

# Northwestern Journal of International Law & Business

---

Volume 8

Issue 1 *Spring*

---

Spring 1987

## Book Review

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>

---

### Recommended Citation

Book Review, 8 Nw. J. Int'l L. & Bus. 273 (1987-1988)

This Book Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

## BOOK REVIEWS

*An Introductory Guide to EEC Competition Law and Practice*, (3d ed.).  
By Valentine Korah. Oxford, England: ESC Publishing Limited, 1986.  
Pgs. 177.

A well-known expert in United Kingdom and European Economic Community ("EEC") competition law, Dr. Valentine Korah is offering us the third edition of her EEC competition law handbook. Originally written to help business executives comply with the EEC competition rules,<sup>1</sup> the third edition has been expanded by sections on price theory, mainly designed for lawyers. Written in clear and simple language, the book gives an excellent overview of the EEC competition law system, placing it within its historical and institutional framework and laying the required emphasis on its connection with the EEC Treaty's objectives of stimulating efficiency and promoting market integration.<sup>2</sup>

The author discusses a number of practical questions which are of immediate relevance to both business executives and lawyers. For example, Korah analyzes the pros and cons of notification to the Commission of the European Communities ("Commission"),<sup>3</sup> the advantages to be gained from amending an agreement before notification,<sup>4</sup> and whether to comply voluntarily with a Commission request for information.<sup>5</sup> She gives useful advice concerning the manner in which Commission investigations are conducted and the steps to be taken by companies to protect their rights.<sup>6</sup>

The book is devoted primarily to an analysis of Articles 85 and 86 of the EEC Treaty, Regulation 17,<sup>7</sup> and the main group exemption regula-

---

<sup>1</sup> V. KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE (1978).

<sup>2</sup> The Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 85-86, 298 U.N.T.S. 11, 47-49.

<sup>3</sup> V. KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE 35-37, 55-57 (3d ed. 1986)[hereinafter V. KORAH, INTRODUCTORY GUIDE, 1986].

<sup>4</sup> *Id.* at 57.

<sup>5</sup> *Id.* at 39-41.

<sup>6</sup> *Id.* at 41-46.

<sup>7</sup> 5 J.O. COMM. EUR. 204 (1962).

tions adopted under Article 85(3). Consideration is also given to the existence of civil law sanctions of breaches of the competition rules.<sup>8</sup> Finally, the Commission's practice and the case law of the Court of Justice of the European Communities ("Court") relating to the main categories of horizontal and vertical agreements and to the interplay between industrial property rights and the EEC Treaty rules are also described.<sup>9</sup>

Although the book's 177 pages allow only for a brief discussion of most problems, a number of fundamental points are examined in a stimulating and original manner. Thus, the notion of "barriers to entry" and its relevance to the assessment of a dominant position are discussed on several occasions.<sup>10</sup> The author adopts a narrow definition of this concept, limiting its application to the obstacles that create a greater hindrance to newcomers than to incumbents. One wonders, however, whether it is possible to exclude from the definition obstacles such as the need to invest a large amount of capital or to wait several years before a new plant comes on line. While it is true that such barriers had to be overcome by incumbents and must still be overcome by new entrants, the fact remains that such barriers tend to make new entry more difficult, even if they do so only in relative terms, and, thus, consolidate the position of incumbents. The author's reliance on "classical economists"<sup>11</sup> to support her interpretation is, unfortunately, not sufficiently specific to permit verification.

Other issues on which Korah provides interesting commentary include the distinction between vertical and horizontal restrictions, the concept of oligopolistic interdependence, and the assessment of potential competition. On this latter point, she rightly criticizes some of the early joint venture decisions of the Commission.<sup>12</sup> Later, however, she applauds the Commission's recent tendency, heralded in its Thirteenth Competition Policy Report,<sup>13</sup> to base its decisions on a more realistic market analysis before deciding that joint venturers are potential competitors.

On the whole, Korah takes a refreshingly critical view of the Commission's practice and of the Court's case law. She analyzes both on the basis of an efficiency test and stresses, quite correctly, the danger in con-

---

<sup>8</sup> V. KORAH, INTRODUCTORY GUIDE, 1986, *supra* note 3, at 48-58.

<sup>9</sup> *Id.* at 59-71.

<sup>10</sup> *Id.* at 4-7, 120-22, 126-29.

<sup>11</sup> *Id.* at 126.

<sup>12</sup> *Id.* at 111-12.

<sup>13</sup> COMMISSION OF THE EUROPEAN COMMUNITIES, THIRTEENTH REPORT ON COMPETITION POLICY (1983).

fusing issues of unfair competition law or of protecting small businesses with the objectives of competition policy.

Finally, a list of bibliographical references taken from EEC, United Kingdom, and United States sources, a useful glossary of technical terms, and the texts of relevant EEC Treaty articles and regulations, complete this most useful and stimulating introductory guide.

*Michel Waelbroeck\**

---

\* Partner, Liedekerke, Wolters, Waelbroeck & Kirkpatrick, Brussels, Belgium.

*Patent Licensing and EEC Competition Rules: Regulation 2349/84.* By Valentine Korah. Oxford, England: ESC Publishing Limited, 1985. Pgs. 126. *R & D and the EEC Competition Rules: Regulation 418/85.* By Valentine Korah. Oxford, England: ESC Publishing Limited, 1986. Pgs. 114.

