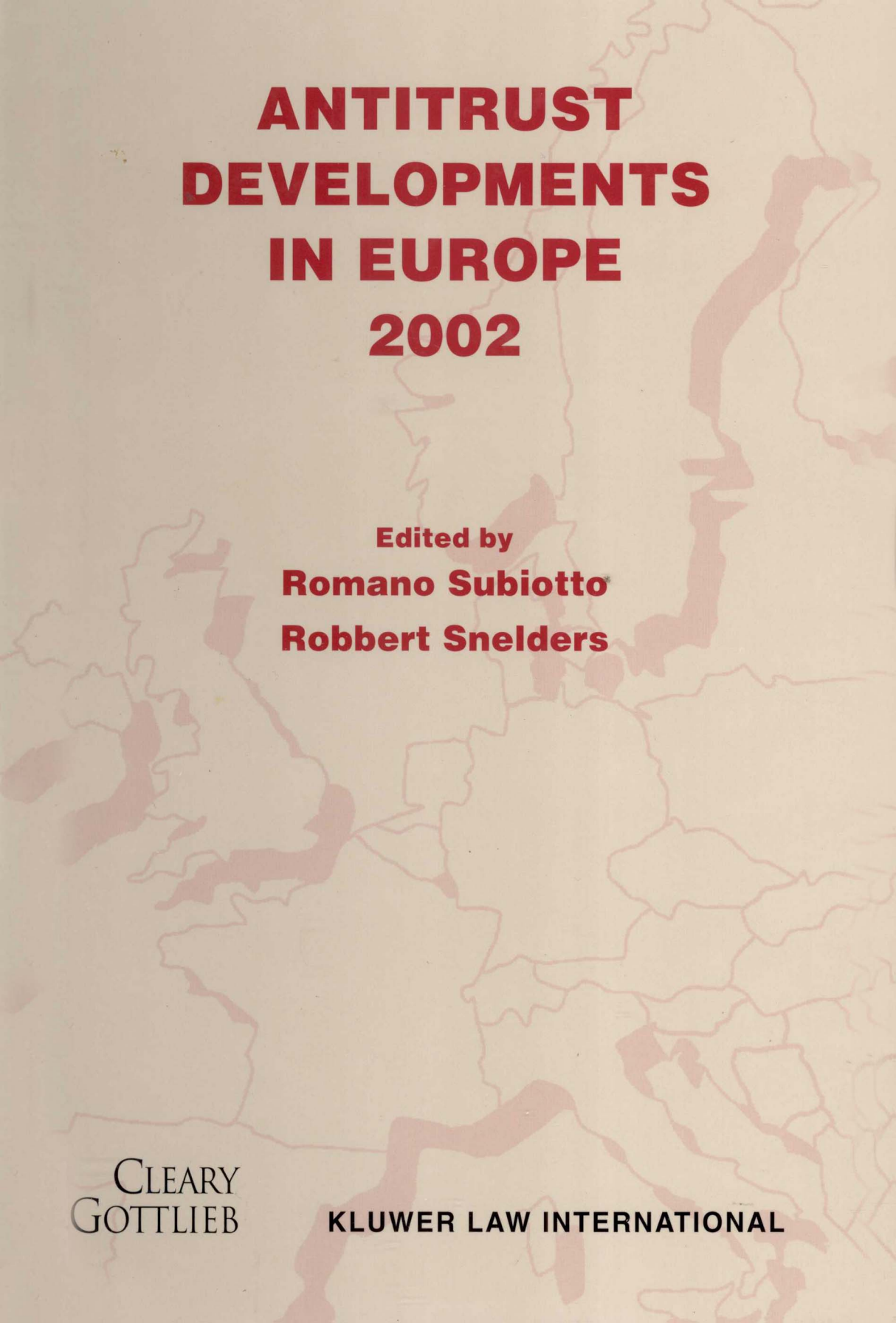




ANTITRUST DEVELOPMENTS IN EUROPE 2002

**Edited by
Romano Subiotto
Robbert Snelders**

**CLEARY
GOTTLIEB**

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and
Robbert Snelders



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FOREWORD

Following last year's highly successful First Edition, we have worked hard to produce this Second Edition, which we hope will meet with the same degree of enthusiasm. As with the First Edition, this book is divided into two main parts, Part I – EC Competition Law Developments and Part II – National Competition Law Developments. Part I is further broken down into topical sections related to Vertical Restraints, Horizontal Agreements, Abuse of Market Power, Mergers and Acquisitions, Joint Ventures, State Aid, and Policy and Procedure. Within these sections, we have added sub-headings to distinguish among the various types of proceedings relevant to that section (*e.g.*, State Aid – CFI – Judgments, or Mergers and Acquisitions – Second Phase Decisions with Undertakings). Part II is first broken down by jurisdiction, and then by topical headings similar to those used in Part I (*e.g.*, France – Abuse of Market Power).

