

Behaviour in Competition
A Guide to Competition Law



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I Introduction

1

Statement

The maintenance of high ethical standards in adhering to national and international laws is one of the fundamental *Roche Corporate Principles*.

As a company with world-wide business activities, Roche is determined to adhere to the required laws and regulations in force in the various countries where it operates as well as to implement high standards of integrity in business transactions. Such laws, regulations and standards include the EC Competition Law and the US Antitrust Law as well as the Rules of Conduct laid down in the Report on Extortion and Bribery in business transactions issued by the International Chamber of Commerce (ICC).

Competition law is intended to help preserve the competitive, free enterprise system that is the basis of the free market economy. It is the belief of the management that even in the absence of such laws the interest of the company, its shareholders and employees are best served by a policy of vigorous and fair competition. For these reasons, it is the policy of the company to comply strictly in all respects with competition laws and to object to all forms of extortion and bribery, which – in addition to being often a crime – may also constitute acts of unfair competition.

► Following these principles, fair and correct behaviour in competition shall be a must for every employee.

Roche is aware that sometimes it is difficult for the employees to understand the requirements of the competition laws of the various countries where Roche does business. In fact, in many cases the law itself is not entirely clear. Therefore, Roche encourages every employee to seek the counsel of the Roche legal department about any specific antitrust question that comes up.

Behaviour in Competition is part of the Roche Compliance Program including this guide, antitrust audits and training on competition law.

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Purpose

The purpose of the *Behaviour in Competition* guide is to explain the basic provisions of antitrust and competition laws, mainly of the US Antitrust Law and the EC Competition Law, in order to make the management and staff aware of the basic rules and how these laws affect their business behaviour in making commercial decisions.

The guide cannot cover all facts and circumstances that the employee may encounter in his business activities. Accordingly, it is recommended and expected that in every case of doubt or if the employee has any question as to whether a particular course of action is appropriate or not, he should contact the Roche legal department for advice.

Behaviour in Competition is designed to provide each employee with enough information about the competition law to recognise situations that require legal advice and to obtain it.

▶ 'I didn't know it was illegal' is no excuse for the competition authorities.

3

Competition law

The best economic and social results are achieved in an environment of free competition. Competition law prohibits unreasonable restraints on competition and acts of monopolisation.

3.1

EC Competition Law

The principal provisions of EC Competition Law are set forth in Articles 81 and 82 EC (ex Articles 85 and 86 EC Treaty) – as stated in the Annex. More detailed regulations are fixed in various commission regulations and directives.

EC Competition Law applies to all companies doing business within the member states or which may affect trade between the member states of the European Economic Area (EEA) regardless of whether these companies are established in one of these countries or not.

3.2

US Antitrust Law

US Antitrust Law is set forth in four principal federal statutes: The Sherman Act, the Clayton Act, the Wilson Tariff Act and the Federal Trade Commission Act.

US Antitrust Law applies to all companies and individuals doing business in the United States or affecting US commerce.

3.3

National competition laws

There are national competition laws to be considered by doing business in the corresponding country. These national competition laws are generally similar to the EC Competition Law and/or US Antitrust Law. You should contact the Roche legal department with any questions regarding the applicability of local law.

4

Application of competition law

The EU Competition Law applies to restrictions of competition within the EEA, which directly or indirectly may affect trade between the member states of the EEA, regardless of where the restrictions of competition have taken place.

The same applies with regard to the US Antitrust Law if there is an unreasonable restraint of trade affecting the US market.

Other national competition or antitrust laws apply to restrictions of competition of a purely national dimension, also regardless of where the restrictions of competition have taken place.

Because of the world-wide business activity of Roche, all employees, regardless of their place of business, have to comply with the EC Competition Law, the US Antitrust Law, and any other applicable local competition laws, where the intended business transaction affects these territories, and, as a result, follow the *Behaviour in Competition* guide.

► Competition law has to be observed by all players in the market.

5

Consequences of violations

Violations of the competition laws may result in extremely serious penalties.

The European Commission imposes fines according to the severity and the duration of the violation. The highest fines are imposed for violations by horizontal agreements, i.e. agreements restricting competition between competitors. For such violations the European Commission may impose a fine of 10% of the annual world-wide turnover. The fine may be increased for every year of the duration of the violation.

