

Third Edition, 200

Cases and Materials on EC Competition Law

Valentine Korah

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Third Edition

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Foreword

By William E. Kovacic, Commissioner, US Federal Trade Commission (on leave: George Washington University Law School)

Few of us who first read an antitrust casebook while studying law in the 1970s could have imagined how the field of competition law would flourish in the decades to come. From a discipline that once commanded the attention of a handful of jurisdictions, competition law today covers the globe.

The evolution of older laws and the creation of newer statutes provide occasions to reflect upon the institutional foundations of an effective competition policy system. Commonly discussed candidates include well-drafted substantive commands, meaningful remedies, capable enforcement authorities and competent courts. Less frequently mentioned, but no less important, is the establishment of an intellectual infrastructure for competition policy. No competition system can attain or sustain success without a network of academic institutions and scholars to teach the economists and lawyers whose skills are crucial to the effective implementation of an antitrust law.

Valentine Korah is one of the leading architects of the intellectual infrastructure of modern competition law. When the history of competition law in the late twentieth and early twenty-first centuries is written, Professor Korah will figure prominently in the chapter about the academics whose efforts as teachers and commentators were vital to the development of this body of public policy. *Cases and Materials on Competition Law* is one of Professor Korah's most significant achievements. This edition continues its predecessors' tradition of providing a superb introduction to competition law. The text's astute selection and ordering of cases, statutes and regulations, and its presentation of insightful explanatory narrative material, are trademarks of the Korah style.

Yet the text is more than an illuminating introduction to the technical details and broader policy themes of competition law. Like earlier editions, this version of *Cases and Materials on Competition Law* reflects two of Professor Korah's most valuable and enduring contributions to antitrust pedagogy and scholarship. She is one of a small group of scholars in the past half-century – her contemporaries in this regard include such notables as Phillip Areeda, Ernest Gellhorn and Richard Posner – who made the core concepts of industrial organisation economics accessible to lawyers. In doing so, Professor Korah helped spur the integration of economics into competition law and promote the search for legal rules that are economically sensible and sensitive to the operational requirements of the legal system.

As she was teaching essential antitrust economics to lawyers, Professor Korah also was building an intellectual bridge across the Atlantic. Professor Korah and scholars such as Eleanor Fox and Barry Hawk were among the first to master the competition law systems of Europe and the United States and to anticipate the emergence of a robust trans-atlantic competition law practice. In the process, these pioneers virtually invented the study of trans-atlantic competition law and, more generally, became models for those who aspire to study comparative competition law. *Cases and Materials on Competition Law* displays the wisdom of Professor Korah in her roles as a law and economics scholar and as one of the field's premier comparative analysts.

The reader of this volume will receive more than an astute survey of an increasingly

important body of law and policy. This volume admits the reader to a large and distinguished society of academics, government officials, judges, and practitioners – and I am one of them – whom Professor Korah has taught in print and in person. No products of a teacher's work are more profound than the lives of students enriched by a deeper grasp of substantive knowledge and a fuller appreciation for price that must be paid to achieve professional proficiency. In literally dozens of countries, I have heard members of the competition policy community say with pride that "Professor Korah was my teacher." We are fortunate that, in the new edition of this text, Valentine Korah has continued the work that has made her one of an elite group of instructors who truly have become teachers to the world.

Dedication to the First Edition

I write this book in sadness over the death of my friend and correspondent over nearly 25 years, Judge René Joliet. As a young Assistant at the University of Liège, he published two of the most perceptive books¹ I have read on competition law. Now almost everyone argues that the Commission's interpretation of Article 85(1) was too wide, but he said it with cogent reasons in a book published 39 years ago. Everyone else² then treated the decision and judgment in *Grundig*³ as the true gospel. It is sad that René should have died just when the Commission was rethinking its policy on vertical restraints and began to accept his views.

