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Cover Page Footnote
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The IEEE-SA Revised Patent Policy and Its Definition of "Reasonable" Rates: A Transatlantic Antitrust Divide?

Nicolas Petit*

The Institute of Electrical and Electronics Engineers Standards Association's ("IEEE-SA") updated patent policy and a business review letter issued by the United States Department of Justice ("DOJ") have caused much discussion in the United States. The purpose of this Article is to assess whether a similarly lenient antitrust approach to Standard Setting Organizations' ("SSOs") rate-setting policies would prevail under the European Union's ("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, Inc. v. European Commission*,* T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, and* Expedia, Inc. v. Autorité de la concurrence *have expanded the scope of the per se prohibition rule found in article 101 of the Treaty on the Functioning of the European Union ("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 incipiency, and punished as a means to set an example. From an enforcement standpoint, this trend in the case law has pros (lower enforcement costs) and*

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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 Article explains that the antitrust risk generated by SSOs rate-setting policies is presumably higher in the European Union than in the United States, where the case law on horizontal coordination is less stringent.

INTRODUCTION

This Article offers a preliminary assessment of the Institute of Electrical and Electronics Engineers Standards Association's ("IEEE-SA") revised patent policy under European Union ("EU") antitrust law and, in particular, under the rules prohibiting unlawful anticompetitive coordination provided in article 101 of the

Treaty on the Functioning of the European Union ("TFEU").[1] In February 2015, the United States Department of Justice ("DOJ") issued a business review letter ("BRL"), which concluded that the IEEE-SA revised patent policy did not deserve a challenge under the United States' antitrust rules, short of "likely harm to competition" and to the extent that its potential procompetitive benefits likely outweighed any possible harm.[2] This Article argues that a similar degree of forbearance might not have been possible if the analysis of the sections of the IEEE-SA revised patent policy related to the definition of "reasonable rates" had been conducted under EU competition law. This is because the case law of EU courts attaches cartel-type liability under TFEU article 101 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 TFEU article 101 as a possible form of horizontal buyer collusion, as 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 Article 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 TFEU article 101 for coordinated interferences with the price system. The Article 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 ("SEP") holders through private ordering

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1 *See IEEE-SA Standards Board Bylaws: Approved Clause 6 of the SASB Bylaws*, IEEE STANDARDS ASS'N, https://standards.ieee.org/develop/policies/bylaws/approved-changes.pdf [https://perma.cc/2S6M-ME4D] (last visited Nov. 19, 2016).

2 *See* Letter from Renata B. Hesse, Assistant Att'y Gen., U.S. Dep't of Justice, to Michael A. Lindsay, Esq., Dorsey & Whitney LLP (Feb. 2, 2015) [hereinafter BRL] (on file with the Fordham Intellectual Property, Media & Entertainment Law Journal).

3 *See* J. Gregory Sidak, *The Antitrust Division's Devaluation of Standard-Essential Patents*, 104 GEO. L.J. ONLINE 48, 56–60 (2015) [hereinafter Sidak, *Antitrust Division*]. *See generally* J. Gregory Sidak, *Patent Holdup and Oligopsonistic Collusion in Standard-Setting Organizations*, 5 J. COMPETITION L. & ECON 123 (2009).

mechanisms may eventually bring them within the strictures of TFEU article 101, thereby creating an antitrust trap.

To show this, the Article proceeds in three steps. Part I describes the changes introduced by the IEEE-SA revised patent policy in relation to the definition and calculation of "reasonable rates." Part II reviews EU case law under TFEU article 101, and demonstrates that the EU courts have progressively elaborated a strict rule of liability that outlaws any coordinated interferences with the price system. Part III explains that the inimicality toward coordinated interference with the price system observed in the case law may be rationalized on the basis of the "incipiency theory." Finally, Part IV 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 U.S. antitrust law.

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

From a methodological standpoint, the analysis is primarily conducted on the basis of the case law of the Court of Justice of the EU ("CJEU") and the General Court ("GC"). The Article 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, Inc. v. Autorité de la concurrence*, and *Post Danmark A/S v. Konkurrencerådet* ("*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.

I. Reasonable Rates Under the IEEE-SA Revised Patent Policy

A. Overview of the IEEE-SA Revised Patent Policy

In the past decade, several important SSOs active in information technologies have internally discussed changes to their patent policies.[5] Within 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 sellers.[6] Calls for SSOs to take action against such perceived evils have also been fueled by external declarations from two of the world's most influential antitrust agencies—the U.S. DOJ and the Commission[7]—who seem to

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[4] Case C-23/14, Post Danmark A/S v. Konkurrencerådet, ¶ 52 (Oct. 6, 2015), http://curia.europa.eu/juris/document/document.jsf?text=&docid=169191&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=54286 [https://perma.cc/8LPJ-WCTJ]; Case C-226/11, Expedia, Inc. v. Autorité de la concurrence, ¶¶ 4, 12 (Dec. 13, 2012), http://curia.europa.eu/juris/document/document.jsf?text=&docid=131804&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=54095 [https://perma.cc/42YR-BHU9].

[5] 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.

[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. *See generally* Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991 (2007); Carl Shapiro, *Injunctions, Hold-Up, and Patent Royalties*, 12 AM. L. & ECON. REV. 280 (2010).

[7] *See* Renata Hesse, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Six "Small" Proposals for SSOs Before Lunch, Remarks as Prepared for the ITU-T Patent Roundtable 9–10 (Oct. 10, 2012), https://www.justice.gov/atr/file/518951/download [https://perma.cc/34KF-5JJJ]. In Europe, see Information Note from the Eur. Comm'n Enter. & Indus. Directorate-Gen., to the Member States Standardisation Comm. 3 (Oct. 7, 2014) (on file with the Fordham Intellectual Property, Media & Entertainment Law Journal).

have accepted the patent holdup theory.[8] Proposals for SSO reform have generally consisted of spelling out in further detail the implications of Fair, Reasonable, and Non-Discriminatory ("FRAND") commitments made by SEP holders.[9] FRAND commitments are voluntary, irrevocable assurances given by standard participants that they are prepared to grant licenses on fair, reasonable, and non-discriminatory terms for their patents that become essential to the implementation of a standard.[10]

In this context, the IEEE-SA has been a pioneer. The IEEE-SA is one of the world's largest SSOs.[11] It operates in the electrical 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]

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[8] Further, they have waved the red scarf of antitrust intervention against SEP holders as an exceptional, last resort perspective. *See, e.g.*, Joaquín Almunia, Vice President of Eur. Comm'n Responsible for Competition Policy, Address at the IP Summit: Intellectual Property and Competition Policy (Dec. 9, 2013), http://europa.eu/rapid/press-release_SPEECH-13-1042_en.htm [https://perma.cc/F7P6-FTKY]. The speech discussed the need to take action to remove injunctions when there is a willing licensee: "Ideally, this principle should be implemented by the standard-setting [organizations] themselves. But since that is not happening, I am willing to provide clarity to the market through competition enforcement." *Id.*

[9] This includes limiting their fundamental right to seek injunctive relief.

[10] For a definition, see *ETSI Rules of Procedure: Annex 6: ETSI Intellectual Property Rights Policy*, EUR. TELECOMM. STANDARDS INST. ¶ 6.1 (Apr. 20, 2016), http://www.etsi.org/images/files/ipr/etsi-ipr-policy.pdf [https://perma.cc/UQW4-5GHH].

[11] IEEE-SA has members from more than 160 countries, including members from corporations, government agencies, and academic institutions. *See IEEE at a Glance*, INST. ELECTRICAL & ELECTRONICS ENGINEERS, https://www.ieee.org/about/today/at_a_glance.html [https://perma.cc/U8MN-6U6S] (last visited Nov. 19, 2016).

