EUROPEAN
COMMISSION

Brussels, 7.5.2013
COM(2013) 257 final

REPORT FROM THE COMMISSION

Report on Competition Policy 2012

{SWD(2013) 159 final}

INTRODUCTION

The European Union (EU) is the world's largest economic and trading area. The EU's unique asset and distinct comparative advantage on the global scene is its Single Market, which encompasses over half a billion consumers and more than 20 million firms.

Since its inception, the on-going process of improving and expanding the Single Market has gone hand in hand with the development of EU competition policy. The first seminal antitrust cases targeting impediments to trade in the Single Market date back to the 1960s, notably the pioneering decision in 1964 against *Grundig-Consten*. That case concerned an agreement to partition the market, which had resulted in substantial price differences between France and Germany. The Court of Justice upheld the *Grundig-Consten* decision and reiterated its position on private impediments to cross-border trade and competition in subsequent judgments[1]. The adoption of the merger control regulation in 1989 represented a qualitative leap in EU competition policy reflecting the development of the internal market after the entry into force of the Single European Act in 1987. EU competition policy took into account the new market realities of increased opportunities for European firms to merge and acquire assets across national borders. Likewise, State aid control has also gradually become an essential pillar of the Single Market, ensuring that companies are able to compete on equal terms independently of where they are located and providing safeguards against Member States engaging in mutual subsidy races at the expense of each other and of the general European interest. Finally, the adoption of Regulation 1/2003 ten years ago marked a new era in the enforcement of the EU antitrust rules, in which national competition authorities (NCAs) have become very active players. The enforcement of the EU antitrust rules is now carried out by a multiplicity of enforcers in the Single Market according to the same standard of assessment. That regime has significantly enhanced the level of enforcement of the EU antitrust rules and underpins the level playing field for companies operating cross-border in Europe.

Without an effective EU competition policy, the Single Market cannot reach its full potential. There would be nothing to prevent private barriers to trade and competition from replacing the public barriers that free movement rules have dismantled over more than half a century. Nor would Member States be prevented from distorting trade and competition through a myriad of subsidies, a scenario which naturally favours the fiscally stronger. Weakening EU competition policy would undermine the Single Market to the detriment of the growth potential of the EU, the individual economies of which – in particular in the eurozone – are increasingly interdependent. At the same time, competition policy is also crucial in allowing the EU to crack down on abuses of dominant position, cartels and concerted practices that harm consumers.

In 2012 the European Commission continued to ensure the sound functioning of the Single Market, despite occasional calls for a softer stance towards anticompetitive conduct by firms or Member States in view of the economic crisis.

No time to relax the enforcement of competition rules

The decade-long world-wide cartels for colour display tubes and for colour picture tubes, which exhibited all the worst kinds of anticompetitive behaviour in the Single Market, is a case in point. Colour display tubes and colour

[1] Joined Cases C-56/64 and C-58/64 *Grundig-Consten* [1966] ECR 299, Judgment of 13 July 1966. See also Judgment of 4 October 2011 in Joined Cases C‑403/08 and C‑429/08 *Football Association Premier League and Others*, judgment of 4 October 2011

picture tubes are key components that go into the making of television and computer screens, accounting for 50 to 70% of the price. On 5 December 2012, the European Commission fined seven international groups of companies a total of EUR 1 470 515 000 for the two cartels.

Throughout 2012, all the tools of the EU competition policy – antitrust and merger enforcement as well as State aid control – continued to be deployed as levers across significant parts of the Single Market. The year 2012 also marked the 20th anniversary of the relaunch in 1992 of the European Single Market. This Report on competition policy thus focuses on the role of competition policy in leveraging the Single Market for growth. In 2012, the Commission also continued working with national competition authorities (NCAs) to ensure a coherent application of the EU antitrust rules. In particular, the Commission engaged in close cooperation with the national competition authorities within the European Competition Network (ECN), including efforts to foster convergence of national procedures for the enforcement of the EU antitrust rules which are not generally regulated by EU law.

This past year EU competition enforcement focused in particular on sectors of systemic and cross-cutting importance to the EU economy: financial services; key network industries such as energy, telecoms and postal services; as well as knowledge-intensive markets such as smartphones, e-books and pharmaceuticals. In those sectors, EU competition enforcement (which mainly operates *ex post*) complements Single Market regulation.

Many of the issues addressed in this Report were already examined in the course of the Commission's continuous structured dialogue with the European Parliament throughout the year (see section 5 on Competition Dialogue with Other Institutions and, for further detail, the Commission Staff Working Document (SWD) accompanying this Report).

1. COMPETITION POLICY SUPPORTING A FAIRER AND MORE TRANSPARENT FINANCIAL SECTOR

A viable, transparent and competitive banking system providing finance to the real economy is a necessary precondition to restore sustainable growth. The current financial and economic crisis has its origins in the financial sector and any exit strategy necessarily requires addressing the root causes of the crisis. With that in mind, in 2012 the European Commission continued to apply the State aid rules to control the parts of the EU banking sector concerned. The bulk of the activity involved the restructuring of banks, so that no more taxpayer funding will be needed for the foreseeable future. In cases where banks were beyond restructuring, State aid control continued to be used as a *de facto* resolution mechanism in anticipation of more comprehensive Single Market legislation[2]. Merger and antitrust rules were also employed to ensure that the Single Market is underpinned by a transparent and competitive financial sector[3].

The temporary emergency regime as a tool for bank restructuring and de facto resolution

At the outbreak of the financial crisis in 2008 and 2009, State aid control became – more by default than by design - the principal tool at EU level to tackle the unprecedented situation. The Commission promptly put in place a special State aid regime to control government bail-

[2] The Commission will come forward with a proposal for a single resolution mechanism for banks. The December 2012 European Council agreed that this proposal "would be to be examined by the co-legislators as a matter of priority with the intention of adopting it during the current parliamentary cycle"

[3] Responding to European Parliament and the Economic and Social Committee calls for action in favour of fair, well-regulated and transparent financial markets

outs of distressed banks to safeguard the stability of the wider financial system.[4] The special regime was also designed to ensure the sound functioning of the Single Market. The existential threat to the Single Market was evident from the sheer scale of government intervention. Between 1 October 2008 and the end of 2011, approximately EUR 1.6 trillion were transferred to banks. The amount pledged by EU governments was in fact three times greater. The bulk of that amount took the form of government guarantees of banks' liabilities and other forms of liquidity support, accounting for over 9% of EU GDP, while recapitalisations and impaired-asset support totalled over 3% of EU GDP. The special temporary regime continued to ensure that the banks concerned were supported on the same conditions across the Single Market. Under these temporary rules, which remain in force as long as market and economic conditions require, EU banks in distress can receive government support on the condition that they restructure.