While he was Professor at the University of Liège René published many clear, critical articles and books. He wrote not only about competition, but also on intellectual property, the EC Institutions and especially the Court. He had the gift of the vivid phrase: he once said in public about the concept of trade between Member States, 'The Court goes like a yo-yo.' His perceptive analyses went straight to the heart of problems. I have derived great benefit and many ideas from reading his work and from our numerous conversations.

An outsider cannot tell how much of the Community Court's judgments have been influenced by his critical analysis and careful drafting, but he was the *juge rapporteur* in *Pronuptia*,⁴ *AKZO*⁵ and *Ideal Standard*.⁶ He took immense trouble to guide Community law wisely.

He died at home in the beautiful house he had built with long, changing views over the valleys. May he rest in peace!

¹ *The Rule of Reason in Antitrust Law* (The Hague, Martinus Nijhoff, 1967) and *Monopolization and Abuse of Dominant Position: A Comparative Study of American and European Approaches to the Control of Economic Power* (The Hague, Nijhoff, 1970).

² *Save Roemer AG*.

³ Reproduced 1.3.1 below.

⁴ 7.2.1.2 below.

⁵ 3.2.5.1 below.

⁶ 8.3.6 below.

The Nature of this Book

This case book is designed to be used in combination with a textbook, not necessarily mine. I have been very selective, and included a few major cases at considerable length. To save space and reading time, other cases are truncated, some of them heavily: often I have summarised the facts and taken only extracts from the judgments and, sometimes, the opinions of the Advocates General. Occasionally, I have not included even parts of the judgment but have prepared questions in case readers are prepared to go to the law reports or download lengthy judgments from the web.

Cases from the ECJ and CFI can be found in PDF form at www.Europa.eu/int/curia on the day they are delivered (usually on Thursdays) in at least some Community languages, although it may take longer for many of the language versions to appear. The English is usually far behind the French, the language of the Courts. These versions cannot be interfered with and the versions from the private sector that can be manipulated seldom include the footnotes. I have annotated some of the regulations and Commission's notices but these are too lengthy to be carried round for an academic year. Hart Publishing is, therefore establishing a website to accompany this book: <http://www.hartpub.co.uk/updates.html>. It will post some of the longer items, not only those with my annotations, but also other important documents, since documents tend to disappear from the EC websites from time to time, although many come back later. Shorter regulations and notices will be included in the paper version of the book.

I dislike breaking up judgments and decisions between the parts relating to Article 81(1) and (3) and have not done so. I have occasionally divided cases in other ways, with cross-references. Some cases are important for the interpretation of Article 81 and should come in chapter 1, but are also important for an area of substantive law. Most of these will be found in the chapter on substantive law, with a note in chapter 1 referring to it. Most of the cases on which I have notes and questions are included.

Nowadays, the Commission is considering nearly 300 merger cases a year and more are going to stage II when the reports are longer. These can also be found from DG Comp's home page. I have reproduced very few of these, and have, instead, obtained permission from three consulting firms of economists—CRAI (formerly Lexecon), NERA and RBB—to reproduce papers from their websites: www.crai.co.uk, www.nera.com and www.rbbecon.com. I have also taken one from Linklaters' former publication (*In Competition*). These are highly analytical, critical and far shorter than the decisions. I have also included part of the contribution by Nicolas Levy of Cleary Gottlieb on mergers to European Competition Law, general ed. Valentine Korah (lexisnexis). For these copyright permissions I am most grateful. Indeed I am grateful to the authors for their lucid analyses.

Teachers may prefer to take the substantive chapters in a different order from that which I have chosen, and there is no reason why this should not be done. I have started the substantive law, after cartels, with distribution because that is where the institutions started in 1964, so it is easier to explain the precedents. I have not included a bibliography or the most important articles of the Treaty as these are set out in most student texts.