[12] *Id.* 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. *See How Are Standards Made?*, IEEE STANDARDS ASS'N, http://standards.ieee.org/develop/process.html [https://perma.cc/FVJ3-MFXX] (last visited Nov. 19, 2016). One of the groups is the IEEE 802 LAN/MAN Standards Committee, which presents itself as the world leader standard development body in wireless communications technologies. *See* IEEE 802 LAN/MAN STANDARDS COMMITTEE, http://www.ieee802.org [https://perma.cc/3CF5-VYSL] (last Nov. 19, 2016). For general information about IEEE 802, see Roger B. Marks, Ian C. Gifford & Bob O'Hara, *Standards in IEEE 802 Unleash the Wireless Internet*, 2 IEEE MICROWAVE MAG. 46 (2001), http://www.ieee802.org/16/docs/01/80216c-01_10.pdf [https://perma.cc/2EE5-PDCL]. Further, the IEEE-SA Standards Board is assisted by a Patent Committee ("PatCom"), which, in particular, receives, considers, and accepts FRAND Letters of Assurances ("LOAs"). *See IEEE-SA Records of IEEE Standards-Related Patent*

On February 8, 2015, the IEEE-SA announced an update of its patent policy.[13] The revised patent policy's stated aim is to provide "[g]reater [c]larity of [m]eaning on '[r]easonable' [r]ate[s],"[14] following unsuccessful previous attempts to reduce the "inherent vagueness" of FRAND commitments given by SEP 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.[16] The IEEE-SA

Letters of Assurance, IEEE-SA STANDARDS BOARD: PATCOM, https://standards.ieee.org/about/sasb/patcom/patents.html [https://perma.cc/5VWG-XJQT] (last visited Nov. 19, 2016). PatCom is also in charge of proposing changes to the IEEE patent policy. *Id.*

13 On December 6, 2014, the IEEE Board of Directors approved revisions to section 6 of the IEEE-SA Standards Board Bylaws. *See IEEE Statement Regarding Updating of Its Standards-Related Patent Policy*, INST. ELECTRICAL & ELECTRONICS ENGINEERS (Feb. 8, 2015), https://www.ieee.org/about/news/2015/8_february_2015.html [https://perma.cc/B2T7-PQAL] [hereinafter *IEEE Statement*]. Those changes took effect on March 15, 2015. *See Understanding Patent Issues During IEEE Standards Development*, IEEE STANDARDS ASS'N 22 (Sept. 1, 2015), http://standards.ieee.org/faqs/patents.pdf [https://perma.cc/428S-TMLS] [hereinafter *Understanding Patent Issues*].

14 *See* Letter from Michael A. Lindsay, Esq., Dorsey & Whitney LLP, to William J. Baer, Assistant Att'y Gen., U.S. Dep't of Justice 15 (Sept. 30, 2014) [hereinafter Request] (on file with the Fordham Intellectual Property, Media & Entertainment Law Journal). 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 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. *See IEEE-SA Standards Board Bylaws*, *supra* note 1.

15 Request, *supra* note 14, at 10; *see also* Konstantinos Karachalios, Managing Dir., IEEE Standards Ass'n, Keynote Address at IEEE SIIT: "If It Works (For Me), Why Fix It?" Status Quo Versus Reforms at the Intersection Between the Patent System and Standardization (Oct. 6, 2015). The address described 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 definitions that makes such a contract totally vague and, thus, potentially tricky for the ones lured in it." *Id.*

16 This seems recognized even by proponents of such policies. *See, e.g.*, Konstantinos Karachalios *Fundamental Uncertainty at the Intersection Between Patents and Standards*, PATENT LAWYER, Nov.–Dec. 2015, at 33.

only received two LOAs in which patent holders accepted to disclose maximum rates.[17]

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.[18] Under the adopted definition, reasonable rate 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."[19] 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.[20] 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.[21]

In addition, the IEEE-SA updated patent policy recommends the consideration of three "factors" in the determination of reasonable rates during licensing negotiations.[22] 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.[23] According to the BRL, this factor is designed to ensure that the royalty correctly reflects the added value of the patented invention, and nothing more.[24] It would prevent SEP holders from free riding on other end product features to extract unreasonable royalties, which might oc-

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17 *See* Request, *supra* note 14, at 10.

18 *See IEEE-SA Standards Board Bylaws*, *supra* note 1, at 2.

19 *Id.*

20 *See Understanding Patent Issues*, *supra* note 13, at 13 ("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.").

21 *See IEEE-SA Standards Board Bylaws*, *supra* note 1, at 2.

22 *Id.*

23 *Id.*

24 *See* BRL, *supra* note 2, at 12–13. It is also often referred to as the smallest saleable patent-practicing unit ("SSPU") requirement.

cur when the end product is complex and runs on many patented technologies.[25]

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."[26] The stated rationale behind the second factor is to mitigate "royalty stacking" risks, when SEP holders fail to consider the adverse cumulative effect of their royalty demands on the aggregate price for the standardized technology.[27]

Finally, the third factor recommends considering "[e]xisting licenses covering use of the same Essential Patent Claim," provided they are "comparable" and were not obtained under the "threat of a Prohibitive Order."[28] Possible benchmarks include licensing terms entered into following voluntary negotiations or granted by courts in the context of assessing damages during litigation.[29]

A degree of ambiguity persists on the binding nature of the three factors articulated in the 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.[30] On the other hand, the Frequently Asked Questions ("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.[31] The remainder of this Article relies on the latter 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 devel-

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25 *Id.* at 12. This is without, however, excluding the possibility of charging royalties expressed in terms of a share of the end-product price (end-product royalties).

26 *See IEEE-SA Standards Board Bylaws*, *supra* note 1, at 2.

27 *See* BRL, *supra* note 2, at 13.

28 *See IEEE-SA Standards Board Bylaws*, *supra* note 1, at 2.

29 *See* BRL, *supra* note 2, at 13 n.48.

30 *See IEEE-SA Standards Board Bylaws*, *supra* note 1, at 2.

31 *See Understanding Patent Issues*, *supra* note 13, at 15 ("While the IEEE-SA Patent Policy recommends considerations for use in determining a Reasonable Rate, these considerations are not mandatory."); *see also* Request, *supra* note 14, at 18.

opment activities.[32] 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 later sections.

B. *Development of the IEEE-SA Revised Patent Policy and the DOJ Business Review Letter*

The process that led to the adoption of the IEEE-SA revised patent policy was both protracted and controversial.[33] Four drafts of the updated patent policy were published for public review and comment.[34] A flood of comments was received.[35] 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 SEP holders through a stricter definition of FRAND.[36] 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 fourteen-to-five vote.[37]

In the course of its development, the revised patent policy gave rise to possible concerns of antitrust liability.[38] Communications

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32 *See Understanding Patent Issues*, *supra* note 13, at 9 (stating that submitting a LOA is "not a precondition to participation").

33 For a comprehensive description, see Nicolo Zingales & Olia Kanevskaia, *The IEEE-SA Patent Policy Update Under the Lens of EU Competition Law*, EUR. COMPETITION J. (Nov. 23, 2016), http://www.tandfonline.com/doi/full/10.1080/17441056.2016.1254482 [https://perma.cc/4GAR-YKZD].

34 *Id.* at 18.

35 *Id.*

36 *See* David Crouch, *Battle Over IP Rights Could Hold Back Next-Generation Technology*, FIN. TIMES (June 11, 2015), https://www.ft.com/content/30cfde18-ffa5-11e4-bc30-00144feabdc0 [https://perma.cc/W5M3-QQ45].

37 *See* IEEE STANDARDS ASS'N, IEEE-SA STANDARDS BOARD MEETING MINUTES—AUGUST 2014, http://standards.ieee.org/about/sasb/0814sasbmin.pdf [https://perma.cc/2KPA-YF4J].

