

# **Behaviour in Competition**

*Directive on 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 worldwide business activities, Roche is determined to adhere to the applicable 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 EU competition law, US antitrust law and other applicable local competition laws.

Competition laws – also referred to as antitrust laws – are designed to protect competition. They prohibit business behaviour which has the objective or the effect of preventing, restricting or distorting competition.<sup>1</sup> It is the belief of the management that even in the absence of such laws, the interest of the Company, its shareholders, its employees and other stakeholders are best served by the principles of free market economy and fair competition. For these reasons, it is the policy of the Company to comply strictly, in all respects, with competition laws.

Roche supports all efforts to promote and protect competition, including the legitimate protection of intellectual property and marketing rights. Roche respects the legitimate undertakings of its competitors, including generic and biosimilar manufacturers. However, it is expected that they comply with applicable laws, regulations and industry codes. Roche does not tolerate misleading claims which disparage its products, and protects its products and interests against unfair competition.

**Following these principles, fair and correct behaviour in competition is mandatory for every employee.**

Roche is aware that sometimes it is difficult for employees to understand the requirements of the competition laws in 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 legal department regarding any specific antitrust or competition question that comes up. As always, you may also use the various speak-up options (Line Management, the local Compliance Officer, the Chief Compliance Officer, available local help and advice resources or the Roche Group Code of Conduct Help & Advice Line) to address questions regarding compliance with competition laws.<sup>2</sup> Similarly, Roche employees who believe in good faith that the Roche Group Code of Conduct has been violated are expected to speak up by using the available speak up options.<sup>3</sup>

1 See p. 29 of the Roche Group Code of Conduct.

2 See p. 14 of the Roche Group Code of Conduct.

3 See p. 15 of the Roche Group Code of Conduct.

The Directive “Behaviour in Competition” is part of the comprehensive Roche Competition Law Compliance Program which also includes other elements, such as antitrust audits, mock dawn raids, general training on competition laws, a compliance podcast as well as an antitrust questionnaire for self-testing.<sup>4</sup> In addition, we have developed an eLearning program called “RoCLID” (Roche Competition Law Interactive Dialogues), which is mandatory for all Roche employees worldwide who are faced with competition issues in their business activities. You will find a link to this e-learning program on the Group Legal Department website.

## 2. Purpose

The purpose of the Directive “Behaviour in Competition” is to explain the basic provisions of antitrust and competition laws, in particular the provisions as applied in the European Union. The Directive is designed to make both management and employees aware of the basic rules, and how these rules affect their business behaviour in making commercial decisions.

This Directive cannot cover all facts and circumstances that an employee may encounter in his or her business activities. Accordingly, it is strongly recommended and expected that in every case of doubt or in any instance where an employee has a question as to whether a particular course of action is appropriate or not, he or she should contact the legal department for advice.

The Directive “Behaviour in Competition” is designed to provide each employee with enough information about the competition laws to recognise situations that require legal advice and to know how to obtain it.

***I did not know it was illegal will not be accepted as an excuse by the competition authorities.***

Where you believe, in good faith, there is a violation of applicable competition laws and regulations, you should report the matter promptly to your line manager, the legal department, the local Compliance Officer or the Chief Compliance Officer. The Roche Group SpeakUp Line is an additional channel for all of us to make a report when we in good faith believe that competition laws are violated. The Roche Group SpeakUp Line is managed by an external company, independent from Roche. If you wish to do so, you can report anonymously. Details of the Roche Group SpeakUp Line can be found either in the Roche Group Code of Conduct or on the Roche intranet.<sup>5</sup>

***If you believe in good faith that in connection with a business where Roche is involved someone has done, is doing or may be about to do something that violates the provisions regarding competition laws, speak up by using the available speak up channels.***

<sup>4</sup> These documents can be found on the Roche intranet (website of Group Legal Department).

<sup>5</sup> See p. 15 of the Roche Group Code of Conduct.

### 3. Application of Competition Law

The best economic and social results are achieved in an environment of free competition. Accordingly, competition laws prohibit unreasonable restraints on competition and acts of monopolisation.