Repairing the financial sector to support the real economy while protecting taxpayers

The restructuring of individual banks continued to be guided by the imperative of ensuring viable business models that support the real economy. Decisions involving cost-cutting, divestments and focusing on core activities were taken in relation to *inter alia* some of the German Landesbanken (*NordLB* and *BayernLB*), the Spanish banks *CAM* and *UNNIM* and the *Latvian mortgage bank*.[5] Particular care was taken to ensure that taxpayer money is used to return banks to long-term viability and that in the medium term the taxpayers will be paid back without losses; indeed, some aid beneficiaries have already started to repay the support they received to their governments[6].

As part of the economic adjustment programmes for *Ireland*, *Portugal* and *Greece*, State aid control continued to contribute significantly to the restructuring[7] of those countries´ entire banking sectors as part of a wider effort involving not only the Commission but also the ECB and in most cases the IMF. Again, a key concern was to ensure the integrity of the Single Market in a context of massive public financial support.

Restructuring the Spanish banking sector

In July 2012 the Eurogroup agreed to a Memorandum of Understanding (MoU) on a sector programme for the Spanish financial sector. Under the MoU, a rigorous stress test was carried out covering a three-year period through 2014. The stress test identified a capital shortfall of around EUR 60 billion in ten banks. Two of those banks, Banco Popular and Ibercaja, raised the necessary capital on the market or through management actions. The eight remaining banks that could not meet the shortfall through private resources were recapitalised with programme funds and are being restructured or resolved in line with the State aid rules. A first group involved banks already controlled by the Spanish authorities: *BFA/Bankia*, *Catalunya Caixa*, *Nova Caixa Galicia* and *Banco de Valencia*. The restructuring plans for those banks were approved on 28 November 2012. For a second group, including *Banco Mare Nostrum, Banco CEISS, Caja3 and Liberbank*, restructuring decisions were adopted on 20 December 2012. As a result, the whole Spanish financial system was fully capitalised by the end of 2012. The restructuring plans for those banks aim to restore their viability and capacity to provide credit to the real economy, while minimising the cost to taxpayers and limiting to the minimum distortions of competition. Of the EUR 57 billion capital need for the eight remaining banks, EUR 37 billion will come from the EU programme for the Spanish financial sector. As regards to the remaining EUR 18 billion, EUR 12 billion is in the form of burden-sharing by junior debt holders, EUR 5 billion from asset disposals by the banks and EUR

[4] In essence the special rules mean that the normal rules for aid for rescue and restructuring do not apply to the financial sector (see IP/11/1488)
[5] For a comprehensive picture, see Annex 2 to the Staff Working Document accompanying this report
[6] See, among others cases, SA.28487 (see press release IP/12/847)
[7] As well as resolution when needed, as in the case of the Agricultural Bank of Greece

1 billion is in the form of the transfer of real estate loans to SAREB, the bad bank set up by the Spanish authorities.

Competition policy accompanies EU Single Market legislation aimed at increasing the transparency, fairness and soundness of financial markets

An ambitious Single Market regulation package is being put in place to make financial markets more transparent to address the roots of the financial crisis in areas such as derivatives. EU competition policy naturally supports that legislative effort. Transparency is essential for competitive markets.

In 2012, the Commission continued to investigate a number of antitrust cases relating to the *Libor*, *Euribor* and *Tibor* benchmark rates. A number of banks and brokers are subject to the investigation. The importance of financial derivative products linked to these benchmarks cannot be overstated. According to the bank for International Settlements (BIS) the outstanding gross market value of the interest rate derivatives in all currencies was USD 19 trillion in June 2012.[8] Those products play a key role in the management of risk in the Single Market. The Commission's antitrust investigations were launched before the Libor scandal which was triggered by the revelations of manipulation of the Libor/Tibor and later on the Euribor benchmark rates, which also gave rise to criminal investigations and investigations under financial regulation across many jurisdictions. In July 2012 the Commission amended a previous legislative proposal so as to cover the sort of manipulation that is emerging from the Libor scandal, making it a criminal offence.

The Commission also pursued two antitrust investigations in the credit default swaps (CDS) market which were opened in 2011. The Commission has continued to analyse, in particular, the cooperation between a number of leading investment banks and an information service provider. The purpose of the investigation is to establish whether those players acted to preserve their stronghold in the profitable Over-The-Counter (OTC) CDS market by hindering the development of exchange traded CDS derivatives in a way which may have infringed EU competition law.

The concerted attempts by the Commission and the EU legislature to increase transparency in financial markets through Single Market legislation can be subverted by anticompetitive collusion and abuses. EU competition policy can be, and is, deployed as part of a wider mix of remedies[9].

The Commission also used in 2012 its merger control tools to ensure competitive prices for companies which manage their risks by investing in derivatives in the EU. On 1 February 2012, the Commission prohibited the proposed merger between *Deutsche Börse* and *New York Stock Exchange Euronext*. The Commission came to the conclusion that the merger would eliminate competition and lead to a quasi-monopoly in some derivatives markets, in particular the worldwide markets for European single stock and equity index derivatives and European interest rate derivatives. In those areas, the two exchanges were *de facto* the only credible global players. The Commission took the view that the merger was likely to lead to higher prices and less innovation for derivatives customers and that the remedies proposed by the parties were insufficient to address these concerns.

8 Bank for International Settlements, November 2012, available at http://www.bis.org/statistics/derstats.htm, figures available at http://www.bis.org/statistics/otcder/dt21a21b.pdf

9 As called for by the European Parliament

Facilitating transactions across the Single Market through better functioning payment systems

In 2012, the Commission pursued its antitrust enforcement action against anticompetitive behaviour relating to the multilateral interchange fees (MIFs) charged by credit card companies, in particular Visa's and MasterCard. MIFs make up a significant part of the total cost that retailers must pay for accepting payment cards. In 2010, 35 billion card payments were made in the European Economic Area (EEA), totalling EUR 1.8 trillion.

