

Statement of the Federal Trade Commission
In the Matter of Victrex plc, File No. 1410042, Docket No. C-4586
July 13, 2016

The Commission has approved a final consent order settling charges that Victrex plc, together with its subsidiaries Invibio Limited and Invibio, Inc. (collectively “Invibio”), violated Section 5 of the Federal Trade Commission Act by using exclusive supply contracts to maintain Invibio’s monopoly power in the market for a high performance polymer used in medical implants known as polyetheretherketone or PEEK. Our order aims to facilitate price competition, spur innovation, and provide medical device makers with a meaningful choice among PEEK suppliers. This enforcement action reflects our commitment to intervene when a dominant firm employs exclusionary practices to maintain its monopoly power and harm competition.

It is well established that exclusive dealing can promote or harm competition, depending on the circumstances.¹ The Commission therefore examines exclusive dealing under the rule of reason to determine whether the probable net effect of an exclusive dealing policy is to benefit or harm competition. In particular, we focus on evidence that the suspect conduct has affected or is likely to affect prices, output, quality, innovation, and consumer choice. Because its legality turns on its impact on competition, an exclusive dealing policy may be lawful when used by a firm in a competitive market, but unlawful if a monopolist uses the policy to maintain its dominant position, for example, by diminishing its rivals’ ability to compete.² We have reason to believe that the latter occurred here.

Invibio was the first, and for several years the only, PEEK supplier in the market. We charge that, when faced with the entry of two new rivals in the late 2000s, Solvay Specialty Polymers LLC and Evonik Corporation, Invibio sought to lock up its customers and lock out these rivals. Invibio recognized that denying Solvay and Evonik access to the largest and most influential customers was critical to preventing the two entrants from validating their reputations in the market and achieving the experience needed to pose a serious threat to Invibio’s market dominance.

As described in our complaint, Invibio had entered into long-term exclusive contracts with nearly every medical device maker producing implants using PEEK. We allege that, to prevent Solvay and Evonik from gaining scope, experience, and supply relationships, Invibio tightened the exclusivity terms of its supply agreements. Some of these provisions explicitly require the use of Invibio’s PEEK for all of a customer’s PEEK-containing devices, while others impose exclusivity for a list of product categories or designated products that often comprise nearly every PEEK-containing device in a customer’s portfolio.

¹ See, e.g., *McWane, Inc. v. FTC*, 783 F.3d 814, 827–28 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1452 (2016); *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005); Ilya R. Segal & Michael D. Whinston, *Exclusive Contracts and Protection of Investments*, 31 RAND J. ECON. 603, 603 (2000); Eric B. Rasmusen, J. Mark Ramseyer & John S. Wiley, Jr., *Naked Exclusion*, 81 AM. ECON. REV. 1137, 1137–38 (1991), *as corrected by* Ilya R. Segal & Michael D. Whinston, *Naked Exclusion: Comment*, 90 AM. ECON. REV. 296, 307 (2000).

² See, e.g., *Dentsply*, 399 F.3d at 187 (“Although not illegal in themselves, exclusive dealing arrangements can be an improper means of maintaining a monopoly.”).

Invibio threatened customers that resisted its demand for exclusivity with retaliation, including termination of the PEEK supply for all of a device maker's products, lack of access to new types of PEEK developed by Invibio, and the loss of necessary regulatory support. In certain cases, Invibio provided customers with a small price discount or other benefit in exchange for exclusivity. Notably, both Solvay and Evonik offered PEEK at prices significantly below those charged by Invibio, lower even than prices reflecting discounts Invibio offered to secure customer exclusivity.

As alleged in the complaint, this strategy worked. Even after Solvay and Evonik's entry, Invibio still accounted for approximately 90 percent of implant-grade PEEK sales. Invibio's exclusive dealing policy foreclosed a substantial majority of PEEK sales for which its rivals otherwise could have competed. The evidence shows that Invibio has been able to charge supracompetitive prices to many device makers notwithstanding Solvay and Evonik's entry. Largely limited to competing for small or start-up device makers that do not have exclusive contracts with Invibio, Solvay and Evonik missed their respective sales targets. Absent the Commission's enforcement action, Invibio's conduct would continue to deny Solvay and Evonik the opportunity to contest most sales opportunities. They would be unable to achieve sales volumes sufficient to incentivize continued investment in the business that would yield further innovations in PEEK technology. Importantly, Invibio has failed to identify any procompetitive justification that would offset the harm that its exclusive supply contracts inflicted on competition.

In order to safeguard competition, the Commission's order generally prohibits Invibio from entering into exclusive supply contracts and from preventing current customers from using an alternative source of PEEK in new products. The order also prohibits Invibio from imposing contract terms that would deter a customer from purchasing additional units of PEEK from a rival. In general, Invibio may neither condition price or other sales terms on a customer's purchase of a specified portion or percentage of its PEEK requirements from Invibio, nor offer volume discounts that are applied retroactively once a customer's total purchases of Invibio PEEK reach a specified threshold. Invibio may, however, offer volume discounts that are not retroactive.

At the same time, we recognize that collaborative research and development efforts involving a PEEK supplier and a device maker present a different set of issues, including potential concerns about free riding. Consequently, our order leaves room for limited exclusive arrangements where Invibio and a device maker jointly research and develop new or custom PEEK products or devices.

In sum, our order appropriately addresses Invibio's exclusionary conduct, provides its rivals a meaningful opportunity to compete, and opens the door for price competition, innovation, and more choice for PEEK customers.