38 *See* PATENT COMM. OF THE IEEE-SA STANDARDS BD., IEEE-SA PATENT POLICY—19TH NOV 2013 DRAFT COMMENTS 18 (Mar. 4, 2014), http://grouper.ieee.org/groups/pp-dialog/drafts_comments/PatCom_sort_by_commentID_040314.pdf

technology company Ericsson argued that the reasonable rate definition could lead to "the collective establishment of mandatory, uniform license terms that will reduce the compensation for standard essential patents, akin to a buyer's side cartel."[39] In a letter to the DOJ,[40] J. Gregory Sidak, a well-known antitrust scholar and consultant, 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."[41]

Arguably to appease those concerns, the IEEE-SA requested a BRL from the DOJ.[42] On February 2, 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.[43] The DOJ's BRL is a succinct policy statement that is relatively devoid of analytical content. The exercise 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 innovate."[44] Two general considerations seem to underpin the DOJ's decision to dismiss antitrust charges. First, the DOJ observed that the IEEE-SA revised policy could not have any bearing on the setting of royalty rates which "ultimately are determined through bilateral negotiations."[45] Second, the DOJ stressed that both the definition of reasonable rates and the three pricing factors remain optional.[46] It insisted, in particular, on the

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[https://perma.cc/3F3H-BSH4] [hereinafter IEEE-SA DRAFT COMMENTS]; *see also* Ron D. Katznelson, IEEE-USA Intellectual Prop. Comm., Presentation at IEEE San Diego Section: Will New IEEE Standards Incorporate Patented Technologies Under the Proposed Patent Policy? (Dec. 23, 2014), http://works.bepress.com/cgi/viewcontent.cgi?filename=0&article=1091&context=rkatznelson&type=additional [https://perma.cc/BP2S-TNLP].

39 IEEE-SA DRAFT COMMENTS, *supra* note 38, at 15–16. This comment was made by D. Kallay of Ericsson in the context of discussing retroactive application. *Id.*

40 Letter from J. Gregory Sidak, Chairman, Criterion Economics LLC, to Renata Hesse, Deputy Assistant Att'y Gen., U.S. Dep't of Justice (Jan. 28, 2015) (on file with the Fordham Intellectual Property, Media & Entertainment Law Journal).

41 *See* Sidak, *Antitrust Division*, *supra* note 3, at 51.

42 *See* Request, *supra* note 14, at 1.

43 *See* BRL, *supra* note 2, at 1.

44 *Id.* at 8.

45 *Id.*

46 *See id.* at 11–12.

fact that "patent holders can avoid the updated IEEE RAND Commitment and still participate in standards-setting activities at IEEE-SA."[47]

In a section specifically dedicated to the IEEE-SA definition of "reasonable rates," the BRL considered possible justifications for the revised patent policy.[48] It noted 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."[49] In relation to the three factors, the BRL cited a variety of patent—not antitrust—case law references to denote that the revised patent policy is consistent with judicial precedent.[50] The DOJ concluded 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."[51]

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 toward technology implementers,[52] and firms have threat-

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47 *Id.* at 8. This particular point is the subject of dispute. While the IEEE-SA has submitted to the DOJ that the changes could be bypassed, the IEEE-SA has continued to label them as a "clarification" of its patent policy, which tends to suggest that they are mandatory. *See generally* Request, *supra* note 14. The technology firm InterDigital has criticized this confusion, and suggested that this could lead to the inapplicability of the DOJ's business review letter. *See* Letter from Lawrence F. Shay, Exec. Vice President, Intellectual Prop., InterDigital, to David Law, Patent Comm. Chair, IEEE-SA Standards Board Patent Comm. 2 (Mar. 24, 2015) [hereinafter InterDigital Letter] (on file with the Fordham Intellectual Property, Media & Entertainment Law Journal).

48 *See* BRL, *supra* note 2, at 11–14.

49 *Id.* at 12.

50 *Id.* at 11–12.

51 *Id*. at 16.

52 This has been confirmed by a subsequent econometric analysis carried out by Sidak, which "reveals a biased treatment of substantive comments submitted to the IEEE by members opposed to the controversial revisions." *See* J. Gregory Sidak, *Testing for Bias to Suppress Royalties for Standard-Essential Patents*, 1 CRITERION J. ON INNOVATION 301, 303 (2016). According to Sidak, this "bias suggests that [decision-making] at the IEEE was controlled by parties that seek to devalue SEPs." *Id.*

ened to reconsider their participation in the IEEE-SA under the revised patent policy.[53]

Some scholars have also leveled trenchant critiques at the BRL. Sidak argued 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."[54] Legal scholars Thomas A. Lambert and Alden F. Abbott analogized the IEEE-SA revised patent policy to an "illegal monopsony buyer cartel," and decried the DOJ's policy under the BRL as "perverse antitrust policy" which "threatens to raise Type II error costs."[55]

II. Coordinated Interference with the Price System as a Restriction by Object Under TFEU Article 101

This Article submits that an antitrust agency would have reached a conclusion opposite to that reached by the DOJ had it conducted its analysis under EU antitrust standards. SSOs' attempts to clarify the concept of "reasonable rates" are likely to give rise to antitrust liability under TFEU article 101 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 TFEU article 101 has evolved to attach cartel-type antitrust liability to any coordinated interference with the free market price system. The following sections review this case law, explore its normative

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53 Those companies include Nokia, Ericsson, Qualcomm, and InterDigital, among others. *See* Crouch, *supra* note 36; *see also* InterDigital Letter, *supra* note 47; Bill Merritt, *Why We Disagree with the IEEE's Patent Policy*, EETIMES (Mar. 27, 2015, 7:00 AM), http://www.eetimes.com/author.asp?doc_id=1326144&section_id=36 [https://perma.cc/KR53-NYH6] ("A handful of manufacturers of devices—the people who pay for the use of the technology—essentially co-opted the IEEE patent committee.").

54 *See* Sidak, *Antitrust Division*, *supra* note 3, at 69. Sidak draws a parallel with the Silicon Valley buyer cartel in *United States v. Adobe Systems, Inc.*, which was deemed a per se violation of section 1 of the Sherman Act. *Id.* at 70 (citing No. 10-CV-1629, 2011 WL 10883994 (D.D.C. Mar. 18, 2011)). In his view, the sole difference between a buyer cartel on labor and a buyer cartel on SEPs is that the former will create deadweight loss in the short term, while the later will reduce output in the long term. *Id.* at 71–72.

55 *See* Thomas A. Lambert & Alden F. Abbott, *Recognizing the Limits of Antitrust: The Roberts Court Versus the Enforcement Agencies*, 11 J. COMPETITION L. & ECON. 791, 840–41 (2015).

implications, and discuss its application to the IEEE-SA revised patent policy.

Admittedly, the case law is not specific to SSOs, let alone to patents and intellectual property ("IP") rights. Yet, given that EU antitrust law observes the general principle of symmetry—according to which antitrust law treats intellectual property as it treats any other form of property[56]—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 TFEU article 101. It is a widely known state of affairs—and one often criticized in legal academia and practice—that the first paragraph of TFEU article 101 catches as restrictions "by object" (the legal equivalent of a per se infringement in U.S. antitrust law) many less patently anticompetitive forms of collusion.[57] What may be less well understood, however, is that the CJEU case law generally considers any coordinated conduct that interferes with the pricing system as a restriction by object.[58] Within the copious amount of CJEU case law on horizontal coordination, five cases are particularly relevant.[59]

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56 *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 2 (1995) ("[F]or the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to any other form of property.").

57 This includes various categories of exchange on strategic data. *See* Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements, 2011 O.J. (C 11) 1, ¶ 74 [hereinafter Guidelines on the Applicability of Article 101] ("Information exchanges between competitors of individuali[z]ed data regarding intended future prices or quantities should therefore be considered a restriction of competition by object.").

58 *Id.* ¶ 60.

59 One of these cases is not a court case, but a Commission decision. This Article reviews it, nonetheless, because it is a transposition of an interesting GC judgment under TFEU article 102.