We thank all the Cleary Gottlieb partners, counsel and associates who have contributed to this work, including Stephan Barthelmess, François Brunet, Maurits Dolmans, David Gelfand, Wolfgang Knapp, Nicholas Levy, Mario Siragusa, Dirk Vandermeersch, Antoine Winckler, Asger Petersen, John Temple Lang, Claudia Annacker, Matteo Beretta, Charles Berger, Gaëlle Bontinck, Christopher Cook, Eric de la Serre, Rupert Elderkin, Christoph Feddersen, Ianis Girgenson, Karina Gistelinck, Shaun Goodman, Thomas Graf, Rogier Groen, Silke Heinz, Daniel Ilan, Philip Kienapfel, Suzanne Kingston, Juha-Pekka Mutanen, Cynthia Ngwe, Kristina Nordlander, Olivier Oosterbaan, Jonathan Parker, Johanne Peyre, Anu Piilola, Neil Rigby, Micol Rigol, Robert Schulz, Igor Simic, Nil Sönmez, Sergio Sorinas, Despina Spanou, Saverio Valentino, Marc Waha, David Went and Peter Werdmuller. Additionally, we are grateful to a number of Cleary Gottlieb alumni and other lawyers who have made contributions to our monitoring efforts, including Alejandro Fernandez de Araoz, Christer Danielsson, Christian Lundgren, Olivier Van Obberghen and Silvio Venturi. We also wish to thank the members of our Brussels office legal support team who have provided research and administrative assistance on this publication, including Paola Cedrangolo, Dominique Costesec, Cornelia Kutterer, Ann Moens, Ian Reynolds, Katrien Verfaillie and Kerri Vermeylen.

Romano Subiotto and Robbert Snelders
Brussels, May 2003

Editors' Note: Cleary, Gottlieb, Steen & Hamilton has a long-standing commitment to the practice of law in Europe. The firm's advisory work for the French Government, and in particular Jean Monnet, on the implementation of the Marshall Plan led to the opening of the firm's first European office in Paris in 1949. In the following years, the firm was invited to assist in the drafting of certain provisions of the Treaties of the European Communities, including its antitrust rules, and to advise and represent the European Commission and the European Atomic Energy Agency. The opening of the Brussels office in 1960 was followed by the opening of offices in London in 1971, Frankfurt in 1991, Moscow in 1992, and Rome and Milan in 1998.

Cleary Gottlieb's antitrust practice is among the largest and longest-established in the world, comprising around 20 partners and over 80 associates based in Washington D.C., Brussels, Paris, Rome, Milan, Frankfurt, and London. The firm's European offices have developed a fully-integrated European antitrust law practice with extensive and varied expertise in advising plaintiffs, complainants, and defendants on the application of EC and national antitrust laws to domestic and cross-border mergers, acquisitions, joint ventures, and minority holdings; relations among competitors and among companies operating at different levels of trade; the behavior of dominant companies; the application of state aid rules; proceedings before the European Commission and national antitrust authorities; arbitration; and litigation before the European Courts and national courts.

TABLE OF CONTENTS

Foreword	xv
----------------	----

Part I: EC Competition Developments 1

1. Vertical Restraints 3

1.1. Commission – Decisions	3
B&W Loudspeakers	3
Nintendo	4
Nigeria LNG Ltd.	5
JCB	6
DaimlerChrysler	7
1.2. Commission – Regulation	8
New Motor Vehicle Block Exemption	8

2. Horizontal Agreements..... 10

2.1. ECJ – Judgment	10
Case C-309/99 J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten	10
Case C-35/99 Manuele Arduino	12
2.2. CFI – Judgment	13
Cases T-185/00, T-216/00, T-299/00 and T-300/00 Métropole Télévision SA (M6) and others v Commission	13
2.3. Commission – Decisions	15
Austrian Airlines/Deutsche Lufthansa	15
Norwegian GFU	18
Visa International	19
3G Patent Platform Partnership	20
Trends in Commission Cartel Fining Practice in 2002	21

