companies run a lot of enticing promotions to get people to participate in their platform,” he added. “It is a bit like Uber and Lyft — it’s a race to the bottom for market share. They are both trying to acquire so much market share that the other company is no longer tenable. It’s similar to what is happening in ride sharing, but it is a very expensive endeavor.”

The FTC’s administrative complaint portrays a business in which users who prefer to play short-term duration contests overwhelmingly look to DraftKings and FanDuel, which are engaging in a “grueling battle against one another.”

The agency distinguished between DFS and season-long fantasy sports (SLFS) which continue over an entire sports season and provides “drastically different user experiences.” SLFS typically do not require an entry fee and offer no material prizes and often is a vehicle for social interaction among friends.

DFS contests require entry fees, a portion of which goes to the company as its commission while the remainder goes to a prize pool.

Manne took sharp issue with the FTC’s approach. “The market definition is pretty surprising because it is so narrow,” he said. “Limiting the market to paid daily fantasy sports and

excluding season-long fantasy and excluding the larger gambling market doesn't jibe with what I know of the way those sites work."

"They sidestepped the role of the professional gambler," he said. "There are clearly two distinct groups of players — casual players and professional gamblers — choosing what sites to use, what games to play, based on their expected return. Maybe some care about the specific game but probably not much."

"It would be really weird to think that if they were receiving lower returns on DFS that they wouldn't just go right back to online poker instead and vice versa," he added. "So it is very hard to see how under very traditional and simplistic merger guidelines analysis how you wouldn't consider the poker sites in the same market or at least feel the need to establish why they are not."

As for the companies' financial struggles, Manne said that "most of the costs these companies are incurring are not a function of competition with each other, but a big chunk is the cost of all the legal fights [in some states]. I don't think it is an antitrust problem to merge for the purpose of economizing on legal and regulatory compliance costs — if anything you call that a synergy or an efficiency."

—Kirk Victor

•

Current Issue: 920

Next Issue: July 21, 2017

•

On this day

•

◦ 1973 Mayo Thompson was sworn in as FTC commissioner

Mayo Thompson served as FTC commissioner from 1973 until 1975.

•

Member Job Listings

•



•

◦ FTC to review TV display, spam rules as agency undertakes

regulatory reforms

◦ Neil Averitt commentary: Sizing up how antitrust enforcers rule? Remember the hidden persuaders

◦ Veteran antitrust lawyer Philip Verveer signs on with Venable

•