Because of the worldwide business activity of Roche, all employees, regardless of their place of business, must comply with EC Competition Law, US antitrust laws, and any other applicable local competition laws, where the intended business transaction affects these territories.

**Competition laws must be observed by all players in the market around the world.**

#### 3.1 EU Competition Law

The principal provisions of EU competition law are set forth in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU, formerly Articles 81 and 82 ECT) – as stated in the Annex. More detailed legal provisions are laid down in various Commission regulations and directives.

EU competition law applies to all companies and individuals 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 Federal Trade Commission Act and the Robinson Patman Act. In addition, the Company may be bound by the antitrust laws of the various states within the United States in which the Company does business.

US antitrust law applies to all companies and individuals doing business in the United States or affecting US commerce.<sup>6</sup>

<sup>6</sup> For further information and guidance on US antitrust law see the US Pharma Code of Conduct, the DIA Code of Business Conduct and related documents.

### 3.3 National Competition Laws

There are national competition laws to be considered when doing business in the corresponding country. These national competition laws are generally similar to EU competition law and/or US antitrust law. You should contact the legal department with any questions regarding the applicability of local law.

## 4. Responsibility of the Employees

Compliance with competition laws is the responsibility of every employee. Roche employees are forbidden to engage in practices that violate competition laws.

Each employee is responsible for acquiring a sufficient understanding of competition laws to recognise situations that 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 competition laws, each employee must consult the legal department.

**Compliance with competition laws is the responsibility of every employee. If you are in doubt, seek advice. If you believe in good faith that a competition law has been violated, you are expected to speak up using the available speak up channels.**

## 5. Consequences of Violations

Violations of competition laws may result in serious penalties and never pays off!

The European Commission may impose fines up to 10% of the annual worldwide respective group turnover of the undertakings involved. When setting the amount of the fine, the European Commission considers the impact and severity of the violation.

Furthermore, any agreement violating EU Competition Law is automatically void. For a violation of US antitrust law, a company may be subject to very substantial fines in the amount of hundreds of millions or billions of USD and may face criminal corporate charges and/or civil enforcement proceedings that could impair the company's ability to continue doing business.

Violations of national competition laws may also result in large fines. In Switzerland for example, the fine can amount to 10% of the company's Swiss turnover in the last three years. The same applies in other regions. In Malaysia for example the penalty is 10% of worldwide turnover.

Besides large fines and corporate criminal charges, violations of competition laws 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 may be entitled to receive triple the amount of their damages plus attorney fees and costs.

Violations of competition laws may also result in convictions of the involved employee(s). Individuals can be fined and/or given prison terms for such criminal antitrust violations.

Violations of competition laws may also result in the mandatory or discretionary exclusion of Roche from public tender procedures or otherwise conducting business with the government.

**Violating competition laws never pays off.  
In case of any doubt, the legal department must be consulted.  
Employees who violate competition laws are subject to severe sanctions.**



# II Agreements and Coordinated Practices Eliminating or Restricting Competition

In the EU, Article 101 (1) TFEU (formerly Article 81 ECT) EC prohibits all agreements or understandings between two or more companies which have as their objective or effect the prevention, restriction or distortion of competition.

In the United States, the Sherman Act prohibits contracts, combinations or conspiracies that unreasonably restrain trade.

The form of agreements is of no importance. Special attention must be paid to all interactions with competitors wherever they may take place. Not only written agreements are deemed to fall within the scope of competition law, but also verbal agreements or so-called coordinated practices, i.e. deliberate and intended collaboration between individual companies for the purpose of eliminating or restricting competition in a certain market, may be actionable.

Restraints of competition under Article 101 (1) TFEU are divided into two types: vertical and horizontal restraints. The United States does not specifically differentiate between horizontal and vertical restraints in its statutes, but different types of analysis or scrutiny may apply depending upon whether the restraints in question are vertical or horizontal, and both types of conduct could potentially violate US antitrust law.

In both the EU and the US, horizontal restraints refer to agreements or coordinated practices between or among companies acting on the same level of trade, e.g. relationships between actual or potential competitors that restrict the freedom of the partners or third companies to compete.

