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Model Law on Competition (2010) – Chapter VI

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Objectives or purposes of the law

To control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.

COMMENTARIES ON CHAPTER VI AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATION

Introduction

1. Mergers and acquisitions (M&As) are an integral part of economic activities today. From an economic perspective, different types of mergers can be distinguished based on their motivation.

2. Industrial mergers are motivated, inter alia, by: geographic expansion; diversification of a company's activities or its products and services portfolio; consolidation of its market position; and greater production efficiency through economies of scale and scope allowing a company to produce goods at a lower marginal cost while operating at the minimum efficient scale of production. They may result in firms obtaining better access to capital, the enhancement of research and development capacities, and better use of management skills. In addition, mergers present a means of exit from a given market, whether it is because the firm is failing or it wishes to restructure its activities.

3. On the other hand, mergers and acquisitions may be carried out purely for investment purposes. In particular, private equity funds and investment banks acquire companies with the objective of increasing shareholder revenues on a short-term basis and profitably reselling the company or parts of it in the medium term.

4. Most mergers do not hamper competition in a market. However, some may alter the market structure in a way that raises competitive concerns. The merged entity may enjoy increased market power and face limited competition so that it will be in a position to restrict output and raise prices. Merger control aims to address competition concerns arising from such mergers by preventing the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power.

5. Although most competition regimes around the world include merger control provisions, the content and enforcement of these provisions vary across different jurisdictions. Differences in the treatment of mergers under competition laws relate to, inter alia:

– legal provisions and enforcement policy relating to the different types of mergers;

– the structural and behavioural factors taken into account and their relative importance, including the market share and/or turnover thresholds to trigger off scrutiny by competition authorities, and the anti-competitive criteria to be met before an arrangement would be forbidden in principle;

– the treatment of efficiency gains and of non-competition criteria;

- the coverage and structure of exemptions; and
- procedural arrangements, such as voluntary or compulsory notifications for mergers of firms meeting certain turnover or market share requirements, or ex post facto possibilities for intervening against mergers, and remedies or sanctions.

6. Nonetheless, on the whole, the similarities among most competition regimes relating to the treatment of mergers are more important than the differences. In recent years, several countries have adopted separate provisions in their competition laws to cover mergers, and as part of this general trend towards the adoption or reform of competition legislation, many countries have adopted or reformed merger controls following the same broad orientations.

Terminology

7. An essential element of merger control legislation is the definition of those transactions that shall be subject to control by the competition authorities. The underlying idea is to capture all transactions that transform formerly independent market players into a single player and thereby alter the structure of a market possibly to the detriment of competition. Nevertheless, the terminology used for the definition of transactions subject to merger control varies significantly across different jurisdictions. This section provides a brief overview of the various definitions of notifiable transactions and the potential harm they may cause to competition.

Concentration

8. Concentration may be used to describe the acquisition of control over another undertaking through M&A activity or otherwise. It may therefore be used interchangeably with the term "merger" described below. Concentration may also be used to describe the number of players in a given market. Basically, a high level of concentration in a market indicates few market players whereas low market concentration is indicative of numerous players on a market. The "Market Concentration Doctrine" is widely used as an indicator of industry market power. Broadly, a relatively high level of concentration, when combined with high barriers to entry, is believed to facilitate industry collusion or dominance, and provides the optimal environment for market players to exercise market power.[1]

Merger

9. According to corporate law, a merger is generally defined as a fusion between two or more enterprises previously independent of each other, whereby the identity of one or more is lost and the result is a single enterprise. The expression "merger" in competition law is often broader than its corporate meaning, and can include an acquisition or takeover, a joint venture, or even other acquisitions of control, such as interlocking directorates (see below).

Acquisition/takeover

10. The acquisition or takeover of one enterprise by another usually involves the purchase of all or a majority of shares of another company, or even of a minority shareholding, so long as it is sufficient to exercise control and substantial influence. In some countries, the acquisition of substantial assets of another company also qualifies as a notifiable transaction, if it allows the acquirer to enter into the related market position of the seller. The acquisition of a production site or another functional unit of another company may serve as an example in

[1] Espen Eckbo B (1985). Mergers and the market concentration doctrine: Evidence from the capital market. *Journal of Business* 58: 325–349.

this respect. Acquisitions may take place without the consent of the target company. This is known as a “hostile” acquisition or takeover.

