

# Section 5 of the FTC Act through European Guidelines

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Section 5 of the FTC Act aims at punishing all

“unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful”<sup>1</sup>.

Recently, s.5 has received new attention. On June 19, 2013,<sup>2</sup> Commissioner Wright submitted a Guidelines proposal in an attempt to improve s.5 comprehensibility. On July 25,<sup>3</sup> Commissioner Ohlhausen proposed another Guidelines project. Likely inspired by these two submissions, on October 23,<sup>4</sup> eight members of Congress sent a letter to FTC Chairman Ramirez, underlining adverse effects created by the lack of clarity surrounding the application of s.5. They also pointed out that both the Sherman Act and the Clayton Act are framed by rigorous economic analyses, contrary to s.5. In the absence of any precise definition of the terms “unfair methods of competition”, the legal uncertainty is significant.<sup>5</sup> Quoting Bill Kovacic, they highlighted the fact that there hasn’t been an FTC action backing a Federal Court of Appeal decision based on s.5 since 1968. However, on April 16, 2013,<sup>6</sup> Ramirez expressed a contrary opinion, judging that the application of s.5 rules were clear enough. Commissioner Ohlhausen very recently expressed the same opinion.

Section 5 of the FTC Act has a lot in common with art.102 TFEU. We argue that s.5 needs Guidelines similar to those of the European text. European Guidelines on art.102 provide some direction for the creation of s.5 Guidelines. Additionally, it is an opportunity to create some convergence between American and European law.

We will successively analyse, through the European Commission Guidance<sup>7</sup> on art.102 of the TFEU, why s.5 Guidelines are essential for increasing the clarity of the FTC Act (I.) and then give some reflections on the content they could include (II.).

## I. Why do we need Guidelines: the broad formulation of Section 5

### A. Section 5: a text leading to potential uncertainty

Section 5 of the FTC Act is written in broad language. Therefore, it can be applied to practices that would not violate other antitrust laws.<sup>8</sup> In *FTC v Sperry Hutchinson Co*,<sup>9</sup> the Court held that the FTC might consider “public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws”. According to this case, a practice is “unfair” depending on: (1) whether the practice is prohibited by some “common law, statutory or other established concept of unfairness”; (2) whether it is “immoral, unethical, oppressive, or unscrupulous”; and (3) whether it causes “substantial injury to consumers (or competitors or other businessmen)”. After this case, judges tried to specify the meaning of these broad terms in *E.I. du Pont de Nemours and Co v FTC*.<sup>10</sup> The Commission itself took a more restrictive interpretation of s.5 in *General Foods Corp*,<sup>11</sup> describing the text as “broad language”.

As Professor Lande explained,<sup>12</sup> the legislative history and Supreme Court decisions clearly demonstrate that s.5 was intended to cover

“incipient violations of the other antitrust laws, conduct violating the spirit of the other antitrust laws, conduct violating recognized standards of business behavior, and conduct violation competition policy as framed by the Commission”.

### B. Two main reasons why Guidelines are essential to Section 5

Article 102 of the TFEU (ex-82 CE) employs broad terms, prohibiting “abuse” and “unfair” practices (s.5 uses the word “unfairness”, which is comparable). Because it is vague, the EC decided that Guidelines were essential to the comprehension of the text,<sup>13</sup> stating that Guidelines

<sup>1</sup> FTC Act, “unfair methods of competition” available at: <http://goo.gl/JNQu6G> [Accessed December 18, 2013].

<sup>2</sup> Statement of commissioner Joshua D. Wright, “Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the FTC Act”, available at: <http://goo.gl/uSwe1s> [Accessed December 18, 2013].

<sup>3</sup> Maureen K. Ohlhausen, “Section 5 of the FTC Act: principles of navigation” (2013) *Journal of Antitrust Enforcement* 1, available at: <http://goo.gl/jFkcln> [Accessed December 18, 2013].

<sup>4</sup> Letter to Edith Ramirez, October 23, 2013, available at: <http://goo.gl/i7GN3I> [Accessed December 18, 2013].

<sup>5</sup> See “Section 5 Symposium — End of Day One, But More to Come”, Truth on the Market, August 1, 2013

<sup>6</sup> Oversight of the enforcement of the Antitrust Laws hearing before the Subcomm. On Antitrust, Competition, Consumer Policy and Consumer Rights of the S. Comm : “I do believe that there is guidance that’s provided”.

