ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
OPĆI SUD EUROPSKE UNIJE
TRIBUNALE DELL'UNIONE EUROPEA
EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
EUROPOS SĄJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI ĠENERALI TAL-UNJONI EWROPEA
GERECHT VAN DE EUROPESE UNIE
SĄD UNII EUROPEJSKIEJ
TRIBUNAL GERAL DA UNIÃO EUROPEIA
TRIBUNALUL UNIUNII EUROPENE
VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
SPLOŠNO SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

24 September 2019 *

(Competition — Agreements, decisions and concerted practices — Euro Interest Rate Derivatives sector — Decision establishing an infringement of Article 101 TFEU and Article 53 of the EEA Agreement — Manipulation of the Euribor interbank reference rates — Exchange of confidential information — Restriction of competition by object — Single and continuous infringement — Fines — Basic amount — Value of sales — Article 23(2) of Regulation (EC) No 1/2003 — Obligation to state reasons)

In Case T-105/17,

HSBC Holdings plc, established in London (United Kingdom),

HSBC Bank plc, established in London,

HSBC France, established in Paris (France),

represented by K. Bacon QC, D. Bailey, Barrister, M. Simpson, Solicitor, and Y. Anselin and C. Angeli, lawyers,

applicants,

v

European Commission, represented by M. Farley, B. Mongin and F. van Schaik, acting as Agents, and B. Lask, Barrister,

defendant,

APPLICATION pursuant to Article 263 TFEU seeking, first, annulment in part of Commission Decision C(2016) 8530 final of 7 December 2016 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement

* Language of the case: English.

(AT.39914 — Euro Interest Rate Derivatives) and, second, a variation of the amount of the fine imposed on the applicants,

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of M. Prek (Rapporteur), President, E. Buttigieg, F. Schalin, B. Berke and J. Costeira, Judges,

Registrar: M. Marescaux, Administrator,

having regard to the written part of the procedure and further to the hearing on 19 March 2019,

gives the following

Judgment

I. Background to the dispute

1 By decision C(2016) 8530 final of 7 December 2016 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39914 — Euro Interest Rate Derivatives) ('the contested decision'), the European Commission found that the applicants, HSBC Holdings plc, HSBC Bank plc and HSBC France, had infringed Article 101 TFEU and Article 53 of the EEA Agreement by taking part, from 12 February to 27 March 2007, in a single and continuous infringement with the object of distorting the normal course of pricing on the market for Euro Interest Rate Derivatives ('EIRD' or 'EIRDs') linked to the Euro Interbank Offered Rate ('Euribor') and/or the Euro Over-Night Index Average ('EONIA') (Article 1(b) of the contested decision) and imposed on them jointly and severally a fine of EUR 33 606 000 (Article 2 (b) of the contested decision).

2 The HSBC group ('HSBC') is a banking group, and one of its activities is global banking and markets. HSBC Holdings is the ultimate parent company of HSBC. HSBC Holdings is the parent company of HSBC France, which is the parent company of HSBC Bank. HSBC France and HSBC Bank are responsible for the negotiation of EIRDs. HSBC France is responsible for submitting rates to the Euribor panel (recitals 58 to 61 of the contested decision).

3 On 14 June 2011, the Barclays banking group (Barclays plc, Barclays Bank plc, Barclays Directors Ltd, Barclays Group Holding Ltd, Barclays Capital Services Ltd and Barclays Services Jersey Ltd) ('Barclays') applied to the Commission for the grant of a marker under the Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17), informing it of the existence of a cartel in the EIRD sector and expressing its wish to cooperate. On

14 October 2011, Barclays was granted conditional immunity (recital 86 of the contested decision).

4 Between 18 and 21 October 2011, the Commission carried out inspections at the premises of a number of financial institutions in London (United Kingdom) and Paris (France), including the applicants' premises (recital 87 of the contested decision).

5 On 5 March and 29 October 2013, pursuant to Article 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1), the Commission initiated infringement proceedings against the applicants and Barclays, Crédit agricole SA and Crédit agricole Corporate and Investment Bank (together 'Crédit agricole'), Deutsche Bank AG, Deutsche Bank Services (Jersey) Ltd and DB Group Services (UK) Ltd (together 'Deutsche Bank'), JP Morgan Chase & Co., JP Morgan Chase Bank National Association and JP Morgan Services LLP (together 'JP Morgan'), Royal Bank of Scotland plc and the Royal Bank of Scotland Group plc (together 'RBS'), and Société générale (recital 89 of the contested decision).