Visa's credit and debit cards represent approximately 41% of all payment cards issued in the EEA. Over five million merchants accept Visa's payment cards. In 2012, the Commission sent a supplementary statement of objections to *Visa* relating to the MIFs it charges for transactions with consumer credit cards in the EEA[10]. The Commission reached the preliminary conclusion that these MIFs reduce price competition between acquiring banks, inflate the cost of credit card acceptance for merchants and ultimately increase consumer prices. The Commission also found that the obligation on cross-border acquirers to pay MIFs applicable in the country of transaction hindered cross-border acquiring and maintained the segmentation of the Single Market into national markets, preventing merchants from benefiting from lower MIFs in other Member States.

The Commission's analysis in the Visa case closely followed the judgment of the EU General Court in May in the *MasterCard* case, which fully upheld the Commission's findings on the anticompetitive nature of MIFs[11].

2. STATE AID REFORM TO FURTHER DEVELOP THE SINGLE MARKET AND SUPPORT GROWTH IN A CONTEXT OF SCARCE PUBLIC RESOURCES

The past year saw the first decisions applying the new framework on State aid for Services of General Economic Interest (SGEIs) adopted in 2011. In May 2012, the Commission launched an even more ambitious reform agenda: State Aid Modernisation.

Entry into force of new rules on SGEIs: extracting the maximum from scarce public budgets in support of the European social and economic model

SGEIs are public services that would not be provided by market forces alone or at least not in a form that would be available to all. SGEIs are an integral part of the European social market economy model.

The new SGEI rules (effective as of 31 January 2012) assist public authorities in designing smarter, more efficient and more effective services in areas such as energy, transport, telecommunications and postal services. The new approach means that the Commission will focus on SGEIs that receive large government funds and, therefore, are more liable to distort competition in the Single Market. The first decisions (e.g. Post Office Limited)[12] illustrate

---

[10] Following the opening of proceedings in March 2008, the Commission sent Visa a statement of objections in April 2009 concerning multilateral interchange fees ("MIFs") for consumer debit and credit card transactions (see MEMO/09/151). Visa Europe offered commitments to cap its debit card MIFs at 0.20%, which the Commission made binding in December 2010 (see IP/10/1684). The proceedings regarding consumer credit MIFs continue

[11] Case T-111/08, judgment of 24 May 2012, not yet published

[12] Case COMP/SA.33054 *Post Office Limited: Compensation for net costs incurred to keep a non-commercially viable network for the period 2012-15 and the continuation of a working capital facility* (see IP/12/320). The case was assessed under Article 106 TFEU

how the State aid rules can guarantee continued delivery of postal and other essential public services while ensuring fair competition in the Single Market[13] (see also section 3.3 below).

State Aid Modernisation: Tackling the twin challenges of growth and budgetary constraints while safeguarding the Single Market

On 8 May 2012 the Commission launched the State Aid Modernisation (SAM), a reform of the whole of State aid policy. Prioritising enforcement on cases with a significant impact on the Single Market is one of the keys objectives of the SAM. Another key objective is to ensure that scarce public budgets are targeted at real market failures, i.e. that they are not wasted on projects that would have been carried out in any case. In other words, SAM's aim is to facilitate the treatment of aid which is well-designed, targeted at identified market failures and objectives of common interest, and least distortive. Aid which does not provide real incentives for companies crowds out private investment and keeps inefficient and non-viable companies on life support ("bad aid")[14]. Good aid strengthens the Single Market while bad aid weakens it. State aid is a horizontal tool which extends its scope across the Single Market, not least the recently liberalised network industries. Thus, it can and must be designed and leveraged so as to help Member States re-launch growth while ensuring fiscal sustainability.

The process of translating SAM into reality began through revisions of a number of key State aid guidelines and frameworks. The objective is to bring them all in line with a coherent overall philosophy and methodology. To this end, the Commission launched public consultations on the current rules on State aid to broadband infrastructure, environmental protection and regional development. Work also progressed on reviews launched earlier on aid for research, development and innovation, risk capital and rescue and restructuring. The intention is for the bulk of the SAM related rules to be in place by the end of the term of the current European Parliament[15].

3. PROMOTING COMPETITION IN NETWORK INDUSTRIES: THE BACKBONE OF THE SINGLE MARKET

3.1 Integrating energy markets in support of sustainability

Removing the remaining obstacles in gas and electricity markets requires Single Market legislation supported by competition policy

In 2005, the Commission carried out an in-depth sector inquiry into gas and electricity markets which revealed that - despite efforts to integrate the Single Market since the late 1990s through EU sectoral regulation - serious obstacles to competition remained, in particular concentrated markets with high entry barriers, often dominated by vertically integrated incumbents. The problems were compounded by limited interconnection capacities between Member States. That state of affairs had led to divergent prices and conditions of supply throughout the Single Market. The Commission followed up its inquiry through

[13] Responding to calls from EP and ECOSOC
[14] Speech of Vice-President Almunia on 8 October 2012 (see SPEECH/12/701) at the European Parliament Presenting the Competition Policy Work Programme for 2013/14. Available at: http://europa.eu/rapid/press-release_SPEECH-12-701_en.htm
[15] Idem

antitrust enforcement often using decisions accepting commitments offered by dominant gas and electricity players in several countries[16].

EU competition policy cannot on its own integrate the EU gas and electricity markets, ensure competitive prices and security of supply. A third legislative package on gas and electricity was therefore adopted in 2011 and is currently in the process of implementation with a view to creating an EU-wide Single Energy Market by 2014.

Shifting the focus of antitrust enforcement in the energy sector eastwards

Most antitrust investigations and decisions in this area, since the publication of the sector inquiry into gas and electricity in 2005, have focused on western European markets. Recently, and in particular during 2012, the emphasis has shifted eastwards. Central and eastern European gas networks tend to be less interconnected across borders than western European networks.

In the CEZ case, concerning an alleged abuse of a dominant position by the Czech electricity incumbent, the Commission market-tested in 2012 structural commitments aimed at remedying foreclosure of the Czech electricity market. In Bulgaria, the Commission is investigating potential foreclosure by the national company BEH gas, as well as obstacles to cross-border trade in electricity. In addition, on 11 December 2012 the Commission opened formal antitrust proceedings against OPCOM, which allows producers and buyers to trade electricity in Romania, and its parent company Transelectrica, a state-owned enterprise which controls the power grid in that Member State. The Commission has concerns that OPCOM may be abusing its dominant position by discriminating against companies on the basis of their nationality or place of establishment. Power exchanges are crucial for the transparent and reliable formation of electricity prices.