Also violations in vertical agreements between the manufacturer and its distributors or customers may result in high fines.

Furthermore, any agreement violating Article 81 (1) EC is automatically void.

For a violation of US Antitrust Law, a company may be subject to very substantial fines in the amount of millions of USD.

In addition, violations of competition law may also give rise to civil lawsuits which may result in substantial damage claims from customers and competitors. In the US, successful plaintiffs in antitrust lawsuits are entitled to triple their damages plus attorney fees.

The violation of the US Antitrust Law and other national competition laws may also lead to criminal convictions of the involved employee. Individuals can be fined and/or given prison terms for criminal antitrust violations.

▶ Violating the competition laws never pays off.

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Responsibility of the employees

Compliance with the competition laws is the responsibility of every employee.

Roche employees are forbidden to knowingly engage in practices that violate competition laws.

Each employee is responsible for acquiring a sufficient understanding of the competition laws to recognise situations which may involve competition law issues.

Where there is any question of whether a current business practice or a commercial decision might be in conflict with any competition law, each employee must consult the Roche legal department.

▶ Compliance with the competition laws is in the responsibility of every employee.

▶ In case of any doubt, the legal department must be consulted.

II Agreements and coordinated policies eliminating or restricting competition

Article 81 (1) EC prohibits all agreements or understandings which have as their object or effect the prevention, restriction or distortion of competition.

The Sherman Act prohibits contracts, combinations or conspiracies that unreasonably restrain trade.

The form of agreement is of no importance. Not only written agreements are deemed to come within the scope of competition law but also verbal agreements or so-called co-ordinated policies, i.e. deliberate and intended collaboration between individual companies for the purpose of eliminating or restricting competition in a certain market.

Restraints of competition are divided into two types: vertical and horizontal restraints.

Horizontal restraints mean agreements or co-ordinated policies between companies acting on the same marketing stage, e.g. agreements with competing manufacturers.

Vertical restraints mean agreements or co-ordinated policies restricting competition between companies acting on different marketing stages, e.g. agreements with distributors and customers, licensees, suppliers or licensors which restrict the competitive freedom of the partners or third companies.

1 Horizontal agreements

Normally, agreements or co-ordinated policies between competitors which affect the terms on which they do business raise the most serious competition law concerns.

The following general principles should be considered in connection with any dealings with competitors:

1.1

Prices and conditions of supply

Every manufacturer is free to establish and change its own prices, and in doing so, it may take account of, in the absence of any co-ordination, the conduct of its competitors. However, it is a violation of competition law to agree or co-operate in any way with the competitors to fix or stabilise prices, particularly:

It is prohibited to:

- jointly determine selling or purchase prices
- jointly determine price increases
- jointly fix specific minimum or maximum prices or price ranges
- jointly agree rebates, discounts and other conditions of supply



It is generally prohibited to:

- exchange price-related information with competitors unless it is merely historical (older than 12 months)



In case of doubt, the Roche legal department should be consulted prior to any exchange of price-related information.

- ▶ Do not fix any price-related conditions with competitors.
- ▶ Never discuss any aspects of pricing with competitors.

1.2

Market sharing

An agreement among competitors to share or allocate markets in any form is forbidden. More specifically:

It is prohibited to:

- share or allocate markets between competitors in respect of specific territories, products, customers or sources of supply
- fix production, buying and selling quotas between competitors



- ▶ Do not arrange any market sharing or allocation with competitors.

1.3

Boycotts

The refusal by a group of competitors to deal with one or more customers or suppliers in order to hinder such customer or supplier to do business in a market is prohibited.

It is prohibited to:

- mutually agree not to supply certain customers or not to purchase from certain suppliers
- agree with competitors to make the supply or purchase of goods subject to certain conditions mutually agreed



It is possible to:

- have a competitor as supplier or customer at an arm's length basis, provided that all other antitrust rules are observed



1.4

Joint ventures

Joint venture agreements between competitors may produce useful efficiencies but can also affect or restrain competition. Consequently, such agreements must not be entered into without legal advice.