3. Abuse of Market Power	24
3.1. ECJ – Advocate General Opinion	24
Cases C-34/01 to C-38/01 <i>Enirisorse v Ministero delle Finanze</i>	24
3.2. CFI – Judgment	26
Case T-175/99 <i>UPS Europe SA v Commission</i>	26
3.3. Commission Decision	27
Michelin	27
De Post – La Poste	27
3.4. Commission Guidelines	29
Commission Guidelines on Market Power in Electronic Communications Services	29
4. Mergers and Acquisitions	31
4.1. CFI – Judgments	31
Case T-342/99 <i>Airtours</i>	31
Cases T-310/01 and T-77/02 <i>Schneider/Legrand</i>	33
Cases T-5/02 and T-80/02 <i>Tetra Laval/Sidel</i>	38
Case T-251/00 <i>Lagardère and Canal+ v Commission</i>	44
4.2. Second-Phase decisions with Undertakings	46
<i>Haniel/Fels, Haniel/Ytong and Haniel/Cementbouw/CVK</i>	46
<i>Energie Baden-Württemberg/ENI/GVS</i>	50
<i>Südzucker/Saint Louis</i>	52
4.3. First-Phase Decisions with Undertakings	53
<i>SEB/Moulinex</i>	53
<i>Masterfoods/Royal Canin</i>	54
<i>Imperial Tobacco/Reemtsma Cigarettenfabriken</i>	54
<i>Telia/Sonera</i>	56
5. Joint Ventures	58
<i>T-Online International/TUI/Thomas Cook</i>	58
6. State Aid	60
6.1. ECJ – Judgments	60
Case C-482/99 <i>France v Commission</i>	60
Case C-499/99 <i>Commission v Spain</i>	61
Case C-209/00 <i>Westdeutsche Landesbank – Girozentrale</i>	62
6.2. ECJ – Advocate General Opinion	63
Case C-83/01 <i>P Chronopost</i>	63

6.3. CFI – Judgments	64
Case T-152/99 Hijos de Andrés Molina v Commission	64
Case T-98/00 Linde AG v Commission	65
6.4. Commission – Decision	65
Deutsche Post	65
7. Policy and Procedure	68
7.1. ECJ – Judgment	68
Case C-94/00 Roquette Frères	68
7.2. CFI – Judgments	71
Case T-354/94 Stora Kopparbergs Bergslags v Commission	71
Case T-395/94 Atlantic Container Line AB & Ors. v Commission	72
Case T-9/99 HFB a. o. v Commission	73
Case T-31/99 ABB Asea Brown Boveri Ltd	74
7.3. Commission – Decision	76
Graphite Electrodes Cartel	76
Deutsche BP	77
7.4. Commission – Notice	78
New Leniency Notice	78
7.5. Council Regulation	80
Regulation 17 Reform	80
Part II: National Competition Developments	85
8. Austria	87
8.1. Mergers And Acquisitions	87
Wolters Kluwer/Linde Verlag	87
Spar/Maximarkt	88
8.2. Policy and Procedure	89
Amendments to the Cartel Act	89
9. Belgium	91
9.1. Horizontal Agreements	91
MSA/Gilde van Vlaamse Antiquairs	91
ARGB	92

Table of Contents

9.2. Abuse of Market Power	92
Clear Channel Belgium/JC Decaux Belgium Publicité	92
9.3. Mergers And Acquisitions	93
Thomas Cook/City Bird	93
Electricity Sector Customer Transfers	93
Belgacom/De Post/BPG e-Services	95
9.4. Policy and Procedure	96
Competition Council Annual Report	96
Notice on Simplified Merger Review Procedures	97
Metraux Services Belgium/Sodimat	98
American Express International/BBL Travel American Express	98
Electronic Data Systems/Atraxis	98
British American Tobacco/Huis Verlo	99
10. Denmark	100
10.1. Vertical Restraints	100
Adidas Danmark	100
Bang & Olufsen	100
Danish Handball Broadcasting Rights	101
10.2. Abuse of Market Power	102
TDC Tele Danmark	102
Berlingske Gratisaviser	102
Skandinavisk Motor Co.	103
Frequent Flyer Programs	103
A/S Em. Z. Svitzer	104
10.3. Mergers And Acquisitions	104
Electronic Media Archive Joint Venture	104
DLG/KFK	105
10.4. Policy and Procedure	105
Amendments to the Competition Act	105
Optical Sector Competition Inquiry	106
11. Finland	107
11.1. Horizontal Agreements	107
Publishing Sector Joint Venture	107
11.2. Policy and Procedure	108
Sonera/Loimaan Seudun Puhelin	108
Nordic Competition Authorities' Report on Airline Competition	109

