THE IEEE-SA REVISED PATENT POLICY AND ITS DEFINITION OF "*REASONABLE*" RATES: A TRANSATLANTIC ANTITRUST DIVIDE?

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Abstract: The IEEE-SA updated patent policy and the Business Review Letter issued by the US DoJ have caused much discussion in the US (Sidak, 2015). The purpose of this paper is to assess whether a similarly lenient antitrust approach to Standard Setting Organizations' ("SSOs") rate setting policies would prevail under the European Union ("EU") competition rules. Recent EU competition case-law has promoted a very hard line in the area of coordinated conduct. Cases such as Dole Food Company, T-Mobile or Expedia have expanded the scope of the per se prohibition rule found in Article 101 TFEU to forms of horizontal coordination with less than obvious anticompetitive potential, such as "cheap-talk" pre-pricing communication (Dole Food Company), episodic collusion (T-Mobile) and horizontal agreements with limited market coverage (Expedia). Those judgments, and others, share a common rationale: that of deterring any coordinated interference with the price system. In the EU courts' view, joint interference by competitors with the price system seems to be a sin in itself, regardless of actual or potential market effects. Horizontal coordination is thus increasingly prohibited on its face, and punished as a means to set an example. From an enforcement standpoint, this trend in the case-law trend has pros (lower enforcement costs) and cons (deters pro-competitive coordination). But perhaps more importantly, it has a major normative implication, which is that it raises the antitrust risk for all forms of coordination, including arrangements of the type found in the IEEE-SA updated patent policy. This paper explains that the antitrust risk generated by SSOs rate setting policies is presumably higher in the EU than in the US, where the case-law on horizontal coordination is less stringent. From a methodological standpoint, the paper choses to discuss this issue on the sole basis of the case-law of the EU courts, instead of focusing on Commission Guidelines and other soft law instruments, whose binding value on parties other than the Commission itself has been considerably degraded in recent judgments.

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I. INTRODUCTION

This paper offers a preliminary assessment of the IEEE-SA revised patent policy under European Union ("EU") antitrust law, and in particular under the rules prohibiting unlawful anticompetitive coordination found in Article 101 of the Treaty on the Functioning of the EU ("TFEU").[1] In February 2015, the US DoJ issued a Business Review Letter ("BRL") concluding that the IEEE-SA revised patent policy did not deserve challenge under the US antitrust rules, short of "*likely harm to competition*" and to the extent that its potential procompetitive benefits likely outweighed any possible harm.[2] This paper argues that a similar degree of forbearance might not have been possible had the analyzis of the sections of the IEEE-SA revised patent policy related to the definition of "*reasonable rates*" been conducted under EU competition law. This is because the case-law of the EU Courts attaches cartel-type liability under Article 101 TFEU to any coordinated interference with the price system, and this creates a risk of antitrust liability for licensing guidelines of the kind set out in the IEEE-SA revised patent policy. To be clear, this article does not argue that the IEEE-SA revised patent policy falls foul of Article 101 TFEU as a possible form of horizontal buyer collusion as has been previously argued by some authors,[3] but instead that it may plausibly give rise to EU antitrust exposure on the mere ground that it interferes with the free market price system. This paper then proceeds to explore the reasons that underpin the strict liability standard which prevails in EU competition law. It finds that the incipiency theory provides a possible *ex post* rationalization for the affirmation of cartel-type liability under Article 101 TFEU for coordinated interferences with the price system. The paper concludes by arguing that antitrust agencies' invitations to Standard Setting Organizations ("SSOs") to adopt rules designed to rein in the alleged market power of standard essential patent ("SEPs") holders through private ordering mechanisms may eventually bring them within the strictures of Article 101 TFEU, thereby creating an "*antitrust trap*".

To show this, the present paper proceeds in three steps. First, it describes the changes introduced by the IEEE-SA revised patent policy in relation to the definition and calculation of "*reasonable rates*" (II). Second, it reviews the EU case-law under Article 101 TFEU, and demonstrates that the EU courts have progressively elaborated a strict rule of liability that

[1] *See* IEEE-SA Standards Board Bylaws, Section 6, Approved Clause 6 of the SASB Bylaws, https://standards.ieee.org/develop/policies/bylaws/approved-changes.pdf

[2] *See* US DoJ, Business Review Letter, 15-1 Institute of Electrical and Electronics Engineers, Incorporated ("IEEE"), 2 February 2015.

[3] *See* J. Gregory Sidak, *Patent Holdup and Oligopsonistic Collusion in Standard-Setting Organizations*, 5(1) J. OF COMPETITION L. & ECON, 123 (2009); J. Gregory Sidak, *The Antitrust Division's Devaluation of Standard-Essential Patents*, 104 GEO L. J. ONLINE, 48 (2015).

outlaws any coordinated interferences with the price system (III). Third, it explains that the inimicality towards coordinated interference with the price system observed in the case-law may be rationalized on the basis of the "*incipiency theory*" (III). Finally, the paper concludes that private ordering institutions like SSOs have less margin of maneuver under EU competition law to remedy perceived concerns of patent holdup than what the BRL suggests is the case under US antitrust law (IV).

At this stage, some qualifications are in order. This paper only covers the changes introduced by the IEEE-SA revised patent policy in relation to the concept of "*reasonable rates*". It does do not discuss other changes introduced by the IEEE-SA revised patent policy (restrictions on the availability of prohibitive orders, duty to license at all levels of production, rules on reciprocity and grant backs). Moreover, the paper does not investigate the allegations of collusive conduct that were levelled at some members of IEEE-SA during the process that led to the development of the revised patent policy.

From a methodological standpoint, the analyzis is primarily conducted on the basis of the case-law of the Court of Justice of the EU ("CJEU") and/or the General Court ("GC"). The paper deliberately leaves aside the policy documents and soft law instruments adopted by the European Commission ("The Commission") in this field. There are two reasons for this conservative approach. First, the judgments of the EU courts in *Expedia* and *Post Danmark II* have emphasized the inability of Commission soft law instruments to have binding effects on third parties, courts and agencies.[4] Second, the formal and substantive validity of those instruments has not been tested before the EU Courts, and they can therefore not be deemed to provide a definitive and authoritative interpretation of the EU competition rules.

II. REASONABLE RATES UNDER THE IEEE-SA REVISED PATENT POLICY

A. OVERVIEW OF THE IEEE-SA REVISED PATENT POLICY

In the past years, several important SSOs active in information technologies have internally discussed changes to their patent policies.[5] In those SSOs, the demand for patent policy reform invariably originates from participants who are net technology buyers, and are based on concerns of alleged patent "*holdup*" by other SSO participants who are net technology

[4] CJEU, C-226/11, *Expedia, Inc. v. Autorité de la concurrence and Others* [2012] ECLI:EU:C:2012:795; CJEU, C-23/14, *Post Danmark A/S v Konkurrenceradet* [2015] ECLI:EU:C:2015:651.

[5] We understand that the issue has also been discussed within other SSOs active in the wireless communications industries, like the International Telecommunications Union ("ITU") and the European Telecommunications Standards Institute ("ETSI"). To date, no other SSO has yet introduced changes similar to those found in IEEE-SA revised patent policy.

sellers.[6] Calls for SSOs to take action against such perceived evils have also been fueled by external declarations from the two of the world's most influential antitrust agencies –the US DoJ and the Commission –[7] who seem to have accepted the patent holdup theory.[8] Proposals for SSO reform have generally consisted in spelling out in further detail the implications of FRAND commitments made by SEPs holders.[9] FRAND commitments are voluntary, irrevocable assurances given by standard participants that they are prepared to grant licences on Fair, Reasonable and Non-discriminatory terms to their patents that become essential to the implementation of a standard.[10]

In this context, the Institute of Electrical and Electronics Engineers Standards Association ("IEEE-SA") has been a pioneer. The IEEE-SA is one of the world's largest SSOs.[11] It operates in the electro and information technologies sectors, and it is well-known for the successful introduction of several cutting-edge wireless communications standards, including IEEE 802.11 better known as Wi-Fi.[12]

On 8 February 2015, the IEEE-SA announced an update of its patent policy.[13] The revised patent policy stated aim is to provide "*greater clarity of meaning on 'reasonable' rates*",[14]

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[6] The idea is that SEP holders use threats of injunctions to force firms to pay more. This theory can be traced back to Mark A. Lemley and Carl Shapiro, *Patent Holdup and Royalty Stacking* 85 TEXAS L. REV (2007), or Carl Shapiro, *Injunctions, Hold-Up, and Patent Royalties* 12(2) AM. L. AND ECON. REV. 27 (2010).

[7] *See* Renata B. Hesse, Six Small Proposals for SSOs before Lunch, Remarks as Prepared for the ITU-T Patent Roundtable, Geneva, Switzerland (October 10, 2012). In Europe, see Letter of the European Commission, Information Note to the Member States Standardization Committee, 7/10/2014, ENTR/A4/FS/WP/pp.