In 2012, the Commission also opened antitrust proceedings against Gazprom in relation to its alleged conduct in a number of central and eastern European gas markets. The opening of the proceedings was due to the Commission's concerns that Gazprom may have and may be abusing its dominant position in upstream gas supply markets in central and eastern Europe, in some of which Gazprom is virtually the sole supplier. The proceedings focus on whether Gazprom has divided gas markets by preventing the free flow of gas between EU countries and whether it is imposing conditions relating to the use of infrastructure that prevent the diversification of sources of gas supply. The scope of the proceedings also covers the possible imposition of unfair prices on customers.

Taking account of energy-intensive firms in the context of the EU Emissions Trading System

Protecting energy-intensive industry against carbon leakage while safeguarding the integrity of the Single Market

The Commission also adopted important State aid rules related to electricity markets. The reform of the EU Emissions Trading System (ETS) agreed in 2009 which takes effect from 2013 onwards means that electricity production will no longer receive free allowances to emit CO2, which could lead to higher electricity bills for

[16] For example, as a result of the Commission's antitrust investigation, Germany’s E.On committed to sell its electricity generation assets and its high-voltage transmission grid business in 2008, a milestone in opening up the market in Germany. Other investigations have helped lift restrictions on cross-border trading of gas and electricity. For instance, the Commission's investigation resulted in changes to the Swedish electricity transmission system that was hindering exports by limiting interconnection capacity with neighbouring countries

companies in the EU. The rules adopted allow Member States to compensate installations in the most electricity-intensive sectors for part of any higher electricity costs resulting from the ETS, as from 2013.[17] The rules were shaped so as to minimise competition distortions in the Single Market in the form of subsidy races at a time of economic uncertainty and need for budgetary discipline; for example, by not allowing full compensation for higher electricity prices and by reducing the compensation over time. At the same time they were designed to preserve the EU objective of decarbonising the European economy. The sectors eligible for compensation include producers of aluminium, copper, fertilisers, steel, paper, cotton, chemicals and some plastics. The new aid regime enables Member States to prevent production shifts from the EU to third countries with less environmental regulation, which could undermine the objective of a global reduction of greenhouse gas emissions.

3.2 Accompanying Single Market legislation in telecoms

Over the past 15 years, EU Single Market legislation has made great strides in injecting competition into telecoms markets. Today, incumbents no longer hold monopolies and must provide wholesale services and network access to alternative operators. However, many ex-monopolists still maintain strong market positions by virtue of their ownership of the fixed networks they rolled out during the monopoly era.

Moreover, as regards mobile networks, four out of five EU citizens possess mobile subscriptions with one of four major groups. At the same time, many features of the telecoms markets remain predominantly national such as licensing of operators and the spectrum for mobile services. We are still far from realising the EU Single Market for telecoms; instead we are confronted with many operators active in 27 separate markets. Furthermore, there are still persistent barriers that limit consumers' ability to take full advantage of market liberalisation. A recent study on Internet service provision[18] shows that the lack of transparent and comparable information as well as contractual barriers (such as long contract duration and charges for early contract termination) discourage consumers from switching.

Tackling market power and fragmentation in telecoms markets in parallel with Single Market legislation

Against that background, *ex post* EU competition law enforcement is required to accompany Single Market *ex ante* regulation, in particular to ensure equal access conditions for new entrants.

In 2012, the Union Courts upheld[19] a 2007 Commission decision fining *Telefónica* for an abuse of its dominant position in the Spanish broadband market. The prices that Telefónica charged its wholesale clients – which were at the same time competitors at the retail level - forced them to make losses if they wanted to continue to operate on the market.

The Commission pursued an antitrust case relating to potential anticompetitive conduct by *Slovak Telekom* on several wholesale broadband markets in Slovakia and investigated whether its parent company *Deutsche Telekom* may be held liable for Slovak Telekom's conduct.

The Commission also pursued an antitrust case against *Telefónica* and *Portugal Telecom* concerning their agreement not to compete with each other on the Iberian telecommunications

[17] The rules allow subsidies of up to 85% of the increase faced by the most efficient companies in each sector from 2013 to 2015, a cap that will gradually fall to 75% in 2019-2020

[18] The functioning of the market for internet access and provision from a consumer perspective in the European Union. Study on behalf of the European Commission, Directorate General for Health and Consumers (expected to be published in April 2013)

[19] Case T-336/07, judgment of 29 March 2012, not yet published

markets. This is the first antitrust case in the telecoms sector which concerns a cross-border market sharing agreement. It is of particular importance for the Commission to investigate this issue in order to avoid that the Single Market is artificially compartmentalised along national borders.

The Commission also examined the manner in which five large telecom operators (the "E5": Deutsche Telecom, France Télécom, Telefónica, Vodafone and Telecom Italia) as well as the mobile sector association GSMA developed standards for future mobile communications services. The Commission's action was meant to ensure that the standardisation process was not being used to foreclose competitors.

Under the EU Merger Regulation, the European Commission unconditionally approved the creation of a joint venture between *Vodafone*, *Telefónica* and *Everything Everywhere* in the field of mobile commerce in the United Kingdom. Mobile commerce or "mobile wallets" is a nascent fast-moving sector. The Commission's central concern was to ensure that these types of markets remain open so that a number of competing solutions can emerge without undue obstacles. The investigation revealed that a number of alternatives already existed and many more were very likely to emerge in the near future to ensure adequate competitive pressure on the UK joint venture's mobile wallet platform.

In December 2012, the Commission also approved the acquisition by *Hutchison 3G Austria* of its competitor Orange, the reducing the number of operators from to three. The approval was subject to a number of conditions. Hutchinson committed to making spectrum available, a necessary condition for the entry of new mobile network operators. Hutchinson also committed to make wholesale access available to up to 16 virtual operators without a full network of their own. Before the implementation of the merger the parties had to conclude an agreement with the upfront entrant.

