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The Use of Structural Presumptions in Antitrust – Note by the European Commission

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1. Overview

1. Presumptions, including structural presumptions, may be helpful to streamline the assessment of public authorities and courts, including in the field of competition. However, presumptions by themselves also involve the risks of generating false positives as well as false negatives. As a result, while the Commission may rely on presumptions, including structural presumptions, in its enforcement activities, such presumptions are typically rebuttable, and the Commission also generally supplements its assessment with other quantitative and qualitative data rather than strictly relying on applicable presumptions.

1.1. Definition of presumptions

2. Presumptions imply that when certain facts are established, related conclusions can *a priori* be drawn. Presumptions usually build on experience that the presumed conclusions are typically a consequence of the established facts.

3. As a result, legal presumptions can be helpful tools to structure and streamline the assessment carried out by competition authorities. Presumptions can enable authorities (and courts) to minimise the investigative resources required, expedite proceedings, and make potentially complex issues more administrable, which also benefits the undertakings involved in the proceedings. Public authorities can build on their enforcement experience to design and refine presumptions over time.

4. Structural presumptions are those that relate specifically to market structures. There are two main and distinct areas where structural presumptions play a role in competition law: (a) as a measure of the level of the market power of firms and market concentration and (b) as a measure of the change in market power brought about by a merger. The former is in particular important to assess dominance in antitrust investigations and to assess the existence of market power in non-horizontal mergers (e.g., as part of the ability to foreclose). The latter is important in merger control to assess the likely impact of mergers.

5. Other presumptions may apply in the context of competition law enforcement. Two well-known presumptions are (i) the procedural presumption of innocence, according to which the burden of proving an infringement of competition law lies on the party accusing another party of such an infringement[1] and (ii) the parental liability presumption, according to which the Commission can presume that a parent company has decisive influence over the commercial activity of a subsidiary once it can prove that the subsidiary is wholly owned by the parent company.[2] Presumptions may also concern the anticompetitive effects of certain practices. For example, under EU competition law, the capability to produce exclusionary effects can be presumed for certain practices by dominant undertakings, such as predatory pricing below average variable costs[3] or margin squeeze in the presence of

[1] See Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1.

[2] See judgment of the Court of Justice of 10 September 2009, *P Akzo Nobel*, C-97/08, EU:C:2009:536, para. 61.

[3] See judgment of the General Court of 18 September 2024, *Qualcomm (predation)*, T-671/19, EU:T:2024:626, para 521.

negative spreads.[4] However, for the purposes of this note these presumptions - which are unrelated to market structure - will not be further discussed.

1.2. Types and use of structural presumptions

6. Structural presumptions are typically based on quantitative data, and primarily relate to the market shares of the relevant companies.

7. Economic theory suggests that, all else equal, higher market shares imply higher market power, and that increases in market share and market concentration lead to an increase in market power. Significant increases in market shares through horizontal concentration are strongly correlated with price increases post-merger empirically. Therefore, merger-induced changes of concentration – especially in concentrated markets -- tend to be quite strong evidence of negative effects on competition.

8. Other metrics related to market share and on which structural presumptions may be built include the level of the Herfindahl-Hirschman Index ("HHI"), and its variation (or delta) in the case of mergers more specifically.[5]

9. In EU competition law, when a structural presumption applies (and is not rebutted), the Commission may be in a position to conclude on the procedural or substantive issue in question.

10. However, the Commission may also choose to rely on additional elements besides the structural presumption. In practice, the Commission will typically supplement its findings based on structural presumptions with other quantitative and qualitative evidence.

11. Structural presumptions may not only facilitate a finding that certain conduct is harmful to competition and ultimately consumers. They can also be used to determine the scope of application of the competition rules in question, the applicable procedure, or to provide safe harbours below which certain agreements or practices are presumed not to raise competition concerns. Such structural presumptions increase legal certainty and can contribute to making competition law enforcement more predictable and efficient.

