CLIENT ALERT

The FTC Continues Its Hard Line on Exclusive Dealing

Apr.29.2016

The Federal Trade Commission continues its aggressive stance against the use of exclusive dealing agreements by dominant firms. On April 27, 2016, the Federal Trade Commission (FTC) filed a complaint against Victrex plc (operating as "Invibio") charging that it monopolized the market for a high-performance polymer sold to medical implant manufacturers through exclusive dealing arrangements, in violation of Section 5 of the FTC Act. The FTC also announced a settlement that will require Invibio to refrain from enforcing the exclusivity provisions in its existing contracts. It will also prevent Invibio from including an even broader range of provisions in future supply contracts, including certain types of market share and retroactive loyalty discounts.

The FTC's Conduct Allegations

According to the complaint, Invibio was the first company to receive FDA approval for implant-grade polyetheretherketone, known as PEEK, a polymer used by medical device makers in various types of implants. Invibio began to sell PEEK to device makers in 1999 and was the sole supplier for more than a decade. In 2010 Solvay Specialty Polymers LLC received FDA approval to market implant-grade PEEK. Evonik Corporation followed, receiving FDA approval in 2013. The FTC alleged that, now facing these new entrants, Invibio enhanced existing exclusivity provisions to prevent Solvay and Evonik from becoming effective competitors. Specifically, the FTC alleged that Invibio (1) demanded more explicit exclusionary provisions in its supply contracts, (2) expanded the scope of its exclusivity requirements and limited any exceptions, and (3) made it difficult for customers to switch to an alternative PEEK supplier for existing products upon contract expiration. Invibio forced its customers into the exclusivity arrangements by threatening to cut off supply for all of a device maker's existing products, refusing to sell new brands of PEEK to a device maker that did not agree to use Invibio's main brand of PEEK exclusively, and denying customers access to Invibio's FDA Master File and other regulatory support. Because device makers could not quickly obtain regulatory clearance to use a new source of implant-grade PEEK, they had no choice but to accept Invibio's demands.

Notably, the FTC did not allege that Invibio, which today accounts for 90 percent of PEEK sales worldwide, locked Solvay and Evonik out of the market entirely. Instead, according to the FTC, Invibio adopted the provisions to prevent Solvay and Evonik from developing the sales volumes and reputations they needed to grow into effective competitors, and the provisions had that effect on the market. The FTC further asserted that Invibio's exclusive dealing provisions lacked any procompetitive justification or efficiencies.

Legal Context

The FTC's case against Invibio is similar to past successful government challenges to exclusive dealing, including *United States v. Dentsply Int'l*, Inc. 399 F.3d 181 (3d Cir. 2005) and *McWane v. FTC, Inc*. 783 F.3d 814 (11th Cir. 2015). In both cases, the government challenged exclusive dealing arrangements that did not foreclose the market entirely, but tied up key customers that were necessary for entrants to gain a foothold in the market and grow into effective competitors. In both cases, the courts relied heavily on evidence showing that the defendants adopted their exclusive dealing policies in response to new competition.

Finally, in both cases, the defendants failed to adequately demonstrate that their exclusive dealing arrangements had a procompetitive effect, such as protecting investments a manufacturer might make in brand or service with downstream customers that might enhance competition.

The Proposed Settlement

The proposed consent decree prevents Invibio from enforcing the exclusivity provisions in its current contracts or adopting similar terms in future agreements. The proposed order also bans conduct that the agency did not challenge in the complaint in order to prevent future anticompetitive behavior—so called fencing-in relief. Specifically, the proposed order prevents Invibio from offering customers certain market share discounts or retroactive loyalty discounts that would apply to a customer's past purchases if the customer reaches a specified supply threshold.

Implications

In the aftermath of its appellate court victory in *McWane*, the FTC is likely to continue to scrutinize exclusive dealing arrangements employed by firms with large market shares. The proposed consent decree also demonstrates a more aggressive posture on remedies. Historically, both FTC and DOJ have been reluctant to pursue monopolization cases, in part because the agencies recognized the challenge of designing administrable remedies capable of restoring competition without deterring efficient behavior. That concern is less apparent here. The Invibio consent (like the order in *McWane*) does more than enjoin the challenged conduct; it prevents Invibio from adopting certain kinds of pricing policies that can be procompetitive.

Despite the FTC's more aggressive posture, even when adopted by large players, both exclusive dealing and loyalty discount programs are often procompetitive. But large market players considering such strategies should carefully consider potential exclusionary effects and be prepared to demonstrate the procompetitive benefits to the FTC.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Lisa Kimmel, Ph.D.
Senior Counsel – Washington, D.C.
Phone: +1 202.624.2749
Email: lkimmel@crowell.com