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Abstract

The Fourth Edition of Professor Valentine Korah's Introductory Guide to EEC Competition Law and Practice (the "Guide") continues her tradition of concise, insightful, and very useful publications. Since it was first published in 1978, this book and its companion Monographs on group exemptions have gained a reputation for being invaluable guides for the beginner as well as a useful starting place for the experienced practitioner. The Guide explains European Economic Community ("EEC") competition rules critically, in the light of the Community objectives they are intended to achieve. The underlying policies and economic theories are also explored.

BOOK REVIEW

AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE. By Valentine Korah. Sweet & Maxwell, London (4th ed., 1990). xli + 269 pp. ISBN 0-406-906214-661. UK£18.95.

*Reviewed by Joseph P. Griffin**

The Fourth Edition of Professor Valentine Korah's *Introductory Guide to EEC Competition Law and Practice*[1] (the "*Guide*") continues her tradition of concise, insightful, and very useful publications. Since it was first published in 1978, this book and its companion Monographs[2] on group exemptions have gained a reputation for being invaluable guides for the beginner as well as a useful starting place for the experienced practitioner. The *Guide* explains European Economic Community ("EEC") competition rules critically, in the light of the Community objectives they are intended to achieve. The underlying policies and economic theories are also explored.

The *Guide* is divided into fourteen chapters, beginning with the background of the competition rules and modes of enforcement. This background includes sections that explain economic analysis in general and that describe the various Community institutions. The specific analyses of Articles 85 and 86, the two provisions of the Treaty Establishing the European Economic Community (the "EEC Treaty" or "Treaty")[3] addressing competition policy, begins with Chapters 2 and 3, which analyze Article 85 of the Treaty. Article 85 prohibits

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1. VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE (4th ed. 1990) [hereinafter GUIDE].

2. Professor Korah's Monographs on specific aspects of EEC competition law include: EXCLUSIVE DISTRIBUTION AND THE EEC COMPETITION RULES (1992); KNOW-HOW LICENSING AGREEMENTS AND THE EEC COMPETITION RULE: REGULATION 556/89 (1989); FRANCHISING (1989); R & D AND THE EEC COMPETITION RULES: REGULATION 418/85 (1986); and PATENT LICENSING AND THE EEC COMPETITION RULES: REGULATION 2349/84 (1985). All are published by Sweet & Maxwell, London.

3. Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 85, 86, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty].

"agreements between undertakings which may affect trade between Member States . . . and have as their object or effect the prevention, restriction or distortion of competition within the Common Market."[4] Article 85 is the provision of the Treaty that most closely approximates Section 1 of the U.S. Sherman Act, which prohibits anticompetitive agreements and conspiracies.[5]

Professor Korah's treatment of Article 85 is more than a technical exegesis of the text of the Article. She describes the conceptual and practical difficulties with its original division into three sections and its often unpredictable interpretation by the Commission and the Court of Justice. Article 85(1) contains the general prohibition outlined above. Article 85(2) provides that the offending provisions of an agreement that infringes Article 85(1) shall be void. Article 85(3) provides for exemptions from the prohibition for agreements or concerted practices that meet certain criteria. Even where an agreement warrants exemption under Article 85(3), practitioners may confront practical problems in enforcing the agreement. Professor Korah explains that national courts do not have the power to enforce agreements that may contribute to the production or the distribution of goods, or which may have other beneficial effects despite their restriction of competition, until the Commission grants an individual exemption, a process that can be quite lengthy and highly unlikely to result in a formal exemption. As Professor Korah observes, in 1988, its best year, the Commission managed ten such exemptions for almost all sectors of industry and commerce in a Common Market of 320 million people. In the interim, the offending provisions are void. She points out, therefore, that it is important for drafters of agreements to attempt to fashion agreements that are not caught by Article 85(1).

Professor Korah continues her critique of the enforcement of Article 85 by directing the attention of the reader to certain problems with the reasoning of the Commission and Court of Justice in defining relevant markets when determining the market power of firms. In comparing the Community's approach to competition law with that of the United States, Professor

4. *Id.* art. 85.
5. 15 U.S.C. § 1 (1988).

Korah points out certain shortcomings of the Community approach and warns practitioners of its unpredictable consequences. The Commission and Court, she explains, tend to consider either supply-side or demand-side substitutability in a given case, but rarely consider both. The side of the market on which the Commission and Court focus in any particular case depends largely on the type of agreement at issue and on whether the agreement threatens to impede the integration of the Common Market. Thus, it is difficult to determine exactly how the Commission or the Court will evaluate a specific legal and market situation, including the effects of exclusive rights such as patents, copyrights, trademarks, and distribution and franchising agreements, which, if viewed *ex ante*, i.e., at the time of contracting, might be seen as favorable to competition. In contrast to U.S. antitrust law, the impact of the decisions of the Commission and Court on the existence of substitutes on both sides of the market and the probability that competing firms may expand their own production of substitutes or enter the market themselves (i.e., the size of sunk costs or other entry barriers) on the decisions of the Commission and Court is not clear.