11. As mentioned above, joint ventures and interlocking directorships are often included within the definition of mergers for the purposes of merger control.

Joint ventures

12. Joint ventures are “agreements between firms to engage in a specific joint activity, often through the creation of a jointly owned and controlled subsidiary, to perform a task useful to both or to realize synergies from the parents’ contributions.”[2] They may produce “commonly needed inputs, manufacture commonly produced outputs or combine expertise for research and development.” Alliances are a form of joint venture, which are used for joint endeavours by firms in different geographic markets and which allow for mutual penetration in each partner’s market. Alliances are often the preferred structure for mergers in the airline and telecommunications industries.[3]

13. If the collaboration creates a new function or business, or performs an old function better, then it usually has pro-competitive effects. However, competition concerns arise where the joint venture serves to create or enhance market power, entails overly restrictive ancillary agreements, or is an unnecessary vehicle by which to achieve the desired objectives (i.e. a less anti-competitive means is available). In such circumstances, a joint venture may harm competition and might even be used to disguise collusive activities such as price-fixing or market division.[4] For example, this will be the case when the common links of the two parent companies to the joint venture lead to collusion outside the scope of the joint venture (“spillover effects”).[5] Reduction of actual or potential competition and foreclosure could also occur. Depending on the degree of integration between the two businesses, a joint venture can be reviewed as a merger or just as an agreement among competitors.

Interlocking directorship

14. An interlocking directorship describes a situation where a person is a member of the board of directors of two or more enterprises, or the representatives of two or more enterprises meet on the board of directors of one firm.

15. The competition concerns here lie in the possibility that an interlocking directorship may lead to administrative control whereby decisions regarding investment and production can, in effect, lead to the formation of common strategies among otherwise competing enterprises, on prices, market allocations, and other concerted activities. At the vertical level, interlocking directorships can result in vertical integration of activities between – for example – suppliers and customers, discouraging expansion into competitive areas and leading to reciprocal arrangements among them.

[2] Fox E (2008). Chapter 14: Competition law. In: Lowenfeld A. *International Economic Law*. Second edition. Oxford University Press: 445.
[3] ibid.
[4] ibid.
[5] Jones et al. (2007). *EC Competition Law*. Second edition. Oxford University Press: 1094.

Alternative approaches in existing legislation – Definition of merger

Country/Region	
Brazil	All mergers, acquisitions and associations (including joint ventures) are caught by the Brazilian merger regulations as long as they meet prescribed thresholds and have certain defined effects on the market in Brazil (see Article 54 of Brazilian Antitrust Law 8,884 of 1994, paragraph 3).
China	In China, the definition of “mergers and acquisitions” is very broad, emphasizing the effect of control. According to Article 20 of the Anti-Monopoly Law of the People’s Republic of China, the definition of “mergers and acquisitions” includes merger of business operators or acquirement of equities or assets or the exertion of a decisive influence on other business operators by contract or any other means.
European Union	Concentrations caught under the ECMR[6] include any merger of two or more previously independent undertakings, or the acquisition of direct or indirect control of the whole or part(s) of another undertaking, which brings about a durable change in the structure of the undertaking concerned. This includes all full-function joint ventures that meet a prescribed turnover threshold. Full-function joint ventures include those that are autonomous economic entities resulting in a permanent structural market change, regardless of any resulting coordination of the competitive behaviour of the parents (see Article 3 ECMR).
South Africa	In clause 12 of Chapter 3 of the Competition Act 89 (1998), “merger” is defined as any transaction involving the direct or indirect acquisition or establishment of control by one or more persons over the whole or part of the business of another firm, whether such control is achieved as a result of the purchase or lease of shares, interest or assets, by amalgamation, or by any other means.
United States	The United States merger regulations catch acquisitions of assets or voting securities. Such acquisitions may include acquisitions of a majority or minority interest, joint ventures, mergers, or any other transaction that involves an acquisition of assets or voting securities (see the Hart-Scott-Rodino Antitrust Improvement Act 1976 (HSR Act)).