1. *FEDETAB*

In *Heintz van Landewyck SARL v. Commission of the European Communities* (also known as "*FEDETAB*"), the board of a non-profit trade association with oversight of ninety-five percent of tobacco production in Belgium issued a recommendation to regulate the wholesale and retail trades of cigarettes.[60] 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).[61] The Commission analyzed the recommendation as a restriction of competition by object and effect, and declared it contrary to article 85 of the European Economic Community ("EEC") Treaty,[62] which later became TFEU article 101.[63]

On appeal before the CJEU, the applicants claimed that the recommendation was not binding and that it could not, therefore, possibly restrict competition.[64] 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.[65] What is more, the court suggested that the question of the formal mandatory nature of the recommendation was to some extent irrelevant.[66] In the court's view, as long as a substantial number of firms endorse the recommendation—the court wrote of "compliance with the recommendation"—then the recommendation can be deemed to have a "profound influence on competition in the market" and infringe TFEU article 101.[67]

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60 *See* Joined Cases 209 to 215 & 218/78, Heintz van Landewyck SARL v. Comm'n, 1980 E.C.R. 3125, 3134–35.

61 *See id.* at 3138–39.

62 *See* Case IV/28.852, 29.127, 29.149—Fedetab, Comm'n Decision, 1978 O.J. (L 224) 29, ¶¶ 80–87.

63 *See* ALISON JONES & BRENDA SUFRIN, EU COMPETITION LAW: TEXT, CASES, AND MATERIALS 105 (6th ed. 2016).

64 *See* Joined Cases 209 to 215 & 218/78, *Heintz van Landewyck SARL*, at 3241–42.

65 *See id.* at 3250–51.

66 *See id.* at 3222.

67 *See id.* at 3250–51. The court also described the parties in the case as firms "who control a substantial part of the total cigarette sales in Belgium." *Id.*

2. *SCK and FNK*

In the second case, *Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v. Commission of the European Communities*, 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 SCK and FNK.[68] At some point, FNK introduced a statutory requirement that its members charge "reasonable rates" for both external crane hiring transactions vis-à-vis clients and internal renting operations amongst members.[69] 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.[70] 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.[71]

The case was scrutinized by the Commission, which suspected that the system operated as a facilitating device for horizontal collusion.[72] During the administrative proceedings, a discussion took place on the nature of the concept of "reasonable rates."[73] FNK argued that its members were entirely free "to interpret the concept 'reasonable.'"[74] The Commission objected to this, noting that "the reasonability of rates was discussed between the crane-[hiring] companies and FNK" and that "FNK members were ob-

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68 *See* Joined Cases T-213/95 & T-18/96, Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v. Comm'n, 1997 E.C.R. II-1739, ¶¶ 1, 4–5.

69 *See id.* ¶ 4. 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. *See id.* ¶ 2.

70 *See id.* ¶¶ 4, 23.

71 *See* Case IV/34.179, 34.202, 216—Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse Kraanverhuurbedrijven, Comm'n Decision, 1995 O.J. (L 312) 79, ¶ 10.

72 *See id.* ¶¶ 26–27.

73 *See id.* ¶ 20.

74 *Id.*

liged under . . . the internal rules to charge 'reasonable' rates."[75] 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 TFEU article [101(1)].[76]

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 intended to serve only as an aid to specific negotiations and had no binding force at all."[77] The GC dismissed the argument.[78] It held that those rates which "give substance to the concept of reasonable rates" were "in fact a pricing system binding its members."[79]

Admittedly, *SCK and FNK* 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*

In *Dole Food Company, Inc. v. European Commission*, four worldwide producers of fresh fruit had coordinated their quotation prices for bananas exported to the European Union.[80] The Commission classified the infringement as a "cartel," and imposed pe-

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75 *Id*. The Commission concluded that the claim that they were "'completely free' when setting their rates [was] therefore inaccurate." *Id.*

76 *See id.*

77 *See* Joined Cases T-213/95 & T-18/96, Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v. Comm'n, 1997 E.C.R. II-1739, ¶ 152.

78 *Id.* ¶ 157.

79 *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 id.* ¶ 164.

80 Case COMP/39.188—Bananas, Comm'n Decision (Oct. 15, 2008) (Summary at 2009 O.J. (C 189) 12), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39188/39188_2291_2.pdf [https://perma.cc/Q3RL-CDWV].

nalties totaling € 60.3 million (around $85 million at the time).[81] The decision was first appealed to the GC,[82] and then to the CJEU.[83] Both courts affirmed the Commission's analysis in full and dismissed the appeals.[84]

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."[85] The problem, in the eyes of the Commission and of the courts, was that this coordination was designed to "reduce uncertainty."[86]

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.[87] The Commission's decision spoke, in that respect, of "pre-pricing communications." Second, the parties were not engaged in discussions over quotation prices, but over quotation price trends and "price setting factors, that is factors relevant for setting of quotation prices."[88] Those somewhat uncommon features—namely, the remoteness of the conduct from market transactions and the abstract content of the topics discussed—did not dissuade the Commission from pursuing

81 *Id.* ¶¶ 51–92, 492.

82 *See* Case T-588/08, Dole Food Co., Inc. v. Comm'n, ¶ 2 (Mar. 14, 2013), http://curia.europa.eu/juris/document/document.jsf?docid=134981&doclang=EN [https://perma.cc/5GJE-RFZR].

83 Case C-286/13 P, Dole Food Co., Inc. v. Comm'n, ¶ 1 (Mar. 19, 2015), http://curia.europa.eu/juris/document/document.jsf?text=&docid=163028&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=684009 [https://perma.cc/NL9M-Y6K2].

84 *See id.* ¶¶ 1, 161.

85 *See* Case COMP/39.188, *Bananas*, ¶ 51.

86 *See id.* ¶ 54; C-286/13 P, *Dole Food*, ¶ 16.

87 *See* Case COMP/39.188, *Bananas*, ¶ 115 (stating that "quotation prices served at least as market signals, trends and/or indications as to the intended development of banana prices, and that they were relevant for the banana trade and the prices obtained").

88 *See id.* ¶ 51; *see also* Case C-286/13 P, *Dole Food*, ¶ 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." *Id.* ¶ 96.

the case as a plain vanilla cartel, and qualifying the infringement as a "restriction by object."[89]

In their appeal before the CJEU, the parties challenged both aspects.[90] 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."[91] They contended that "not all discussions concerning factors that might be relevant to price-setting are sufficiently deleterious to merit classification as a restriction of competition by object."[92] The CJEU disposed of the claim by holding that those communications "related to factors which had an influence on supply vis-à-vis demand, market conditions and price developments."[93]

The applicants also argued 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."[94] The GC judgment had actually acknowledged that pre-pricing communications on price-setting factors like the weather were "innocuous."[95] The applicants thus argued that the mere fact that pre-pricing communications "might have a certain influence on prices is not sufficient to establish . . . restriction . . . by object."[96] The court, again, rejected this view.[97] While the court 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.[98] Instead, the court took a more principled ap-

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89 The case originated from a leniency application by Chiquita. *See* Case C-286/13 P, *Dole Food*, ¶ 5.
90 *Id.* ¶¶ 86, 106.
91 *Id.* ¶ 86.
92 *Id.* ¶ 87.
93 *Id.* ¶ 97.
94 *Id.* ¶ 106.
95 *Id.* ¶ 109.
96 *Id.* ¶ 107.
97 *Id.* ¶ 134.
98 *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

proach, 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 [TFEU article 101]."[99]

4. *T-Mobile Netherlands*

In *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, the five wireless communications operators in the Netherlands had shared information over remunerations paid to dealers.[100] The case looked like a classic information exchange, with the significant difference that the conspirators had only met once to discuss dealers' payments.[101] The Dutch competition agency nonetheless issued fines.[102] 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.[103] 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.[104] The national court also sought to understand if an exchange of information which did not have the object of raising con-

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banana trade and the prices obtained and, on the other, in some transactions the actual prices were directly linked to the quotation prices.").