In Chapter 4, Professor Korah addresses the enforcement of Article 86, which prohibits any abuse by one or more firms of a dominant position within a substantial part of the Common Market. This provision resembles Section 2 of the Sherman Act, which prohibits monopolization.[6] Again, Professor Korah takes a critical approach to explaining the competing analyses at work in the interpretation and application of the Article, and the resulting difficulties for businessmen and practitioners. She reminds her readers that the plain language of Articles 85 and 86 must be read in light of the broad social, structural, and consumer interests articulated by Articles 2 and 3 of the Treaty.[7] Thus, she warns practitioners, the scope of Article 86 is broader than its U.S. counterpart because Article 86 also prohibits conduct that harms or affects the structure or pattern of existing competition. As a result, dominance in the EEC is broader than the economists' concept of power over

6. 15 U.S.C. § 2 (1988).

7. *See* EEC Treaty, *supra* note 3, arts. 2, 3(f).

price, and the mere fact of dominance may be seen as abusive.[8]

The European institutions have not been successful in distinguishing competition on the merits from unacceptable exclusionary practices. They have been more concerned with protecting competitors than competition. In the United States, by contrast, "Chicago school" economists and the enforcement authorities tend to be concerned mainly with protecting those dealing with a dominant firm from exploitation, an objective that only requires controlling firms which are protected from the competition of equally efficient firms. Professor Korah goes beyond the bare bones of the law, and includes in her discussion of "abuse" an explanation of the theory behind the Court's interpretation. Thus, practitioners and students are better able to understand the rationale behind the decisions of the Commission and Court, thereby lessening the superficial obscurity of many individual Commission decisions and Court judgments. In concluding Chapter 4, Professor Korah discusses the practical consequences of Article 86 from the perspective of the entrepreneur and consumer. On the basis of the Court's judgment in *United Brands Co. and United Brands Continental B.V. v. Commission* ("*United Brands*"),[9] firms that meet substantial competition may be treated as dominant if they have over forty-five percent of the market and if they are larger than their competitors. As a result, dominance seems to be decided as a matter of status, independent of any particular abuse being alleged, and firms with little or no power over price may find themselves in a dominant position. Moreover, the prohibition on overcharging by firms with only slight market power is also worrisome because it prohibits unfair prices without establishing a predictable method of determining fair prices. Ultimately, Professor Korah considers the somewhat circular interpretation of Article 86 detrimental to consumers and the economy as a whole because it subordinates their in-

8. Professor Korah observes, however, that recently the Court of Justice has expanded its definitions of relevant geographic and product markets and has been less willing to confirm a finding of dominance. *See, e.g.*, Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V., Case 66/86, [1989] E.C.R. 803, [1990] 4 C.M.L.R. 102; Société Alsacienne et Lorraine de Télécommunications et d'Electronique (Alsatel) v. Novasam SA, Case 247/86, [1988] E.C.R. 5987, [1990] 4 C.M.L.R. 434.

9. Case 27/76, [1978] E.C.R. 207, [1978] 1 C.M.L.R. 429.

terests in encouraging efficiency to the interests of smaller traders in preserving their place in the market.

In addition to the legal interpretations and their impact on the conduct of undertakings, Professor Korah's *Guide* is replete with practical advice for the practicing lawyer. Each chapter concludes with a useful bibliography of additional reading material on the given subject. For example, Chapter 5 outlines the steps involved in an inspection by the Commission's enforcement authorities by describing the investigation process and informing the practitioner of what action to expect the Commission to take and how to respond most prudently to Commission action. Professor Korah advises against refusing the inspectors entry onto the premises of the undertaking inspected, because the inspectors are likely to infer that the undertaking has something to hide. She further advises the practitioner to assemble a committee to greet the inspectors. The committee should include a lawyer and a "good short hand secretary," because a record should be made of all documents that the inspectors request.

Professor Korah then explains the hearing process before the Commission under Council Regulation No. 17/62 from both the procedural and the substantive points of view.[10] She defines the rights of the undertakings involved, such as the right of the undertaking to be heard before the Commission renders a decision, and the right of an interested party to intervene in the proceedings. In addition, she explains who the various Commission officials present at the hearing are and what their duties entail.