Supporting the roll-out of broadband infrastructure across the Single Market

The roll-out of new infrastructure for broadband networks across the Single Market was another strategic focus of EU competition policy in 2012. Here the main challenge was that while commercial operators are shouldering most of the investment, they have little incentive to extend the reach of their networks into remote, sparsely populated and rural areas where the market alone will not bear their costs. At the same time the Digital Agenda – one of the Europe 2020 Strategy Flagship Initiatives – aims to bring basic broadband to all Europeans by 2013 and seeks to ensure that, by 2020, (i) all Europeans have access to much higher internet speeds (above 30 Mbps) and (ii) 50% or more of European households subscribe to very fast internet connections (above 100) Mbps. It is clear that government subsidies are required in some instances to address the market failures; indeed, over the past two years the Commission approved aid of about EUR 4 billion, verifying inter alia that public funds do not crowd out private investment.

During the year – as part of the comprehensive State Aid Modernisation project - the Commission completed its update of the rules on State aid for broadband infrastructure, i.e. the Broadband Guidelines, to bring them further in line with the ambitious Digital Agenda objectives of promoting very fast broadband connections throughout the EU. To this end, the new Guidelines aim to achieve the right mix between public and private investment while building a pro-competitive environment (e.g. by ensuring open access to all operators in the Single Market to State funded infrastructure). National incumbents still dominate broadband markets, except in the few countries where a nationwide cable infrastructure has been put in place. To help achieve the Digital Agenda objective of delivering very fast connections (of more than 100 Mbps) to half of European households by 2020, the revised guidelines will allow public funding also in urban areas but subject to very strict conditions to ensure a pro-competitive outcome.

The European Commission also adopted a proposal to amend the Enabling Regulation of 1998. This would allow the Commission to exempt certain categories of aid for broadband infrastructure from prior notification to the Commission and simplify the approval of certain type of projects. This concerns notably:

- aid covering basic broadband in regions where there is no broadband infrastructure and where no such infrastructure is likely to be developed in the near future (‘white’ areas), and small individual aid measures covering very high-speed next-generation access (‘NGA’) networks in ‘white NGA’ areas;
- aid for broadband-related civil engineering works and passive broadband.

3.3 Promoting efficient cross-border postal services while ensuring public service

Postal services are another classic network industry crucial to the functioning of the Single Market. Many European firms rely increasingly on just in-time deliveries to keep inventory costs at an optimal level. They often use parcel express delivery services as part of their logistic chains, notably for cross-border shipments. From a growth perspective, it is essential that cross-border postal deliveries operate as efficiently as possible. Efficient postal services are also a tool to tap the growing potential of cross-border e-commerce.

At the same time, the postal sector constitutes a fundamental service of general economic interest (SGEI) which may need State aid in situations where the market by itself would not guarantee universal and affordable services. EU competition and Single Market rules reconcile those two imperatives.

Phasing in the new rules ensuring the viability of SGEIs and fair competition across the Single Market

Indeed, the first application of the new framework for State aid for SGEIs which came into effect on 31 January 2012 concerned the postal sector. In March 2012, the Commission adopted two decisions concerning UK Post Office Limited based on the new SGEI framework. The Commission found that the aid did not exceed the net cost of the public service mission entrusted to the Post Office Ltd and that its entrustment complied with public procurement rules. Moreover, the entrustment letter and funding agreement governing the payment of the compensation contained appropriate provisions to incentivise an efficient provision of the public service, in line with the Post Office Ltd's strategic plan for the period 2012-2015 which aims at modernising and improving the provision of services over its network according to yearly efficiency milestones.

Similarly, the Commission approved a tax relief measure of EUR 764 million granted by France to *La Poste*, the French incumbent, to enable it to cover costs related to maintaining a high density of postal services from 2008 to 2012. It also authorised compensation of EUR 1.2 billion for the costs incurred by La Poste in carrying out its task of transporting and delivering the press over that same period of time. The two aid measures were found to be compatible with EU State aid rules as they only partially offset the net costs of the important public service tasks incumbent on La Poste and thus did not give it any unfair competitive advantage in the Single Market.

The postal sector deserved particular scrutiny given that the sector was fully liberalised across the EU by the end of 2012. To that end, the Commission adopted four major decisions on State aid granted by *Germany*, *Belgium*, *France* and *Greece* to their respective incumbent postal operators. For Germany and Belgium, the Commission ordered the recovery of substantial amounts of incompatible aid, whereas it approved the French and Greek support. *Deutsche Post* and the *Belgian Post* had received an amount of aid that exceeded the level of compensation required for the provision of the SGEIs that public authorities had entrusted them with. For that reason the Commission decided that that extra aid was incompatible with the Single Market since it gave those two companies an advantage over their competitors in commercial activities beyond their public service mandate.

Merger scrutiny to ensure continued competition in cross-border parcel markets

Developments in the postal sector were also subject to merger scrutiny. The proposed merger involving the takeover by *UPS* of *TNT* would have reduced the number of companies that control pan-European express parcel-transport networks from four to three. On 20 July 2012, the Commission opened an in-depth investigation into the planned merger and finally prohibited the proposed acquisition on 30 January 2013. The transaction would have restricted competition in fifteen Member States in the express delivery of small packages to other European countries. In those Member States, the acquisition would have reduced the number of significant players to only three or two, sometimes leaving DHL as the only alternative to UPS. The concentration would therefore have likely harmed customers by causing price increases and by removing the competitive constraint exercised by TNT. The Commission carried out an in-depth assessment of the proposed remedies including a market test where customers and other interested parties were consulted. However, those remedies proved inadequate to remove the identified competition concerns.

4. HELPING TO UNLOCK THE POTENTIAL OF THE KNOWLEDGE ECONOMY

4.1 Preventing misuses in nascent and fast-moving digital sectors

In digital industries, network effects and lock-in can create entrenched market positions which could be used to exclude competitors or new entrants. The Commission has previously taken decisions in high-tech sectors, preventing dominant companies from abusing proprietary technologies or engaging in other forms of anticompetitive behaviour[20]. A central challenge in digital economy cases is that the markets in question usually move at great speed, necessitating timely and effective intervention[21]. As stated by the ECJ in its Telia Sonera ruling: "*the* […] *application of* [competition rules] *cannot depend on whether the market concerned has already reached a certain level of maturity. Particularly in a rapidly growing market, Article 102 TFEU requires action as quickly as possible, to prevent the formation and consolidation in that market of a competitive structure distorted by the abusive strategy of an undertaking* […]”[22].