99 *Id.* ¶ 134.

100 *See* Case C-8/08, T-Mobile Neth. BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, 2009 E.C.R. I-04529, ¶¶ 10, 12–13.

101 *See id.* ¶ 12.

102 *Id.* ¶ 13.

103 *Id.* ¶ 21. With this, agencies and courts that apply TFEU article 101 can dispense with an analysis of effects and dismiss defendants' claims that their coordination was ineffective. *See id.* ¶ 30.

104 *Id.* ¶ 22.

sumer prices could nevertheless be deemed a restriction by object.[105]

Unsurprisingly, the court's answer to the second question was that "to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices."[106] The wording of TFEU article 101 indeed accommodates as restrictions by object any coordination that "directly or indirectly fix[es] purchase or selling prices or any other trading conditions."[107]

Perhaps less evidently, the court reaffirmed the implementation presumption even when the concerted practice is "isolated."[108] 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.[109] The court then went on to explain that, in real 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 one parameter of competition," though one may question if such thin coordination can effectively harm competition.[110]

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.[111] 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.[112] The case attracted a great deal of attention in practitioners' circles, as it

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105 *See id.* ¶ 19.
106 *Id.* ¶ 39.
107 *Id.* ¶ 37. Further, the facts showed that dealers' remunerations were a "decisive factor in fixing the price to be paid by the end user." *Id.*
108 *Id.* ¶ 59. The parties remain entitled to try to rebut the presumption of anticompetitive effects. *See id.*
109 *Id.*
110 *Id.* ¶ 60. The number of meetings is therefore irrelevant. *See id.* ¶ 61.
111 Case COMP/C.38.281/B.2—Raw Tobacco Italy, Comm'n Decision, ¶ 1 (Oct. 20, 2005) (Summary at 2006 (L 353) 45), http://ec.europa.eu/competition/antitrust/cases/dec_docs/38281/38281_508_1.pdf [https://perma.cc/XBA7-BVVB].
112 *Id.*

was 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.[113] On appeal, the EU court fully upheld the Commission's analysis.[114]

In addition to its buyer coordination aspects, the interest of this decision for this Article lies in another, relatively unnoticed aspect.[115] 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 "organi[z]ed crime" activity.[116] 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."[117]

The Commission dismissed both justifications on legal grounds, paying no heed to the factual merits of the argument.[118] In the Commission's view:

> Serious infringements of [TFEU article [101(1)], 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 [TFEU article 101(1)] to counteract [behavior] which, rightly or wrongly, they regard as illegal and/or contrary to their own interests.[119]

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113 *See* Case T-12/06, Deltafina SpA v. Comm'n, 2011 E.C.R. II-05639, ¶¶ 43–46.

114 *See* Case C-578/11 P, Deltafina SpA v. Comm'n, ¶ 95 (June 14, 2014), http://curia.europa.eu/juris/document/document.jsf?text=&docid=153583&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=827012 [https://perma.cc/YF35-YMGA].

115 That aspect is in relation to buyer coordination in auctions with intermediaries.

116 Case COMP/C.38.281/B.2, *Raw Tobacco Italy*, ¶ 287 & n.253.

117 *Id.* ¶ 288.

118 *See id.* ¶ 289.

119 *Id.*

And the Commission went even further, mooting that such conduct could not even qualify for exemption under TFEU article 101(3).[120]

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.[121] In *Hilti AG v. Commission of the European Communities*, the GC 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.[122]

B. *Normative Implications*

All of the cases from this Article's sample led the courts and the Commission to affirm antitrust liability under TFEU article 101(1), and, in a majority of them, the impugned coordination was formally qualified as a "restriction by object."[123] In EU antitrust law, this is the closest one can come to the non-treaty notion of a "cartel." Despite their differences, each of the cases conveys legal principles of relevance for the analysis of the changes introduced by the IEEE-SA revised patent policy under EU antitrust law. This section considers each in turn.

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[120] *See id.* ¶¶ 291–92 ("Had the processors genuinely intended to justify their [behavior] 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 [TFEU article 101(3)] could apply to the infringements described in this Decision.").

[121] The Commission's decision makes an analogy with the TFEU article 102 case law in *Hilti AG v. Commission of the European Communities*, where the court held, in relation to a dominant firm that was trying to justify an alleged abusive tying, that: "[T]here 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." Case T-30/89, Hilti AG v. Comm'n, 1991 E.C.R. II-1439, ¶ 118.

[122] *See id.* ¶ 119.

[123] *See supra* Section II.A.

SCK and FNK suggests that a trade association can lawfully introduce "reasonable rates" requirements.[124] However, the ruling also shows that the introduction of rate-related requirements paves the way to the applicability of TFEU article 101(1), and the risk of antitrust liability increases gradually as the trade association undertakes to give "substance" to rate-related requirements.[125] In the case at hand, the Commission easily found antitrust liability in light of the direct coordination of trade association participants on quantitative rate levels (internal and recommended).[126] But, this leaves open the question of whether indirect coordination on rate-setting factors or qualitative methodologies would have attracted antitrust liability.

The answer to this question may be found in *Dole Food*.[127] The facts quoted in the opinion and judgments suggest that "by object" restrictions occur when rivals coordinate their understanding of abstract, non-quantitative factors like the weather, holiday periods, and market trends, among other factors.[128] In its decision, the Commission objected in general and abstract terms to coordination on "price setting factors," which it defined as "factors influencing supply vs. demand."[129] The parties in the proceedings actually ironized on this, noting that their coordination was referred in the industry as "radio banana."[130]

Dole Food is also important because it held that "pre-pricing" coordination suffices to trigger antitrust liability.[131] In other words, remote coordination well ahead of market transactions is a source of TFEU article 101(1) exposure. *T-Mobile Netherlands* conveys a

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[124] *See* Joined Cases T-213/95 & T-18/96, Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v. Comm'n, 1997 E.C.R. II-1739, ¶ 159.

[125] *Id.*

[126] *See id.*

[127] Case T-588/08, Dole Food Co., Inc. v. Comm'n, (Mar. 14, 2013), http://curia.europa.eu/juris/document/document.jsf?docid=134981&doclang=EN [https://perma.cc/5GJE-RFZR].

[128] *Id.* ¶ 255.

[129] *See id.* ¶¶ 294–95, 377.

[130] *Id.* ¶ 195.

[131] *Id.* ¶ 21.

similar teaching, in the sense that early, one-off coordination can be deemed a restriction of competition "by object."[132]

Third, *Raw Tobacco Italy*[133] serves as a reminder 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*[134] case law to the area of coordinated conduct. Under *Hilti AG*, firms cannot justify anticompetitive conduct by the need to forestall the illegal behavior of others.[135] In *Hilti AG*, the court emphasized that such justifications are not available when specific legal institutions and enforcement structures exist to remedy the illegality.[136] 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.[137] 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 made the important point that nonbinding recommendations issued by representative institutions can give rise to a restriction by object if they are endorsed by a sufficient number of member firms.[138] 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, both *T-Mobile Netherlands*[139] and *Raw Tobacco Italy*[140] show that restrictions of competition by object can also originate at

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132 *See* Case C-8/08, T-Mobile Neth. BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, 2009 E.C.R. I-04529, ¶¶ 60–61.

133 Case COMP/C.38.281/B.2— Raw Tobacco Italy, Comm'n Decision (Oct. 20, 2005) (Summary at 2006 (L 353) 45), http://ec.europa.eu/competition/antitrust/cases/dec_docs/38281/38281_508_1.pdf [https://perma.cc/XBA7-BVVB].

134 Case T-30/89, Hilti AG v. Comm'n, 1991 E.C.R. II-1439.

135 *See id.* ¶ 118.

136 *Id.* ¶¶ 116–17.

137 For a discussion on when commercial parties will employ private ordering, see generally Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328 (2004).