I have used the post-Amsterdam numbering for the Articles of the EC Treaty, even in quotations from earlier documents. Decisions and judgments have long been numbered by paragraphs, but the opinions of Advocates General only in recent years. In documents

X THE NATURE OF THIS BOOK

where the original was not numbered, paragraph numbers have been added in italics for ease of reference. I have also added numbers to the competition briefs and memos included.

There is a full table of contents in the beginning of the book. So I have dispensed with an index. Each chapter also starts with a table of contents. After a short introduction, the materials are reproduced with a large number of comments and questions about them. Some of these are easy to answer; others have no unique correct answer but are designed to encourage reflection. Some questions are repeated after several cases as the law develops.

Table of equivalences referred to in Article 12 of the Treaty of Amsterdam

Numbering of the Treaty on European Union and the EC Treaty *before* and *after* the entry into force of the Treaty of Amsterdam

A. Treaty on European Union (TEU)

<i>Before</i>	<i>After</i>	<i>Before</i>	<i>After</i>	<i>Before</i>	<i>After</i>
Title I	Title I	Art J.7	Art 17	Art K.9	Art 37
Art A	Art 1	Art J.8	Art 18	Art K.10	Art 38
Art B	Art 2	Art J.9	Art 19	Art K.11	Art 39
Art C	Art 3	Art J.10	Art 20	Art K.12	Art 40
Art D	Art 4	Art J.11	Art 21	Art K.13	Art 41
Art E	Art 5	Art J.12	Art 22	Art K.14	Art 42
Art F	Art 6	Art J.13	Art 23	Title VIa	Title VII
Art F.1	Art 7	Art J.14	Art 24	Art K.15	Art 43
Title II	Title II	Art J.15	Art 25	Art K.16	Art 44
Art G	Art 8	Art J.16	Art 26	Art K.17	Art 45
Title III	Title III	Art J.17	Art 27	Title VII	Title VIII
Art H	Art 9	Art J.18	Art 28	Art L	Art 46
Title IV	Title IV	Title VI	Title VI	Art M	Art 47
Art I	Art 10	Art K.1	Art 29	Art N	Art 48
Title V	Title V	Art K.2	Art 30	Art O	Art 49
Art J.1	Art 11	Art K.3	Art 31	Art P	Art 50
Art J.2	Art 12	Art K.4	Art 32	Art Q	Art 51
Art J.3	Art 13	Art K.5	Art 33	Art R	Art 52
Art J.4	Art 14	Art K.6	Art 34	Art S	Art 53
Art J.5	Art 15	Art K.7	Art 35		
Art J.6	Art 16	Art K.8	Art 36		

B. Treaty establishing the European Community (EC)

<i>Before</i>	<i>After</i>	<i>Before</i>	<i>After</i>	<i>Before</i>	<i>After</i>
Part One	Part One	Art 7	– (repealed)	Art 9	Art 23
Art 1	Art 1	Art 7a	Art 14	Art 10	Art 24
Art 2	Art 2	Art 7b	– (repealed)	Art 11	– (repealed)
Art 3	Art 3	Art 7c	Art 15	Chapter 1	Chapter 1
Art 3a	Art 4	Art 7d	Art 16	Section 1	(deleted)
Art 3b	Art 5	Part Two	Part Two	Art 12	Art 25
Art 3c	Art 6	Art 8	Art 17	Art 13	– (repealed)
Art 4	Art 7	Art 8a	Art 18	Art 14	– (repealed)
Art 4a	Art 8	Art 8b	Art 19	Art 15	– (repealed)
Art 4b	Art 9	Art 8c	Art 20	Art 16	– (repealed)