<sup>7</sup> Here after “Guidelines” for the sake of simplicity.

<sup>8</sup> See *Grand Union Co v FTC* 300 F.2d 92 (2d Cir. 1962) and *Matter of Dean Foods Co* 70 FTC 1146, 1966 WL 88197 (1966)

<sup>9</sup> *FTC v Sperry & Hutchinson Co* 405 U.S. 233 (1972).

<sup>10</sup> *E.I. du Pont de Nemours & Co v FTC* 729 F.2d 128, 1984-1 Trade Cas. (CCH) 65881 (2d Cir. 1984).

<sup>11</sup> *General Foods Corp*, Trade Reg. Rep. (CCH) Transfer Binder 22,142 (FTC 1984).

<sup>12</sup> R. Lande, “FTC v. Intel: Applying the “Consumer Choice” Framework to “Pure” Section 5 Allegations” (2010) 2 The CPI Antitrust Journal 1.

<sup>13</sup> Guidance on its enforcement priorities in applying art.102 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, available at: <http://goo.gl/Y9Vu0P> [Accessed December 18, 2013].

are not binding on the judge but give great interpretation to the parties. According to the European Commission, the creation of Guidelines for art.102

“sets out the enforcement priorities that will guide the Commission’s action in applying Article [102] to exclusionary conduct by dominant undertakings. Additionally, “it is intended to provide greater clarity and predictability as regards the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better assess whether certain behavior is likely to result in intervention by the Commission under Article 82”.<sup>14</sup>

There are two main reasons why s.5 also needs Guidelines: (i) to raise the legal certainty; (ii) and to improve s.5 application consistency.

The *legal certainty* surrounding the application of s.5 can be increased by two means: (i) by knowing when it is appropriate to apply s.5; and (ii) by knowing which economic framework the FTC will use.

Section 5 intends to sanction practices going beyond the scope of the Sherman Act, which means that s.5 could lead to convictions in instances when the Sherman Act would not. In practice, the FTC has already been tempted to introduce a s.5 action in order to rehabilitate a deficient Sherman or Clayton Act claim. Indeed, many practices prohibited by s.5 are also prohibited under the Sherman Act and the Clayton Act,<sup>15</sup> including naked horizontal price fixing, horizontal market allocations, anti-competitive group boycotts, competitively unreasonable exclusive dealing, violations of the rule of reason, monopolisation, attempted monopolisation, and conspiracies to monopolise. Therefore, even if the scope of s.5 has been limited in practice, we make the case for some very specific Guidelines in order to raise the legal certainty by *knowing which text would be applied* to specific practices. In the *N-Data* matter, dissenting opinions from Chairman Majoras<sup>16</sup> and Commissioner Kovacic<sup>17</sup> fully explained why the FTC should avoid using s.5 when it is not completely necessary. Today, the introduction of standalone s.5 cases is not clear enough. Section 5 should provide fair notice of the standards to which persons must conform their conduct. Guidelines allow the business community to act within the scope of legality. Without them, companies do not always know which practices can potentially constitute harm of competition, resulting in the reduction of resource allocations and market efficiencies.

Furthermore, a *framework* should be available to ensure that s.5 violations are bounded. Indeed, when the FTC is punishing practices that go beyond the scope of the Sherman and Clayton Acts, there is a great need to provide economic evidence of anti-competitive effects and reduction of consumer welfare. In this case, Guidelines are the best instrument for introducing an economic framework. Section 5 should not be used to impose antitrust liability for conduct that does not threaten fundamental principles of antitrust. That is why the European Guidelines on art.102 TFEU state that

“the Commission will normally intervene under Article [102] where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure. The Commission considers the following factors to be generally relevant to such an assessment”.<sup>18</sup>

Guidelines would also improve *consistency* in the application of s.5. As Commissioner Wright recently noticed,<sup>19</sup> former FTC Commissioner Mike Pertschuck defined the terms “unfair method of competition” as

“actions that are collusive, coercive, predatory, restrictive or deceitful, or other-wise oppressive, and does so without a justification that is grounded in legitimate, independent self-interest”.

Commissioner Wright commented:

“I do not know any antitrust practitioners who would have felt comfortable providing guidance to clients on how to avoid the ‘otherwise-oppressive’ prong of an UMC claim”.