1.3. Rebuttability of presumptions

12. As structural presumptions based on quantitative elements may lead to false positives and negatives if applied indiscriminately, it is important that companies involved in investigations and competition authorities be able to rebut presumptions when the circumstances of a specific case require it.

13. Under EU competition law, presumptions, including structural presumptions, are typically rebuttable. Companies involved in competition proceedings can thus bring forward evidence and arguments to call into question the probative value of the relevant presumption. They can do so, for example, by showing that the circumstances of the case are substantially different from the background assumptions upon which the presumption is based. The European Commission will typically take such elements into account and assess whether the presumption is rebutted based on the arguments and supporting evidence

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[4] See, to that effect, judgment of the Court of Justice of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, para 73.

[5] The HHI is calculated by summing up the squares of the individual market shares of all firms in the relevant market. The HHI increment (or delta) corresponds to the difference between the pre-transaction and the post-transaction HHI levels.

submitted by the undertaking. Accordingly, the European Commission may decide not to rely on a presumption if it considers that to do so would not be justified in light of the circumstances of the case.

14. In general, the Commission adopts an open approach to empirical evidence, aimed at making effective use of all available information which is relevant in the individual case, and it makes an overall assessment based on that evidence as a whole.[6]

15. Market shares (and derived metrics such as HHI levels or deltas), which tend to form the basis for most structural presumptions, are merely one factor in the overall assessment of levels of market power or changes in market power and should be seen in the context of the overall facts and context of a market. When measuring the level of market power, the Commission will often also consider other elements such as a firms' profit margins, the ability and willingness of customers to switch suppliers, the differences between different suppliers or the existence of network effects. Similarly, when assessing changes in market power, the Commission will also consider firms' closeness of competition (e.g. through diversion ratios or bidding overlaps), the existence of capacity constraints, switching costs or network effects, and the pre-merger level of market power of the firms in question, etc.

16. Market shares provide a reliable first indicator of market power and changes in market power. When a competition authority identifies a competition concern despite the presence of low market shares, then it has to present particularly convincing effects-based evidence to support its conclusions regarding the relevant firms' market power. Similarly, when a firm argues that despite high market shares it has no market power, it has to present particularly convincing effects-based evidence to rebut the initial presumption.

17. However, the reliability of market shares also depends on the specific characteristics of the markets under investigation. For instance, market shares are typically more meaningful in markets with limited (product or geographic) differentiation. In highly differentiated markets, firms may possess significant market power even if their market share is small.[7]

2. Role of structural presumptions in the EU Commission's jurisdiction and procedures

2.1. Merger

18. The Commission aims to focus its resources on those concentrations notifiable to the EU that could potentially raise competition concerns, and more generally to reduce to the extent possible the administrative burden involved in merger reviews, without impairing effective enforcement.

19. To that end, the Commission first introduced in 2000 a simplified procedure for mergers deemed not to raise competition concerns. In 2013, the Commission extended the categories of eligible cases and reduced the information requirements for merger notifications. In 2024, the Commission further extended the categories eligible for simplified treatment based on its enforcement practice to date and further lightened the

[6] See judgment of General Court of 6 July 2010, *Ryanair v Commission*, T-342/07, EU:T:2010:280, paragraph 136.

[7] See Commission Notice on the definition of the relevant market for the purposes of Union competition law, C/2023/6789, OJ C/2024/1645 of 22.2.2024 (the "Market Definition Notice"), paragraph 110.

information requirements of notifying parties.[8] The Simplified Notice refers to the Commission's experience, which indicates that "*certain categories of concentrations are generally not likely to raise competition concerns*".[9]

20. When defining concentrations that are eligible for the simplified procedure, and thus would be unlikely to raise concerns, the level of market shares and other quantitative elements such as variations in the Herfindahl-Hirschman Index ("HHI") or the expected level of turnover or assets transferred to a full-function joint venture are taken into account.[10] Concentrations meeting the criteria will be presumed to qualify for simplified treatment as they are expected not to raise competition concerns. For instance, the simplified procedure will apply in principle to horizontal concentrations where the combined market share of all parties is either lower than 20 % or lower than 50 % if the increment to the HHI is below 150. These thresholds can thus be assimilated to structural presumptions.