Vertical restraints refer to agreements or coordinated practices restricting competition between companies acting on different levels of trade, e.g. relationships with distributors and customers, licensees, suppliers or licensors that restrict the competition freedom of the partners or third companies.

A dominant company is subject to additional legal scrutiny. In at least the EU and under certain circumstances also in the US, a company can be said to have a special responsibility with regard to competition on such market if it is found to be dominant. Additional rules that must be observed in cases of dominance are explained in chapter III.

## 1. Horizontal Agreements

Agreements or coordinated practices between competitors which affect the terms on which they do business may raise very serious competition law concerns.

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

### 1.1 Prices and Conditions of Supply

In the absence of a dominant position, every manufacturer is free to establish and change its own (non-predatory) prices, and in doing so, it may take account of, in the absence of any coordination, the conduct of its competitors. However, it is a violation of competition law to agree or to cooperate in any way with competitors to fix prices. In particular:

It is prohibited between competitors to:\*

- jointly determine selling or purchase prices
- jointly determine price increases or decreases
- jointly fix minimum or maximum prices or price ranges
- jointly determine output or sales quantities, or decreases or increases in output or sales quantities
- jointly agree to rebates, discounts and other conditions of supply
- exchange cost- or price-related information that will be followed by fixing similar pricing
- exchange cost- or price-related information unless the parameters of the exchange are carefully constructed and the exchange is occurring for otherwise pro-competitive reasons
- engage in any form of “bid rigging” or coordination of a competitive bidding process



\* In case of doubt, the 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 cost or pricing with competitors.**

### 1.2 Market Allocation

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

It is prohibited between competitors to:

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



**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 the customer or supplier from conducting business in a market is prohibited.

It is prohibited between competitors to:

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



### 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 first obtaining legal advice.

**Advice should be sought if you intend to:**

- enter into an agreement with a competitor on joint research and/or development
- enter into an agreement with a competitor on joint manufacturing
- enter into an agreement with a competitor on joint marketing or sales
- enter into an agreement with a competitor on joint distribution

### 1.5 Trade Associations

Joining a trade association where competitors meet is generally permissible. However, any meetings or other activity that involves sharing of information among competitors can raise significant antitrust risks. Accordingly, Roche's participation in such associations or meetings must be monitored carefully.

It is prohibited to:

- share information about prices, rebates, discounts, conditions of supply, profit margins, cost structures, calculation practice vs distribution practices, territories, customers, products, etc. during meetings of a trade association



It is possible to:

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



**Do not exchange competitively sensitive information with competitors. If competitively sensitive information is exchanged at a trade association meeting, immediately protest, leave the meeting, make sure that both your protest and your leaving are documented in the protocol and inform the legal department right away.**

## 2. Vertical Agreements

Vertical agreements affect business partners that are not acting at the same level of the production or distribution chain, such as distributors, customers, licensees, licensors and suppliers.

- Treatment of certain vertical agreements in the US differs from that of the EU.
- In the EU, certain categories of vertical agreements as well as licence agreements on technology transfer do not violate EU Competition Law if the requirements of the applicable Block Exemption Regulations are met.

**As competition laws and the following principles have to be carefully checked, the legal department should always be consulted prior to the establishment of a vertical agreement.**

### 2.1 Resale Prices

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

In the EU\*, 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, invoices 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 minimum resale prices
- systematically monitor the resale prices of the distributor

In the EU\*, it may be possible to:

- give a non-binding price recommendation for resale prices of branded products, if no direct or indirect pressure is exercised or any incentive is offered to enforce such recommendation, provided there is no dominance
- state maximum resale prices
- mark all statements of resale prices as **“recommended resale prices”**\*\*

\*\* Non-binding price recommendations may, under certain circumstances, be prohibited under Swiss or other national competition laws. Advice from the legal department should be sought.

\* The law in the United States and other countries may differ from that of the EU. The Roche legal department should be consulted prior to the establishment of any resale price maintenance initiatives.