He then concluded:

“The FTC has voted out a number of complaints in administrative adjudication that have been tried by administrative law judges in the past nearly twenty years. In each of those cases, after the administrative decision is appealed to the Commission, the Commission has ruled in favor of FTC staff. In other words, in 100 percent of cases where the administrative law judge ruled in favor of the FTC staff, the Commission affirmed; and in 100 percent of the cases in which the administrative law judge ruled against the FTC staff, the Commission reversed. By way of contrast, when the antitrust decisions of federal district court judges are appealed to the federal courts of appeal, plaintiffs do not come

<sup>14</sup>“Communication from the Commission — Guidance on the Commission’s enforcement priorities in applying Article [102] of the EC Treaty to abusive exclusionary conduct by dominant undertakings”, point 2, available at: <http://goo.gl/Y9Vu0P> [Accessed December 18, 2013].

<sup>15</sup> See Holmes and Mangiaracine, *Antitrust Handbook*, para.7:2

<sup>16</sup>“Dissenting Statement of Chairman Majoras In the Matter of Negotiated Data Solutions LLC, File No. 0510094” available at: <http://goo.gl/nPfozl> [Accessed December 18, 2013].

<sup>17</sup>“Dissenting Statement Of Commissioner William E. Kovacic In the Matter of Negotiated Data Solutions, LLC, File No. 051-0094”, available at: <http://goo.gl/xEF8AZ> [Accessed December 18, 2013].

<sup>18</sup> Point 20.

<sup>19</sup> Joshua D. Wright, “Revisiting antitrust institution : The case for Guidelines to recalibrate the FTC’s Section 5 of unfair methods of competition authority” *Conurrences* 4-2013.

anywhere close to a 100 percent success rate—indeed, the win rate is much closer to 50 percent”.<sup>20</sup>

The blurred nature of s.5 offers a combination of institutional and procedural advantages. Guidelines are the best possible remedy to this unfortunate combination. As Robert Litan and Hal Singer noticed,<sup>21</sup> FTC Chairman Kovacic said that he could not name ten litigated cases that made a positive contribution to social welfare.<sup>22</sup> Broad texts lead to curious results; hence the introduction of Guidelines would be an improvement which would increase social welfare by prohibiting only anti-competitive practices. In the European Guidelines, Title IV’s “Specific Forms Of Abuse” provides the clarity businesses need. Four kinds of practices are listed: “Exclusive dealing”, “Tying and bundling”, “Predation” and “Refusal to supply and margin squeeze”. Even though the EC specified that

“for the purpose of providing guidance on its enforcement priorities the Commission at this stage limits itself to exclusionary conduct and in, particular, certain specific types of exclusionary conduct which, based on its experience, appear to be the most common”,<sup>23</sup>

letting antitrust authorities understand their role, the Guidelines provide art.102 with much more clarity.

### C. Why Guidelines are at least as essential in America as in Europe

Due to specificities of American antitrust law, Guidelines appear to be just as relevant in America as they are in Europe. Indeed:

- The FTC should release some Guidelines because of its own nature. Unlike the DoJ, which handles enforcement, the FTC should play a more innovative and investigative role.<sup>24</sup> Because the FTC is responsible for advancement, it should offer Guidelines so that parties can legally adapt their practices to antitrust evolutions. Also, because the two organisations share responsibility for antitrust enforcement, issues arise when the

FTC uses s.5 (with lower liability standards) to judge the same practices on which the DoJ would use the Sherman Act. This needs to be avoided, as it culminates in incongruous results for the parties in question, depending on which organisation handles the case.<sup>25</sup>

- As mentioned, s.5 of the FTC Act, the Sherman Act and the Clayton Act can each be potentially used to punish some of the same practices. It is very unusual in Europe to have a mechanism of this nature, in which different texts can prohibit the same practices. In order to reduce the burden of having to prove anti-competitive characteristics, the FTC should not use s.5 when the practice can be punished under the Sherman or Clayton Acts. Guidelines are needed to clarify this. Therefore, it is our opinion that it is crucial for the FTC to explain, in each case, the principles that justify departure from the Sherman Act. As Commissioner Rosch recognised, the Commission must not only assert independence from the Sherman Act,<sup>26</sup> but also explain why the Sherman Act could not be applied to the practice concerned.
- Contrary to Sherman Act para.2 and art.102 of the TFEU, levels of market power are not a prerequisite analysis for s.5. European Guidelines state that

“assessment of whether an undertaking is in a dominant position and of the degree of market power it holds is a first step in the application of Article [102]”.<sup>27</sup>

Furthermore

“market shares provide a useful first indication for the Commission of the market structure and of the relative importance of the various undertakings active on the market”.<sup>28</sup>

<sup>20</sup> Wright, “Revisiting antitrust institution” Concurrences 4-2013.