21. Section C of the Simplified Notice lists circumstances that may allow the Commission to consider that simplified treatment is not suitable. As such, the Simplified Notice integrates elements that can be assimilated to a rebuttal of the presumption that mergers meeting the relevant thresholds qualify for the simplified procedure. These circumstances are largely based on qualitative elements rather than other quantitative elements. Circumstances that may remove the benefit of the simplified procedure include, for instance, the presence of non-controlling minority shareholdings held by merging parties in companies active in the same market, the presence of highly differentiated markets, the combination of important innovators, or competition concerns raised by Member States or third parties.[11]

2.2. Antitrust

22. In the area of antitrust, structural presumptions are used to determine whether an agreement is likely to affect trade between EU Member States, which is an essential criterion for applying Articles 101 and 102 TFEU[12].

23. The Guidelines on the effect on trade concept *inter alia* consider that, if the parties to an agreement have low (aggregate) market shares—specifically, less than 5% of the relevant market—and the total sales involved in the agreement are below EUR 40 million within the EU, there is a rebuttable presumption that the agreement will not appreciably affect trade between Member States. In that case, the agreement in question is considered too small or local in scope to impact competition or trade across EU borders.

24. This presumption provides clarity and reduces the regulatory burden on undertakings, particularly for smaller companies and those with a local focus. It also allows the Commission to focus on agreements that are more likely to have a real impact on the EU internal market.

[8] See Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 160 of 5.5.2023, p. 1–10 (the "Simplified Notice").

[9] Simplified Notice, paragraph 1.

[10] Ibid, paragraphs 5 and 8.

[11] Simplified Notice, Section C.

[12] See Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101 of 27.4.2004, p. 81–96.

3. Role of presumptions as part of the substantive assessment

3.1. Merger control

25. Under the EU Merger Regulation,[13] the Commission assesses concentrations with an EU dimension to establish whether they are compatible with the common market. To that effect, the Commission must assess whether a concentration would lead to a significant impediment to effective competition (or "SIEC"), in particular as a result of the creation or strengthening of a dominant position in the common market (or a substantial part of it). In that context, structural indicators, including the level of (combined) market shares and the change in market shares or increment caused by a transaction, are relevant.

26. The Commission's guidance documents in relation to merger control, and chiefly its Horizontal Merger Guidelines[14] and Non-Horizontal Merger Guidelines,[15] include various structural indicators that can be regarded as structural presumptions.

27. In relation to horizontal mergers, the Commission will rely on indicators including combined market shares and HHI delta and levels in its assessment, as useful first indicators.

28. First, where market shares are high, and in particular when they exceed 50%, the Commission will consider these as evidence of a dominant market position, and thus potentially of a SIEC.[16] A case by case assessment, including of other factors such as "*the strength and number of competitors, the presence of capacity constraints or the extent to which the products of the merging parties are close substitutes*" is necessary for cases where combined market shares are below 50%. As a result, a SIEC has regularly been found in cases where the parties held a combined market share exceeding 40%, but also at lower levels.[17] However, even high market shares may not be seen as a cause of concern (let alone a sign of dominant position or market power) by themselves. For instance, in the recent Arcelik/Whirlpool merger, the transaction was cleared unconditionally despite combined market shares exceeding 50% in various markets. The Commission concluded that the transaction would not raise competition concerns given in particular the presence of alternative suppliers in the countries where both parties are active.[18]

29. Second, and conversely, when market shares are low, i.e. below 25%, the Commission considers that concentrations can be presumed to not raise concerns. Indeed, the Horizontal Merger Guidelines state that "*Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market (…), in particular, where the*

[13] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24 of 29.1.2004, p. 1–22 (the "EU Merger Regulation").