<i>Before</i>	<i>After</i>	<i>Before</i>	<i>After</i>	<i>Before</i>	<i>After</i>
Art 5	Art 10	Art 8d	Art 21	Art 17	– (repealed)
Art 5a	Art 11	Art 8e	Art 22	Art 18	– (repealed)
Art 6	Art 12	Part Three	Part Three	Art 19	– (repealed)
Art 6a	Art 13	Title I	Title I	Art 20	– (repealed)
Art 21	– (repealed)	Art 62	– (repealed)	Art 86	Art 82
Art 22	– (repealed)	Art 63	Art 52	Art 87	Art 83
Art 23	– (repealed)	Art 64	Art 53	Art 88	Art 84
Art 24	– (repealed)	Art 65	Art 54	Art 89	Art 85
Art 25	– (repealed)	Art 66	Art 55	Art 90	Art 86
Art 26	– (repealed)	Chapter 4	Chapter 4	Section 2	<i>(deleted)</i>
Art 27	– (repealed)	Art 67	– (repealed)	Art 91	– (repealed)
Art 28	Art 26	Art 68	– (repealed)	Section 3	Section 2
Art 29	Art 27	Art 69	– (repealed)	Art 92	Art 87
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Art 30	Art 28	Art 71	– (repealed)	Art 94	Art 89
Art 31	– (repealed)	Art 72	– (repealed)	Chapter 2	Chapter 2
Art 32	– (repealed)	Art 73	– (repealed)	Art 95	Art 90
Art 33	– (repealed)	Art 73a	– (repealed)	Art 96	Art 91
Art 34	Art 29	Art 73b	Art 56	Art 97	– (repealed)
Art 35	– (repealed)	Art 73c	Art 57	Art 98	Art 92
Art 36	Art 30	Art 73d	Art 58	Art 99	Art 93
Art 37	Art 31	Art 73e	– (repealed)	Chapter 3	Chapter 3
Title II	Title II	Art 73f	Art 59	Art 100	Art 94
Art 38	Art 32	Art 73g	Art 60	Art 100a	Art 95
Art 39	Art 33	Art 73h	– (repealed)	Art 100b	– (repealed)
Art 40	Art 34	Title IIIa	Title IV	Art 100c	– (repealed)
Art 41	Art 35	Art 73i	Art 61	Art 100d	– (repealed)
Art 42	Art 36	Art 73j	Art 62	Art 101	Art 96
Art 43	Art 37	Art 73k	Art 63	Art 102	Art 97
Art 44	– (repealed)	Art 73l	Art 64	Title VI	Title VII
Art 45	– (repealed)	Art 73m	Art 65	Chapter 1	Chapter 1
Art 46	Art 38	Art 73n	Art 66	Art 102a	Art 98
Art 47	– (repealed)	Art 73o	Art 67	Art 103	Art 99
Title III	Title III	Art 73p	Art 68	Art 103a	Art 100
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Art 48	Art 39	Title IV	Title V	Art 104a	Art 102
Art 49	Art 40	Art 74	Art 70	Art 104b	Art 103
Art 50	Art 41	Art 75	Art 71	Art 104c	Art 104
Art 51	Art 42	Art 76	Art 72	Chapter 2	Chapter 2
Chapter 2	Chapter 2	Art 77	Art 73	Art 105	Art 105
Art 52	Art 43	Art 78	Art 74	Art 105a	Art 106
Art 53	– (repealed)	Art 79	Art 75	Art 106	Art 107
Art 54	Art 44	Art 80	Art 76	Art 107	Art 108
Art 55	Art 45	Art 81	Art 77	Art 108	Art 109
Art 56	Art 46	Art 82	Art 78	Art 108a	Art 110
Art 57	Art 47	Art 83	Art 79	Art 109	Art 111
Art 58	Art 48	Art 84	Art 80	Chapter 3	Chapter 3
Chapter 3	Chapter 3	Title V	Title VI	Art 109a	Art 112
Art 59	Art 49	Chapter 1	Chapter 1	Art 109b	Art 113
Art 60	Art 50	Section 1	Section 1		

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Art 109c	Art 114	<i>Chapter 3</i>	<i>Chapter 3</i>	<i>Part Four</i>	<i>Part Four</i>
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<i>Chapter 4</i>	<i>Chapter 4</i>	Art 127	Art 150	Art 132	Art 183
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