**Do not impose any resale prices. Always consult the legal department prior to the establishment of any resale price maintenance initiatives.**

## 2.2 Exclusivity

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

In the EU\*, it is prohibited to:

- prevent wholesalers or distributors from accepting orders from outside the agreed 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 territorial restrictions
- forbid internet promotion by a distributor



In the EU\*, it may be possible to:

- grant an exclusive distribution, purchase, franchise or licence right in a certain territory or to a certain group of customers
- 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. However, the partner may not be prohibited from advertising on the internet or fulfilling orders not solicited by the partner



\* The law in the United States and other countries may differ from that of the EU. The legal department should be consulted prior to the establishment of any exclusive relationships.

## 2.3 Export Bans/Parallel Trade

Parallel trade is a consequence of free trade within a given territory.

In the EU\*, 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 territorial restrictions



In the EU\*, it may be possible to:

- prohibit an active marketing policy outside the agreed territory (as long as internet advertising is not prohibited), if one of the parties' market share is below 30%
- inform the partner about any differences affecting the product's acceptance in another country or other legal requirements in another country
- unilaterally limit the quantity of products sold to a partner



\* The law in the United States and other countries may differ from that of the EU. The legal department should be consulted prior to taking any measures that might limit parallel trade.

## 2.4 Non-Compete Clause

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

In the EU\*, it is prohibited to:

- forbid the manufacturing and selling of competing products in a distribution agreement for a duration of more than five years from the start of the agreement
- purchase from the supplier more than 80% of the buyer's total purchases of the contract goods
- forbid the manufacturing and selling of competing products in a licence agreement including the distribution of the licensed products for a duration of more than five years from the start of the agreement
- forbid the manufacturing and selling of competing products beyond the duration of the agreement



In the EU\*, it may be possible to:

- forbid the manufacturing and selling of competing products during the first five years of the duration of a distribution or licence agreement



\* The law in the United States and other countries may differ from that of the EU. The legal department should be consulted prior to the establishment of a non-compete clause.

## 2.5 Patent, Trademark, Copyright

The fact that intellectual property (IP) laws grant exclusive rights of exploitation does not imply that IP rights are immune from competition law intervention. On the contrary, over the past few years, the use of IP rights has given rise to an increasing number of highly visible cases in EU competition law. In the pharmaceutical sector the following types of conduct with regard to patents have been viewed as anti-competitive:

It is prohibited to:\*

- mislead patent offices and to misuse the patent system in order to prevent generic or biosimilar competition by gaining "artificial" prolongation of patent protection
- develop "patent clusters" with anticompetitive intent in order to create legal uncertainty and to prevent generic or biosimilar entry



\* The legal department should be consulted prior to the establishment of any agreement by licensing patents, copyrights, know-how or trademarks.

When licensing patents, copyrights, know-how or trademarks in the EU, consider the following:

In the EU\*, 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 has to charge for its product
- enter into pay-for-delay and reverse payment arrangements whereby brand firm patent holders make payments to generic or biosimilars companies that may delay or impede market entry of generic medicinal products (EU)



\* The legal department should be consulted prior to the establishment of any agreement by licensing patents, copyrights, know-how or trademarks.

## 2.6 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:\*

- oblige the licensee to grant an exclusive licence to the licensor or a third party for the licensee's own severable improvement and new application of the licensed technology
- restrict either party from competing with the other party in respect of research and development, manufacture, use or sale of its own developed product, improvement and new application of the technology in question



It is possible to:\*

- oblige the licensee to grant a non-exclusive licence to the licensor for any improvement and new application of the technology in question



\* The law in the United States and other countries may differ from that of the EU. The legal department should be consulted prior to the establishment of any of the above.

## 2.7 Supply Agreements

Many clauses in supply agreements do not affect free competition. However, the following should be considered when establishing a supply agreement in the EU:

In the EU\*, it is prohibited to:

- agree an exclusive supply agreement if one of the parties is dominant
- agree the exclusive supply of the ordered product if the supplier is capable of producing the product in question without the know-how and the auxiliaries of the buyer
- forbid the competition by the buyer or the seller 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
- take any influence on the resale prices charged by the buyer



In the EU\*, it is possible to:

- agree to an exclusive supply agreement if the buyer's market share is below 30% and the supplier is not dominant
- establish requirements and arrangements referring to quality, specifications, quality control, raw materials, packing materials, quantities, terms of delivery and the like
- oblige the supplier not to use the know-how and/or technical means for other purposes than for the supply to the buyer, if the protection of the buyer's know-how is the sole purpose of the restriction



\* The law in the United States and other countries may differ from that of the EU. The legal department should be consulted prior to entering into any exclusive supply agreement.