[8] And have waved the red scarf of antitrust intervention against SEPs holders as an exceptional, last resort perspective. *See*, for instance, Joaquin Almunia, *Intellectual property and competition policy*, IP Summit 2013 (Paris), 9 December 2013, SPEECH/13/1042 on the need to take action to remove injunctions when there is a willing licensee: "*Ideally, this principle should be implemented by the standard-setting organisations themselves. But since that is not happening, I am willing to provide clarity to the market through competition enforcement*".

[9] Including by limiting their fundamental right to of injunctive relief.

[10] For a definition, *see* for instance, ETSI Rules of Procedure, Annex 6, ETSI Intellectual Property Rights Policy, para 6.1. (19 November 2014).

[11] IEEE-SA has members from more than 160 countries, including corporations, government agencies or academic institutions.

[12] Within the IEEE-SA, individual technical committees (also known as working groups) develop industrial standards, which are then subject to ballot approval by the IEEE-SA standards board. One of them is the IEEE 802 LAN MAN Standards Committee, which presents itself as the world leader standard development body in wireless communications technologies. Besides, the IEEE-SA standards board is assisted by a Patent Committee (PatCom). PatCom in particular receives, considers and accepts FRAND Letter of Assurances ("LoAs"). PatCom is also in charge of proposing changes to the IEEE patent policy. *See* Roger B. Marks, Ian C. Gifford and Bob O'Hara, *Standards from IEEE 802 Unleash the Wireless Internet*, 2 IEEE Microwave Magazine, 56 (June 2001). For more on IEEE-SA governance *see* http://www.ieee802.org/.

[13] On 8 February 2015, the IEEE Board of Directors approved revisions to Section 6 of the IEEE-SA Standards Board Bylaws. Those changes entered into force on 15 March 2015.

[14] *See* Letter from Michael A. Lindsay, Esq., Dorsey & Whitney LLP, to The Hon. William J. Baer, Assistant Att'Y Gen., U.S. Dep't of Justice (Sept. 30, 2014) [hereinafter, Request], at 15. In addition to providing guidance on the meaning of "*reasonable rate*", the updated patent policy (i) clarifies that compliant implementations cover both end-use products and components or sub-assemblies, and that FRAND commitment

following unsuccessful previous attempts to reduce the "*inherent vagueness*" of FRAND commitments given by SEPs holders.[15] Readers familiar with the field will recall that, in 2007, the IEEE-SA tried to address the issue by adopting a patent policy that expressly permitted a patent holder to disclose its proposed maximum rates and other terms in a Letter of Assurances ("LoA"). In practice, the experience under the 2007 policy was a failure. The IEEE-SA only received two LoAs in which patent holders accepted to disclose maximum rates.

The 2015 revised patent policy has more teeth. It introduces a definition of a "*reasonable rate*" that applies to all patent holders that make an early FRAND commitment in an accepted LoA. Under the adopted definition, reasonable means "*appropriate compensation to the patent holder for the practice of an essential patent claim excluding the value, if any, resulting from the inclusion of that Essential Patent Claim's technology in the IEEE standard*". In other words, an SEP holder that makes a FRAND declaration commits that it will not charge royalties up to the value implementers would incur to switch technologies.[16] The definition of a "*reasonable rate*" is mandatory in the sense that it applies to all essential patent claims for which the IEEE-SA has an accepted LoA. It is, however, not mandatory in the sense that patent holders can still avoid to give a FRAND commitment and nonetheless participate in the standard setting activities of IEEE-SA.

In addition, the IEEE-SA updated patent policy recommends the consideration of three "*factors*" in the determination of reasonable rates during licensing negotiations. Under the first factor, the rate should reflect the value contributed by the SEP-protected invention to the "*value of the relevant functionality of the smallest saleable compliant implementation*" of the SEP.[17] According to the IEEE-SA, this factor is designed to ensure that the royalty correctly

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indistinctly apply to all; (ii) restricts the availability of injunction or exclusion orders to patent holders to circumstances where the implementer fails to comply with the outcome of third party judicial proceedings over FRAND setting disputes, invalidity, enforceability, essentiality and infringement, and damages; and (iii) confirms that SEP holders can seek to benefit from grant backs on the licensee's SEPs and non SEPs.

[15] *Id*. at 10. See also, Konstantinos Karachalios, *If it works (for me), why fix it? – Status Quo versus Reforms at the Intersection between the Patent System and Standardization*, Keynote Speech at IEEE SIIT 2015 (October 2015) describing the problem with the FRAND commitment concept: "*to be clear the problem is not the relative ambiguity of an incomplete contract, since most useful contracts include several levels and degrees of ambiguity. It is the total ambiguity of the basic definition that makes such a contract vague and, thus, potentially tricky for the ones lured in it*".

[16] *See* IEEE, Understanding Patent Issues During IEEE Standards Development, 1 September 2015, Question 42, http://standards.ieee.org/faqs/patents.pdf: "*A Reasonable Rate does not include value arising from the cost or inability of implementers to switch from the Essential Patent Claim's technology included in the standard*". Available at:

[17] *See* IEEE-SA Standards Board Bylaws, Section 6, Approved Clause 6 of the SASB Bylaws, p.2.

reflects the added-value of the patented invention, and not more.[18] It would prevent that SEPs holders free ride on other end product features to extract unreasonable royalties, which might occur when the end product is complex and runs on many patented technologies.[19]

Under the second factor, account shall be given to the relative value contributed by the SEP to the smallest saleable compliant implementation "*in light of the value contributed by all Essential Patent claims for the same IEEE standard practiced in that Compliant Implementation*".[20] The stated rationale behind the second factor is to mitigate "*royalty stacking*" risks, when SEPs holders fail to consider the adverse cumulative effect of their royalty demands on the aggregate price for the standardized technology.

Finally, the third factor recommends considering "*existing licenses covering use of the same Essential Patent Claim*", provided they are "*comparable*" and were not obtained under the "*threat of a Prohibitive Order*".[21] Possible benchmarks include licensing terms entered into following voluntary negotiations or granted by rate setting courts in the context of damages litigation.

A degree of ambiguity persists on the binding nature of the three factors articulated in IEEE-SA updated patent policy. On the one hand, the text emphatically prescribes that the "*determination of reasonable rates should include but need not be limited to*" the consideration of the three factors identified, suggesting that they constitute a core set of pricing rules.[22] On the other hand, the FAQs issued by the IEEE-SA explain that the revised patent policy simply "*recommends*" but "*does not require*" the consideration of the three factors, suggesting that they constitute mere pricing guidelines.[23] In the remainder of this paper, we rely on the later reading in view of the fact that an SEP holder that is unwilling to submit a FRAND commitment can nonetheless continue to participate in IEEE-SA standards development activities.[24] That said, it is obvious that the former reading of the patent policy would have even more serious implications from an antitrust standpoint than the ones described in the remainder of this article.

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[18] It is also often referred to as the SSPU requirement ("*Smallest Saleable Patent Practicing Unit*").
[19] Without, however, excluding the possibility of charging royalties expressed in terms of a share of the end product price (end-product royalties).
[20] *See* IEEE-SA Standards Board Bylaws, Section 6, Approved Clause 6 of the SASB Bylaws, p.2.
[21] *Id.*
[22] *Id*.
[23] IEEE, Understanding Patent Issues During IEEE Standards Development, Question 47: "*While the IEEE-SA Patent Policy recommends considerations for use in determining a reasonable rate, these considerations are not mandatory*". *See* also, Request, *supra* 14, p.16.
[24] *See* IEEE, Understanding Patent Issues During IEEE Standards Development, Question 23 and Question 24. A LoA is "*not a precondition to participation*".

B. DEVELOPMENT OF IEEE-SA REVISED PATENT POLICY AND DOJ BUSINESS REVIEW LETTER

The process that led to the adoption of the IEEE-SA revised patent policy was both protracted and controversial. Four drafts of the updated patent policy were published for public review and comment. A flood of submissions were received. The definition and calculation of reasonable rates proved particularly contentious. A debate occurred between technology developing firms, desirous to maintain flexibility in *ex post* licensing negotiations, and technology implementing firms, intent on limiting *ex ante* the bargaining power of SEPs holders through a stricter definition of FRAND.[25] In most consensus-driven SSOs, such a divide would have been fatal to the proposed policy changes. However, a distinguishing feature of IEEE-SA is that it appears to be able to adopt such modifications under majority vote. In August 2014, the IEEE-SA Standards Board eventually adopted the updated version following a 14-5 vote.

