Insight

FTC Leveraged Merger Authority to Extort Consent Agreements

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Executive Summary

- In a span of five months, the Federal Trade Commission (FTC) has twice leveraged its merger review authority to extort consent agreements from merging parties – under the threat of a costly and lengthy process – despite finding no evidence the transaction posed a threat to competition.
- The consent agreements in Exxon Mobil's $64.5 billion acquisition of Pioneer Natural Resources and Chevron's $53 billion purchase of Hess banned individual executives from the acquired companies from serving on the respective boards of directors of the newly merged firms.
- Congress should be concerned about what such tactics mean for the rule of law and the risk they pose for future merger negotiations.

Introduction

In a span of five months, the Federal Trade Commission (FTC) has twice leveraged its merger review authority to extort consent agreements from merging parties – under the threat of a costly and lengthy process – despite finding no evidence the transaction violated antitrust laws.

On May 2, the FTC approved a consent agreement preventing founder and former Pioneer Chief Executive Officer Scott Sheffield from gaining a seat on Exxon's board of directors or serving in an advisory capacity once the $64.5-billion acquisition closed. Months later, on September 30, the FTC authorized a similar consent agreement, this time prohibiting Hess CEO John Hess from serving on Chevron's board of directors following the close of the $53-billion deal.

Both agreements were accepted by the FTC commissioners with a 3–2 vote. Republican commissioners Melissa Holyoak and Andrew Ferguson dissented with concerns that the FTC was abusing its merger review process.

Congress should similarly be concerned that the FTC was able to leverage its authority to extract consent agreements targeting individual executives in exchange for allowing mergers to move forward. Specifically, lawmakers should examine what these practices mean for the rule of law and the risk they pose for future merger negotiations that do not violate antitrust law.

Background

On October 10, 2023, Exxon and Pioneer entered into a $64.5-billion merger agreement. Almost two weeks later, on October 22, Chevron agreed to acquire Hess in a deal valued at $53 billion. The transactions were met with opposition from 23 Democratic senators, who urged the FTC to block the deals. They claimed that oil markets were "already too concentrated" and that the agency "must protect Americans from Big Oil." Such concerns were shared by most FTC commissioners, who have shifted the focus of antitrust merger enforcement

away from the long-held consumer welfare standard – which measures effects on prices, output, quality, and innovation – in favor of a "big is bad" approach.

The FTC's complaint outlining its anticompetitive concerns with Exxon's acquisition of Pioneer largely focused on public and private statements made by Pioneer founder and former CEO Scott Sheffield. The FTC alleged that Mr. Sheffield "campaigned to organize anticompetitive coordinated output reductions between and among U.S. crude oil producers and others, including the Organization of Petroleum Exporting Countries (OPEC), and a related cartel of other oil-producing countries known as OPEC+." The FTC detailed several statements that it claimed were "part of Mr. Sheffield's sustained and long-running strategy to coordinate output reductions" to raise prices. This alleged collusive behavior concerned the FTC's majority because the merger agreement required Exxon to "take all necessary actions to cause Scott D. Sheffield…to be appointed to the board of directors." This, according to the FTC, would give Sheffield "a larger platform from which to pursue his anticompetitive schemes." His potential appointment to the board of directors, the FTC alleged, would violate Section 7 of the Clayton Act "because it would meaningfully increase the likelihood of coordination, and thereby harm competition."

The antitrust concerns in Chevron's acquisition of Hess was similar. The FTC claimed that CEO John Hess "communicated publicly and privately with OPEC representatives and oil ministers of OPEC member states about global output and other dimensions of crude oil market competition" and "stressed the importance of oil market stability and inventory management." Hess is alleged to have "encouraged his OPEC competitors to stabilize production and draw down inventories" to drive up prices. The FTC concluded that "because Chevron is substantially larger than Hess, Mr. Hess's elevation to the Chevron's Board of Directors would amplify the importance and likely effect of public or private communications on these issues." If Hess gained a seat on the Chevron board of directors, according to the FTC's majority, "the effects of the transaction may be substantially to lessen competition by increasing the risk of harm to competition and meaningfully increasing the likelihood of industry coordination in the global market for the production and sale of oil," in violation of Section 7 of the Clayton Act.

On May 2, 2024, the FTC approved a consent order preventing Sheffield from gaining a seat on Exxon's board of directors or serving in an advisory capacity at Exxon once the acquisition was completed. On September 30, the FTC issued a similar consent decree banning Hess from sitting on Chevron's board of directors.

Merits of the Case

Both consent agreements were accepted by the FTC with a 3–2 vote. Republican Commissioners Andrew Ferguson and Melissa Holyoak dissented.