<sup>21</sup> Robert Litan and Hal Singer, *Are Google’s Search Results Unfair or Deceptive Under Section 5 of the FTC Act?* (May 8, 2012). Available at SSRN: <http://ssrn.com/abstract=2054751>.

<sup>22</sup> FTC Workshop, Opening Remarks of Chairman William Kovacic, October 17, 2008, Official Transcript, p.11, available at: <http://goo.gl/sQZZgS> [Accessed December 18, 2013]. (“In litigated disputes, name your best ten, and then ask which of those have durable shelf-life power? What are the enduring good contributions that have come from the litigation of this process? For myself, who, again, thinks that this is a necessary and useful component of competition policy, that’s a sobering exercise—to come up with the ten good ones or the ten distinctive ones. And my basic argument would be, if you can’t do better than one a decade, it forces you to ask, why has that been the case?”)

<sup>23</sup> “Communication from the Commission — Guidance on the Commission’s enforcement priorities in applying Article [102] of the EC Treaty to abusive exclusionary conduct by dominant undertakings”, Point 7.

<sup>24</sup> See R. Peritz, “Toward An Expansive Reading Of Ftc Act § 5: Beyond The Sherman Act And An Ex Post Model Of Enforcement” explaining why the FTC should assume this role.

<sup>25</sup> See “Statement Of Commissioner Maureen K. Ohlhausen In the Matter of Robert Bosch GmbH FTC File No. 121-0081”, available at: <http://goo.gl/qjmP6p> [Accessed December 18, 2013].

<sup>26</sup> “Concurring and Dissenting Statement of Commissioner J. Thomas Rosch, In re Intel Corp., Docket No. 9341”, available at: <http://goo.gl/CJHJq8> [Accessed December 18, 2013].

<sup>27</sup> Point 9.

<sup>28</sup> Point 13, stating in footnotes *F Hoffmann La Roche & Co AG v Commission of the European Communities* (85/76) [1979] E.C.R. 461 at [39]–[41]; *AKZO Chemie BV v Commission of the European Communities* (C-62/86) [1991] E.C.R. I-3359 at [60]; *Hilti AG v Commission of the European Communities* (T-30/89) [1991] E.C.R. II-1439 at [90]–[92]; *France Telecom SA (formerly Wanadoo Interactive SA) v Commission of the European Communities* (T-340/03) [2007] E.C.R. II-107 at [100].

Without this first step of analysis, s.5 can potentially be applied to more companies. When antitrust law has a large public, it needs to be precise, clear, and easily accessible to all. This is one of the main reasons why Guidelines are so essential for s.5.

Besides analysing why Guidelines would be essential to s.5, we can also consider their possible content. European Guidelines, by their structure and their substance, give us some idea of what Guidelines for s.5 might concern.

## II. Some reflections on the content of Guidelines through the European experience: differences to explore and ideas to take

### A. On differences: broader interpretation is not necessarily better

Although they have similar grounds, we can also recognise a gap between s.5 and art.102. Some argue that a broader interpretation of s.5 would converge with art.102.<sup>29</sup> This isn't necessarily true. Indeed, even if the European law prohibits some practices that are perfectly lawful under s.5,<sup>30</sup> s.5 also punishes some practices that aren't apprehended under art.102.

For instance, s.5 of the FTC Act may be used to punish unilateral invitation to collude.<sup>31</sup> There is no equivalent in Europe.<sup>32</sup> Indeed, the 2011 EC Horizontal Guidelines reaffirmed that

“the concept of a concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition”.<sup>33</sup>

It does

“preclude any direct or indirect contact between competitors, the object or effect of which is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question”.<sup>34</sup>

<sup>29</sup> See a great article by Prof. Peritz, “Toward An Expensive Reading of FTC Act § 5: Beyond the Sherman Act And An Ex Post Model of Enforcement”, June 18, 2009, available at: [http://www.antitrustinstitute.org/files/Peritz%20Toward%20an%20expensive%20reading%20of%20FTC%20sec5%20AAI2009\\_071420091556.pdf](http://www.antitrustinstitute.org/files/Peritz%20Toward%20an%20expensive%20reading%20of%20FTC%20sec5%20AAI2009_071420091556.pdf) [Accessed December 18, 2013].