In the course of its development, the revised patent policy gave rise to possible concerns of antitrust liability.[26] Ericsson argued that the reasonable rate definition could lead to "*the collective establishment of mandatory, uniform license terms that will reduce the compensation for Essential Patents akin to a buyer's side cartel*".[27] In a letter to the DoJ,[28] Sidak expressed concerns that the proposed "*amendments posed a serious risk of violating section 1 of the Sherman Act by facilitating tacit or explicit collusion among implementers to suppress the royalties they pay for SEPs*".[29]

Arguably to appease those concerns, the IEEE-SA requested a BRL from the DoJ. On 2 February 2015, the DoJ officially stated in a BRL that it had no intention to challenge the IEEE-SA revised patent policy under the antitrust rules. The DoJ's BRL is a succinct policy statement that is relatively devoid of analytical content. The exercize conducted by the DoJ essentially consisted in assessing whether the revised patent policy would "*harm competition by anticompetitively reducing royalties and thereby diminishing incentives to*

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[25] *See* David Crouch, *Battle over IP rights could hold back next-generation technology*, FIN. TIMES, June 11, 2015.

[26] *See* IEEE-SA PatCom – IEEE-SA Patent Policy – 19th Nov 2013 draft comments (4 March 2014), http://grouper.ieee.org/groups/pp-dialog/drafts_comments/PatCom_sort_by_commentID_040314.pdf.

[27] If applied retroactively. *Id.*, Comment from D. Kallay, at 15. *See* also, Memorandum by Ron Katznelson on IEEE-SA Patent Policy, http://works.bepress.com/cgi/viewcontent.cgi?filename=0&article=1091&context=rkatznelson&type=additional.

[28] Letter from J. Gregory Sidak, Chairman, Criterion Economics, L.L.C., to Hon. Renata Hesse, Deputy Assistant Attorney Gen., U.S. Dep't of Justice (Jan. 28, 2015), http://www.criterioneconomics.com/proposed-ieee-bylaw-amendments-affecting-frand-licensing-of-seps.html. See also, J. Gregory Sidak, *supra* 3, p.51.

[29] *Id.*

innovate".[30] Two general considerations seem to underpin the DoJ's decision to dismiss antitrust charges. First, the DoJ observes that the IEEE-SA revised policy could not have any bearing on the setting of royalty rates which "*ultimately are determined through bilateral negotiations*".[31] Second, the DoJ stresses that both the definition of reasonable rates and the three pricing factors remain optional. It insists, in particular, on the fact that "*patent holders can avoid the updated IEEE RAND Commitment and still participate in standards-setting activities at IEEE-SA*".[32]

In a section specifically dedicated to the IEEE-SA definition of "*reasonable rates*", the BRL considers possible justifications for the revised patent policy. It notes that the mandatory definition reduced the possibility that SEP holders will "*hold up implementers of a standard and obtain higher prices … than would have been possible before the standard was set*".[33] In relation to the three factors, the BRL cites a variety of patent – not antitrust – case-law references to denote that the revised patent policy is consistent with judicial precedent. The DoJ concludes its BRL on an optimistic note, stating that the IEEE-SA revised patent policy will "*benefit competition and consumers by facilitating licensing negotiations, mitigating hold up and royalty stacking, and promoting competition among technologies for inclusion in standards*".[34]

The adoption of the BRL has not extinguished the controversy surrounding the IEEE-SA revised patent policy, much to the contrary. Technology developing firms with significant patent positions have complained that the IEEE-SA revised patent policy is skewed towards technology implementers, and have threatened to reconsider their participation in IEEE-SA under the revised patent policy.[35]

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[30] *See* BRL, p.8.
[31] *See* BRL, p.8.
[32] This particular point is the subject of dispute. Whilst the IEEE-SA has submitted to the DoJ that the changes could be bypassed, the IEEE-SA has kept labelling them as a "clarification" of its patent policy, which tends to suggest that they are mandatory. The technology firm InterDigital has criticized this confusion, and suggested that this could lead to the inapplicability of the DoJ Business Review Letter. *See* Interdigital, Letter to PatCom of 24 March 2015, Licensing Assurances and IEEE's 2015 Patent Policy.
[33] *See* BRL, p.12.
[34] *See* BRL, p.16.
[35] Those companies include *inter alia* Nokia, Ericsson, Qualcomm and InterDigital. *See* David Crouch, *Battle over IP rights could hold back next-generation technology*, supra 25. *See* also, Interdigital Letter to Mr. Law, Licensing Assurances and IEEE's 2015 Patent Policy, http://wpuploads.interdigital.com.s3.amazonaws.com/uploads/2015/03/Letter-to-IEEE-SA-PatCom.pdf. *See* also, Bill Merritt, *Why We Disagree with the IEEE's Patent Policy*, EETimes (27 March 2015), http://www.eetimes.com/author.asp?doc_id=1326144&section_id=36: "*A handful of manufacturers of devices -- the people who pay for the use of the technology -- essentially co-opted the IEEE patent committee*".

Some scholars have also levelled trenchant critiques at the BRL. Sidak argues that the DoJ has applied a "*laxer standard to the risk of collusion over the prices that buyers will pay for SEPs*" than the standard usually applied "*over the prices that the very same buyers will pay for other kinds of essential inputs*".[36] Lambert and Abbott analogize the IEEE-SA revised patent policy to an "*illegal monopsony buyer cartel*", and decry the DoJ's policy under the BRL as "*perverse antitrust policy*" which "*threatens to raise Type II error costs*".[37]

III. COORDINATED INTERFERENCE WITH THE PRICE SYSTEM AS A RESTRICTION BY OBJECT UNDER ARTICLE 101 TFEU

This paper submits that an antitrust agency would have reached a conclusion opposite to that reached by the DoJ had it conducted its analyzis under EU antitrust standards. SSOs' attempts to clarify the concept of "*reasonable rates*" are likely to give rise to antitrust liability under Article 101 TFEU without the need to adduce further facts. The basis for this contention is that, through the years, the case-law handed down by the CJEU under Article 101 TFEU has evolved to attach cartel-type antitrust liability to any coordinated interference with the free market price system. In the following sections, we review this case-law, explore its normative implications (B) and discuss its application to the IEEE-SA revised patent policy (C).

Admittedly, the case-law that we review hereafter is not specific to SSOs, let alone to patents and intellectual property ("IP") rights. Yet, given that EU antitrust law observes the principle of symmetry – according to which antitrust law treats intellectual property as it treats any other form of property –[38] there is no reason to segregate SSO patent policies from the application of this body of cases. The existence of specific agency Guidelines on the matter does not modify the assessment.

A. EU COURTS' CASE-LAW

EU antitrust law goes well beyond treating only horizontal price fixing as brazen violations of article 101 TFEU. It is a widely known state of affairs – and one often criticized in legal

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[36] *See* J. Gregory Sidak, supra 3, p.69. Sidak draws a parallel with the Silicon Valley buyer cartel in *Adobe*, which was deemed a *per se* violation of Section 1 of the Sherman Act. In his view, the sole difference between a buyer cartel on labour and a buyer cartel on SEPs, is that the former will create deadweight loss in the short term, whilst the later will reduce output in the long term (pp.71-72).

[37] *See* Thomas A. Lambert and Alden F. Abbott, *Recognizing the Limits of Antitrust: The Roberts Court versus the Enforcement Agencies*, J. OF COMPETITION L. & ECON., Forthcoming (online version: http://ssrn.com/abstract=2596660 (April 20, 2015)).

[38] Antitrust Guidelines for the Licensing of Intellectual Property, Issued by the U.S. Department of Justice and the Federal Trade Commission (April 6, 1995): "*for the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to any other form of property*".

academia and practice – that the first paragraph of Article 101 TFEU catches as restrictions "*by object*" (the legal equivalent of a "*hardcore restriction*" in US antitrust law) many less patently anticompetitive forms of collusion.[39] What may be less well understood, however, is that the CJEU case-law generally considers as a restriction by object any coordinated conduct that interferes with the pricing system. Within the copious CJEU case-law on horizontal coordination, five cases are particularly relevant.[40]

1. FEDETAB

In *FEDETAB*, the board of a nonprofit trade association with oversight over 95% of tobacco production in Belgium had issued a recommendation to regulate the wholesale and retail trade of cigarettes.[41] The recommendation set out maximum discounts and minimum quantity requirements for cigarette distribution, uniform end-of-year rebates and standardized terms of payment (cash and specific credit periods). The Commission analyzed the recommendation as a restriction of competition by object and effect, and declared it contrary to Article 101 TFEU.[42]

On appeal before the CJEU, the applicants claimed that the recommendation was not binding and that it could not, therefore, possibly restrict competition. The Court dismissed the allegation on the facts, and sided with the Commission's finding that the recommendation "*operated as a genuine mandatory rule of conduct*" adopted by the major industry players sitting in FEDETAB's board.[43] What is more, the Court suggested that the question of the formal mandatory nature of the recommendation was to some extent irrelevant. In the Court's view, as long as a substantial number of firms endorse the recommendation – the Court talks of *"compliance with the recommendation"* – then the recommendation can be deemed to have a *"profound influence on competition in the market*" and infringe Article 101 TFEU.[44]

2. FNK AND SCK

[39] Including various categories of exchange on strategic data. *See* Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, p. 1–72, §74: "*Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object*".