# III Abuse of a Dominant Position

Being or striving to be in a dominant position is as such not illegal or prohibited. In the EU, however, Article 102 TFEU (formerly Article 82 ECT) prohibits the abuse of a dominant position.

Similarly, in the US, the Sherman Act does not prohibit being or seeking to become a monopolist, but it prohibits monopolisation, attempts to monopolise and conspiracies to monopolise through exclusionary means (i.e. other than by competition on the merits).

Therefore, companies in a dominant position must pay special attention to some additional principles. A company having a dominant position is entitled to compete on the merits and to meet competition. However, a dominant company has a special responsibility not to hinder the market entrance, the effective competition existing in the market or the growth of that competition. For a dominant company, conduct that restricts the ability of other companies to compete, such as the different treatment of distributors, licensees and customers, is not permitted without additional justification.

In the EU, the dominant position is defined as a position of economic strength enabling a company to prevent effective competition on the relevant market by having the power to behave to an appreciable extent independently of its competitors, customers and consumers in a specific market.

Several factors are considered to determine whether a company has a dominant position in the EU. In December 2008, the European Commission issued a guidance document concerning its enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant companies.<sup>7</sup> This EU guidance document introduces a “more economic approach” for the assessment of dominance and the abuse of a dominant position and is still in force. However, it is not uncontested in the EU jurisdiction.

In this approach, market share still provides a useful indication of the market power of a company in the EU. The Commission considers that a low market share is generally a good approximation of the absence of substantial market power. If market share is below 30%, dominance is unlikely.

However, the European Commission will always interpret market share in light of the relevant market conditions, such as (i) the dynamics of the market (expansion and entry), (ii) the extent to which the products are differentiated and (iii) the constraints on the company from actual or potential competitors as well as from its customers and suppliers.

It is not necessary to have a dominant position in an entire industry to be subject to the legal provisions related to dominance in the EU. To determine if a company is dominant, the relevant product market and the relevant geographical market have to be identified. As a general rule, products belong to the same product market if they are “reasonably interchangeable” on both the demand and the supply side.

<sup>7</sup> Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings.

Furthermore, the geographical market is defined as the area where there are identical or comparable conditions for competition. For pharmaceutical and diagnostic products, the relevant geographical market is typically national. However, the definitions may differ for technical markets. The relevant geographical market may, for example, cover the world, several continents, a single continent, several countries (e.g. the EU or EEA), a single country and even parts of such countries. Consequently, the definition of the relevant market must be assessed on a case-by-case basis.

The restrictions on the conduct of dominant companies or monopolists are less clear under US antitrust law. As a general matter, Section 2 of the Sherman Act prohibits companies that possess monopoly power, or that have a dangerous probability of obtaining it, from engaging in exclusionary means to gain, maintain, or enhance monopoly power.<sup>8</sup>

## 1. Discrimination/Different Sales Conditions

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

In the EU, it is prohibited to:\*

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



In the EU, 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)



\* The law in the United States and other countries may differ from that of the EU. Under U S law, the Robinson-Patman Act establishes a complex web of governing principles affecting rebate/discounts programs. Importantly, this complex rule applies equally across all competitors, not merely those that are considered dominant.

Any rebate/discount programs should be reviewed carefully with the legal department.

**Do not discriminate between similar customers.  
Do not abuse your market power.**

<sup>8</sup> For further information and guidance on US antitrust law see the US Pharma Code of Conduct, the DIA Code of Business Conduct and related documents.

## 2. Imposing Exclusive/Excessive Purchase Commitments on Customers

In the EU dominant companies are not permitted to substantially restrict the access of competitors to customers or dealers by exclusive purchase obligations or by excessive terms.