6 Barclays, Deutsche Bank, Société générale and RBS wished to participate in a settlement procedure pursuant to Article 10a of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU] and [102 TFEU] (OJ 2004 L 123, p. 18), as amended. HSBC, Crédit agricole and JP Morgan decided not to participate in that settlement procedure.

7 On 4 December 2013, the Commission adopted, with regard to Barclays, Deutsche Bank, Société générale and RBS, decision C(2013) 8512 final, relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39914, Euro Interest Rate Derivatives (EIRD)(Settlement)) ('the settlement decision'), by which it concluded that those undertakings had infringed Article 101 TFEU and Article 53 of the EEA Agreement by participating in a single and continuous infringement with the object of distorting the normal course of pricing on the EIRD market (recital 95 of the contested decision).

A. The administrative procedure which led to the contested decision

8 On 19 March 2014, the Commission sent a statement of objections to the applicants, and to Crédit agricole and JP Morgan (recital 98 of the contested decision).

9 The applicants were able to consult the accessible parts of the Commission's file on DVDs, and their legal representatives received further access to the file at the Commission premises (recital 99 of the contested decision). The applicants also had access to the statement of objections sent to the settling parties, the replies of those parties and the settlement decision (recital 100 of the contested decision).

10 On 14 November 2014, the applicants submitted their written observations on the statement of objections and presented their views orally at the hearing which took place on 15 to 17 June 2015 (recital 104 of the contested decision).

11 On 6 April 2016, the Commission amended the settlement decision as regards the determination of the amount of Société générale's fine. The applicants had access to the amending decision, the underlying correspondence and the corrected financial data submitted by Société générale (recitals 105 and 106 of the contested decision).

B. Contested decision

12 On 7 December 2016, the Commission adopted the contested decision on the basis of Articles 7 and 23 of Regulation No 1/2003. Article 1(b) and Article 2(b) of that decision are worded as follows:

'*Article 1*

The following undertakings have infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, during the periods indicated, in a single and continuous infringement regarding Euro Interest Rate Derivatives covering the entire EEA, which consisted of agreements and/or concerted practices that had as their object the distortion of the normal course of pricing components in the EIRD sector:

…

(b) [the applicants] from 12 February 2007 to 27 March 2007; …

Article 2

For the infringement referred to in Article 1, the following fines are imposed:

…

(b) [the applicants] jointly and severally liable: 33 606 000 EUR'.

1. Relevant products

13 The infringements at issue relate to EIRDs, that is to say Euro Interest Rate Derivatives linked to Euribor or EONIA.

14 Euribor is a set of benchmark interest rates intended to reflect the cost of interbank loans frequently used on the international capital markets. It is defined as an index of the rate at which euro interbank term deposits are offered by one prime bank to another prime bank within the euro area. Euribor is calculated on the basis of the average of the prices offered daily by a panel — composed of 47 prime banks during the period concerned by the contested decision, including the banks

referred to in paragraph 5 above — submitted to Thomson Reuters acting as the calculation agent to the European Banking Federation ('EBF') between 10.45 a.m. and 11.00 a.m. The banks provide contributions for the 15 different Euribor interest rates, which vary according to their term which ranges from 1 week to 12 months. EONIA fulfils an equivalent function to Euribor, but with regard to daily rates. It is calculated by the European Central Bank ('ECB') on the basis of an average of the rates for unsecured interbank deposits from the same panel of banks as is used to set Euribor (recitals 20 to 27 of the contested decision).

15 The most frequent EIRDs are forward rate agreements, interest rate swaps, interest rate options and interest rate futures (recitals 4 to 10 of the contested decision).

2. Conduct alleged against the applicants

16 In recital 113 of the contested decision the Commission described the conduct of the banks referred to in paragraph 5 above as follows:

'Barclays, Deutsche Bank, JPMorgan Chase, Société générale, Crédit agricole, HSBC and RBS have participated in a series of bilateral contacts in the EIRD sector that largely consisted of the following practices between different parties.

(a) On occasions, certain traders employed by different parties communicated and/or received preferences for an unchanged, low or high fixing of certain Euribor tenors. These preferences depended on their trading positions/exposures.

(b) On occasions, certain traders of different parties communicated and/or received from each other detailed not publicly known/available information on the trading positions or on the intentions for future Euribor submissions for certain tenors of at least one of their respective banks.

(c) On occasions, certain traders also explored possibilities to align their EIRD trading positions on the basis of such information as described under (a) or (b).