[40] One of those cases is not strictly speaking a Court case, but a Commission decision. We review it nonetheless, because it is a transposition of an interesting GC judgment under Article 102 TFEU.

[41] *See* CJEU, Joined cases 209 to 215 and 218/78, *Heintz van Landewyck SARL and others v Commission*, ECR, 1980, p.3125.

[42] *See* Commission Decision of 20 July 1978, IV/28.852 – GB-Inno-BM/Fedetab ; IV/29.127 – Mestdagh-Huyghebaert/Fedetab ; IV/29.149 – Fedetab recommendation.

[43] *See* CJEU, supra 41, §89.

[44] *See* CJEU, supra 41, §89: "*firms who control a substantial part of the total cigarette sales in Belgium*".

In our second case, Dutch firms that rent mobile cranes to the construction, petrochemical and transport industries set up a trade association and a certification body under the names FNK and SCK.[45] At some point, FNK introduced a statutory requirement that its members charge "*reasonable rates*" for both external crane hiring transactions vis-a-vis clients and internal renting operations amongst members.[46] In parallel, FNK sought to give guidance on the meaning of "*reasonable rates*", by issuing internal rates for transactions amongst crane hiring firms and by publishing a handbook comprising cost calculations and recommended rates for transactions with external clients. The general conditions established by FNK also contained conditions concerning prices, such as minimum rental hours, higher rates for Sundays and holidays, and a prohibition of charging cancellation costs.[47]

The case was scrutinized by the EU Commission, which suspected that the system operated as a facilitating device for horizontal collusion. During the administrative proceedings, a discussion took place on the nature of the concept of "*reasonable rates*". FNK argued that its members were entirely free to "*to interpret the concept "reasonable"*".[48] The Commission objected to this, noting that "*the reasonability of rates was discussed between the crane-hire companies and FNK*" and that "*FNK members were obliged under [...] the internal rules to charge "reasonable rates"*".[49] The Commission found that the "*system of recommended and internal rates, which is intended to give substance to the concept of "reasonable rates" falls [...] within the scope of Article [101(1)] TFEU*".

The facts suggest that the Commission's concerns were not with the requirement to set "*reasonable rates*". Instead, its objections were to the mandatory measures taken to interpret the concept of reasonable rates, including the fixing of rates at a level superior to market rates.

On appeal, the parties challenged the Commission's decision on the ground that the recommended and internal rates were "*rates were intended to serve only as an aid to specific negotiations and had no binding force at all*".[50] The General Court dismissed the argument.

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[45] *See* GC, T-213/95 and T-18/96, *Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v Commission*, ECLI:EU:T:1997:157.
[46] In the mobile cranes sector, it is common for crane hiring firms to internally rent extra cranes from each other to serve clients, because this is more attractive than purchase.
[47] *See* Commission Decision of 13 April 1994, IV/B-2/34.179 – *Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse Kraanverhuurbedrijven*, §11.
[48] *Id*, §20.
[49] *Id*. The Commission concluded that the claim that they were "*completely free when setting their rates [was] therefore inaccurate*".
[50] GC, T-213/95 and T-18/96, supra 45, §152.

In an interesting statement, it held that those rates which "*give substance to the concept of reasonable rates*" were "*in fact a pricing system binding its members*".[51]

Admittedly, *FCK* and *SCK* is a case that belongs to the horizontal price fixing genre. That said, it suggests that the risk of antitrust liability increases when a trade association seeks to give binding force and substance to "*reasonable rates*" requirements.

3. Dole Food Company, Inc. v Commission

In *Dole Food Company, Inc. v Commission*, four worldwide producers of fresh fruit had coordinated their quotation prices for bananas exported to the EU. The Commission classified the infringement as a "*cartel*", and imposed penalties of €60.3 million. The decision was first appealed to the General Court,[52] and then to the CJEU.[53] Both courts confirmed the Commission's analysis in full and dismissed the appeals.

The theory of liability advanced in the Commission's decision was that the parties had unlawfully entertained "*bilateral pre-pricing communications during which they discussed banana price setting factors, that is factors relevant for setting of quotation prices for the upcoming week*".[54] The problem, in the eyes of the Commission and of the Courts, was that this coordination was designed to "*reduce uncertainty*".[55]

On closer examination, the impugned conduct had several original features. First, the case concerned quotation prices for bananas, not transaction prices which were subsequently determined through bilateral negotiations with customers.[56] The Commission's decision talks in that respect of "*pre-pricing*" communications.

Second, the parties were not engaged in discussions over quotation prices, but over "*quotation price trends*" and on "*price-setting factors, that is to say factors relevant to the setting of quotation prices*".[57] Those somewhat uncommon features – namely the remoteness of the conduct from market transactions and the abstract content of the topics discussed – did not

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[51] *Id*, §159. In the case at hand, the Court went on to consider other factors, which made the price system binding and akin to a "*system of imposed prices*". *See* §164.

[52] GC, T-588/08, *Dole Food Company, Inc. and Dole Germany OHG v Commission*, ECLI:EU:T:2013:130.

[53] CJEU, C-286/13 P, *Dole Food Company Inc. and Dole Fresh Fruit Europe v Commission*, ECLI:EU:C:2015:184.

[54] *See* Commission Decision of 12 08 2009, 39188 – *Bananas*, OJ C 189, p.12-14.

[55] *See* Commission Decision, supra 54, §54 and CJEU, *supra* 53, §16.

[56] *See* CJEU, supra 53, §13: "*quotation prices served at least as market signals, trends and/or indications as to the intended development of banana prices and were relevant for the banana trade and the prices obtained*".

[57] *See* Commission Decision, supra 54, §51; CJEU, supra 53, §14. In reality, the Commission objected to both (i) price setting factors, and (ii) price trends and indications of quotation prices for the forthcoming week before those quotation prices were set. *See*, for a more explicit formulation, CJEU, supra 53, §96.

dissuade the Commission from pursuing the case as a plain vanilla cartel, and to qualify the infringement as a "*restriction by object*".[58]

In their appeal before the CJEU, the parties challenged both aspects. Their first argument was that "*the subjects to which the pre-pricing communications related was too general for it to be possible, on that basis, for them to determine with certainty the future conduct on the market*".[59] They contended that "*not all discussions concerning factors that might be relevant to price-setting are sufficiently deleterious to merit classification as a restriction by object*".[60] The CJEU disposed of the claim by holding that those communications "*related to factors which had an influence on supply vis-a-vis demand, market conditions and price developments*".[61]

The applicants' second argument was that pre-pricing communications on quotation price trends could not be deemed a restriction by object because "*quotation prices were far removed from actual prices*".[62] The GC judgment had actually acknowledged that pre-pricing communications on price setting factors like the weather were "*innocuous*".[63] The applicants thus argued that the mere fact that pre pricing communications "*might have an influence on prices is not sufficient to establish a restriction by object*".[64] The Court, again, rejected this view. Whilst it addressed the argument on quotation prices trends, insisting on their important role in the formation of actual prices, the Court did not proceed to explain the anticompetitive impact of communications on pre-pricing factors.[65] Instead, the Court took a more principled approach, affirming somewhat discretionarily that "*the pre-pricing communications had the object of creating conditions of competition that do not correspond to the normal conditions on the market and therefore gave rise to a concerted practice having as its object the restriction of competition within the meaning of Article [101 TFEU]*".[66]

4. T-MOBILE NETHERLANDS

[58] It ought to be noted that the case originated from a leniency application by Chiquita. See CJEU, supra 53, §5.
[59] CJEU, supra 53, §86.
[60] *Id.*,, §87.
[61] *Id.*,, §97.
[62] *Id.*,, §106.
[63] *Id.*,, §109.
[64] *Id.*, §§106 to 109.
[65] *Id.*, §130: "*[Q]uotation prices were relevant to the market concerned, since, on the one hand, market signals, market trends or indications as to the intended development of banana prices could be inferred from those quotation prices, which were important for the banana trade and the prices obtained and, on the other, in some transactions the actual prices were directly linked to the quotation prices*".
[66] CJEU, supra 53, §130.