12. France	111
12.1. Horizontal Agreements	111
Akaï, Thomson Multimédia	111
Ball Bearings Cartel	111
12.2. Abuse of Market Power	112
Lilly France, Pfizer	112
Compagnie Générale des Eaux, Suez Lyonnaise des Eaux	113
Speed Rabbit Pizza	113
Flexible Gas Pipes	114
12.3. Mergers and Acquisitions	115
La Poste/Delta Diffusion	115
Pierre & Vacances/Maeva	115
SEB/Moulinex	116
12.4. Practice and Procedure	117
GlaxoSmithKline, Pfizer	117
13. Germany	118
13.1. Horizontal Agreements	118
Ready-Mixed Concrete Cartel	118
Paper Cartel	118
Der Grüne Punkt – Duales System Deutschland AG	119
13.2. Abuse of Market Power	120
Wal-Mart	120
C&A	120
Mineral Oil Sector	121
Lufthansa	121
envia Energie Sachsen Brandenburg	122
Fuchs Gewürze	122
Excessive Energy Sector Pricing	122
Deutsche Bahn	123
13.3. Mergers and Acquisitions	123
E.ON/Ruhrgas	123
Liberty Media/Deutsche Telekom	125
T-Online/Bild.de	126
Haniel/Fels and Haniel/Ytong	126
Viterra/Brunata-Minol	126
Eurohypo	127
Holtzbrink/Berliner Verlag	127

Table of Contents

Nehlsen/Rethmann/swb	128
Sanacorp/Andrae-Noris Zahn	128
13.4. Joint Ventures	128
BASF/Northeast Pharmaceutical Group	128
13.5. Policy and Procedure	129
FCO Anti-cartel Unit	129
Amendment of Energy Act	129
14. Greece	130
14.1. Horizontal Agreements	130
Tobacco Cartel	130
14.2. Abuse of Market Power	131
Coca-Cola Hellenic Bottling S.A.	131
14.3. Mergers and Acquisitions	132
Minoan Flying Dolphins	132
14.4. Policy and Procedure	133
Competition Committee Opinion on Privatizations	133
Competition Committee Annual Report	134
15. Italy	135
15.1. Horizontal Agreements	135
Pharmacy Associations	135
Insurance Services Cartel	136
Credit Card Sector Investigations	137
Meal Tickets Cartel	137
15.2. Abuse of Market Power	138
Telecom Italia	138
Tourist Ferry Boat/Caronte	138
Eni	139
15.3. Mergers and Acquisitions	140
Canal+/Telepiù/Stream	140
Autogrill/Ristop	140
Edizione Holding/Autostrade	141
Enel/France Telecom/Infostrada	142
S.E.C.I./Co.Pro.B/Finbieticola	143
Sai/Fondiarìa	144
15.4. Joint Ventures	145
Nokia/Marconi/Securcomm	145

15.5. Policy and Procedure	146
New Merger Turnover Thresholds	146
Bank of Italy's Jurisdiction in Competition Matters	146
Henkel/Loctite	147
16. The Netherlands	148
16.1. Vertical Restraints	148
Heineken	148
AstraZeneca	149
16.2. Horizontal Agreements	149
Telecom Operators Cartel	149
16.3. Abuse of Market Power	150
Pretium Telecom/KPN Telecom	150
Dutch Football Broadcasting Rights	150
16.4. Mergers And Acquisitions	151
Dutchtone/Ben Nederland	151
Construction Industry	151
Liberty Media/Casema/Carlyle & Providence	151
16.5. Policy and Procedure	152
Leniency Guidelines	152
Remedy Guidelines	153
Interconnection Report	153
Heijmans	153
Procedural Fines	154
17. Spain	155
17.1. Vertical Restraints	155
Disa Red de Servicios Petrolíferos	155
17.2. Horizontal Agreements	156
Unión Videográfica Española	156
Quota litis – Spanish General Bar Association	156
17.3. Abuse of Market Power	157
Repsol Butano	157
Iberia	158
17.4. Mergers and Acquisitions	158
Logista/Grupo Bural	158
Prosegur/Blindados	159
Caprabo/Enaco	160