In the EU, it is prohibited to:\*

- agree with customers that they will purchase all requirements exclusively from the dominant company



\* The law in the United States and other countries may differ from that of the EU. Purchasing requirements intended to be imposed on a customer should always be reviewed carefully in advance together with the legal department.

## 3. Rebates

### 3.1 Fidelity Rebates

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

It is prohibited in the EU to:\*

- grant fidelity rebates by a company dominating the market



\* The law in the United States and other countries may differ from that of the EU. Any fidelity rebates should always be reviewed carefully with the legal department.

### 3.2 Target Rebates

Target rebates are rebates that are granted to buyers if they reach a certain quantity or turnover with the dominant products.

It is prohibited in the EU to:\*

- grant target rebates for reaching a certain sales volume by a company dominating the market
- grant target rebates for reaching a turnover increase by a company dominating the market



\* The law in the United States and other countries may differ from that of the EU. Any target rebates should always be reviewed carefully the legal department.

### 3.3 Aggregated Rebates

Aggregated sales rebates which develop a foreclosure/tying effect in favour of the company dominating the market are generally forbidden.

It is prohibited in the EU to:\*

- grant aggregated rebates on the overall turnover reached with the supply of different goods



It may be possible in the EU to:\*

- grant rebates in return for efficiencies



\* The law in the United States and other countries may differ from that of the EU. Any rebates that might have a tying effect on the customer should always be reviewed carefully with the legal department.

## 4. Unfair or Predatory Pricing

In the EU it is forbidden to continuously sell products below one's own average avoidable costs or long-run average incremental cost with the aim or effect of eliminating a competitor.

It is prohibited in the EU to:\*

- grant prices below cost (dumping prices)



\* The law in the United States and other countries may differ from that of the EU. The legal department should be consulted.

## 5. Tying and Bundling

### 5.1 Tying

Tying clauses are 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, are not part of one system or have no connection with the other product. They must not be used if Roche is dominant in one product.

It is prohibited in the EU to:\*

- make the supply of dominant product A conditional upon the obligation to buy product B
- make the supply of a dominant product subject to the obligation to enter into a service agreement



It may be possible in the EU to:\*

- require a customer to buy a full range of products including accessories, reagents and controls
- require a customer of an instrument to enter into a service agreement for reasons of product safety
- prescribe in licence agreements the purchase of materials and special tools which are necessary for a technically satisfactory exploitation of the licence



\* The law in the United States and other countries may differ from that of the EU. The legal department should always be consulted prior to the establishment of any agreement foreseeing that multiple assets must be purchased together.

## 5.2 Bundling

A bundle is the case when two or more distinct products are only sold together in fixed proportions (“pure bundling”) or if the products are also sold separately but the sum of the prices when sold separately is higher than the bundled price (“mixed bundling”).

Bundling of two or more products can be harmful on competition if at least one of the products is dominant since the bundle might foreclose the market for products competing with the single products in the bundle.

In the EU\*, it is prohibited to:

- strategically bundle a dominant product with one or more products for the sole purpose of excluding competitors and without pursuing innovative, scientific and/or medical efforts
- set a predatory price for a product bundle to the effect that the price has a foreclosing effect on competitors



It may be possible in the EU to:\*

- bundle two or more products when there are robust scientific and medical arguments for the bundle
- bundle two products that are part of a system



\* The law in the United States and other countries may differ from that of the EU. The legal department should always be consulted prior to the establishment of any product bundle arrangement.

## 6. 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:

In the EU\*, it is prohibited to:

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



It may be possible in the EU to:\*

- refuse to sell to existing or new customers provided such refusal is reasonable and proportionate for the purpose of protecting commercial interests
- refuse to sell to a customer because of insufficient capacity



\* The law in the United States and other countries may differ from that of the EU. Any measures that might be considered as a refusal to sell should be reviewed carefully together with the legal department.