16. From an economic perspective, a merger may be horizontal, vertical or conglomerate.

[6] Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L24/1 of 29 January 2004).

Horizontal mergers

17. Horizontal mergers are those that take place between actual or potential competitors in the same product and geographic markets and at the same level of the production or distribution chain. Such mergers raise competition concerns because they may lead to a reduction in the number of rivals in the market, causing increased market concentration. Furthermore, a horizontal merger usually results in the merged entity gaining a larger market share by aggregation.

18. This combination may be problematic for two reasons. Firstly, owing to its larger combined market share and the reduced number of competitors on the market, the merged firm may have gained "market power", allowing it to unilaterally raise prices and restrict outputs (unilateral effects). Secondly, the resulting increase in market concentration makes it easier for market players to coordinate and exercise "joint market power" by engaging in interdependent behaviour (coordinated effects).[7]

19. Horizontal mergers, more than other forms of mergers, may present severe competition concerns, and have the potential to contribute most directly to concentration of economic power and to lead to a dominant position of market power or to unlawful collusions.

Vertical mergers

20. Vertical mergers occur where firms that operate at different levels of the production and distribution chain merge (i.e. a merger between a supplier and a distributor). Vertical mergers generally raise fewer competition concerns than horizontal ones, and may even prove beneficial if savings from synergies and efficiencies are transferred to consumers by way of lower prices. However, vertical mergers may raise concerns where they lead to foreclosure; that is to say, where the merged entity will have the ability to control the chain of production and distribution, allowing it to drive existing competitors out of the market or create/increase barriers to the entry of new competitors at one or more functional levels. In addition, vertical mergers may increase the ease with which competing firms can coordinate, if, for example, they lead to increased price transparency.[8]

Conglomerate mergers

21. The term conglomerate mergers refers to mergers between parties involved in totally different markets and activities. Generally, they raise few competition concerns, as they do not affect or change the structure of competition in a specific market. However, in some circumstances, conglomerate mergers may grant the merged entity market power, allowing it to foreclose competitors in separate but related markets.

Notification obligations

22. Merger notifications allow mergers to be brought to the attention of competition authorities, and facilitate the enforcement of merger control. Merger notification obligations vary across competition law regimes. These variations fall into three broad categories:

- those that mandate notification prior to the completion of a merger transaction ("mandatory ex ante" regimes);
- those that allow merging parties to notify authorities after the merger is consummated ("mandatory ex post" regimes); and

[7] Whish (2009). *Competition Law*. Sixth edition. Oxford University Press: 779–800.
[8] ibid.: 809.

– those that leave it entirely to the discretion of the merging parties (“voluntary” regimes).

23. Many voluntary regimes encourage informal inquiries and notification from merging parties to reduce the risk of the completion of anti-competitive mergers and to avoid the need for costly intervention by the authority. Nonetheless, whether notification requirements are voluntary or mandatory, competition authorities usually have the power to investigate potentially anti-competitive mergers if they are consummated without authority clearance, and often have the ability to apply remedies or seek these from a court to minimize or counter any anti-competitive effects from such mergers.

24. For the purpose of procedural efficiency and to minimize administrative costs, virtually all competition law regimes limit a notification obligation to transactions of a certain economic significance that may potentially raise competitive concerns. This objective is realized through notification thresholds, pertaining to the asset value and/or turnover of the merging parties, their geographical position, and the combined market share of the merging parties in the relevant markets. Only when the proposed transaction reaches the respective notification threshold is the notification obligation triggered.

Alternative approaches in existing legislation – Jurisdictional thresholds

Country/Region	
Voluntary merger control regimes	
Australia	Section 50 of the Trade Practices Act 1974 (TPA) prohibits corporations from directly or indirectly acquiring shares or assets if doing so will substantially lessen competition in a substantial market in Australia. Although notification is voluntary, the Australian Competition and Consumer Commission (ACCC) guidelines indicate that it expects to be notified of mergers well in advance where the products or services of the merged parties are either substitutes or complements, and the merged firm will have a post-merger market share of greater than 20 per cent (ACCC Merger Guidelines 2008).
United Kingdom	Jurisdictional thresholds are based on the fulfilment of either a turnover test and/or a share of supply test. The turnover test is fulfilled where the target company has a turnover in the United Kingdom of more than £70 million (which will catch the majority of significant acquisitions). The share of supply test is fulfilled where both parties are active in a particular market segment and their combined share of this segment is more than 25 per cent.
Mandatory merger control regimes	
European Union	The EC Merger Regulation (ECMR) requires concentrations that have Community Dimension to be notified. Community Dimension is determined by reference to turnover thresholds,