138 *See* Case IV/28.852, 29.127, 29.149—Fedetab, Comm'n Decision, 1978 O.J. (L 224) 29, ¶¶ 120–23.

139 *See* Case C-8/08, T-Mobile Neth. BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, 2009 E.C.R. I-04529.

the buyer level. While this point is not the most spectacular, it is worth recalling, given the positive stance generally taken by antitrust policy toward buyer power.

All in all, there is a credible claim to make that TFEU article 101(1) 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 U.S. antitrust law after the U.S. Supreme Court's 1940 ruling in *United States v. Socony-Vacuum Oil Co*.[141] In this case, the Supreme Court wrote in dicta that the Sherman Act condemned any combination which tampers with the price system.[142] The Court wrote:

> *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.[143]

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[140] *See* Case COMP/C.38.281/B.2—Raw Tobacco Italy, Comm'n Decision (Oct. 20, 2005) (Summary at 2006 (L 353) 45), http://ec.europa.eu/competition/antitrust/cases/dec_docs/38281/38281_508_1.pdf [https://perma.cc/XBA7-BVVB].

[141] 310 U.S. 150 (1940); *see also* ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 183–84 (4th ed. 1994).

[142] *Socony*, 310 U.S. at 221.

[143] *Id*. at 221–22 (emphasis added).

Since then, courts have relaxed the *Socony* case law,[144] but it is interesting to note that no similar evolution—with anecdotal exceptions—seems to have taken place in EU competition law.[145] In contrast, in close intellectual proximity with the Supreme Court of the 1940s, the EU 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 judgment in the 2014 case *Groupement des Cartes Bancaires v. European Commission*,[146] which put an

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[144] 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, e.g.*, GELLHORN & KOVACIC, *supra* note 141, at 195 ("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. *See id.* at 1012–14.

[145] *See, e.g.*, Case C-35/99, Arduino, 2002 E.C.R. 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. *Id.* Further, even though this aging 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 judgment in *MasterCard, Inc. v. European Commission*, 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." Case C-382/12 P, MasterCard, Inc. v. Comm'n, ¶ 193 (Sept. 11, 2014), http://curia.europa.eu/juris/document/document.jsf?text=&docid=157521&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=832893 [https://perma.cc/JCV3-ZSZD]. Like the GC in *MasterCard*, however, the court scrutinized this price interference under the rule of reason. *See* C-382/12 P, *MasterCard*, ¶ 129 (citing Case T-111/08, MasterCard, Inc. v. Comm'n, ¶¶ 143, 163–164 (May 24, 2012), http://curia.europa.eu/juris/document/document.jsf?text=&docid=123081&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=833704 [https://perma.cc/XJD2-AHSG]. The court did not use the "restriction by object" framework applied in other contemporary cases of coordinated interferences with the price system. *Id.*

[146] *See* Case C-67/13 P, Groupement des Cartes Bancaires v. Comm'n, ¶ 58 (Sept. 11, 2014), http://curia.europa.eu/juris/document/document.jsf?text=&docid=157516&

end to the open-ended interpretation of the notion of a restriction by object, is compatible with this Article's 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 *only to certain types of coordination* between undertakings which reveal a sufficient degree of harm to competition," so long as the court views such interferences with the price system as the supreme evil of antitrust.[147]

To conclude, this Article notes that its 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."[148] Even though the price "structure established by the railway companies [did] not directly concern haulage prices," it nevertheless had "an indirect effect on tariff levels."[149]

C. *Applied Analysis*

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 TFEU article 101(1). However, at a deeper level of analysis, the definition of "reasonable rates" and the three factors listed in the policy[150] seem to constitute an attempt to "give substance" to the content of the IEEE-SA's FRAND commitment, which

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pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=834032 [https://perma.cc/ART3-VKH9] ("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 . . . .").

147 *Id*. (emphasis added).

148 *See* Case IV/34.494—Tariff Structures in the Combined Transport of Goods, Comm'n Decision 1993 O.J. (L 73) 38, ¶¶ 11, 24.

149 *Id.* ¶ 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. *See* Council Regulation (EEC) 1017/68, 1968 O.J. (L 175) 1.

150 *IEEE-SA Standards Board Bylaws*, *supra* note 1, at 2.

gradually raises the risk of antitrust liability along the lines described in *SCK and FCK*.[151] This is confirmed in the letter addressed by IEEE-SA to the DOJ in support of its request, which is rife with references to the revised patent policy's goal to "provide greater clarity."[152]

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*.[153] This point seemed critical in the DOJ assessment, which noted that the revised patent policy did not impose "any specific royalty calculation methodology."[154] In contrast, in EU antitrust law, a shared understanding on mere pricing "considerations" seems to merit severe antitrust scrutiny under article 101(1) TFEU.[155]

A similar analysis applies to the fact that the actual definition of licensing rates is "left to parties' negotiations."[156] In its BRL, the DOJ dismissed concerns of antitrust harm as "unlikely to occur as a result of the [u]pdate given that, inter alia, licensing rates ultimately are determined through bilateral negotiations . . . ."[157] 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.[158] In reality, mere interference with the free market price system seems to be a sufficient

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151 *See generally* Joined Cases T-213/95 & T-18/96, Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v. Comm'n, 1997 E.C.R. II-1739.

152 *See* Request, *supra* note 14, at 15, 18; *see also* Karachalios, *supra* note 15, at 6.

153 *See* Case C-286/13 P, Dole Food Co., Inc. v. Comm'n (Mar. 19, 2015), http://curia.europa.eu/juris/document/document.jsf?text=&docid=163028&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=684009 [https://perma.cc/NL9M-Y6K2].

154 See BRL, *supra* note 2, at 12.

155 *See supra* Section II.A. The concept of other considerations in determining "reasonable rates" is discussed in question 47 of the IEEE-SA's FAQs. *See Understanding Patent Issues*, *supra* note 13, at 15. Such coordination falls squarely within the notion of "price setting factors" described in the Commission's decision. *See supra* Section II.A.3.

156 *See* Request, *supra* note 14, at 16.

157 *See* BRL, *supra* note 2, at 8.

158 *See supra* Sections II.A.3–4.

concern to trigger a finding of restriction by object under TFEU article 101(1).

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.[159] As *FEDETAB* makes abundantly clear, it is sufficient that the recommendation receives substantial endorsement from market participants.[160] 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. Further, the IEEE-SA website confirms that several large firms such as Broadcom, Intel, and Samsung have already issued LOAs that were deemed to comply with the revised patent policy.[161]

All this notwithstanding, this Article's reasoning could be criticized on the ground that several of the cases cited concern 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*, enter 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.[162] This suggests that the optimistic findings reached by the BRL under U.S. 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

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[159] Patent holders may refuse to issue a LOA or to select the FRAND box on the LOA form.

[160] *See* Joined Cases 209 to 215 & 218/78, Heintz van Landewyck SARL v. Comm'n, 1980 E.C.R. 3125, ¶ 89.

[161] These letters can be found on the IEEE-SA website. *See IEEE-SA Records of IEEE Standards-Related Patent Letters of Assurance for IEEE Standards 802–802.1 and Amendments*, IEEE-SA STANDARDS BOARD: PATCOM, https://standards.ieee.org/about/sasb/patcom/pat802.html [https://perma.cc/692F-64VC] (last visited Nov. 22, 2016).

[162] Also, the possible justification to avert otherwise unlawful anticompetitive conduct is not available.

facts, but law. In the EU, a cartel-type prohibition rule applies to any coordination that interferes with the price system.[163]

Beyond IEEE-SA, the case law of the EU 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 TFEU article 101,[164] or 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 TFEU article 101(3). On the contrary, major world antitrust agencies have generally cast a favorable eye on such changes. In 2006, the DOJ issued a BRL, finding no need to challenge VMEbus International Trade Association's ("VITA") new patent policy, which prescribed a commitment by working group members to declare "the maximum royalty rates and most restrictive non-royalty terms."[165] In 2010, the Commission took exactly the same position in its guidelines on horizontal cooperation agreements.[166] The

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163 And this holds true regardless of its remoteness, ineffectiveness, or whether it is excusable. *See* Case T-588/08, Dole Food Co., Inc. v. Comm'n, ¶ 653 (Mar. 14, 2013), http://curia.europa.eu/juris/document/document.jsf?docid=134981&doclang=EN [https://perma.cc/5GJE-RFZR].