# IV Guidelines on Tenders

When participating in a tender the Roche Companies concerned must ensure that the provisions as set forth in the Roche Group Code of Conduct, the Roche Directive on Behaviour in Competition and the Roche Directive on Integrity in Business are fully complied with and that all internal and external documents created throughout the process are appropriate and do not contain misleading or suggestive statements.<sup>9</sup>

## 1. Tender Law Regulations

In any jurisdiction the following general principles have to be observed by all parties to a tender process throughout the tender process, in compliance with applicable local tender law regulations.<sup>10</sup>

- **Transparency must be maintained throughout the procurement cycle by adhering to applicable formal procedures**
- **Governmental decision makers must be provided with correct and transparent data**
- **In its interactions with governmental officials Roche shows its commitment to high integrity standards through its transparent and responsible behaviour<sup>11</sup>**

9 See also the Roche Global Records Management Directive, the Roche E-Mail Directive, the e-learning program "Guide to E-Mail Use", the Roche Guidelines on Competition Law Investigation ("Dawn Raid") and the video "Your Email Matters".

10 See also the Roche Guideline on Tenders.

11 See the Roche Working with Governmental Officials: Good Practice Guideline.

## 2. Competition Law Requirements

The general principles of dealing with competitors are also valid for the tender process, in particular but not limited to the following:

It is prohibited to:\*

- discuss tender offer terms, such as prices, sales conditions, etc., with competitors or other bidders
- agree on an allocation of tender participation
- make any agreements with competitors to participate in a tender with only a mock offer
- withdraw from a public tender under the condition or receiving compensation from a competitor for such withdrawal
- fix the price offered by the wholesaler(s) in the tender if the wholesaler(s) participate(s) in a tender process in his name and at his own business risk
- discriminate against other customers when offering low prices for a dominant product (assess carefully the impacts that a low-price offer in a tender might trigger, e.g. reactions of other customers who pay higher prices or reactions in the media or political implications with health authorities)
- offer dumping prices (prices below cost) when having a dominant market position



It is possible to:\*

- provide an offer that includes correct and transparent information and figures
- autonomously decide to directly participate in a public tender
- ask the wholesaler (or several wholesalers) to participate in a public tender, however, without fixing the prices offered by the wholesaler(s) or coordinating the offers of the wholesaler(s)
- give a non-binding price recommendation for the prices to be offered by the wholesaler(s)
- make an offer below the standard list price for a dominant product in order to be awarded a tender, provided such offer is not below cost exploitation of the licence



\* The legal department should be consulted in case of questions regarding a tender process.

## 3. Integrity in Business

As a participant in a tender process you are not allowed to influence in any undue way the tender process itself or any decision makers involved in any jurisdiction. Violations of these principles may result in severe sanctions such as exclusion from tender procedures.

It is prohibited to:\*

- exert any illicit influence on the content of the tender documents
- act as a ghostwriter for tender documents
- maintain undue contacts with the decision makers
- influence tender decision makers by granting any undue advantage or gift



It is possible to:\*

- provide existing technical documentation upon inquiry of the tender authority
- provide product specifications to potential customers



\* The legal department should be consulted in case of questions regarding a tender process.

# V 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 solely controlled affiliates or between sister companies belonging to the Roche Group.

However, it is essential that all information given by the parent company to its affiliates for its customers, such as advertising material, brochures, price lists, internal calculating documents, marketing plans, etc., must themselves meet the requirements of competition law.



# VI Merger Control

The term “merger control” refers to the procedure of reviewing mergers and acquisitions and is another pillar of most competition laws along with the prohibition of anticompetitive agreements and of abusive conduct in a monopoly situation.

Merger control regimes are adopted in the EU, the US or other countries to prevent anticompetitive consequences of mergers and acquisitions. They usually require approval of merger and acquisition deals by the competent antitrust authority regardless of their form (e.g. share or assets deals), if certain thresholds are exceeded. Such transactions must not be closed and integration activities must not start before the necessary approvals have been obtained. Also, the exchange of certain competitively sensitive information may be limited prior to the approval.

It is necessary to evaluate at an early stage of each individual merger and acquisition whether or not the transaction is subject to prior approval of one or more antitrust authorities, to involve the Group Legal Department for this evaluation and to take the necessary steps to obtain the approval(s).

# Annex

## EXTRACT FROM THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU) OF 26 OCTOBER 2012

### ARTICLE 101 (formerly Article 81 EC)

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 102 (formerly Article 82 EC)

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 in so far 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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© March 2016

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