	which are as follows: The aggregate worldwide turnover of all the parties exceeds 5 billion euros; and The Community-wide turnover of each of at least two parties exceeds 250 million euros; unless: Each of the parties achieves more than two thirds of its aggregate Community-wide turnover in one and the same member State. See Article 1 of Council Regulation (EC) No 139/2004.
South Africa	Generally, notification requirements only apply to intermediate and large mergers. The thresholds for intermediate and large mergers differ, but are assessed annually. These thresholds relate to the turnover and assets of the merging parties.
Sweden	A concentration shall be notified to the Swedish Competition Authority if (a) the combined aggregate turnover of all the undertakings concerned in the preceding financial year exceeds SEK 1 billion; and (b) at least two of the undertakings concerned had a turnover in Sweden in the preceding financial year exceeding SEK 200 million for each of the undertakings. Notably, the thresholds that apply in Swedish merger control apply only to the undertakings' turnover in Sweden (i.e. strong local nexus).
United States	Under Chapter 1 §18a of the HSR Act, notification is required where the following conditions are fulfilled: – The "*commerce*" test: Either the acquiring or the acquired party is engaged in US commerce or in any activity affecting US commerce; – The "*size-of-transaction*" test: The amount of voting securities or assets which will be held as a result of the acquisition meets a dollar threshold (the threshold is adjusted annually and amounts to $65.2 million in 2010); – The "*size-of-the-parties*" test: The size-of-the-parties test only applies to transactions with a value that does not exceed $262.7 million (subject to annual adjustment). The test is satisfied if one party has worldwide sales or assets of $13 million or more (as adjusted annually), and the other has worldwide sales or assets of $130.3 million or more (as adjusted annually); and – No exemptions applicable: The merger does not qualify for any of the exemptions

	set out in the HSR, for example the acquisition of non-voting securities.

Merger control analysis

25. Again, there is vast variation amongst jurisdictions worldwide in relation to assessing the legality of mergers. Most frequently, one of the following tests is applied to assess the outcomes that are likely to occur as a result of the merger:

– Will there be a substantial lessening of competition in a given market?

– Will the merger result in the creation or strengthening of a dominant position (higher consumer prices or reduced output are the usual indicia of these effects)?

– Will competition be prevented, distorted and/or restricted?

Alternative approaches in existing legislation – Substantive assessment criteria

Country/Region	
Brazil	Brazilian competition law contains tests both for dominant position and for lessening or restriction of competition. Competition authorities have adopted horizontal merger guidelines that establish that a merger shall not be considered harmful to competition when it: (i) does not grant control over a substantial part of the relevant market; (ii) does grant control over a substantial part of the relevant market, but the exercise of market power is unlikely given other structural factors (e.g. low entry barriers); (iii) does grant control over a substantial part of the market and the exercise of market power is likely, but those negative effects do not amount to the welfare gains generated by the transaction's efficiencies. The substantive test requires causality between the transaction and the control of a substantial part of the relevant market, or the necessary conditions to exercise market power without which the merger must be cleared. (See Joint Directive SDE-SEAE 50/2001).
China	The AML prohibits mergers that have or are likely to have the effect of eliminating or restricting competition, unless the parties can show that the concentration may improve conditions for competition and that the positive effects on competition resulting from the merger outweigh any negative effects. MOFCOM may also permit mergers on certain public interest grounds. The following factors are taken into account by MOFCOM