In *T-Mobile Netherlands*, the four wireless communications operators in the Netherlands had shared information over remunerations paid to dealers. The case looked like a classic information exchange, with the significant difference that the conspirators had only met once to discuss dealers' payments.[67] The Dutch competition agency nonetheless issued fines. As the case progressed through the Dutch appeals system, a court considered that the fact that there had only been a "*single meeting*" called into question the applicability of the implementation presumption which holds that – in concerted practice cases where the burden of proof is discharged on the basis of circumstantial evidence – the existence of an exchange of information can be presumed to influence the parties' conduct on the market.[68] It thus referred the case to the CJEU, asking for clarification on whether the implementation presumption also applied in the case of an "*isolated event*", or if by contrast "*a certain degree of regularity over a lengthy period*" was needed.[69] The national court also sought to understand if an exchange of information which did not have the object of raising consumer prices could nevertheless be deemed a restriction by object.[70]

Unsurprisingly, the Court's answer to the second question was that "*to find that a concerted practice has an anticompetitive object, there does not need to be a direct link between that practice and consumer prices*".[71] The wording of Article 101 TFEU indeed accommodates as restrictions by object any coordination that "*directly or indirectly fix[es] purchase or selling prices or any other trading conditions*".[72]

Perhaps less evidently, the Court reaffirmed the implementation presumption even when the concerted practice is "*isolated*".[73] In the Court's view, it cannot be ruled out that a "*meeting on a single occasion*" may constitute a sufficient basis to distort competition.[74] The Court then went on to explain that, in real life markets, firms can seek "*to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to*

[67] CJEU, C-8/08, T-*Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343, §12.
[68] *Id.*, §21. With this, agencies and courts that apply Article 101 TFEU can dispense with an analyzis of effects and dismiss defendants' claims that their coordination was ineffective.
[69] *Id.*, §22, question 3.
[70] *Id.*, §19.
[71] *Id.*, §39.
[72] *Id.*, §37. And the facts showed that dealers' remunerations were a "*decisive factor in fixing the price to be paid by the end user*".
[73] *Id.*, §59. The parties remain entitled to try to rebut the presumption of anticompetitive effects.
[74] *Id.*, §59.

one parameter of competition", though one may question if such thin coordination can effectively harm competition.[75]

5. *Raw Tobacco Italy*

In *Raw Tobacco Italy*, the Commission fined four processors of raw tobacco who had operated a buyer cartel to reduce the prices paid to farmers and intermediaries in Italy.[76] The impugned conduct was garden variety horizontal collusion, and included the joint fixing of purchase prices, a mechanism of allocation of suppliers and quantities and the exchange of confidential information. The case attracted a great deal of attention in practitioners' circles as the first in which the Commission refused to grant immunity to a leniency applicant who had subsequently divulged details of its application to co-cartelists.[77] On appeals, the EU courts fully upheld the Commission's analyzis.[78]

In addition to its buyer coordination aspects, the interest of this decision for the present paper lies in another, relatively unnoticed aspect.[79] In the course of the administrative proceedings, some defendants attempted to justify some of their collusive activities on the ground that they had sought to "*eliminate the power that intermediaries could enjoy on the basis of their illegal activities*", including possibly "*organised crime*" activity.[80] Other raw tobacco processors argued that they intended to "*establish a transparent auction system for the sale of tobacco which would have made the purchase of raw tobacco more efficient and significantly reduced the role of intermediaries*".[81]

The Commission dismissed both justifications on legal grounds, paying no heed to the factual merits of the argument. In the Commission's view "*serious infringements of Article 101(1) TFEU of the Treaty, such as those described in this Decision, cannot be justified by the aim to counteract third parties' allegedly illegal conduct. It is clearly not the task of undertakings to take steps contrary to Article 101(1) TFEU to counteract behaviour which, rightly or wrongly, they regard as illegal and/or contrary to their own interests*".[82] And the

[75] *Id.*, § 60. The number of meetings is therefore irrelevant, *see* id., §61.
[76] Commission Decision of 20 October 2005, COMP/38.281 *Raw tobacco Italy*.
[77] CJEU, T-12/06, *Deltafina SpA v Commission,* ECLI:EU:T:2011:441.
[78] CJEU, C-578/11 P, *Deltafina SpA v Commission*, ECLI:EU:C:2014:1742.
[79] In relation to buyer coordination in auctions with intermediaries.
[80] Commission Decision, supra 76, §287 and footnote 253.
[81] *Id.*, §288.
[82] *Id.*, §290.

Commission went even further, mooting that such conduct could not even qualify for exemption under Article 101(3) TFEU.[83]

The point was not further discussed during the appeals that took place before the EU courts. However, the Commission's reasoning in *Raw Tobacco Italy* is an explicit transposition of the established case-law of the EU Courts in single firm conduct cases.[84] In *Hilti AG v Commission*, the General Court ruled that a dominant firm cannot justify anticompetitive tying on grounds of a perceived necessity to ensure product safety, when specific laws and enforcement institutions exist to that effect.

B. NORMATIVE IMPLICATIONS

As is well understood by now, all the cases of our sample led the Courts and the Commission to affirm antitrust liability under Article 101(1) TFEU, and in a majority of them the impugned coordination was formally qualified as a "*restriction by object*". In EU antitrust law, this is the closest one can come to the non-Treaty notion of a "*cartel*".

Despite their differences, each of those cases conveys legal principles of relevance for the analysis of the changes introduced by the IEEE-SA revised patent policy under EU antitrust law. Let us consider them in turn.

FCK and SCK suggests that a trade association can lawfully introduce "*reasonable rates*" requirements. However, the ruling also shows that the introduction of rate-related requirements paves the way to the applicability of Article 101(1) TFEU, and the risk of antitrust liability increases gradually as the trade association undertakes to "*give substance*" to rate-related requirements. In the case at hand, the Commission easily found antitrust liability in light of the direct coordination of trade association participants on quantitative rates levels (internal and recommended). But this leaves open the question whether indirect coordination on rate setting factors or qualitative methodologies would have attracted antitrust liability.

[83] *Id.*, §§291-292: "*Had the processors genuinely intended to justify their behaviour on sound economic and legal arguments, they should have invoked the application of Article 81(3) of the Treaty. In any event, there are no elements in the Commission's file indicating that Article 81(3) of the Treaty could apply to the infringements described in this Decision*".

[84] The Commission's Decision makes an analogy with the Article 102 TFEU case law in GC, T-30/89 *Hilti AG v Commission* [1991] ECR II-1439, § 118, where the Court held, in relation to a dominant firm that was trying to justify an alleged abusive tying, that "*there are laws in the United Kingdom attaching penalties to the sale of dangerous products and to the use of misleading claims as to the characteristics of any product. There are also authorities vested with powers to enforce those laws. In those circumstances it is clearly not the task of an undertaking in a dominant position to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or at least as inferior in quality to its own products*".

The answer to this question may be found in *Dole Food Company, Inc. v Commission*. The facts quoted in the decision and judgments suggest that "*by object*" restrictions occur when rivals coordinate their understanding of abstract, non-quantitative factors like the weather, holiday periods, market trends, etc. In its decision, the Commission objected in general and abstract terms to coordination on "*price setting factors*", which it defined as "*factors influencing supply against demand*".[85] The parties in the proceedings actually ironized on this, noting that their coordination was referred in the industry as "*radio banana*".

Dole Food Company, Inc. v Commission is also important because it holds that "*pre pricing*" coordination suffices to trigger antitrust liability. In other words, remote coordination well ahead of market transactions is a source of Article 101(1) TFEU exposure. *T-Mobile v Commission* conveys a similar teaching, in the sense that early, one-off coordination can be deemed a restriction of competition "*by object*".

Third, *Raw Tobacco Italy* reminds us that objective justifications are not in the cards when firms engage in "*by object*" restrictions. To be more accurate, *Raw Tobacco Italy* transposes the GC's *Hilti AG v Commission* case-law to the area of coordinated conduct. Under *Hilti AG v Commission*, firms cannot justify anticompetitive conduct by the need to forestall the illegal behaviour of others. In *Hilti AG v Commission*, the Court emphasized that such justifications are not available when specific legal institutions and enforcement structures exist to remedy the illegality. In other words, this statement means that firms cannot resort to (unlawful) anticompetitive private ordering remedies like buyer coordination to curb (unlawful) anticompetitive supplier conduct.[86] In more mundane terms, it is not the role of firms to correct antitrust infringements through recourse to other antitrust infringement when specific regulatory institutions are in place. Two wrongs do not make a right in antitrust law.

FEDETAB makes the important point that non-binding recommendations issued by representative institutions can give rise to a restriction by object if they are endorsed by a sufficient number of member firms. In other words, the greater the number of industry participants who decide to comply with the industry recommendation, the greater the risk of antitrust exposure.

Last but not least, both *T-Mobile Netherlands* and *Raw Tobacco Italy* recall that restrictions of competition by object can also originate at the buyer level. Whilst this point is not the most

[85] See Commission Decision, supra 76, §193.

[86] See Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328 (2004).

spectacular, it is worth recalling, given the complacent view generally taken in antitrust policy towards buyer power.