[14] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31 of 5.2.2004, p. 5–18 (the "Horizontal Merger Guidelines").

[15] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265 of 18.10.2008, p. 6–25 (the "Non-Horizontal Merger Guidelines").

[16] Horizontal Merger Guidelines, paragraph 17. Also see Section 3.2.1 below regarding dominance presumptions in antitrust cases.

[17] See M.8713 – *Tata Steel / ThyssenKrupp / JV*.

[18] See M.11086 – *Arcelik / Whirlpool EMEA MDA*.

market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it" (emphasis added).[19] This 25% threshold has also been retained in the latest Simplified Notice, as a threshold below which, at the request of the notifying parties, the Commission may review under the simplified procedure certain concentrations not falling under any of the other categories of the Simplified Notice, under the so-called "flexibility clause", increasing the alignment between the jurisdictional and the substantive assessments of the Commission for the eligible concentrations.[20] That being said, the Commission also raised concerns in relation to markets where the merger led to combined market shares below 25% where other circumstances warranted it.[21]

30. Third, the Commission also takes into account the level of concentration in the relevant markets and the changes brought about by the transaction based on HHI levels and deltas. For instance, when (i) a post-merger HHI is below 1000, or (is) between 1000 and 2000 with a HHI delta below 250 (and none of the listed special circumstances apply), the Horizontal Merger Guidelines state that the Commission is "*unlikely to identify horizontal competition concerns*".[22] However, the Horizontal Merger Guidelines specify in relation to HHI indicators (but not to market share indicators) that they "*may be used as an initial indicator of the absence of competition concerns. However, they do not give rise to a presumption of either the existence or the absence of such concerns*" (emphasis added).

31. In non-horizontal mergers, the Commission also relies on structural features, namely market shares and HHI levels, to inform its assessment of mergers. The Non-Horizontal Merger Guidelines state that "*the Commission is unlikely to find concern in non-horizontal mergers, be it of a coordinated or of a non-coordinated nature, where the market share post-merger of the new entity in each of the markets concerned is below 30 % and the post-merger HHI is below 2 000*".[23] The Commission's Non-Horizontal Merger Guidelines however clearly state that "*these thresholds do not give rise to a legal presumption*", due to the fact that in non-horizontal mergers "*it is less appropriate (...) to present market share and concentration levels above which competition concerns would be deemed to be likely, as the existence of a significant degree of market power in at least one of the markets concerned is a necessary condition for competitive harm, but is not a sufficient condition*".[24]

3.2. Antitrust

3.2.1. Dominance ("Akzo" presumption)

32. From an enforcer's perspective, the most important structural presumption in the area of antitrust is the presumption of dominance. The European Court of Justice ("ECJ") in the Akzo case held that a 50% market share could be considered very high and was therefore, in itself, save in exceptional circumstances, evidence of the existence of a

[19] Horizontal Merger Guidelines, paragraph 18.

[20] Simplified Notice, paragraph 8.

[21] These cases include M.9331 – *Danaher/GE Healthcare Life Sciences Biopharma*, M.8713 - *Tata Steel/ThyssenKrupp/JV*, M.7932 - *Dow/Dupont*, M.7962 – *ChemChina/Syngenta*, M.7978 *Vodafone/Liberty Global/Dutch JV*, M.7917 - *Boehringer Ingelheim/Sanofi Animal Health Business*.

[22] Horizontal Merger Guidelines, paragraphs 19 and 20.

[23] Non-Horizontal Merger Guidelines, paragraph 25.

[24] Ibid, para. 27.

dominant position.[25] While a market share of 50% or higher thus creates a presumption of dominance, the ECJ also acknowledged in Akzo - and subsequent cases - that dominance can exist at lower market shares, especially if they are sustained over time and accompanied by other factors indicating market power. For instance, market shares in the 40-50% range might also indicate dominance, especially if competitors hold significantly lower market shares. As the Akzo presumption is rebuttable, an undertaking with a market share of 50% or more can always argue against the presumption of dominance by showing that it faces strong competitive constraints (e.g. low barriers to entry, strong countervailing buyer power, or competition from rapidly growing rivals, etc.).