164 An interesting and thought-provoking question would be to determine whether a standards participant could apply to the Commission for immunity under the leniency notice.

165 *See* Letter from Thomas O. Barnett, Assistant Att'y Gen., U.S. Dep't of Justice, to Robert A. Skitol, Drinker, Biddle & Reath LLP (Oct. 30, 2006) [hereinafter VITA BRL] (on file with the Fordham Intellectual Property, Media & Entertainment Law Journal). VITA requested a business review letter from the U.S. DOJ. *See* Letter from Robert A. Skitol & Kenneth M. Vorrasi, Drinker, Biddle & Reath LLP, to Thomas O. Barnett, Assistant Att'y Gen., U.S. Dep't of Justice (June 15, 2006) (on file with the Fordham Intellectual Property, Media & Entertainment Law Journal). The DOJ recalled the procompetitive effects of collaborative standard-setting processes. *See* VITA BRL, *supra*, at 7. It noted the potential of standard setting to generate exclusionary and collusive effects, which could be found to harm competition. *Id.* In light of this, the DOJ undertook an analysis of the new patent policy under the rule of reason. *Id.* at 8. The DOJ eventually issued the business review letter finding no cause for antitrust concern. *Id.* at 10. It nonetheless called VITA, the VITA Standards Organization, and its member companies "vigilantly to continue to educate working group participants about the severe consequences of such activities." *Id.*

166 *See* Guidelines on the Applicability of Article 101, *supra* note 57, ¶ 299 ("[S]hould a standard-setting organi[z]ation's [intellectual property rights] policy choose to provide for [intellectual property rights] holders to individually disclose their most restrictive

Commission additionally stated in a footnote that, in its view, the prohibition of TFEU article 101 did not prevent IPR holders to individually take "the decision to license [intellectual property rights] essential to a standard on royalty-free terms;"[167] though this statement of forbearance came with the caveat that this "should not serve as a cover to jointly fix prices either of downstream products or of substitute [intellectual property rights]/technologies."[168]

Instead, this Article's point is that regardless of the policy preferences expressed by antitrust agencies, changes of the kind introduced by the IEEE-SA should be given serious consideration under the case law adopted pursuant to TFEU article 101. Courts and arbitration tribunals dealing with patent infringement cases, patent damages litigation, or rate-setting proceedings could indeed be faced with a new form of competition defense (or counter-defense), raised by SEP holders who do not comply with an SSO's patent policy—e.g., 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 TFEU article 101. For example, an unlicensed implementer subject to injunction proceedings may argue in defense that the SEP owner has violated the IEEE-SA patent policy by bringing infringement proceedings following the failure of negotiations based on a proposed rate that is unreasonable in view of the new definition. A possible counter-defense by the SEP owner could be that the IEEE-SA definition of "reasonable rates" in not enforceable, given its contrariety with TFEU article 101.

Interestingly, the risk of violation of TFEU article 101(1) could also offer a retrospective explanation for the CJEU's conservative ruling in *Huawei Technologies Co. Ltd v. ZTE Corp.*[169] In his opinion

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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 [a]rticle 101(1).").

167 *Id.* ¶ 274 n.109.

168 *Id.* ¶ 299 n.124. In other words, the decision to license on royalty-free terms shall remain individual, and firms shall not jointly decide that licensing must take place on a royalty-free basis.

169 *See* Case C-170/13, Huawei Techs. Co. Ltd v. ZTE Corp., ¶ 77 (July 16, 2015), http://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=

to the court, Advocate General Wathelet suggested that the court invite SSOs "to establish minimum conditions or a framework of 'rules of good conduct' for the negotiation of FRAND licensing terms."[170] 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 TFEU article 101(1).[171]

In sum, in the United States, the main antitrust concern that scholars have leveled at the IEEE-SA revised patent policy is one of buyer collusion. In the European Union, 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.

III. RATIONALE: INCIPIENCY THEORY

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 under U.S. law. Perhaps no other case conveys this philosophy better than the *Dole Food* decision, where the fact that the impugned coordination had "an influence on supply vis-à-vis demand" was deemed sufficient to find a restriction by object.[172]

This strict legal standard is presumably based on deeper legal and economic considerations. Unfortunately, however, the CJEU

0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=51500 [https://perma.cc/G8SG-ELT6].

170 *See* Opinion of Advocate General Wathelet, Huawei Techs. Co. Ltd v. ZTE Corp., C-170/13 ¶ 11 (Nov, 20, 2014), http://curia.europa.eu/juris/document/document.jsf?docid=159827&doclang=EN [https://perma.cc/FVY2-C28S]. The opinion further continued: "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." *Id.*

171 *See* Case C-170/13, *Huawei*, ¶ 77.

172 Case C-286/13 P, Dole Food Co., Inc. v. Comm'n, ¶¶ 97, 107 (Mar. 19, 2015), http://curia.europa.eu/juris/document/document.jsf?text=&docid=163028&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=684009 [https://perma.cc/NL9M-Y6K2].

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.[173] In this Article's view, a plausible foundation for the EU courts' strict regime is the "incipiency theory" which, again, can be traced to early U.S. antitrust law.[174] 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.[175] As U.S. antitrust experts Robert H. Bork and Ward S. Bowman once colorfully explained in relation to U.S. 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."[176] 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."[177] The incipiency theory does not catch only 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.[178] The foundations of this extraordinarily precautionary enforcement theory are still discussed in modern antitrust scholarship.[179] Some rationalize it on economic grounds, considering that incipiency is designed for cases of firm conduct that knowingly yields a "dangerous probability" of anticompetitive ef-

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173 This can be described as "it-is-so-because-we-say-so" jurisprudence. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 552 (1989) (Scalia, J., concurring in part and concurring in the judgment).

174 *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

175 *See* Robert H. Bork & Ward S. Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 368 (1965).

176 *Id*. For a critique, see Olivier E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 27 (1968) (noting that "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").

177 *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. CORP. & FIN. L., 261, 295 (2011).

178 *See* Thomas Dahdouh, *Section 5, the FTC and Its Critics: Just Who Are the Radicals Here?*, 20 COMPETITION: J. ANTITRUST & UNFAIR COMPETITION L. SEC. ST. B. CAL. 1, 14 (2011).

179 *See, e.g.*, *id.*

fects.[180] Others argue that incipiency is justified in all cases of firm conduct that challenges the political objectives of antitrust law (preservation of a self-policing system, individual freedom, etc.).[181]

The incipiency theory is the bedrock of several U.S. antitrust statutes including section 7 of the Clayton Act[182] and the Celler Kefauver Act, which set out a merger control system;[183] section 5 of the Federal Trade Commission Act, which outlaws trade restraints that threaten to become a Sherman Act violation;[184] and section 2 of the Sherman Act, which declares unlawful attempted monopolization.[185] Some authors actually refer to those pieces of legislation as the "incipiency statutes."[186]

The incipiency theory has also been influential in U.S. case law. In a series of cases, U.S. 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 Supreme Court enjoined mergers with limited market coverage.[187] It is also the theoretical

180 *See* Markham, *supra* note 177, at 295 ("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." (citation omitted) (citing Swift & Co. v. United States, 196 U.S. 375, 396 (1905))).

181 *See* Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 382–83 (1965); Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 525.

182 *See* Steven C. Salop, *Symposium on Mergers and Antitrust*, 1 J. ECON. PERSP. 3, 4 (1987); Note, *"Preliminary Preliminary" Relief Against Anticompetitive Mergers*, 82 YALE L.J. 155, 170 (1972).