More practical advice follows in Chapter 6. Professor Korah devotes a portion of the chapter to a discussion of whether undertakings should notify their agreements to the Commission. Although there is no duty to notify an agreement to the Commission, notification is the only way that undertakings may obtain an exemption or at least a comfort letter. An individual exemption allows the agreement to be enforced in national courts, and spares undertakings from the threat of nullity and fines. If a comfort letter states that the agreement does not infringe Article 85, or that it comes within

10. Council Regulation No. 17/62, art. 9(1), 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87.

a group exemption, this may facilitate the enforcement of the contract because it may be taken into account by a national court that is asked to enforce it. If the comfort letter, on the other hand, states that the agreement merits exemption, it may be dangerous because the national court may infer that the contract falls within the prohibition of Article 85(1). Because a national court has no power to exempt, all it can do in this situation is adjourn to enable the Commission to consider the grant of a formal exemption. The exemption process is lengthy, however, and consequently, few exemptions are given each year. Furthermore, Professor Korah explains, notification will not help parties to enforce their agreements not yet exempted. The conditions that may be attached to an exemption may lead to opportunistic renegotiation if the bargaining power of the parties has shifted since the agreement was made.

Chapter 7 analyzes classes of agreements that are most clearly prohibited, such as naked cartel agreements, collective aggregated discounts, export bans, and other tight territorial distribution restraints at Member State borders. Professor Korah provides a detailed comparison of conduct in the Community that is clearly prohibited under the case law and conduct in the United States that is *per se* illegal, and she emphasizes the failure of the Court and Commission to adopt the U.S. rule of reason. Her discussion is critical of the failure of the Commission and Court to stress clearly the distinction between naked restraints, which are illegal *per se*, and ancillary restraints, which can be legal if reasonable, a distinction made by Judge William Howard Taft in the seminal U.S. case, *United States v. Addyston Pipe and Steel Co.*[11] Professor Korah is also critical of the Commission's failure to consider free rider arguments as justification for certain restrictive practices. She observes that EEC law, unlike U.S. antitrust law, provides a possibility for exemption in many situations in which U.S. courts might now hold that competition is not restricted. The bifurcation in EEC law between the prohibition in Article 85(1) and the possibility of exemption under Article 85(3) allows the Commission to centralize control in its hands. As Professor Korah observes, however, this practice is unfortunate because the Commission lacks the resources to grant many exemptions

11. 85 F. 271 (6th Cir. 1898), *modified on other grounds*, 175 U.S. 211 (1899).

and national courts are asked to enforce contracts that they have no power to exempt. She concludes that although the Community has not adopted *per se* rules of illegality, it continually condemns certain types of agreements such as naked horizontal cartels and "absolute territorial protection" which, as a consequence, should be avoided. For practitioners who find their clients already engaged in clearly prohibited conduct, Professor Korah suggests formally terminating the agreement and implementing an effective system of compliance with the competition rules.

On the other hand, Professor Korah points out that there are categories of agreements that the Commission has found not to pose a threat to competition and that are exempted by regulation. Chapter 8 includes analyses of the group exemption for exclusive distribution agreements, Commission Regulation No. 1983/83;[12] the group exemption for exclusive purchasing agreements, Commission Regulation No. 1984/83;[13] and the group exemption for franchising agreements, Commission Regulation No. 4087/88.[14] An undertaking can avoid the notice procedure if the agreement fits into one of these narrowly and formalistically defined categories. Professor Korah believes, however, that the Commission's tendency to draft group exemptions in such legalistic detail reduces legal certainty and impedes the negotiation of many desirable agreements that fail to meet its strict terms. As she notes, whether one is trying to protect the public from the extortion of unfair prices or competitors from foreclosure, the legal nature of the contract is less important than economic analysis and questions that concern the structure of the market.[15]

Professor Korah's concluding chapter contains a concise,

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12. O.J. L 173/1 (1983), *corrected by* O.J. C 101/2 (1984).

13. O.J. L 173/7 (1983), *corrected by* O.J. C 101/2 (1984).

14. O.J. L 359 (1988).

15. As Professor Korah comments:

> Advisers sometimes persuade their clients to distort a transaction to come within the straitjacket of one of the group exemptions. This is worrisome. One great virtue of contracts is that they are infinitely variable and can be drafted to fit any possible transaction. It would be so much more sensible for the Commission to develop broader rules, based on openly acknowledged economic considerations as to why particular provisions are or are not anti-competitive in specified circumstances.

GUIDE, *supra* note 1, at 233.

analytical overview of the *Guide*'s discussion of Community competition law. She criticizes the paucity of the economic analysis in the Commission's public decisions and its practice of reciting primary facts without adequate connection to legal conclusions. The result, as she observes, allows the Commission very wide discretion in reaching its often unpredictable conclusions, and to lose valuable opportunities to educate business, legal counsel, national courts and the Court of Justice. Nevertheless, Professor Korah perceives more promising developments in some recent Commission decisions and, especially, in some recent Court judgments.