33. While this structural presumption simplifies enforcement, by allowing the Commission to use market share as the primary indicator of dominance, the Commission typically does not limit its dominance assessment to an analysis of market shares, even in cases where the 50% threshold is exceeded. Instead, it assesses dominance in the light of the overall evidence. The market shares of the potentially dominant undertaking and its competitors facilitate the identification of competitive constraints that an undertaking may face from actual competition in a given market. However, they do not reflect the constraints that it may face from potential competitors or from customers on the market. Moreover, market shares should generally be interpreted in light of the relevant market conditions, the dynamics of the market and the extent to which products are differentiated. While the scope of the assessment of dominance varies from case to case, the Commission frequently considers other factors that determine the ability of the undertaking in question to behave independently on the market. These factors may include the existence of barriers to market expansion or entry that prevent actual competitors from expanding their activities on the market or that prevent potential competitors from gaining access to the market, or the competitive constraints deriving from countervailing buyer power.[26]

3.2.2. De minimis notice

34. Another substantive structural presumption is contained in the so-called *De Minimis Notice*[27] and serves to identify agreements that are unlikely to have an appreciable impact on competition within the EU internal market and, therefore, fall outside the scope of Article 101 TFEU. The Notice primarily covers small-scale, low-impact agreements and provides clear market share thresholds, or structural presumptions, that determine when agreements are considered "*de minimis*" (of minimal importance). It establishes that horizontal agreements between competitors with combined market shares under 10% on any of the relevant markets affected by the agreement and vertical agreements where each party has a market share under 15% on any of the relevant markets affected by the agreement are generally presumed not to appreciably affect competition. However, this presumption does not apply to agreements that contain by object restrictions of competition

[25] Judgment of the Court of Justice of 3 July 1991, *Akzo v Commission*, C-62/86, EU:C:1991:286, paragraph 60

[26] See for example the recent Commission decision in case AT.40437 – *Apple - App Store Practices (music streaming)* where the Commission analysed - despite a 100 % market share of Apple in the market for the provision to developers of platforms for the distribution of music streaming apps to iOS users - barriers to entry and expansion, network effects, countervailing buyer power as well as competitive constraints coming from the consumer side of Apple's two-sided app distribution platform.

[27] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), Official Journal C 291 30.8.2014 p. 1

(such as price-fixing or market-sharing)[28], which are always subject to Article 101 TFEU, regardless of the parties' market shares.

35. In cases covered by the Notice, the Commission will not initiate proceedings either upon a complaint or on its own initiative. This provides a safe harbour for small companies and those with low market shares, as these businesses know they can collaborate or enter into agreements without triggering EU competition concerns, provided they stay within the thresholds and avoid by object restrictions.

3.2.3. Block Exemption Regulations (legal safe harbour below certain market shares)

36. Various block exemption regulations ("BERs")[29] in EU competition law create legal safe harbours through structural presumptions based on market share thresholds. In the absence of any so-called hardcore restrictions, certain types of agreements are exempted from Article 101(1) TFEU, thereby facilitating collaboration between undertakings and increasing legal certainty. The key BERs include those for vertical agreements, horizontal cooperation agreements (like R&D and specialisation), and technology transfer agreements. Each of these BERs contain market share thresholds which, if met, automatically exempt qualifying agreements from the application of Article 101(1) TFEU.

37. The Vertical Block Exemption Regulation ("VBER")[30] covers vertical agreements between non-competitors, i.e. agreements between undertakings active at different levels of the production or distribution chain, such as suppliers and distributors. It sets a market share threshold of 30% for each party to the agreement. If the supplier and the buyer each have a market share of 30% or less in their respective markets, their vertical agreement is exempted from Article 101(1) TFEU, provided it does not contain any hardcore restrictions, such as resale price maintenance or territorial restrictions that prevent cross-border sales in the EU.