Advice should be sought if you intend to:

- enter into an agreement with a competitor on joint research and development
- enter into an agreement with a competitor on joint manufacturing
- enter into an agreement with a competitor on joint marketing



1.5

Trade associations

Joining a trade association where competitors meet is not prohibited, however, any meetings or other activities that involve sharing of information among horizontal competitors can raise antitrust risk. Accordingly, Roche's participation in such associations must be monitored carefully.

It is prohibited to:

- share information about prices, discounts, conditions of supply, profit margins, cost structures, calculation practices, distribution practices, territories, customers, etc., during meetings of a trade association without having discussed it with counsel in advance



It is possible to:

- agree joint petitioning, government relation matters and similar topics within a trade association



▶ Do not exchange competitively sensitive information with competitors.

2

Vertical agreements

Vertical business partners include distributors, customers licensees, licensors and suppliers.

With respect to agreements with such vertical business partners the following principles should be considered:

2.1

Resale prices

The producer must not set the resale prices charged by the distributor. More specifically:

It is prohibited to:

- fix or set the resale prices to distributors or dealers for any product
- fix or set the resale prices in letters, offers and the like
- state resale prices in order forms*
- state resale prices in price lists, catalogues, displays, price labels, tags, packings, brochures, etc.*
- require the distributor to adhere to the recommended resale prices
- terminate the agreement with a distributor because of its refusal to adhere to the recommended resale prices*
- coordinate the price policy with the distributor according to the market situation
- prohibit the distributor from granting any rebates or discounts
- provide the distributor with formulas to calculate prices
- state the profit margin of the distributor
- prescribe maximum and minimum ranges for the resale prices

It is possible to:

- give a non-binding price recommendation for resale prices of branded products, if no direct or indirect pressure is exercised to enforce such recommendation
- mark all statements of resale prices as 'recommended resale prices' ✓

* May, under certain circumstances, be lawful in the US. Advice from the Roche legal department should be sought.

▶ Do not impose any resale prices.

2.2

Exclusivity

By entering into agreements to buy exclusively from one source or to supply exclusively to one customer (exclusive distribution, purchase, franchise or license agreements) certain principles must be considered:

It is prohibited to:

- prescribe not to passively supply customers from outside the territory*
- forbid a distributor to accept a customer's inquiry from outside the territory*
- forbid a distributor to supply the products to other distribution channels upon corresponding orders*
- refuse orders from distributors exporting the products with the argument of territory restrictions*

It is possible to:

- grant an exclusive distribution, purchase, franchise or license right in a certain territory
- prohibit an active marketing policy outside the agreed territory. Therefore, outside the contract territory and in relation to the contract goods, the partner can be obliged to refrain from actively seeking customers, establishing any branch or maintaining any distribution depot

* May be allowed in the US. Advice from the Roche legal department should be sought.

The Roche legal department should be consulted prior to the establishment of an exclusive agreement.

2.3

Parallel trade

Parallel trade is the consequence of free trade within a market.

It is prohibited to:

- impose export bans*
- prescribe to the partner not to export the product upon a customer's inquiry from outside the territory*
- refuse orders from partners exporting the products with the argument of territory restrictions*

It is possible to:

- prohibit an active marketing policy outside the agreed territory
- inform the partner about any differences affecting the product's acceptance in another country or other legal requirements in another country
- limit the amount of products sold to a partner under capacity reasons

* Territorial and customer restrictions may, under some circumstances, be permissible in the US. Advice from the Roche legal department should be sought.


2.4

Tying


Tying clauses, which make the supply of a product subject to the acceptance of supplementary obligations to buy other goods and/or services which, either by their nature or according to commercial usage, have no connection with the subject of the contract, generally should not be used, especially where Roche has a significant market share in the first product.

Where Roche has a significant market share in a product, it is prohibited to:

- make the supply of the product conditional upon the obligation to buy other products of another nature
- make the supply of the product subject to the obligation to enter into a service agreement for any kind of service



It may be possible to:

- require a customer to buy a full range of products including accessories
 - prescribe in license agreements to buy materials and special tools which are necessary for a technically satisfactory exploitation of the license
- 

The Roche legal department should be consulted prior to the establishment of any agreement if the employee intends to implement any arrangement where multiple assets must be purchased together.