183 *See* Celler-Kefauver Anti-Merger Act of 1950, Pub. L. No. 81-899, 64 Stat. 1225 (codified as amended at 15 U.S.C. § 18 (2012)); Stucke, *supra* note 181, at 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.").

184 15 U.S.C. § 45 (2012); *see also* Luca Fiorito, *When Economics Faces the Economy: John Bates Clark and the 1914 Antitrust Legislation*, 25 REV. POL. ECON. 139, 159 (2013).

185 15 U.S.C. § 2 (2012).

186 *See, e.g.*, Markham, *supra* note 177, at 296.

187 *See* United States v. Von's Grocery Co., 384 U.S. 270, 304 (1966); United States v. Phila. Nat'l Bank, 374 U.S. 321, 362–63 (1963); Brown Shoe Co. v. United States, 370

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. Law professors Harlan M. Blake and William K. Jones explained 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."[188] 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.[189]

In modern U.S. antitrust law, the influence of the incipiency doctrine in the case law has receded. Amongst others, progress in economic theory throughout the twentieth century has weakened the early consensus that ascribed deleterious effects to a wide range of business practices.[190] This openness to economic reasoning is what presumably motivated the Supreme Court to overrule the in-

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U.S. 294, 346 (1962); *see also* Robert H. Lande, *Resurrecting Incipiency: From* Von's Grocery *to Consumer Choice*, 68 ANTITRUST L.J. 875 (2001).

[188] *See* Blake & Jones, *supra* note 181, at 386. However, this is disputed. *See* Robert H. Bork, *Contrasts in Antitrust Theory: I*, 65 COLUM. L. REV., 401, 414 n.16 (1965).

[189] Blake & Jones, *supra* note 181, at 386 n.32; *see also* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 384–85 (1911), *overruled by* Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877 (2007). In *Dr. Miles*, the Court wrote:

> 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 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.

See id.

[190] *See* Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 CALIF. L. REV. 733, 734 (2012).

cipiency treatment of resale price maintenance in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*

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.[191] Even the per se prohibition rule on price-fixing[192] 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.[193] As the Supreme Court noted in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, "[w]hen 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."[194]

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.[195] This interpretation 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 TFEU article 101(1) lends itself quite well to an incipiency theory reading. The per se prohibition of isolated coordination in *T-Mobile Netherlands*[196] can be rationalized on the ground of the need to attack collusion in its infancy. Similarly, the finding of an infringement for unlawful pre-

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191 David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 17 BERKELEY TECH. L.J. 729, 749 (2001).

192 *See* Louis Kaplow, *On The Meaning of Horizontal Agreement in Competition Law*, 99 CALIF. L. REV. 683, 683 (2011).

193 *See* Gavil, *supra* note 190, at 751.

194 441 U.S. 1, 9 (1979).

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

196 *See* Case C-8/08, T-Mobile Neth. BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, 2009 E.C.R. I-04529.

pricing communications in *Dole Food*[197] shares the same spirit. Finally, the spectacular reversal of the case law on de minimis restrictions of competition in *Expedia Inc. v. Autorité de la concurrence* may be reasoned on the basis of incipiency theory.[198] In *Expedia*, the CJEU affirmed dicta that restrictions by object were presumed to appreciably affect competition,[199] reversing a decades old precedent and discarding the laxer principle affirmed in the Commission's 2001 de minimis notice.[200] In the court's view, a price fixing arrangement covering two percent of a market is "by its nature and independently of any concrete effect" an "appreciable restriction on competition."[201]

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 eighteenth century classical economist 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."[202] 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 oligo-

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197 *See* C-286/13 P, Dole Food Co., Inc. v. Comm'n, ¶ 1 (Mar. 19, 2015), http://curia.europa.eu/juris/document/document.jsf?text=&docid=163028&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=684009 [https://perma.cc/NL9M-Y6K2].

198 Case C-226/11, Expedia, Inc. v. Autorité de la concurrence, ¶ 36 (Dec. 13, 2012), http://curia.europa.eu/juris/document/document.jsf?text=&docid=131804&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=54095 [https://perma.cc/42YR-BHU9].

199 *Id.* ¶ 37.

200 *Id.* ¶ 38. This precedent is Case C-5/69, Franz Volk v. S.P.R.L. Ets J. Vervaecke, 1969 E.C.R. I-00295.

201 Case 226/11, *Expedia*, ¶ 37.

202 *See* 2 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 145 (R.H. Campbell et al. eds., Oxford Univ. Press ed. 1976).

polists 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, one can recall that the IEEE-SA changed its patent policy in 2007 in order to entitle patent holders to disclose their proposed maximum rates and other terms.[203] 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.[204] 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.[205] Second, the various documents adopted by the IEEE-SA to explain its revised patent policy focus on the avowed aim of providing "clarification" and resolving an alleged problem of "uncertainty."[206] Given 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.[207]

At this stage of the discussion, *Dole Food*[208] is again useful, because it provides hints on which of the two incipiency narratives *does not* drive the case law interpreting TFEU article 101(1). 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 trans-

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203 *See* Request, *supra* note 14, at 10.
204 *See id.*
205 *See* SMITH, *supra* note 202.
206 *See, e.g.*, Request, *supra* note 14, at 10–12; *IEEE Statement*, *supra* note 13.
207 *See generally* Nicolas Petit, *The Oligopoly Problem in EU Competition Law*, *in* RESEARCH HANDBOOK IN EUROPEAN COMPETITION LAW 259 (I. Lianos & D. Geradin eds., 2013).
208 Case T-588/08, Dole Food Co., Inc. v. Comm'n (Mar. 14, 2013), http://curia.europa.eu/juris/document/document.jsf?docid=134981&doclang=EN [https://perma.cc/5GJE-RFZR].

action prices.[209] Moreover, the existence of import quotas on bananas limited the parties' ability to influence the total quantities supplied in the EU, and in turn, their power to raise prices.[210] Those facts suggest that the parties' pre-pricing communications on quotation prices were quite unlikely to ever "ripen" into anticompetitive coordination.[211] While it treated the conduct as a restriction by object, the Commission explicitly acknowledged this by granting a sixty percent 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 [favor] 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 [sixty percent] is applied to the basic amount of the fines for all the parties.[212]

The Commission's leniency vis-à-vis a restriction by object implicitly means that the pre-pricing communications were not treated as an incipient infringement because of the economic risk that they would facilitate collusive pricing. Instead, 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.

CONCLUSION

This Article argues that the evolution of the general EU antitrust case law on horizontal coordination under TFEU article 101 creates a risk of antitrust liability for SSO policies that attempt to give substance to the concept of reasonable rates and guidelines on

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209 *See id.* ¶ 432 (noting that "the Commission recogni[z]es itself quotation prices are not closely correlated to actual prices").

210 *See id.* ¶ 301.

211 For use of the word, see Ward S. Bowman Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 30 (1957).

212 Case COMP/39.188—Bananas, Comm'n Decision, ¶ 470–76 (Oct. 15, 2008) (Summary at 2009 O.J. (C 189) 12), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39188/39188_2291_2.pdf [https://perma.cc/Q3RL-CDWV].

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 TFEU article 101 case law treats as a "restriction by object" any coordination that tampers with the price system.[213] In practice, coordinated conduct is thus deemed on its face to be incompatible with the first paragraph of TFEU article 101,[214] and unlikely to benefit from an exemption under the third paragraph of TFEU article 101.

While 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 TFEU article 101. 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.[215] In light of the EU courts' case law, those invitations may have counterintuitively created an antitrust trap for SSOs. In brief, while 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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213 *See supra* notes 146–47 and accompanying text.

214 *See supra* note 57 and accompanying text.

215 *Interview with Terrell McSweeny, Commissioner, Federal Trade Commission*, 15 ANTITRUST SOURCE 1, 8 (2016).