Table of Contents

Andersen España/Deloitte Touche Tohmatsu	160
Sogecable/Vía Digital	160
17.5. Policy and Procedure	161
New Law Regarding Regional Competition Authorities	161
Coca-Cola	162
18. Sweden	163
18.1. Horizontal Agreements	163
Electricity Sector Supply Contracts	163
Volvo Car Dealers	163
18.2. Mergers and Acquisitions	164
DLG/Svenska Foder	164
18.3. Policy and Procedure	164
Amendments to Competition Act	164
New Leniency Notice for Cartel Fines	164
Competition Authority Report: “Competition in Sweden 2002”	165
Mo och Domsjö AB	165
19. Switzerland	167
19.1. Vertical Restraints	167
Motor Vehicle Distribution	167
19.2. Horizontal Agreements	167
Gas Distribution	167
Credit Cards	168
ETA SA Fabrique d’Ebauches	168
19.3. Abuse of Market Power	169
Swisscom	169
19.4. Policy and Procedure	170
Proposed Amendments to Competition Act	170
FCC Communication on Vertical Agreements	170
Merck, Rhône-Poulenc	171
20. The United Kingdom	172
20.1. Vertical Restraints	172
Unipart Group Limited v O2 (UK) Limited	172
20.2. Horizontal Agreements	173
Arriva/FirstGroup	173

John Bruce (UK) Limited	173
Hasbro UK Limited	174
20.3. Abuse of Market Power	174
Napp Pharmaceuticals	174
Aberdeen Journals	176
Intel/Via Technologies	177
Ordinance Survey	178
British Sky Broadcasting	179
20.4. Mergers and Acquisitions	180
Neopost/Ascom	180
Cargill/Cerestar	180
H+H Celcon/Marley Building Materials	181
Coloplast/SSL	182
Johnston Press/Trinity Mirror	182
Vivendi Water/First Aqua	183
Synopsys/Avant!	184
20.5. Policy and Procedure	184
Unison Industries/GE Engine Services	184
Merger Control Referral Requests	185
Of tel Position on Competition Act	186
North & West Belfast Health and Social Services Trust	186
Enterprise Act 2002	187
Freeserve.com plc	188
Table of Cases	191
Keyword Index	197

PART I: EC COMPETITION DEVELOPMENTS

1. VERTICAL RESTRAINTS

1.1. COMMISSION – DECISIONS

B&W Loudspeakers

On June 24, the Commission approved a selective distribution system operated by B&W Loudspeakers, subject to B&W removing certain provisions, including a prohibition on internet sales.¹ The Commission's decision is the latest step in the evolution of its approach to distance selling in selective distribution systems. The Commission's early view was that distance selling (mail order) was at odds with the obligation to display products and provide advice to customers, and could therefore be prohibited under selective distribution.² However, the Commission subsequently decided that distance sales were not at odds with such obligations, provided that the distributor also maintained physical facilities comparable to those required of other members of the selective distribution network.³ This approach was followed in *Yves Saint Laurent*, where the Commission cited the Guidelines on Vertical Restraints⁴ in connection with its approval of a selective distribution system which permitted retailers already operating a physical sales outlet to distribute also over the internet.⁵ The Commission continued this evolution in its assessment of B&W's distribution system, stating that B&W could prevent internet sales only in writing and only if the retailer's internet site did not comply with criteria "comparable to those for sales from a traditional retail outlet" needed to "maintain the brand image and reputation of the products." Note that in a later unreported case, the Commission appears to have accepted a requirement that retailers achieve more than 50% of their sales at their physical outlet.

¹ Commission Press Release IP/02/916.

² *Grundig*, OJ 1985 L 233/1.

³ *Grundig*, OJ 1994 L 20/15.

⁴ OJ 2000 C 291/1.

⁵ Commission Press Release IP/01/713 of May 17, 2001.