All in all, there is a credible claim to make that Article 101(1) TFEU prohibits as a restriction by object any coordinated interference with the price system. This strict legal regime is not unprecedented. It shares many similarities with the "*rigid*" situation that prevailed in US antitrust law after the US Supreme Court 1940 ruling in *Socony*.[87] In this case, the US Supreme Court stated *obiter dictum* that the Sherman Act condemned any combination which tampers with the price system. Let us cite the US Supreme Court:

> " *Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination* (emphasis added) ".[88]

Since then, the *Socony* case-law has been relaxed,[89] but it is interesting to note that no similar evolution – with anecdotal exceptions – seems to have taken place in EU competition law.[90] In contrast, in close intellectual proximity with the US Supreme Court of the 1940s, the EU

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[87] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). *See* ERNEST GELLHORN & WILLIAM KOVACIC, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL, 183-184 (West publishing company, 1994).

[88] *Id*.

[89] Most commentators underline that *Socony* remains good law, yet they stress that the Supreme Court has practically brought derogations by permitting defendants to raise rule of reason type arguments. See for instance, ERNEST GELLHORN AND WILLIAM KOVACIC, supra 87, p.195 *who note: "Since the late 1970s, with the notable exception of Maricopa, the Court's horizontal pricing jurisprudence has demonstrated a willingness to modify the traditional per se/rule of reason dichotomy. At a minimum, BMI and NCAA authorize courts to expand the characterization component of the traditional per se standard and explicitly entertain a fuller assessment of defendants' claims that the price-setting behavior has nontrivial procompetitive merit". See* also, *In re Sulfuric Acid Antitrust Litig*., 703 F.3d 1004, 1012 (7th Cir. 2012): "The plaintiffs retreat to the general language in the Socony–Vacuum opinion, an opinion 72 years old and showing its age". Judge Posner proceeded to examine the many relaxations brought to Socony by the Supreme Court's case-law.

[90] CJEU, C 35/99 *Arduino* [2002] ECR I-1529, §§37-38. In *Arduino*, for instance, the Court accepted the idea that the "*public interest*" may justify the fixing of minimum and maximum prices by bar associations. And even though this ageing case-law has only been rarely applied, it is also true that the Court has never taken steps to reverse it and has occasionally referred to it in subsequent cases. Moreover, the recent case-law of the EU courts suggests that some coordinated interferences with the price system deserve to be treated under the rule of reason. In the 2014 *MasterCard* judgment (CJEU, C-382/12 P, *MasterCard and Others v. Commission,* not yet published, at § 193 (September 11, 2014)), the CJEU found that the multilateral interchange fees ("MIFs") collectively set by the MasterCard payment system were problematic because they reduced "*the possibility of prices* [for merchants] *dropping below a certain threshold*". Like the General Court, however, the Court scrutinized this price interference under the rule of reason (GC, T-111/08, *MasterCard and Others v. Commission*, ECR 2012 -00000, §143, 163 &164 (May 24, 2012)). The Court did not use the "*restriction by object*" framework applied in other contemporary cases of coordinated interferences with the price system.

courts have built an edifice of case-law that seems to repute as unlawful and a restriction by object any coordination that interferes with the free market price system.

Even the celebrated CJEU *Cartes Bancaires* judgment of 2014,[91] which has put an end to the open-ended interpretation of the notion of a restriction by object, is not incompatible with our understanding of the case-law. Admittedly, the strict liability rule applied to coordination that tampers with the price system fits the *Cartes Bancaires* restricted scope requirement whereby the notion of restriction of competition by object "*can be applied <u>only to certain types of coordination</u> between undertakings which reveal a sufficient degree of harm to competition*", as long as the Court views such interferences with the price system as the supreme evil of antitrust.[92]

To conclude, we note that our interpretation of coordinated interference with the price system as a restriction by object also seems to be the Commission's understanding. In a not so distant past the Commission held that railway companies active in the "*International Railways Union*" had restricted competition by jointly defining provisions "*on the structure of sales prices*" for rail haulage and the "*methods for determining such prices*".[93] Even though the price that "*structure established by the railway companies [did] not directly concern haulage prices*", it nevertheless had "*an indirect effect on tariff levels*".[94]

C. APPLIED ANALYZIS

With this background, it is now time to revert to the IEEE-SA revised patent policy. At the outset, it seems uncontroversial to consider that the IEEE-SA revised patent policy can be analogized to a price recommendation by an industry association, likely to trigger the applicability of Article 101(1) TFEU.

At a deeper level of analysis, the definition of "*reasonable rates*" and the three factors listed in the policy seem to constitute an attempt to "*give substance*" to the content of the IEEE-SA's FRAND commitment, which gradually raises the risk of antitrust liability along the lines described in *FCK and SCK*. This is confirmed in the letter addressed by IEEE-SA to the DoJ

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[91] See CJEU, C-67/13 P, *Groupement des cartes bancaires v. Commission*, ECLI:EU:C:2014:2204, §54 : "*The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects*".

[92] *Id*.

[93] *See* Commission Decision of 24 February 1993 (IV/34.494 — Tariff structures in the combined transport of goods), (93/1 74/EEC).

[94] *Id.* at §25. The Commission accepted to exempt the agreement on the basis of a sector specific legislative immunity that reinstated the applicability of Article 101(3) TFEU (Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway).

in support of its request, which is rife with reference to the revised patent policy's goal to "*provide greater clarity*".[95]

In addition, the fact that neither the concept of a reasonable rate, nor the three factors are given quantitative content is not sufficient to defuse the risk of antitrust liability, as clearly shown in *Dole Food Company, Inc. v Commission*. This point seemed critical in the DoJ assessment, which noted that the revised patent policy did not impose "*any specific royalty calculation methodology*".[96] In contrast, in EU antitrust law, a shared understanding on mere pricing "*considerations*" seems to merit severe antitrust scrutiny under Article 101(1) TFEU.[97]

A similar analysis applies to the fact that the actual definition of licensing rates is "*left to parties' negotiations*".[98] In its BRL, the DoJ dismissed concerns of antitrust harm as "*unlikely to occur as a result of the Update given that, inter alia, licensing rates ultimately are determined through bilateral negotiations*".[99] As seen above, EU antitrust law finds antitrust liability by object, even if the coordination is too remote from market transactions to entitle the parties to control the market price. In reality, mere interference with the free market price system seems to be a sufficient concern to trigger a finding of restriction by object under Article 101(1) TFEU.

Last, the contention that the IEEE-SA revised patent policy is optional, and can be disregarded by standards participants was perhaps relevant in the DoJ analysis, but has little significance from an EU antitrust standpoint.[100] As *FEDETAB* makes abundantly clear, it is sufficient that the recommendation receives substantial endorsement from market participants. On the facts, this is manifestly the case, otherwise the policy would have never attracted a majority of votes within the IEEE-SA governing bodies. And upon verification on the IEEE-SA website, several large firms such as Broadcom, Intel, LG and Samsung have already issued LoAs that were deemed to comply with the revised patent policy.[101]

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[95] *See* also Konstantinos Karachalios, supra 15.
[96] See BRL, supra 30, p.12.
[97] The concept of considerations is used in the FAQ issued by IEEE-SA. *See* supra 16, at question 47. Such coordination falls squarely within the notion of "*price setting factors*" described in the Commission's decision.
[98] See Request, supra 14, p.16.
[99] See BRL, supra 30, p.8.
[100] Patent holders may refuse to issue a LoA or to select the FRAND box on the LoA form.
[101] Those letters can be found on the IEEE-SA website at https://standards.ieee.org/about/sasb/patcom/pat802.html

All this notwithstanding, our reasoning could be criticized on the ground that several of the above cases concerned secret and direct communication between firms over pre pricing factors, and not public and indirect pricing recommendations within the formal framework of a trade association. However, this objection is not fatal. When a trade association declares that members A, B and C shall apply pricing principles X and Y, it is the same as having market rivals A and B and B and C entering into secret contact to agree that they will apply pricing principles X and Y.