<sup>30</sup> For instance, if the European Commission recognises that a dominant firm has no obligation to deal with competitors, the case *United Brands* specifies that such a refusal can, under several conditions, possibly constitute a violation of art.102. Under s.5 and Sherman Act para.2, such an obligation to deal with competitors simply cannot be imposed. In our opinion, antitrust authorities do not have the legitimacy to impose deals. Therefore, on this particular point, the European law can potentially be more severe than the American one.

<sup>31</sup> See Administrative Complaint, Valassis Comm'ns, Inc., FTC Dkt No C-4160 (March 14, 2006).

<sup>32</sup> T. Schrepel, “Patent troll through the US and EU antitrust law: when cooperation is no longer an option” [2013] E.C.L.R. 318.

<sup>33</sup> “Communication From The Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements”, point 60, available at: <http://goo.gl/R8Xfi9> [Accessed December 18, 2013].

<sup>34</sup> “Communication From The Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements”, point 61, available at: <http://goo.gl/R8Xfi9> [Accessed December 18, 2013].

<sup>35</sup> “Analysis of Propose Consent Order to Aid Public Comment, PacificCorp, FTC File N° 971-0091, February 18, 1998 <http://goo.gl/nOJFw6> [Accessed December 18, 2013].

<sup>36</sup> See A. Foer, “Section 5 as a Bridge Toward Convergence”, *The Antitrust Source*, February 2009, available at: <http://goo.gl/zHEoa6> [Accessed December 18, 2013].

<sup>37</sup> *Microsoft Corp v Commission of the European Communities* (T-201/04) [2007] E.C.R. II-3601 at [643], [647]–[649], [652], [653], [656].

<sup>38</sup> Intel complaint, available at: <http://goo.gl/UdCQU0> [Accessed December 18, 2013].

<sup>39</sup> Point 94.

Also, unilateral withholding<sup>35</sup> violates s.5 even when para.2 of the Sherman Act is not necessarily violated.<sup>36</sup> European law does prohibit such a practice within art.102 TFEU,<sup>37</sup> stating that

“any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (...) (b) limiting production, markets or technical development to the prejudice of consumers”.

Therefore, a broader application of s.5 would not necessarily match art.102. Europe and America must seek convergence, not uniformity. The differences we exposed emerged from historical reasons, and international co-operation does not call for international homogenisation, but only for a more specified application of s.5. This is exactly what Guidelines could ensure.

### B. On similarities: integration of the “damage to innovation” concept?

Article 102 Guidelines use the word “innovation” seven times. In point 87, we can read that

“the Commission considers that consumer harm may, for instance, arise where the competitors that the dominant undertaking forecloses are, as a result of the refusal, prevented from bringing innovative goods or services to market and/or where follow-on innovation is likely to be stifled.”<sup>37</sup>

In the *Intel* complaint,<sup>38</sup> the FTC charged the company with blocking or preventing innovation in the relevant markets, holding that:

“Intel’s conduct adversely affects competition and consumers by, including but not limited to: reducing competition to innovate in the relevant CPU and GPU markets by Intel and others; (...) reducing the incentive and ability of OEMs to innovate and differentiate their products in ways that would appeal to customers”.<sup>39</sup>

Such a case would not have violated the Sherman Act. Therefore, common ground exists between art.102 and s.5. In principle, the Supreme Court has affirmed that the broad language of s.5 gives the Commission a wider authority than exists under the antitrust laws to “stop in their incipency acts which, when full blown, would violate those Acts.”<sup>40</sup> The Court also states that

“the standard of unfairness under the FTC Act ... encompass[es] not only practices that violate the Sherman Act and the other antitrust laws ... but also practices that the Commission determines are against public policy for other reasons”.<sup>41</sup>

Section 5 and art.102 deal with more criteria than Sherman Act para.2. Whether the FTC chooses to integrate the notion or accept it, future Guidelines for the s.5 should concern innovation<sup>42</sup> just as much as Guidelines for art.102. The idea that American antitrust law only protects consumers while European antitrust law only protects competition isn't true. As the EC says in its Guidelines, “the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors”<sup>43</sup>. When the FTC concentrates on innovation, it focuses directly on competition. The Supreme Court also affirmed that s.5 exists in order to interpret “other reasons”, such as innovation. Once again, clarity is needed on whether or not innovation could be a criterion enforced by s.5.