As noted earlier, the Commission's view that Article 85(1) prohibits any restriction of conduct that is significant on the market is often difficult to reconcile with its conclusions under Article 85(3). In Professor Korah's opinion, this inconsistency has begun to undermine the contract law of the Member States. Certain ancillary restrictions that *ex ante* are necessary to make a transaction viable and that may even increase competition are held to restrict competition under Article 85(1) and then exempted under Article 85(3) on the ground that they are "necessary and reasonable" to make the transaction viable.[16] This reasoning is also reflected in the group exemption regulations. In Regulation No. 1983/83,[17] for example, the Commission lists the ways in which exclusive distribution agreements help suppliers to penetrate another Member State market and yet grants an exemption rather than a negative clearance. Because of the Commission's inability to meet the demand for individual exemptions, its unwillingness to clear agreements with ancillary restraints undermines legal certainty and contract law.[18]

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16. *See, e.g.*, Mitchell Cotts/Sofiltra, O.J. L 41/31 (1987), [1988] 4 C.M.L.R. 111; BP/Kellogg, O.J. L 369/6 (1985), [1986] 2 C.M.L.R. 619.

17. O.J. L 173/1 (1983), *corrected by* O.J. C 101/2 (1984).

18. In its recent judgment in Delimitis v. Henninger Bräu AG, Case C-234/89 (Eur. Ct. J. Feb. 28, 1991) (not yet reported), the Court of Justice was asked by a Frankfurt court whether a national court had the power to anticipate a formal exemption by the Commission and to treat the contract at issue as valid. The Court replied that national courts are empowered to treat contracts as valid where there is no doubt that they do not infringe Article 85(1). In cases in which there is a doubt as to their clear compatibility or incompatibility, the Court referred national courts to their duty of cooperation under Article 5 of the EEC Treaty and stated that they might ask the Commission about the state of its procedure.

Throughout the *Guide* Professor Korah emphasizes the need for greater use of *ex ante* reasoning in competition analysis: it is at the time that firms consider whether to make their investment that they must know whether they will be able to rely on their agreement to appropriate the benefits of their investment. This applies, of course, to the restrictive provisions of joint venturers contemplating an agreement to share research and development costs and benefits and to those of dealers and franchisors who may be contemplating investment and marketing in new territories. As Professor Korah observes, the Commission often succeeds in both having its cake and eating too, when it compels the parties to renegotiate or to amend their agreement *ex post*, once the agreement has been negotiated and the investment possibly made, in order to allow free riders to compete. If this occurs too frequently, firms will become increasingly reluctant to conclude agreements whose commercial advantages will be altered to the benefit of free riders.

Nevertheless, Professor Korah sees grounds for optimism, particularly in some recent Court of Justice judgments that echo the early and realistic reasoning of Advocate General Roemer in *Etablissements Consten SARL and Grundig-Verkaufs-GmbH v. Commission*.[19] In more recent judgments, such as *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgalis*,[20] *Remia BV and Verenigde Bedrijven Nutricia N.V.v. Commission*,[21] and *Erauw-Jacquéry SPRL v. La Hesbignonne SC*,[22] in areas such as franchising, covenants on the sale of a business, and absolute territorial protection for plant breeders' rights, the Court has been willing to conclude that ancillary restrictions required to encourage investment by the parties did not infringe Article 85(1).

The following passage from the conclusion illustrates that the *Guide* is not a dry academic treatise:

> My hope is that [the Court of First Instance] will quash a few decisions of the Commission for defective reasoning where the legal appraisal has not been properly related to

19. Joined Cases 56 & 58/64, [1966] E.C.R. 299, [1966] C.M.L.R. 418.
20. Case 161/84, [1986] E.C.R. 353, [1986] 1 C.M.L.R. 414.
21. Case 42/84, [1985] E.C.R. 2545, [1987] 1 C.M.L.R. 1.
22. Case 27/87, [1988] E.C.R. 1919, [1988] 4 C.M.L.R. 576.

> the facts in order to encourage more lucid analysis. In the long run, this should lead to a more effective competition policy.[23]

In his Forward to the book, Judge René Joliet of the Court of Justice agrees with Professor Korah's critique of the "legalistic and formalistic approach" often taken by European Community officials.

It is no secret that many enforcement officials study Professor Korah's writings and speeches carefully. All those interested in the evolution of European competition policy will share Professor Korah's hope that these officials are open-minded enough to adopt her suggestions.

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23. GUIDE, *supra* note 1, at 236.