In sum, the rulings of the EU courts point to an unlawful restriction by object when an industry association remotely recommends the application of qualitative pricing factors in future market transactions.[102] This leads us to believe that the optimistic findings reached by the BRL under US antitrust law standards would not be exportable if the IEEE-SA revised patent policy were to be scrutinized under EU antitrust law. The reason for this is not a matter of facts, but law. In the EU, a cartel-type prohibition rule applies to any coordination that interferes with the price system.[103]

Beyond IEEE-SA, the case-law of the Union courts more generally creates a serious risk of antitrust exposure for SSOs that contemplate similar changes to their patent policy. To be sure, the argument here is not that EU antitrust agencies would – let alone should – take action against SSOs patent policies for infringement of Article 101 TFEU.[104] Nor that the EU antitrust agencies would not use their margin of discretion to dismiss complaints against SSOs, settle such cases or extend the benefit of an exemption under Article 101(3) TFEU. On the contrary, major world antitrust agencies have generally cast a favourable eye on such changes. Readers will recall that in 2006, the DoJ issued a BRL finding no need to challenge VITA's new patent policy which prescribed a commitment by working group members to declare "*the maximum royalty rates and most restrictive non-royalty terms*".[105] In 2010, the EU Commission took exactly the same position in its Guidelines on horizontal cooperation

[102] And the possible justification to avert otherwise unlawful anticompetitive conduct is not available.
[103] Regardless of its remoteness, ineffectiveness or excusability.
[104] An interesting, and thought provoking, question would be to determine whether a standards participant could apply to the EU Commission for immunity under the leniency notice.
[105] See US Department of Justice, Antitrust Division, October 30 2006, Business Review Letter from Thomas Barnett. VITA requested a business review letter from the US DoJ. The DoJ recalled the procompetitive effects of collaborative standard setting processes. It noted the potential of standard setting to generate exclusionary and collusive effects, which could be found to harm competition. In light of this, the DoJ undertook an analysis of the new patent policy under the rule of reason. The DoJ eventually issued a business review letter finding no cause for antitrust concern. It nonetheless called VITA, VSO, and its member companies "*vigilantly to continue to educate working group participants about the severe consequences of such activities*".

agreements.[106] It additionally stated, in a footnote, that in its view, the prohibition of Article 101 TFEU did not prevent "*the decision to license IPR essential to a standard on royalty-free terms*".[107]

Instead, our point is that regardless of the policy preferences expressed by antitrust agencies, changes of the kind introduced by IEEE-SA should be given serious consideration under the case-law adopted pursuant to Article 101 TFEU. Courts dealing with patent infringement cases or involved in rate setting proceedings could indeed be faced with a new form of competition defense, raised by SEPs holders who do not comply with an SSO's patent policy (*eg* a SEP holder requests royalties that reflect the added value of the end product) to avoid the consummation of an unlawful restriction of competition by object within the meaning of Article 101 TFEU.

Interestingly, the risk of violation of Article 101(1) TFEU could also offer a retrospective explanation for the CJEU's conservative ruling in *Huaweï v ZTE.*[108] Readers familiar with this case will recall that Advocate General Wathelet had suggested in his Opinion to the Court to invite SSOs "*to establish minimum conditions or a framework of 'rules of good conduct' for the negotiation of FRAND licensing terms*".[109] In its judgment, the CJEU did not follow the invitation, possibly in light of the inconsistency between such a pronouncement and the Court's case-law under Article 101(1) TFEU.

In sum, in the US, the main antitrust concern raised by scholars with regard to the IEEE-SA revised patent policy was one of buyer collusion. In the EU, a less facts-dependent standard of liability applies, with the result that the risk of antitrust liability under European law is considerably higher for SSOs that consider changes of the kind introduced by the IEEE-SA revised patent policy.

IV. RATIONALE: INCIPIENCY THEORY

[106] *See* Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C11, 14.1.2011, p. 1, § 299: "*should a standard-setting organisation's IPR policy choose to provide for IPR holders to individually disclose their most restrictive licensing terms, including the maximum royalty rates they would charge, prior to the adoption of the standard, this will normally not lead to a restriction of competition within the meaning of Article 101(1) TFEU"*.

[107] *Id.*, at footnote 109.

[108] *See* CJEU, C-170/13, *Huaweï v ZTE* [2015] ECLI:EU:C:2015:477.

[109] *See* Opinion of AG Wathelet, C-170/13, *Huaweï v ZTE* [2014] ECLI:EU:C:2014:2391, at §11 (continuing: "*Without these, not only actions for a prohibitory injunction but also the rules on abuse of a dominant position, which should be employed only as solutions of last resort, are being used as a negotiating tool or a means of leverage by the SEP-holder or the undertaking which implements the standard and uses the teaching protected by that SEP*").

EU competition law brings any coordinated interference with the price system under a quasi *per se* prohibition rule, similar to the standard of liability applied in cartel cases. Perhaps no other case conveys this philosophy better than the *Dole Food Company, Inc. v Commission*, where the fact that the impugned coordination had "*an influence on supply vis a vis demand*" was deemed sufficient to find a restriction by object.

This strict legal standard is presumably based on deeper legal and economic considerations. Unfortunately, however, the CJEU has not explicitly elaborated the intellectual roots of this strict regime, in line with its customary practice of stating what the law is, without articulating why this law is justified.[110] In our view, a plausible foundation for the EU courts' strict regime is the "*incipiency theory*" which, again, can be traced to early US antitrust law. Under the incipiency theory, the antitrust structure should seek to arrest anticompetitive conduct in its incipiency, before it expands into a full-fledged restriction of competition. As Bork and Bowman colourfully explain in relation to US antitrust law, the theory is based on the "*idea that it is possible to nip restraints of trade and monopolies in the bud before they blossom to Sherman Act proportions*".[111] Put differently, the incipiency theory seeks to provide an anticipative remedy for conduct that presents a "*dangerous likelihood*" of anticompetitive infringement if and when "*fully grown*".[112] The incipiency theory does not only catch finite forms of conduct that are yet to produce anticompetitive effects, but also infinite forms of conduct that pose an even more distant threat to competition. The foundations of this extraordinarily precautionary enforcement theory are still discussed in modern antitrust scholarship. Some rationalize it on economic grounds, considering that incipiency is designed for cases of firm conduct that knowingly yields a "*dangerous probability*" of anticompetitive effects.[113] Others argue that incipiency is justified in all cases of firm conduct that challenges

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[110] Something that can be described as "*it-is-so-because-we-say-so*" jurisprudence, see *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 552 (1989) (Justice Scalia, concurring in part and concurring in the judgment).

[111] *See* Robert H. Bork and Ward S. Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV 363, 368 (March 1965). For a critique, *see* Olivier E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 (1) THE AM. ECON. REV. 18, 27 (March 1968): "*while Bork and Bowman may be correct in charging that scale economy justifications have not been given sufficient weight in the recent enforcement of the merger law, they are also guilty of a certain heavy-handedness in their own treatment of the incipiency question*".

[112] *See* Jesse W. Markham, *Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the "too-big-to-fail" Phenomenon*, 16 FORDHAM J. OF CORP. AND FIN. L.261, 278–80 (2011).

[113] *Id.*, citing at p.295 Justice Holmes in *Swift & Co.* v. *United States*, 196 U.S. 375: "*Where acts are not sufficient in themselves to produce a result which the law seeks to prevent — for instance, the monopoly — but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen . . . But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result*".

the political objectives of antitrust law (preservation of a self-policing system, individual freedom, etc.).[114]

The incipiency theory is the bedrock of several US antitrust statutes including Section 7 of the Clayton Act[115] and the Celler Kefauver Act which set out an *ex ante* merger control system;[116] Section 5 of the FTC Act, which outlaws trade restraints that threaten to become a Sherman Act violation;[117] Section 2 of the Sherman Act which declares unlawful attempted monopolization. Some authors actually refer to those pieces of legislation as the "*incipiency statutes*".[118]

The incipiency theory has also been influential on the case-law of the US courts. In a series of cases, the US courts have relied on incipiency theory to extend antitrust liability to conduct with benign anticompetitive potential. The incipiency theory is, in particular, the foundation of a controversial line of opinions where the US Supreme Court enjoined mergers with limited market coverage, including *Brown Shoe*,[119] *US v National Philadelphia Bank*[120] and *Von Grocery's*.[121] It is also the theoretical backbone of the case-law that affirms a *per se* prohibition rule against all cartels, including those that are ineffective at affecting market conditions due to lack of market power. Blake and Jones explain that, in those cases, the courts acted on the "*supposition that an ineffective cartel would eventually correct its mistakes and expand its efforts to embrace or crush any troublesome outside competition*".[122] Finally, the incipiency theory has also inspired the – now reversed – *per se* prohibition of resale price maintenance, by analogy to horizontal price-fixing agreements, but without proof of market control.[123]

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[114] *See* Harlan M. Blake and William K. Jones, *In Defense of Antitrust*, 65 (3) COLUM. L. REV., 377 (Mar., 1965); Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, UNIV. OF ILLINOIS L. REV., 497 (2009)

[115] *See* Steven C. Salop, *Symposium on Mergers and Antitrust*, 1 (2) THE J. OF ECON. PERSP. 3, (Autumn 1987); Note, *'Preliminary Preliminary' Relief Against Anticompetitive Mergers*, 82 YALE L.J. 155, 170 (1972).

[116] Celler-Kefauver Antimerger Act of 1950, 64 Stat. 1225. *See* Maurice E. Stucke, supra 114, at p.525: "*Seeking, with mixed results, to break up the German cartels, the United States after World War II domestically strengthened its merger laws to arrest concentration of economic might in its incipiency*".

[117] *See* Luca Fiorito, *When Economics Faces the Economy: John Bates Clark and the 1914 Antitrust Legislation*, 25 (1) REV. OF POL. ECON.139 (January 2013).

[118] *See* Jesse W. Markham, supra 112, at p.296.

[119] *Brown Shoe Co. v. United States*, 370 U.S. 294, 316-17 (1962).

[120] *United States v. Philadelphia Nat'l Bank*, 374 U.S. 362, 363 (1963).