Enabling continued innovation in digital sectors from smartphones to music

Potential misuse of standard-essential patents in the so-called patent wars among smartphone manufacturers were a particular focus during the year. The Commission considered the issue of standard essential patents under the EU merger regulation in its approval of the acquisition of *Motorola* by *Google*[23]. It also opened three proceedings[24] concerning possible abuses by *Samsung* and *Motorola* of their standard essential patents, partly in order to provide more

[20] Notably the Article 102 TFEU cases involving Microsoft (see Commission Decision of 24 March 2004 in Case COMP/C-3/Case COMP/C-3/37.792) and Intel (see Commission Decision of 13 May 2009 in Case COMP/C-3/37.990)

[21] See speech by Joaquin Almunia Vice President of the European Commission of 8 October 2012 (SPEECH/12/701)

[22] C-52/09 *TeliaSonera Sverige* [2011] ECR I-527

[23] Case COMP/M.6381, Google/Motorola Mobility (see IP/12/129)

[24] Initiation of proceedings against Samsung on 30 January 2012 (Case COMP/C-3/39.939); initiation of proceedings against Motorola on 2 April 2012 (Cases COMP/C-3/39.985 and COMP/C-3/39.986)

clarity in this field where the Commission received numerous complaints during the year. In On 21 December 2012, in respect of one of those three proceedings, the Commission sent a statement of objections to Samsung, informing it of the Commission's preliminary view that Samsung's seeking of injunctions against Apple in various Member States on the basis of its mobile phone standard-essential patents amounts to an abuse of a dominant position[25].

The critical importance of standard-essential patents to innovation in the ICT sector

Standard-essential patents are relevant for innovation across entire sectors. Such patents are, by definition, part of a standard and the holders of those patents have committed to licensing them on fair, reasonable and non-discriminatory (FRAND) terms. A possible worst-case scenario is when a company willing to take a licence for standard-essential patents on FRAND terms is locked out of the market through court injunctions. Such litigation or threats thereof may thus hold up innovation in the entire industry. Standards can be enormously beneficial for a number of interconnected markets, fostering interoperability and enabling economies of scale and scope in the Single Market and beyond**.**

On the merger front, the Commission approved the takeover by *Universal* - the world´s leading record company - of *EMI*´s recorded music arm after having verified that the concentration would not produce negative effects for digital customers and the development of new digital services. This is one of several sectors being transformed through digitisation. The Commission had concerns that the transaction, as initially notified, would have allowed Universal to significantly worsen the licensing terms it offered to digital platforms that sell music to consumers. To meet those concerns, Universal offered substantial commitments (essentially consisting of the divestiture of a significant portion of EMI's repertoire in the EEA, including top-selling active and catalogue artists, as well as of a commitment by Universal not to include so-called "Most Favourite Nation" clauses in its licensing agreements with digital music services in the EEA for a period of ten years). In light of these commitments, the Commission concluded that the transaction did not raise further competition concerns.

Commitment decisions as a flexible alternative to ensure the rapid restoration of competition in fast-moving digital markets

Commitment decisions such as the one used in the e-books case (see below) can obviate the need for lengthy proceedings and enable the Commission to obtain concrete results for consumers. However, such an approach only works if the commitments entered into are scrupulously complied with. If not, the Commission has the power to impose fines.

On 12 December 2012, the Commission adopted a commitment decision in the e-books sector, another nascent and fast-moving part of the digital economy, that rendered legally binding commitments offered by Apple and four international e-book publishers: Simon & Schuster (CBS Corp.), Harper Collins (News Corp.), Hachette Livre (Lagardère Publishing) and Verlagsgruppe Georg von Holtzbrinck (owner of inter alia Macmillan).

The Commission had opened proceedings in December 2011 against these companies, as well as a fifth international e-book publisher, Penguin (Pearson Group). While the December 2012 decision was not addressed to Penguin as that publisher chose not to offer commitments to the Commission, the Commission is currently engaged in constructive discussions with

[25] See press release at http://europa.eu/rapid/press-release_IP-12-1448_en.htm

Penguin on commitments that would allow an early closure of proceedings also against that publisher.

In its decision, the Commission expressed concerns that Apple and the four international e-book publishers may have colluded to limit retail price competition for e-books in the European Economic Area (EEA), in breach of EU antitrust rules. Prior to January 2010, e-books were sold by publishers to retailers mainly under the so-called "wholesale model", whereby retailers would buy e-books from publishers and then freely determine the retail prices for those e-books when sold to consumers. In January 2010, Apple and the four international e-book publishers jointly switched to agency contracts that all contained the same key terms, with the result that retailers became sales agents for publishers who wanted to sell directly to consumers. Under this "agency model", the four publishers determined the retail prices for e-books according to pricing rules in the agency contracts. Those pricing rules were designed in a way that resulted in higher retail prices than those offered by certain major retailers at the time. In some countries in the EEA, they were designed in such a way as to exclude any possibility of lower prices being offered to consumers in the first place.

In order to address the Commission's concerns, Apple and the four international e-book publishers agreed to terminate all their existing agency agreements that included the retail price restrictions and the pricing rules the Commission had objected to. Apple and the four international e-book publishers also committed, for a period of five years, not to enter into any new agreements containing the pricing rules the Commission had objected to. The four international e-book publishers further agreed, for a period of two years, to allow retailers to offer retail price discounts for e-books up to an amount equal to the commission the retailer receives from the publisher over a one year period.

The commitments ended the practices that were at the origin of the Commission's concerns and restored conditions that will allow the e-books market to reset itself. Where permitted by national retail price laws for e-books, this has the potential to result in lower e-book prices for consumers in the EEA.

A case involving an alleged abuse of a dominant position concerns *Google*. The Commission has expressed concerns that four types of Google business practices may constitute an abuse of a dominant position within the meaning of Article 102 TFEU, namely: (i) the way in which Google’s vertical search services are displayed within general search results as compared to services of competitors; (ii) the way Google may use and display third party content on its vertical search services; (iii) exclusivity agreements for the delivery of Google search advertisements on other websites; and (iv) restrictions in the portability of AdWords advertising campaigns. Google submitted a detailed commitment text at the end of January 2013. The Commission's services are currently analysing Google's proposal with a view to deciding whether it would allow the Commission to start the process for the adoption of a decision pursuant to Article 9 of Regulation 1/2003.

Non-compliance with a previous commitment decision was at issue in a case concerning *Microsoft.* In December 2009, the Commission made legally binding on Microsoft commitments offered to address competition concerns related to the tying of Microsoft's web browser, Internet Explorer, to its dominant client PC operating system Windows. Specifically, Microsoft committed to make available for five years (i.e. until 2014) in the European Economic Area a "Choice Screen" enabling users of the Windows operating system to choose in an informed and unbiased manner which web browser(s) they wanted to install in addition to, or instead of, Microsoft's web browser. The choice screen was to be provided as of March 2010 to European Windows users who have Internet Explorer set as their default web browser.