38. The R&D Block Exemption Regulation[31] provides a safe harbour for research and development agreements, irrespective of whether the parties are competitors or not. It applies a (combined) market share threshold of 25%. If the parties to an R&D agreement collectively hold a market share of 25% or less in the relevant market, the agreement is

[28] See also Commission Staff Working Document "*Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice*" of 25 June 2014, SWD(2014) 198 final.

[29] BERs specify the conditions under which certain types of agreements are exempted from the prohibition of restrictive agreements laid down in Article 101(1) TFEU.

[30] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 134, 11.5.2022, p. 4. Recital 8 of the VBER states that "*it can be presumed that, where the market share held by each of the undertakings party to the agreement on the relevant market does not exceed 30%, vertical agreements which do not contain certain types of severe restrictions of competition generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.*"

[31] Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ L 143, 2.6.2023, p. 9. Recital 5 of the R&D Block Exemption Regulation states that *"[b]elow a certain level of market power, it can in general be presumed, for the application of Article 101(3) of the Treaty, that the positive effects of research and development agreements will outweigh any negative effects on competition*."

exempted from Article 101(1) TFEU, provided certain conditions are met (e.g. shared results of the R&D). As with the VBER, certain hardcore restrictions, such as price-fixing or restrictions of the freedom of the parties to carry out research and development independently or in cooperation with third parties in fields unrelated to the R&D, disqualify the agreement from exemption.

39. The Specialisation BER[32] covers specialisation agreements (agreements between companies to specialise in producing certain products or services or to produce them jointly). It applies if the parties have a combined market share of 20% or less in the relevant market and if the agreement does not contain certain hardcore restrictions such as price-fixing for the sale of products to third parties or the allocation of markets and customers.

40. The Technology Transfer BER (or TTBER)[33] applies to licensing agreements for intellectual property, such as patents, know-how, and software copyrights, under which one party authorises another to use these property rights to produce goods or services. For agreements between competitors, the TTBER applies a combined market share threshold of 20%. For agreements between non-competitors, the threshold rises to 30% market share for each party, making it easier for non-competing firms to qualify for exemption. Hardcore restrictions that would remove an agreement from this safe harbour include price-fixing or certain territorial restrictions.

41. Overall, the BERs offer a structured framework of safe harbours that provide legal certainty for companies and allow competition authorities to focus enforcement resources on the agreements that are most likely to harm competition. The BERs do so by setting out clear market share thresholds and specific conditions that exempt certain types of agreements from the general prohibition on restrictive agreements in Article 101(1) TFEU. These thresholds allow businesses to self-assess and confidently structure their agreements, knowing that if they meet the market share conditions and avoid hardcore restrictions, their agreements will benefit from the block exemption and be unlikely to attract competition law scrutiny. Without the BERs, businesses would need to assess each agreement individually to ensure compliance, which can be complex, costly, and time-consuming. For instance, if an agreement is found to restrict competition within the meaning of Article 101(1) TFEU, it is then necessary to assess whether it fulfils the four conditions for exemption listed in Article 101(3) TFEU. This exercise would be particularly burdensome - and disproportionate - for agreements that have a limited impact on the market, such as the ones covered by the BERs.

42. The simplification brought about by the BERs is particularly important for small and medium-sized enterprises (SMEs) and companies engaging in standard commercial practices. The BERs also help the Commission and EU national competition authorities to apply Article 101 TFEU effectively, minimizing unwarranted interference in pro-competitive business practices and allowing them to focus their resources on anti-competitive practices. The result is a balanced regulatory environment which supports both business efficiency and effective enforcement of competition law.

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[32] Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 143, 2.6.2023, p. 20.

[33] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ L 93, 28.3.2014, p. 17–23.