	when assessing a merger: The market share of the merging parties and the ability of them to control the market; The level of concentration in the relevant market; The likely effect of the merger on market access and technology development; The likely effect of the merger on consumers and other market players; The likely effect of the merger on the development of the national economy; and Other factors that affect competition that are considered relevant by MOFCOM.
European Union	The ECMR prohibits mergers that significantly impede effective competition in the common market, or a substantial part of it, particularly as a result of the creation or strengthening of a dominant position (see Article 2 of Council Regulation (EC) No 139/2004).
United States	The Clayton Act (1914) prohibits acquisitions which may result in the substantial lessening of competition or the creation of a monopoly. Various merger guidelines published by the antitrust agencies have also indicated that mergers should not be permitted if they create or enhance market power or facilitate its exercise. "Market power" is defined as the ability of a seller to "profitably… maintain prices above competitive levels for a significant period of time." (See Joint Commentary on Horizontal Merger Guidelines (2006), available at http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.)
Zambia	The substantive test for clearance of a merger is the substantial lessening of competition test, which requires authorities to consider: whether the proposed merger would result in dominance or in the acquisition of market power; whether the proposed merger would result in a foreclosure of the relevant markets; the existence of parallel imports or the lack of such parallel imports; and any countervailing consumer power. The substantial lessening of competition test is applied subject to public interest considerations such as the creation of employment and the empowerment of Zambians. Possible efficiency gains are also considered. (See Section 8 of the Competition and Fair Trading Act 1994.)

26. Merger control analysis is necessarily forward-looking and involves a comparison of the market situation before and after the proposed merger in order to assess the potential effect on competition ("counterfactual"/prognosis analysis).[9] A counterfactual analysis of the market generally incorporates the following aspects:[10]

(i) Market definition (what is the relevant market in geographical or product terms?);

(ii) Assessment of the pre-merger market structure and concentration (what existing firms are there, what are their shares and strategic importance with respect to the product markets, which firms might offer competition in the future?);

(iii) Assessment of the likely effects of the notified merger, including unilateral and coordinated effects (the likelihood that the merged entity will have the power to exercise market power unilaterally and the likelihood that the merger will give rise to more opportunity for market players to coordinate behaviours); and

(iv) The likelihood of new entry and the existence of effective barriers to new entry and expansion.

27. It is often up to the merging parties to rebut any theory of competitive harm put forward and to show that the merger will not adversely affect the competition in the market in comparison to the status quo. A careful balance must be struck with regard to the evidence requirements. Competition authorities must ensure on the one hand that the criteria are not so demanding that they cause beneficial mergers to be abandoned, and on the other hand that the standard of proof is not so low that some harmful mergers are cleared.

28. In addition to the above general themes, some jurisdictions include other "public interest" considerations in merger control analysis. Such considerations include, inter alia, financial stability, the protection of national champions, industrial policies, the promotion of employment, the survival of small and medium-sized enterprises, and increasing the ownership status of historically disadvantaged persons. While many of these public interests are important, they are not strictly related to competition, and usually entail certain trade-offs (e.g. an outcome that is less than the most efficient).

29. The formation of national champions presents an interesting example of such a trade-off. Some nations with small markets may want to channel the merger of domestic firms into one national champion**,** resulting in a monopoly position domestically, on the argument that this might allow it to be more competitive in international markets. However, in the absence of regulatory controls, such champions are very likely to extract "monopoly rents" domestically, and without the discipline of competition in their domestic markets, may also fail to become more competitive in international markets, to the ultimate detriment of domestic consumers and eventually to the development of the economy as a whole. Moreover, in the case of small economies, domination of the domestic market is unlikely to generate the economies of scale necessary to be internationally competitive. On the other hand, if the local market is open to competition from imports or foreign direct investment, the world market might be relevant for the merger control test, and the single domestic supplier may be authorized to merge. Consequently, competition authorities need to balance considerations of international competitiveness against the potential resultant harm to the domestic market.

30. What is certain is the necessity for competition authorities and governments to engage in thorough deliberation, in order to decide if public interest considerations should be adopted in

[9] Whish (2009). *Competition Law*. Sixth edition. Oxford University Press: 811.
[10] See ICN's Merger Guidelines Workbook (2006).

the competition policy or if they are better achieved through alternative and more effective means.[11]

Remedies

31. Competition authorities usually have the power to clear or prohibit a merger based on their analysis of the likely effects on competition. Furthermore, where a notified transaction raises competitive concerns, a number of merger control regimes allow the notifying party to propose remedies and thereby restructure the proposed transaction in a way that resolves the competition issues. The competition authority would then have to assess the altered transaction. Other jurisdictions empower the competition authority to impose such remedies upon the notifying parties.