However, in a decision adopted on 6 March 2013, the Commission found that Microsoft had failed to roll out the browser choice screen with its Windows 7 Service Pack 1 from May 2011 until July 2012, with the result that 15 million Windows users in the EU did not see the choice screen during this period. Microsoft has publically acknowledged that the choice screen was not displayed during that time.

4.2 Preventing misuses of IPRs in the pharmaceutical sector

Pharmaceuticals are another sector where knowledge, inventions and ideas and the intellectual property rights (IPRs) they embody are of central importance. However, in that sector, patent holders and generic companies may be tempted to enter into anticompetitive agreements delaying the entry of cheaper generic medicines, especially when the basic patent protection around the active substance nears expiry or after expiry. At the same time, many such patent settlements may be a rational and socially beneficial way to reduce uncertainty and avoid litigation costs.

Against this background, the Commission launched an inquiry into the pharmaceutical sector in 2008, the results of which were published in July 2009[26]. During 2012, the follow-up to the inquiry advanced on several fronts. In terms of antitrust enforcement, on 25 July and 30 July 2012 the Commission sent statements of objections to more than fourteen companies in two major cases involving possible anticompetitive agreements and unilateral practices.

Statements of objections in respect of conduct potentially delaying the entry of generic antidepressants and cardiovascular medicines in the Single Market

One of the statements of objections concerned the *Citalopram* case where the originator company *Lundbeck* and several generic competitors entered into agreements which may have hindered the entry of generic citalopram into markets in the EEA. Citalopram is the active substance of a class of antidepressants. The statement of objections was also addressed to *Merck KGaA, Generics UK, Arrow, Resolution Chemicals, Xellia Pharmaceuticals, Alpharma, A.L. Industrier* and *Ranbaxy,* all of which belonged to the generic groups that concluded the agreements. The sending of a statement of objections does not prejudge the final outcome of the investigation.

The companies concluded these agreements when generic entry in principle became possible due to the expiry of certain of Lundbeck's citalopram patents. According to the preliminary findings in the statement of objections the agreements foresaw substantial value transfers from Lundbeck to four generic competitors. In turn, the generic companies abstained from entering the Single Market to sell generic citalopram. Lundbeck's value transfers to the generic competitors included, among other things, direct payments purchases of generic citalopram stock for destruction as well as guaranteed profits in distribution agreements offered to the generic firms. The Commission took the preliminary view that this conduct, if proven, may have caused substantial consumer harm, since generic entry could have been delayed and prices kept higher as a result of the agreements.

The second statement of objections concerned the *Perindopril* case where *Les Laboratoires Servier* and *several generic competitors* entered into agreements which may have hindered the entry of generic perindopril in the Single Market. Perindopril is the active substance in a class of cardiovascular medicines. According to the preliminary view set out in the statement of objections, in exchange for payments by Servier, the generic companies agreed not to enter the market with their cheaper generic products and/or not to further challenge the validity of the patents that protected Servier's more expensive medicine. Similarly, Servier may have implemented a comprehensive strategy to prevent market entry of cheaper generic versions of perindopril at the time when the patent protection for Servier's perindopril was nearing expiry. The practices under analysis

[26] See IP/09/1098 and MEMO/09/321

include acquisitions of patents that could potentially exclude competitors from the market as well as patent settlements with other companies that included the type of reverse payments at issue in the Citalopram case.

The practices at issue in the Citalopram and Perindopril cases could, if the allegations were to be proven, involve significant harm as national health services and insurance schemes would be forced to continue paying longer for the more expensive patent protected versions of a medicine.

Sanctioning such anticompetitive practices is necessary to preserve incentives to innovate in this sector. Anticompetitive conduct should not be used to artificially prolong patent protection which by definition is limited in time. That limitation is essential to preserve incentives for continuous innovation in knowledge-intensive sectors such as pharmaceuticals.

The Commission continued to monitor potentially harmful patent settlement agreements between originators and generic firms

In July 2012, the Commission issued its third monitoring report on patent settlements in the pharmaceutical sector[27]. The report confirmed that, while the overall number of concluded settlements significantly increased, the proportion of settlements that may be problematic for competition fell by half as compared to the levels observed at the time of the sector inquiry. The proportion of potentially problematic settlements stabilised at 11% compared to the 21% identified by the sector inquiry. At the same time, the total annual number of concluded settlements increased by 500% to 120 compared to the findings of the sector inquiry. Most settlements appear to be unproblematic from an antitrust perspective. The figures show that the Commission's scrutiny has not hindered companies from concluding settlements in the Single Market, contrary to some initial fears expressed by certain stakeholders.

In its judgment in the AstraZeneca case the Court of Justice ruled that EU competition law complements Single Market rules

In June 2005, the Commission adopted a decision sanctioning AstraZeneca (AZ) for two infringements of Article 102 TFEU and Article 54 of the European Economic Area (EEA) Agreement. The decision found that AZ had misused public procedures and regulations in a number of EEA states aimed at excluding generic firms and parallel traders from competing against AZ’s bestselling antiulcer product Losec.

In a judgment of 6 December 2012 (Case C-457/10 P) the Court of Justice upheld the General Court´s judgment of 2010 which had, to a very large extent, dismissed AstraZeneca´s appeal against the 2005 Commission decision, the first decision imposing fines for an abuse of a dominant position in the pharmaceutical sector. In particular, the General Court had confirmed that misuses of regulatory procedures can under certain circumstances constitute abuses of a dominant position.

The Court of Justice found that in a majority of cases abuses of dominant positions consist of behaviour which is otherwise lawful under branches of law other than competition law. This confirms that EU competition policy is complementary, and not subordinate, to other branches of EU law, including Single Market rules.

5. COMPETITION DIALOGUE WITH THE OTHER INSTITUTIONS

5.1 Structured dialogue with the European Parliament

[27] See MEMO/12/593

DG Competition engages in a continuous structured dialogue on competition issues with the European Parliament, and its Economic and Monetary Affairs (ECON) Committee in particular.

