

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

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May 27, 2016

Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20590

Dear Chairwoman Ramirez:

On behalf of the U.S. Chamber of Commerce, the world's largest business federation representing the interests of over three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system, I am writing to express our concerns over the lack of transparency around the Federal Trade Commission's (FTC) action in the matter of Invibio, Inc., accusing it and its parent company, Victrex, of violating FTC Act Section 5 through exclusive dealing contracts.

While we do not question a company's right to settle a matter through a consent order, the Chamber writes in support of our strong interest in the policy implications of the FTC's actions. The analysis that the FTC provided in this case as a basis upon which to seek public comment is void of a sufficient explanation to aid the public in understanding how the facts in this matter support the FTC's complaint.

Anti-competitive concerns that arise in the context of exclusive dealing relationships are one area of antitrust law that is in need of better guidance. This is particularly critical given that the Supreme Court has repeatedly stressed the need for clear rules that avoid chilling pro-competitive conduct, and exclusive dealing has unquestionable pro-competitive effects in most circumstances. Unfortunately, any careful reading of the Invibio decision based on the FTC's publicly disclosed analysis adds uncertainty.

Unclear harm to consumers and vague reference to offending terms

In *Invibio* the FTC argues that the arrangements allowed the firm to "maintain *supracompetitive* prices" or "prices that were *substantially* higher than competing versions" despite offers from the two competitors of "*significantly* lower prices." None of the terms italicized appear to have been defined, explained, or even estimated in any way by the FTC. Nor was there any visible attempt by the FTC to demonstrate that there were no other plausible explanations for those differences, such as quality or methods of production or delivery.

The FTC complaint also alleged potential harm from future negative effects on prices and innovation through potential effects on the two competitors: Because "each firm has missed sales

targets,” neither might achieve “sufficient returns to justify further investment in the business” and so “there is a significant risk” that they will “become even less effective competitors in the future.” Such unsubstantiated claims also raise significant questions for practitioners. If competitors are not losing money, then how “insufficient” must the returns be to raise issues? If competitors are not exiting the market, then how much “less effective” must they be before the FTC will step in? Whatever the risk is exactly, when does it become “significant”?

Significance of foreclosure and its effect on “key” costumers

Older cases have focused closely on the volume of sales that was foreclosed to competitors by the exclusive arrangements. More recently economic thinking has argued the foreclosure amount is the beginning, not the end, of the analysis. But if foreclosure has any importance, then it would be helpful to know what level of foreclosure the FTC thinks can lead to anticompetitive results like those alleged. Here, however, the only guidance received from the complaint is that the “exclusive contracts have foreclosed from competitors a substantial portion of the [market].” While the percentage of sales that can raise competition issues would vary by industry, the complaint and other materials give no estimate or explanation for why the amount is “substantial” here.

Another way incomplete foreclosure could be anticompetitive is if certain “key” customers are foreclosed. Here, the complaint makes that allegation but, again, unfortunately fails to explain clearly why the unnamed customers are “key” ones. First, it says that “Invivio recognized that it was particularly important to lock up the largest” customers, which forced the two competitors to “focus sales efforts on small device makers.” So are the foreclosed customers key because they prevent either competitor from achieving efficiencies? Or are they key customers because the costs to serve the remaining small customers raise the competitors’ costs? Is it both? And how much must those costs be raised to be anticompetitive?

The complaint also describes the customers as “key” because they are the “most sophisticated medical device makers,” and sales to them would “validate [the competitors] in the eyes of other device makers,” thereby enhancing their “reputation.” The complaint is silent as to why the two large chemical company competitors need a validation of their reputation. Are they new suppliers to these customers? Are they new to the FDA and its regulation?

Because the competitive effect of exclusive agreements can depend on the market and regulatory environment, more details about sales and regulation would have helped practitioners from outside this industry apply the FTC’s actions in this complaint to other circumstances.

Conclusion

It is possible the FTC’s investigation revealed answers to these questions. It is also completely understandable if business confidential information limited what could be shared with the public. However, judging from the published materials, the FTC failed to clearly provide sufficient analysis to support its concerns in this case. Failure to disclose an appropriate

level of analysis has unfortunately been a recurring problem in those instances in which a consent order is adopted to avoid litigation of FTC allegations.

The Chamber would hope the FTC sees it in its own interest to provide more detailed analysis and not miss important opportunities to guide practitioners, especially where a case involves unsettled matters of antitrust law such as exclusive dealing contracts and its Section 5 authority. Given the criticism of the Commission for its recent efforts to provide Section 5 guidance, the failure to set forward a thorough analysis in this case is particularly surprising. In response to that criticism, FTC Commissioners often direct practitioners to “read the complaints.” Unfortunately, a careful review of the public material surrounding the Invibio case raises more questions than it answers.

The Chamber appreciates the opportunity to offer these comments and stands ready to engage in discussions about possible solutions.

Sincerely,



R. Bruce Josten

cc: Commissioner Maureen K. Ohlhausen
Commissioner Terrell McSweeney
Honorable Michael Lee
Honorable Amy Klobuchar
Honorable Tom Marino
Honorable Hank Johnson