2.5

Competition clause


Under certain circumstances, it may be possible to forbid a distributor or licensee to sell or manufacture competing products:

It is prohibited to:

- forbid the manufacturing and selling of competing products beyond the duration of the agreement



It may be possible to:

- forbid the manufacturing and selling of competing products during the term of the agreement
- 

The Roche legal department should be consulted prior to the establishment of any agreement if the employee intends to implement a competition clause.

2.6

Patent, trademark, copyright

By licensing patents, copyrights, know-how or trademarks, the following has to be considered:

It is prohibited to:

- forbid the partner to contest the secrecy of the licensed know-how or the licensed trademarks and patents
- forbid the partner to contest the validity of the licensed patent
- fix the price which the licensee charges for its product
- reach agreements with other patent owners regarding royalties to be charged for competing patents

It may be prohibited to:

- condition the grant of a license upon the licensee's agreement to purchase certain goods or to license other patents
- forbid the partner to use competing technologies (no non-competition clause permitted)

The Roche legal department should be consulted prior to the establishment of any agreement by licensing patents, copyrights, know-how or trademarks, unless the market share is lower than 25%.

2.7

Improvements and new applications

In patent licensing and know-how licensing agreements either party should generally be free to compete with its own developed products, improvements or new applications of the technology in question in so far as these are severable from the licensee's initial know-how.

It is prohibited to:

- restrict either party from competing with the other party in respect of research and development, manufacture, use or sale of any own developed product, improvement and new application of the technology in question

2.8

Supply agreements

Obligations in supply agreements usually do not affect free competition unless the supplier is required to deliver the products exclusively to the buyer.

Generally, requirements and arrangements referring to quality, specifications, quality control, raw materials, packing materials, quantities, terms of delivery, etc., may be made.

However, if either the buyer or the seller has significant market share, entering into a long-term exclusive supply agreement may cause competition concerns.

If the supplier uses technical auxiliaries and/or know-how of the buyer for the production, it is possible to oblige the supplier not to use such know-how or technical means for other purposes than for supply of the buyer.

However, it has to be stated that such obligation generally should be used only if the supplier was not capable of producing the corresponding products without the know-how and the auxiliaries of the buyer.

That means that the exclusivity must not be agreed if the supplier is already in possession of the necessary auxiliaries and know-how or if the company only provides specification such as dimension, tolerance, weight, quality of the product, etc.

In addition, it has to be considered that the buyer and the supplier have to be free to compete with their own developed products, improvements or new applications of the technology in question in so far as these are severable from the know-how of the supplied product.

The Roche legal department should be consulted prior to entering into any exclusive supply agreement.

III Prohibited abuse of dominant position

Article 82 EC prohibits the abuse of a dominant position.

The Sherman Act prohibits monopolisation, attempts to monopolise and conspiracies to monopolise.

Therefore, companies dominating a market have – besides the rules mentioned before – to pay special attention to some additional principles.

▶ The larger the market share, the more careful a company must be in certain practices.

Several factors are used to determine whether a company has a dominant position. However, the market share of the product involved is the main factor. To determine the market share, the relevant product market and the relevant geographical market have to be identified. It is not necessary to have a dominant position in an entire industry – it is enough to be dominant in a particular segment of that industry. As a rule, products belong to the same product market if they are ‘reasonably interchangeable’.

Furthermore, it is not necessary to have a dominant position throughout the entire European Union. The geographical market is defined as the area where there are the same or comparable conditions of competition. Such market, for example, may cover every single country of the European Union and even parts of such countries.

Any market share exceeding 50% is in itself evidence of a likely dominant position. In certain circumstances, a company with a smaller market share may have a dominant position. For example, if there is a significant gap between the market share of the dominant company and the market shares of its competitors, that may be considered as a confirmation of a dominant position.

As a consequence, there may be a dominant position even with market shares around 30% in one single European country. Even though there is no precise rule for determining when a company has a dominant position, if the company’s share exceeds 30%, it is prudent to take into account the principles set forth below.

