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Comments of the International Center for Law & Economics Regarding Contract Terms That May Harm Fair Competition
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INTRODUCTION

Petitioners in this proceeding have called for the FTC to use its rulemaking authority pertaining to unfair methods of competition to prohibit employee non-compete clauses and various forms of exclusive dealing. These rulemaking proposals are deeply misguided from both a procedural and substantive standpoint, however.

Bright-line competition rules, as opposed to broader judicially enforced standards, are appropriate only when it is possible to isolate a category of identical practices that routinely harm competition. This is not the case for the categories of conduct currently under consideration. More fundamentally, these calls ignore positive and significant consumer benefits generated by vertical agreements, in general, and exclusive dealing and non-competes, more specifically. Critics seem to assume that powerful firms foist these exclusive agreements upon their helpless commercial partners (whether employees or other companies). Yet a vast body of economic literature clearly rejects this premise. Instead, it shows that these clauses entail costs and benefits that each party must carefully weigh when they a enter into a commercial relationship.

Of course, this does not mean that non-compete clauses or exclusive dealing should be categorically out of bounds for antitrust authorities. Rather, they should be assessed on a case-by-case basis (i.e., under the rule of reason), accounting for both their pro- and anti-competitive potential. This would limit enforcement efforts only to the limited instances where those clauses harm consumers, thereby preserving the tremendous aggregate benefits they generate.

Read the full public comments here.

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