The mere possession of monopoly power does not violate federal antitrust laws. The laws only address the anticompetitive acquisition, maintenance, or abuse of that power. The Federal Trade Commission (“FTC”) entered into a consent agreement this week, settling charges that a medical polymer maker used long-term exclusive contracts in violation of Section 5 of the FTC Act to illegally maintain the monopoly it had developed as the first supplier of that product. In the Matter of Victrex plc, Invibio Limited, and Invibio, Inc., FTC File No. 141-0042 (Apr. 27, 2016). Invibio was the first company to sell implant-grade polyetheretherketone (“PEEK”) to medical device makers. The FTC alleged that Invibio’s negotiation tactics and exclusive contracts prevented later market entrants from competing, thus allowing Invibio to retain 90% of PEEK sales worldwide. The FTC Director of the Bureau of Competition said that this case “affirms that the first company to enter a market cannot rely on anticompetitive contract terms to lock up customers and box out rivals.”

Industry Background

PEEK is a high-performance polymer developed by a predecessor to Victrex for use in many applications and industries. Invibio is a wholly owned subsidiary of Victrex. In the late 1990s, Invibio was the first company to develop an implant-grade PEEK as an alternative to traditional implant materials (e.g., metal or bone). According to the FTC’s complaint, many of Invibio’s supply contracts with medical device makers included exclusivity provisions.

In the late 2000s, two other PEEK suppliers — Solvay and Evonik — also began making implant-grade PEEK. Until that point, both companies had only made industrial-grade PEEK and non-PEEK polymers for medical device manufacturers. According to the FTC’s complaint, Solvay and Evonik offered to sell implant-grade PEEK at prices significantly lower than Invibio. In response, according to the complaint, Invibio adopted a strategy of expanding the scope and coverage of the exclusivity terms in its supply contracts in order to avoid competing on price with the new market entrants.

Invibio’s Exclusivity Strategy

The FTC cited the following actions taken by Invibio as part of its anticompetitive strategy to block Solvay and Evonik. In negotiations with existing customers, Invibio (i) inserted more explicit exclusivity provisions in its supply contracts, (ii) expanded the scope of and limited the exceptions to the exclusivity terms, and (iii) employed restrictive terms that impeded customers’ ability to switch PEEK suppliers even upon contract expiration. Invibio then enforced those terms by threatening to withhold needed supply or regulatory support, and offering minor inducements — such as limited discounts — in exchange for the exclusivity.

According to the FTC, as a result of Invibio’s tactics, nearly all medical device makers that purchase PEEK from Invibio do so under contracts with some type of exclusivity. The exclusivity provisions generally take one of three forms: (1) requiring a customer to use Invibio PEEK for all PEEK-containing medical devices; (2) requiring a customer to use Invibio PEEK for a broad category of devices; or (3) requiring a customer to use Invibio PEEK for a specified list of devices.

The FTC alleged that Invibio used these exclusivity provisions to maintain its monopoly power, and exercises that power by pricing its PEEK substantially higher than competing products.

Consent Order

Under the proposed consent order, Invibio is prohibited from entering into exclusive supply contracts and from preventing current customers from using an alternative PEEK supplier. The proposed settlement also requires Invibio to permit current customers that meet certain conditions to modify existing contracts to eliminate the exclusivity provisions. Invibio is further prohibited from setting minimum purchase requirements, conditioning discounts or important services on a minimum percentage purchase requirement, and providing retroactive volume discounts. Invibio is also required to establish an antitrust compliance program.

The settlement is subject to a 30-day public comment period, ending on May 27, 2016.

This settlement highlights the limits set by the antitrust laws on the behaviors of market participants with monopoly power. First-to-market firms by definition will have monopoly power until new competitors enter the market. Procompetitive behavior, such as competing on price or product improvement, is the goal of the antitrust laws even when that behavior results in the maintenance of a dominant market position. But maintaining market dominance through tactics that restrain competition, result in anticompetitive effects, increase barriers to entry, and have no legitimate procompetitive justification, will be challenged.