### C. When s.5 Guidelines could help improve European Guidelines

In the Council Regulation of December 16, 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty<sup>44</sup> (now arts 101 and 102 of the TFEU), the EC provided an entire chapter on “Penalties”.<sup>45</sup> On October 17, 2008,<sup>46</sup> FTC Chairman Leibowitz stressed that s.5 cannot lead to private treble-damages. He said that s.5 violation “has the potential to protect consumers while at the same time limiting Intel's susceptibility to private treble-damages cases”. In his opinion, businesses should therefore support

the application of s.5 rather than the Sherman Act. However, in saying that s.5 protects consumers as well as the Sherman Act where treble-damages can be allowed, is Chairman Leibowitz suggesting that treble-damages do not protect consumers? If not, what is their purpose? Also, what if businesses can be sanctioned under s.5 (because of its broad formulation and lack of Guidelines) when they might avoid a sanction under the Sherman Act? In our opinion, this is also a topic that future s.5 Guidelines need to address.

The European Commission imposes fines in cases of violation of art.102. For its part, the FTC can only impose cease-and-desist orders. As FTC Commissioner Ohlhausen recently wrote, “the FTC should not seek disgorgement for standalone violations of Section 5”.<sup>47</sup> In Europe, Jean-François Bellis recently expressed his wish to see the European Commission develop a broader range of sanctions where fines would not be automatic.<sup>48</sup>

The EC also needs to develop impartial administrative law judges, similar to those that now exist at the FTC. These elements are the proof that both systems of law can benefit from integrating some elements from the other.

### III. To conclude

It isn't a new idea that both American and European systems of law can learn from each other. There are many topics to be cross-examined between the two continents, s.5 being one of the most important.

Because the “FTC Policy Statement On Unfairness” from 1980 has not been updated,<sup>49</sup> and because the “FTC Policy Statement On Deception” from 1983 is also outdated,<sup>50</sup> European Guidelines could inspire the FTC to draft something better for s.5. European Commissioner Kroes once said

“while I firmly believe our systems are on a patch of convergence, no-one has a monopoly on antitrust innovation. I think we can all agree that a bit of competition never did anyone harm”.<sup>51</sup>

The FTC now has a great opportunity to increase the level of antitrust innovation.

<sup>40</sup> *FTC v Brown Shoe Co* 348 U.S. 316,322 (1966), available at: <http://goo.gl/nWO7wo> [Accessed December 18, 2013].

<sup>41</sup> *FTC v Indiana Federation of Dentists* 476 U.S. 447, 454 (1986), available at: <http://goo.gl/Heh1JG> [Accessed December 18, 2013].

<sup>42</sup> Please note that one Guidelines and one Report already deal with innovation on IP related issues : “Antitrust Guidelines for the Licensing of Intellectual Property” (1995) and “Antitrust Enforcement and Intellectual Property Rights : Promoting Innovation and Competition” (2007). However, they are mostly focused on a licensing. Therefore, s.5 Guidelines need to deal with innovation in a broader way.

<sup>43</sup> “Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article [102] of the EC Treaty to abusive exclusionary conduct by dominant undertakings”, point 6.

<sup>44</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty, available at: <http://goo.gl/JZCvS> [Accessed December 18, 2013].

<sup>45</sup> Chapter 6.

<sup>46</sup> “Statement of Chairman Leibowitz and Commissioner Rosch In the Matter of Intel Corporation Docket No. 9341”.

<sup>47</sup> “Section 5 of the FTC ACT : principles of navigation”, *Journal of Antitrust Enforcement*, 2013.

<sup>48</sup> J.F. Bellis, “Article 102 TFEU : The case for a remedial enforcement Model along the lines of Section 5 of the FTC Act”, *Concurrences*, No. 1-2013.

<sup>49</sup> “FTC Policy Statement On Unfairness Appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984) See 15 U.S.C. § 45(n)”, available at: <http://goo.gl/GkPE5t> [Accessed December 18, 2013].

<sup>50</sup> “FTC Policy Statement On Deception Appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984)”, available at: <http://goo.gl/K30ST2> [Accessed December 18, 2013].

<sup>51</sup> Commissioner Kroes, “EU & US antitrust policies — our shared belief in competitive markets”, *Commission Européenne — SPEECH/08/154 28/03/2008*, Washington, DC, March 28, 2008, available at: <http://goo.gl/X2VpUK> [Accessed December 18, 2013].