32. Taking into account that merger control is concerned with safeguarding competitive market structure, structural remedies appear to be the first choice to remedy competitive concerns raised by a transaction under scrutiny. The divesture of certain aspects of the merging parties' businesses (usually areas of overlap) in order to prevent or reduce the increase of market power is the most effective form of structural remedy available to competition authorities.

33. Structural remedies are easier to adopt in mandatory ex ante or pre-notification regimes, as the merging parties can be required to put the structural changes in place before the merger has been completed. Although many authorities have the power to undo anti-competitive mergers after they have been consummated, this is clearly a more disruptive and time-consuming approach.

34. Many competition authorities may also utilize behavioural remedies whereby merging parties agree to take certain actions upon completion of the merger (granting licences to competitors, for example) which address competition concerns. In merger cases, behavioural remedies are generally less effective than structural remedies, owing to difficulties in monitoring and tracking implementation.

[11] Whish (2009). *Competition Law*. Sixth edition. Oxford University Press: 805–806 and 813–814.

Alternative approaches in existing legislation – Remedies

Country/Region	
Brazil	The CADE has extensive remedial powers and is expressly permitted to use whatever measures available to resolve any damage to competition resulting from a merger. This includes requiring the dissolution or break-up of the merged entity. (See Article 54 of Brazilian Antitrust Law 8,884 of 1994, para. 9).
China	AML grants MOFCOM the power to block mergers or impose remedies before clearance is granted. It also has at its disposal various legal sanctions against merging parties for non-compliance, and may impose structural remedies, behavioural remedies, or a combination of both.
European Union	The Commission has the power to fine firms up to 10 per cent of their aggregate annual worldwide turnover for failing to comply with requirements to suspend implementation of a merger pending Commission examination, or for consummating a merger that has been prohibited by the Commission. The Commission may also impose periodic penalty payments of up to 5 per cent of average daily worldwide turnover for each day that an infringement persists. Furthermore, fines of up to 1 per cent of aggregate worldwide turnover may be imposed in certain circumstances, for instance where misleading or incorrect information was supplied by the merging parties. In the event that an anti-competitive merger has already been completed, the Commission may require its complete dissolution and may impose interim measures or other action necessary for the restoration of effective competition in the given market. (See Article 8 of Council Regulation (EC) No 139/2004.)
Kenya	The competition authority may refuse authorization of a merger or grant approval on a conditional basis. Conditions may include divestments of sections of the business of the merging parties. Behavioural remedies are also available to the competition authority. (See Article 31 of the Restrictive Trade Practices, Monopolies and Price Control Act 1990).

United States	The competition authorities may seek an injunction in the federal court to prohibit completion of a proposed merger. The Federal Trade Commission (FTC) may also bring administrative proceedings to determine the legitimacy of a merger. Failure to comply with provisions of the HSR Act may result in a fine of up to $16,000 per day for the period of violation. Structural remedies are commonly used, particularly in the form of a consent order requiring merging parties to divest certain portions of existing assets or a portion of assets to be acquired on completion of the transaction. Behavioural remedies are also available to authorities, but it is uncommon for them to be used in merger cases.

Cross-frontier acquisition of control

35. Given their potential effects on the local market, many competition law regimes also subject so-called "foreign-to-foreign" mergers to control by the local competition authorities. Foreign-to-foreign mergers are mergers, takeovers or other acquisitions of control involving companies that are incorporated in other countries, but that nevertheless generate turnover on the local market, either through local subsidiaries or through cross-border direct sales.

36. Competition authorities should be aware of two problems that emerge in the international arena. Firstly, assessment decisions of the same transaction may differ between jurisdictions when there is a divergence in the standards of assessment or where dissimilar market conditions may lead to a different result even if the same substantive test is used. Secondly, the application of varying pre-merger notification and clearance provisions to the same transaction imposes high transaction costs upon the notifying parties.[12] International cooperation can solve some of these concerns.

[12] Fox E (2008). Chapter 14: Competition Law. In: Lowenfeld A. *International Economic Law.* Second edition. Oxford University Press: 444.