These two books will be welcomed by academicians and practitioners alike. In these two relatively short texts, Dr. Valentine Korah has undertaken a remarkably detailed and thorough analysis of the provisions of the two most important groups of exemption regulations adopted by the Commission of the European Communities ("Commission") since 1984.<sup>1</sup> Each provision of the regulations is analyzed in extensive detail. The author takes into consideration the drafting history of each regulation, its purposes, and the general objectives of the European Economic Community. One is surprised to discover how many questions of interpretation are raised by the text of these regulations. The answers which Korah provides take into consideration the literal meaning of the provisions as well as their spirit and purpose in conformity with the case law of the Court of Justice of the European Communities ("Court").

A particularly good example of Korah's comprehensive approach is seen in her interpretation of the "putting on the market" concept. Making such a determination provides the starting point of the five-year period during which a patentee may protect a licensee against "passive sales" by other licensees in the same territory. Taking into consideration the provision's purpose—to allow licensees limited protection so that they may tool up and develop a market for the licensed products—Korah concludes that the five-year period should start running only when the investment starts to pay off.<sup>2</sup> Consequently, according to the author, a mere test marketing exercise would not qualify as "putting on the market."<sup>3</sup>

The reader will also appreciate the thorough discussion of the interconnection between the various group exemption regulations. To what extent can the provisions of one regulation be combined with those of another in order to apply to agreements which fall partly within the scope of both group exemptions? This difficult question is only partially answered by the regulations' provisions and their preambles. The considerations which Korah devotes to this discussion fully deserve reading.

In addition to an analysis of the technical provisions of the regulations, the author discusses questions of more general interest. Thus, she

---

<sup>1</sup> 27 O.J. EUR. COMM. (No. L 219) 15 (1984) as corrected in 28 O.J. EUR. COMM. (No. L 113) 34 (1985); 28 O.J. EUR. COMM. (No. L 53) 5 (1985).

<sup>2</sup> V. KORAH, PATENT LICENSING AND EEC COMPETITION RULES: REGULATION 2349/84 40-44 (1985)[hereinafter V. KORAH, PATENT LICENSING].

<sup>3</sup> *Id.* at 42.

stresses the need to introduce a rule of reason into the application of EEC competition law.<sup>4</sup> Such a rule, Korah contends, avoids burdening the Commission with the notification of a host of insignificant agreements, the legal validity of which will be put at risk for an extended period of time. Without such a rule of reason, the competition law potentially could hamper the development of projects which would have an overall procompetitive impact. Thus, the Commission's tendency to consider any restriction on the freedom of the parties to an agreement as a restriction of competition may, as Korah points out, discourage the development and dissemination of technology and its accessibility to a larger number of firms.<sup>5</sup> This result may ultimately hinder rather than promote competition.

A few of the author's positions, while clearly and forcefully expressed, are not entirely convincing. For example, Korah's argument that tying agreements in patent licenses should be prohibited only if they allow the licensor to reap monopoly profits<sup>6</sup> ignores two significant points. First, the risks to competition of tying arrangements arise not only from the possibility of obtaining excessive profits, but from foreclosing competitors of the tying party from the possibility of selling to the tied customers. Second, even if the tying agreement does not result in an immediate increase in the tying party's profit, the agreements may have anticompetitive effects on the general structure of market competition, thereby enabling the tying party to increase its market share to the detriment of competition.

Another assumption made by the author which may be questioned is that most licensing agreements are entered into between parties in a vertical relationship; consequently, any restriction between them should be judged according to the more lenient standard applicable to such agreements.<sup>7</sup> Korah's definition of a vertical relationship is limited to situations in which the licensee is incapable of competing with the patentee without a license.<sup>8</sup> This definition seems to be overly restrictive. Even if the licensee is in such a position, the licensee may be, and generally is, a potential competitor of the patentee. As a result of the license grant, the licensee becomes an actual competitor of the patentee. The relationship is, therefore, horizontal, not vertical. Only in rather exceptional circumstances—where, for example, distribution of a product in-

---

<sup>4</sup> *Id.* at 3-7; V. KORAH, R & D AND THE EEC COMPETITION RULES: REGULATION 418/85 2-8 (1986)[hereinafter V. KORAH, R & D].

<sup>5</sup> V. KORAH, R & D, *supra* note 4, at 2-8.

<sup>6</sup> V. KORAH, PATENT LICENSING, *supra* note 2, at 79-80.

<sup>7</sup> *Id.* at 31-32.

<sup>8</sup> *Id.*

volves the use of a patented process by a distributor not otherwise capable of competing with the patentee—may one speak of a truly vertical relationship between the patentee and the licensee.

Also of particular interest is the consideration given to the “opposition procedure.”<sup>9</sup> Unfortunately, Korah does not take a clear position with regard to the Commission’s authority to institute an opposition procedure in group exemption regulations. Nonetheless, her analysis of the system set up by the regulations and of the procedural problems which they raise, especially in connection with the possibility of appeals to the Court, is well worth reading.<sup>10</sup>

It should be mentioned that an annotated version of the regulations discussed is appended to each volume. Thanks to numerous footnotes, cross-references, subtitles, and underscoring of selected words and phrases in each clause, Korah has succeeded in making the regulations much more handy and convenient instruments to use.

*Michel Waelbroeck\**

---

<sup>9</sup> *Id.* at 88-103; V. KORAH, R & D, *supra* note 4, at 66-82.

<sup>10</sup> V. KORAH, PATENT LICENSING, *supra* note 2, at 99-103; V. KORAH, R & D, *supra* note 4, at 78-81.

\* Partner, Liedekerke, Wolters, Waelbroeck & Kirkpatrick, Brussels, Belgium.