[121] *Von's Grocery Co.*, 384 U.S. 270 (1966). See Robert H. Lande, *Resurrecting Incipiency: From Von's Grocery to Consumer Choice*, 68 ANTITRUST L.J. 875 (2001).

[122] *See* Harlan M. Blake and William K. Jones, supra 114, p.386. Though this is disputed, *see* Robert H. Bork, *Contrasts in Antitrust Theory I*, 65 (3) COLUM. L. REV., 401, 414 (note 16) (March 1965).

[123] *Id.* p.386 (note 32). *See Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U.S. 373 (1911): "*As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by*

In modern US antitrust law, the influence of the incipiency doctrine in the case-law has receded. Amongst others, progress in economic theory throughout the XXth century has weakened the early consensus that ascribed deleterious effects to a wide range of business practices. To be sure, the incipiency statutes remain in force. But when they are applied, agencies and courts embrace an effects based approach which gauges prospective risks of consumer harm on a case-by-case basis. Even the *per se* prohibition rule on price fixing[124] has given way to a structured analysis, whereby price fixing is no longer prohibited on its face, but is subject to a "*quick look*" examination of the relevant facts which determines its subsequent treatment under the law.[125] As the US Supreme Court noted in *BMI*, "*When two partners set the price of their goods or services, they are literally "price-fixing," but they are not* per se *in violation of the Sherman Act*".[126]

Against this background, the incipiency theory could be the implicit rationale that underpins the strict case-law of the EU Courts in relation to remote, indirect and peripheral interferences with the price system.[127] This interpretation would acknowledges that coordinated interferences with the price system may not be presently anticompetitive, but that they nonetheless deserve to be prohibited on the ground that they move participating firms one step closer to unlawful price coordination (and one step away from independent competitive pricing).

The case-law of the EU courts under Article 101(1) TFEU lends itself quite well to an incipiency theory reading. The *per se* prohibition of isolated coordination in *T-Mobile Netherlands* can be rationalized on the ground of the need to attack collusion in its infancy. Similarly, the finding of an infringement for unlawful pre-pricing communications in *Dole Food Company, Inc. v Commission* shares the same spirit. Finally, the spectacular reversal of the case-law on *de minimis* restrictions of competition in *Expedia* may be reasoned on the

agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system. But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. [...] The complainant's plan falls within the principle which condemns contracts of this class. It in effect creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question."

[124] *See* Louis Kaplow, *On The Meaning of Horizontal Agreement in Competition Law*, 99 (3) CALIF. L. REV. (June 2011)

[125] *See* Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 CALIF. L. REV. 733 (2012)

[126] *Broadcast Music, Inc. v. CBS, Inc.* 441 U.S. 1 (1979).

[127] *See* Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281 (1956).

basis of incipiency theory. In *Expedia Inc.*, the CJEU affirmed *obiter dictum* that restrictions by object were presumed to appreciably affect competition,[128] reversing a decades old precedent and discarding the laxer principle affirmed in the Commission's 2001 De Minimis Notice.[129] In the Court's view, a price fixing arrangement covering 2% of a market is by its "*nature and independently of any concrete effect*" an "*appreciable restriction of competition*".

Pushing the incipiency hypothesis further, two declinations of the theory can be potentially envisioned. On the one hand, coordinated interference with the price system may be looked at as a first stage, preliminary measure that forms part of a larger plan to cartelize an industry. This ties in with Adam Smith's famous quote: "*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices*".[130] In this hypothesis, the narrative is that rivals that initially cooperate may be naturally and irremediably brought to adopt additional anticompetitive arrangements.

On the other hand, coordinated conduct that interferes with the price system may be seen as a facilitating device or plus factor, which raises risks of tacit collusion amongst interdependent oligopolists through, for instance, a reduction of market uncertainty. In this variant, the narrative is economic, and it focuses on a presumed risk of anticompetitive effects that stems from the facilitating device.

On a cursory analysis, both narratives could explain the classification of the IEEE-SA revised patent policy as a restriction by object. First, it ought to be recalled that the IEEE-SA SA changed its patent policy in 2007 in order to entitle patent holders to disclose their proposed maximum rates and other terms. As admitted by IEEE-SA in its request for a BRL, it is precisely the failure of this policy that prompted the SSO to adopt a revised patent policy in 2015 which sets up a more comprehensive system.[131] This evolution fits well with the Smithian incipiency theory narrative, which encapsulates the – gloomy – conjecture that any competitor coordination is doomed to progress towards price fixing. Second, the various documents adopted by the IEEE-SA to explain its revised patent policy focus on the avowed aim of providing "*clarifications*" and to resolve an alleged problem of "*uncertainty*". Given

[128] CJEU, C-226/11, *Expedia, Inc. v. Autorité de la concurrence and Others* [2012] ECR 0000, §36.
[129] This precedent is: CJEU, C-5/69, *Franz Völk v. S.P.R.L. Ets J. Vervaecke* [1969] ECR I-00295.
[130] *See* ADAM SMITH, THE GLASGOW EDITION OF THE WORKS AND CORRESPONDENCE OF ADAM SMITH: AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS VOLUME 2 (Oxford University Press, Incorporated. 1975).
[131] *See* Request supra 14, p.10, section IV.

that participants in IEEE-SA working groups are also often rival oligopolists in manufacturing markets, it is not wholly heretical to adopt a rule that finds antitrust liability for measures that increase transparency in concentrated markets, though it may be overly crude to use the "*restriction by object*" approach.[132]

At this stage of the discussion, the *Dole Food Company, Inc. v Commission* case is again useful, because it provides hints on which of the two incipiency narratives *does not* drive the case law interpreting Article 101(1) TFEU. The facts discussed by the Commission and the EU courts reveal that the quotation prices on which the impugned pre-pricing communications took place were "*not closely correlated*" with actual transaction prices.[133] Moreover, the existence of imports quotas on bananas limited the parties' ability to influence the total quantities supplied in the EU, and in turn their power to raise prices. Those facts suggest that the parties' pre-pricing communications on quotation prices were quite unlikely to ever "*ripen*" into anticompetitive coordination.[134] Whilst it treated the conduct as a restriction by object, the Commission explicitly acknowledged this by granting a 60% reduction on the fine inflicted to the parties:

> *"The fact that during the relevant period the banana sector was subject to a very specific regulatory regime is taken into consideration, in favour of all the parties, as a mitigating circumstance as well as that the coordination related to the quotation prices. In light of the very particular circumstances of this case, a reduction of 60 % is applied to the basic amount of the fines for all the parties".*

The Commission's leniency vis-a-vis a restriction by object means implicitly that the pre-pricing communications were not treated as an incipient infringement because of the economic risk that they would facilitate collusive pricing. Instead, therefore, the incipiency theory that possibly underpins the Court's case-law may be closer to the Smithian narrative which proposes to outlaw competitor cooperation on price in the cradle, before it grows into plain vanilla price-fixing.

IV. CONCLUSION

The point made in this paper is that the evolution of the general EU antitrust case-law on horizontal coordination under Article 101 TFEU creates a risk of antitrust liability for SSO

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[132] *See* NICOLAS PETIT, THE OLIGOPOLY PROBLEM IN EU COMPETITION LAW, IN RESEARCH HANDBOOK IN EUROPEAN COMPETITION LAW (I. Lianos and D. Geradin, eds., 2013).

[133] The Commission implicitly acknowledged this in its decision. *See* Commission Decision, supra 54, §352: "*the Commission does not claim that actual prices and quotation prices are closely correlated*".

[134] For use of the word, *see* Ward S. Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L. J. 19, 30 (1957-1958).

policies that attempt to give substance to the concept of reasonable rates and guidelines on rate-setting factors.

The intellectual foundation of this may be a belief by the EU Courts that, in a market economy, the free market price system must remain untouched. Accordingly, the Article 101 TFEU case law treats as a "*restriction by object*" any coordination that tampers with the price system. In practice, coordinated conduct is thus deemed on its face to be incompatible with the first paragraph of Article 101 TFEU, and unlikely to benefit from an exemption under the third paragraph of Article 101 TFEU.

Whilst SSOs should not be too worried about the risk of antitrust enforcement by the EU Commission or other national competition agencies in light of their stated policy preferences, SSOs should nonetheless remain cautious. Due to the direct effect of the EU competition rules, national courts involved in patent litigation may be called upon to assess the validity of SSOs' patent policies under Article 101 TFEU. And in this context, the policy preferences expressed by antitrust agencies occupy little, if no, place in the assessment.

In the past decade, antitrust agencies have repeatedly invited SSOs to define and clarify the meaning of FRAND commitments. In light of the EU courts case-law, those invitations may have counterintuitively created an "*antitrust trap*" for SSOs. In brief, whilst SSOs initiatives to refine their patent policies will certainly be viewed with sympathy by some antitrust agencies outside of Europe – as the DoJ BRL shows – they may trigger findings of antitrust liability in the courts of the old continent.

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