In Exxon/Pioneer, Ferguson and Holyoak issued a joint statement outlining the flaws in the majority's theory. They acknowledged the alleged "previous efforts" of Sheffield "to organize tacit (and potentially express) coordination of capital investment discipline and oil production levels." Yet they asserted that the order banning Sheffield from the merged board of directors did not answer the question of whether FTC believed "*this transaction* itself violates Section 7 [author's emphasis]." They discussed the primary factors adopted in the 2023 Merger Guidelines for assessing the increased risk of coordination and concluded that "the post-merger firm's share in the alleged market will not be substantial," adding that "the concentration in this market, and thus, the likelihood of successful coordination post-merger, are virtually unchanged by the proposed acquisition."

In the Chevron and Hess merger, Commissioners Holyoak and Ferguson each issued a dissenting statement casting doubt on Hess' ability to collude with OPEC and other market participants to raise oil prices. Ferguson described the theory as "laughable." Holyoak observed that "the majority's complaint does not take issue with Chevron's acquisition of Hess Corporation's assets. Nor could it. There is no evidence to suggest Chevron, post-merger, could diminish competition in the global market for oil." She also took issue with the FTC's current "big is bad" approach to enforcement, stating that "even if one were to accept the Majority's fetish with concentration levels, post-merger Chevron would have a low single-digit share" adding that "the delta in concentration from the merger is miniscule."

Potential Future Impact

The dissenting commissioners warned that these consent decrees could be harmful to the future of the agency and the rule of law.

Holyoak's dissent in Chevron/Hess admonished the FTC's majority, stating that "the majority has used its leverage in the [merger review] process to extract a consent from merger parties with *no reason* to believe the law has been violated [author's emphasis]." She added that "consent targets an individual and deprives him of his contractual rights." Similarly, Ferguson accused the FTC of "leverag[ing] its [merger review] authority by threatening to hold up Chevron and Hess's $53 billion merger even though the lack of a plausible Section 7 theory had long been obvious." He added that, "although the merging parties surely would have prevailed [in court]," they "rationally took the quick and easy path opened to them by this consent agreement."

Holyoak also accused the majority of politicizing the process. Her dissent in Chevron/Hess stated:

> But herein lies the problem [with the majority's decision and its novel theory]: no legitimate and factually supported theory of harm existed for the Commission's Majority to execute the bidding of the political left. Still, the fact that the Commission opted not to challenge the biggest merger of 2023 seems to have been lost on the press. So the Majority got what it wanted. And they are trying to repeat the play here. Rather than accept reality and any political blowback, the Majority creates a sequel to the fairy tale in Exxon where Section 7 of the Clayton Act means whatever the Majority needs it to mean to appease political demands. Unfortunately for Mr. Hess, the CEO of Hess Corporation, the author of every fairy tale must also fabricate a villain, and today's action unjustifiably gave him that label.

From this particularly pointed language, Holyoak made clear her concern that the commission's majority has bent to political pressure to penalize an otherwise competitively benign merger. Faced with this pressure, Holyoak appears to allege that the commissioners simply invented a theory of harm critical of the merger.

Ferguson's dissent in Chevron/Hess also suggests that the method by which the FTC pursued its review demonstrated the shakiness of its theory. He argued that the consent agreement should not be instructive to future applications of law. He stated that it was "not a coincidence that the Commission has trotted out this theory only in settlements," and that he had "lamented repeatedly that the majority has a penchant for pressing far-fetched, novel theories in complaints it knows will not be litigated, and relying on those unadjudicated complaints as a precedent for subsequent Commission action," and that "no court should give this consent, or its equally lawless predecessor in Exxon-Pioneer, any precedential value."

The dissents from Commissioners Ferguson and Holyoak are a stark warning to Congress that the FTC has

leveraged its power to extract consent agreements for political gain under a theory of harm that condemns the merger of two firms because of the alleged behavior of one individual. As Ferguson argued, however, the courts have not yet ruled on such a theory. Nevertheless, the FTC's new precedent could cause future merging parties to reconsider deals – even if the merger would not otherwise violate antitrust law.

Conclusion

The FTC's use of its merger review authority to force consent agreements from merging parties – under the threat of a costly and lengthy process – despite finding no evidence the transaction posed a threat to competition.

The dissenting statements from Commissioners Ferguson and Holyoak cast doubt on the merits of the case and admonished the FTC for politicizing the process. Congress should be concerned about what such a tactic means for the rule of law and the risk it poses for future merger negotiations that do not violate antitrust law.