Under these circumstances, the prohibition of discrimination in particular has to be considered, i.e. the different treatment of distributors, licensees and customers is not allowed without justifying reasons under EC Competition Law. The company which dominates the market may not be discriminatory in its treatment of distributors, licensees and customers under comparable conditions unless there are reasons war-

ranting such conduct. The restrictions on the conduct of monopolists is less clear under US Antitrust Law.

However, quantity rebates, function rebates or price reductions for services which are not performed by other distributors, licensees or customers, for example, justify different treatment.

1

Discrimination/Different sales conditions

A company with a dominant position must not discriminate in its sales conditions when dealing with similar customers under comparable circumstances.

It is prohibited to:

- grant different sales conditions (prices, rebates) to distributors or customers meeting the same requirements



It may be possible to:

- grant different sales conditions (rebates) to distributors providing special services that are not met by other distributors
- grant different sales conditions to distributors of another stage in the distribution channel (wholesalers – retailers) as such distributors are providing different services



Note: US law – Robinson-Patman Act – governing price discrimination is quite complex. Any rebate/discount programs should be reviewed carefully with US counsel.

The Roche legal department should be consulted.

- ▶ Do not discriminate between your customers.
- ▶ Do not abuse your market power.

2

Hindrance of competitors

2.1

Imposing exclusive purchase commitments on customers

Furthermore, market-dominant companies are not permitted to substantially restrict the access of competitors to customers or dealers by exclusive purchase obligations or fidelity rebates or rebates and bonuses having a similar effect (e.g. 'target' rebates).

2.2

Fidelity rebates

Fidelity rebates mean rebates which are granted to buyers on the condition that they obtain their supplies exclusively from the dominant supplier.

It is prohibited to:

- grant fidelity and target rebates by a company dominating the market



Note: US law – Robinson-Patman Act – governing price discrimination is quite complex. Any rebate/discount programs should be reviewed carefully with US counsel.

2.3

Rebates with similar effects

Aggregated sales rebates which develop a so-called suction effect in favour of the company dominating the market and target rebates which individually are related to the sales volume of a specific customer are generally forbidden.

It is prohibited to:

- grant aggregated rebates on the overall turnover reached with the supply of goods belonging to separate markets
- grant target rebates



It may be possible to:

- grant quantity rebates
- grant turnover rebates based on the prior information about quantities of one product to be ordered



Note: US law – Robinson-Patman Act – governing price discrimination is quite complex. Any rebate/discount programs should be reviewed carefully with US counsel.

2.4

Unfair or predatory pricing

Prices that are lower than 'average variable cost' or above 'variable cost', but considerably lower than 'average total cost' with the aim of eliminating a competitor, must not be charged.

It is prohibited to:

- grant prices below cost (dumping prices)



3

English clause

It is not allowed to stipulate an English clause specifying that the party bound by contract to the company dominating the market has the possibility of purchasing from a competitor – provided it has in advance informed the company dominating the market of the competitor, quantities and prices agreed upon.

It is prohibited to:

- agree an English clause obliging the customer to disclose names and prices of competitors



4

Refusal to sell

A refusal to sell to distributors or customers may constitute an abuse of a dominant position. The following principles have to be considered:

It is prohibited to*:

- refuse to sell to a customer which meets the same requirements as other customers which are supplied
- reduce supplies to comparable customers in different ways without objective justification



It is possible to*:

- refuse to sell to existing or new customers under a good business reason
- refuse to sell to a new customer because of insufficient capacity



* US law may provide more flexibility in this area. If such an issue occurs it should be reviewed carefully with US counsel.

IV Intracorporate agreements

Agreements between affiliated companies do not in principle fall within the scope of competition law. Therefore, the above mentioned rules of competition are not applicable with respect to the relation of the parent company to its affiliates or between sister companies.

However, it has to be considered that all information given by the parent company to its affiliates in order to be provided to customers, such as advertising material, brochures, price lists, internal calculating documents, marketing plans, etc., have to meet the requirements of competition law.

Annex

TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS

Amsterdam, 2 October 1997

Article 81 (ex Article 85)

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
 - any agreement or category of agreements between undertakings;
 - any decision or category of decisions by associations of undertakings;
 - any concerted practice or category of concerted practices,which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
 - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 82 (ex Article 86)

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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