Structured dialogue with the ECON Committee

As part of the structured dialogue, the Vice President in charge of Competition visited ECON twice in 2012. In June, he presented the Annual Report on Competition Policy and in October, the Commission Work Programme for 2013. The Vice President also maintains regular contacts with the European Parliament outside the structured dialogue. On 22 May 2012, he attended a workshop on the European Competition Report on the food sector[28]. On 24 September 2012, he participated in a hearing on LIBOR-EURIBOR market manipulation. The Vice President also attended a workshop on State aid modernisation (25 September 2012) and an event on data protection and competition rules (26 November 2012).

In the context of the cooperation, on 7 June 2012 DG Competition organised a seminar for assistants and political advisers of the members of the ECON covering the main themes in the 2011 Competition Work Programme[29]. The Vice President exchanged views with the IMCO committee on 28 February 2012 on competition and growth. DG Competition regularly informs the relevant committees of public consultations and the adoption of new guidelines. All in all, the Vice President made eight appearances before the European Parliament (see table).

Date	Meeting	Issue
28/02/2012	**EP IMCO** committee	Exchange of views on competition and growth
22/05/2012	**EP ECON** Competition Working Group	ECN report and CAP reform
19/06/2012	**EP ECON** structured dialogue	Presentation of Annual Competition Report 2011
11/09/2012	**EP Plenary** Question Time	State of play of the energy market acquis (3rd package) implementation - Gazprom
24/09/2012	**EP ECON** Public Hearing - Libor	Market manipulation - Libor
25/09/2012	**EP ECON** Workshop – SAM	State aid modernisation
08/10/2012	**EP ECON** structured dialogue	Presentation of work programme for 2013
26/11/2012	**EP** Event – Privacy Platform	Competition and Privacy in Markets of Data

Public consultations and Impact assessments

DG Competition provides information on the launch of public consultations to the secretariat of the ECON and more generally welcomes timely contributions by the members of the EP. Its services are available to brief MEPs on aspects of particular interest. Public consultations and the responses thereto, studies related to competition policy, studies which are commissioned, Impact Assessments in the area of competition policy as well as any related Staff Working Papers are published on DG Competition's website[30].

In response to the interest expressed by the members of the ECON committee in the Commission's State aid modernisation communication, the Vice President and DG

[28] http://ec.europa.eu/competition/ecn/food_report_en.pdf

[29] Issues covered included State aid in the financial sector the food sector, the aviation sector, the financial sector and the State aid modernisation initiative

[30] http://ec.europa.eu/competition/index_en.html

Competition officials attended a State aid modernisation workshop in Parliament on 8 October 2012.

As part of the discussion on the reform of the Common Agricultural Policy, MEPs called on the Commission to have a closer look at the issue of producers' bargaining power vis-à-vis retailers in the food supply chain. While the Commission did not identify particular competition problems in the retail sector, as expressed in the report published by the European Competition Network[31], it nonetheless launched a study to assess the impact of retail market structure on product innovation and choice in the food sector in December 2012.

MEPs frequently ask the Commission questions on individual on-going competition cases. The Commission is unable to reply on certain aspects of those cases due to the confidentiality requirement of the investigative procedures.

On-going investigations and sector inquiries

DG Competition staff regularly meet MEPs at their request to explain the procedural steps in an investigation and to engage in a general discussion on a particular sector, as far as possible under the confidentiality obligation in relation to the parties. DG Competition has a range of tools at its disposal for the enforcement of EU competition law and making markets more competitive by other means, such as investigations in individual cases, sector inquiries and working with other Directorates General on regulatory measures impacting competition in the Single Market.

5.2 Follow-up to Parliament's Resolution on the 2010 Report on Competition Policy

In January 2012, the Parliament adopted its Resolution on the 2010 Report on Competition Policy[32], making a series of requests to the Commission. In addition to the official response by the Commission to Parliament's Resolution, the Commissioner for Competition responded in April 2012 through a letter to the Chair of the ECON committee, and DG Competition also submitted a detailed response to all of the points made in the Parliaments Resolution.

Topics covered by the European Parliament's Resolution

The Parliament was particularly interested in the DG Competition's activities linked to the **financial and economic crisis and the role of State aid control in that context**. In its response, the Commission stressed the types of conditions routinely imposed as part of the application of the temporary State aid rules applying to the banking sector for the time being. That so-called conditionality includes burden sharing and restructuring imposed on banks and financial institutions to ensure that their viability is restored on a long-term basis while preserving the integrity of the Single Market.

In its Resolution, the Parliament also recalled its earlier requests[33] for the Commission to bring forward legislation to facilitate effective **compensation for damages** resulting from breaches of antitrust law. The Commission's Work Programme for 2012 includes a proposal on antitrust private damages actions. The Vice President in charge of Competition confirmed that such a proposal will be tabled in 2013. In response to the Parliament's call to investigate competition in the food sector, DG COMP set up an internal task force on the food sector which coordinated a European Competition Network study on the food sector. In addition, in December 2012 the Commission launched a study on modern retail sector impact on food product choice and innovation.

5.3 Competition DG Competition's engagement with the EESC and the CoR

The Commission also informs the European Economic and Social Committee (EESC) and the Committee of the Regions (CoR) about major policy initiatives. It also participates in study

[31] http://ec.europa.eu/competition/ecn/food_report_en.pdf
[32] P7_TA(2012)0031
[33] Resolutions by the European Parliament in 2007, 2009, 2010 and 2011

group and section meetings. On 4 September 2012, Vice President Almunia met the EESC rapporteur on the State Aid Modernisation initiative and, on 7 December 2012, the CoR rapporteur on the revision of the Regional aid guidelines. On 14 November 2012, the EESC adopted an opinion on the State aid modernisation initiative[34] and, on 4 December 2012, the INT section of the EESC adopted an opinion on the Annual Competition Report 2011[35]. On 29 November 2012, the CoR adopted an opinion on the State Aid mModernisation initiative[36] and, on 7 December 2012, the COTER commission of CoR adopted an opinion on the Regional aid guidelines[37].

[34] Available at http://www.eesc.europa.eu/?i=portal.en.int-opinions.23584
[35] Available at http://www.eesc.europa.eu/?i=portal.en.int-opinions.24209
[36] Available at http://www.toad.cor.europa.eu/corwipdetail.aspx?folderpath=ECOS-V/035&id=21619
[37] Available at http://www.toad.cor.europa.eu/corwipdetail.aspx?folderpath=COTER-V/034&id=21792