(d) On occasions, certain traders also explored possibilities to align at least one of their banks' future Euribor submissions on the basis of such information as described under (a) or (b).

(e) On occasions, at least one of the traders involved in such discussions approached the respective bank's Euribor submitters, or stated that such an approach would be made, to request a submission to the EBF's calculation agent towards a certain direction or at a specific level.

(f) On occasions, at least one of the traders involved in such discussions stated that he would report back, or reported back on the submitter's reply before the point in time when the daily Euribor submissions had to be submitted to the calculation agent or, in those instances where that trader had already

discussed this with the submitter, passed on such information received from the submitter to the trader of a different party.

(g) On occasions, at least one trader of a party disclosed to a trader of another party other detailed and sensitive information about his bank's trading or pricing strategy regarding EIRDs.'

17 In recital 114 of the contested decision, the Commission added that, 'in addition, on occasions certain traders employed by different parties discussed the outcome of the Euribor rate setting, including specific banks' submissions, after the Euribor rates of a day had been set and published'.

18 The Commission found that those instances of conduct formed a single and continuous infringement.

19 In order to substantiate that finding, in the first place, the Commission declared that those instances of conduct had a single economic aim (recitals 444 to 450 of the contested decision) of reducing the cash flows which the participants would have to pay under the EIRDs or increasing those which they were to receive. In the second place, it declared that the various instances of conduct formed a common pattern of behaviour, in so far as a stable group of individuals was involved in the cartel, the parties had followed a very similar pattern in their anticompetitive activities and the various discussions between the parties covered the same or overlapping topics and had therefore the same or almost the same content (recitals 451 to 456 of the contested decision). In the third place, it declared that the traders participating in the anticompetitive exchanges were skilled professionals and knew or should have been aware of the general scope and the essential characteristics of the cartel as a whole (recitals 457 to 483 of the contested decision).

20 It found that HSBC had participated in that single and continuous infringement, emphasising that the bilateral contracts with Barclays themselves constituted an infringement of Article 101(1) TFEU (recital 486 of the contested decision).

21 As regards the duration of HSBC's participation, the Commission took 12 February 2007 as its starting date (recital 620 of the contested decision) and 27 March 2007 as its end date (recital 625 of the contested decision).

3. Calculation of the amount of the fine

(a) Basic amount of the fine

22 As regards, in the first place, the determination of the value of sales of the banks that participated in the cartel, since EIRDs do not generate any sales in the usual sense of the term, the Commission determined the value of sales by means of a proxy. Furthermore, in the light of the circumstances in the present case, it concluded that it was preferable not to use an annualised proxy, but to take as its

basis a proxy based on the months corresponding to the banks' participation in the infringement (recital 640 of the contested decision). It pointed out that it was not required to apply a mathematical formula and that it had a margin of discretion when determining the amount of each fine (recital 647 of the contested decision).

23 The Commission considered it appropriate to use as its proxy the cash receipts generated by the cash flows that each bank received from their portfolio of EIRDs linked to any Euribor tenor and/or EONIA and entered into with EEA-located counterparties (recital 641 of the contested decision), to which a uniform reduction factor of 98.849% was applied.

24 The Commission therefore took as the applicants' value of sales the amount of EUR 192 081 799 (recital 648 of the contested decision).

25 As regards, in the second place, the gravity of the infringement, the Commission used a gravity factor of 15% as the infringement related to price coordination and price-fixing arrangements. It added a gravity factor of 3% by reference to the fact that the cartel concerned the whole of the EEA and had related to rates that were relevant for all EIRDs and that, as those rates related to the euro, they were of fundamental importance to the harmonisation of financial conditions in the internal market and for banking activities in Member States (recitals 720 and 721 of the contested decision).

26 As regards, in the third place, the duration of the infringement, the Commission stated that it had taken into account the duration of the participation of each participant in the cartel on 'a rounded down monthly and *pro rata* basis', which led to a multiplier of 0.08% being applied in respect of the applicants (recitals 727 to 731 of the contested decision).

27 In the fourth place, the Commission added an additional amount of 18% of the value of sales, described as an 'entry fee' in so far as the infringement consisted of horizontal price-fixing, in order to deter undertakings from participating in such practices, irrespective of the duration of the infringement (recitals 732 to 734 of the contested decision).

28 The Commission thus set the basic amount of the fine to be imposed on the applicants at EUR 37 340 000 (recital 735 of the contested decision).

(b) Final amount of the fine

29 As regards the setting of the final amount of the fine, the Commission found that HSBC had a more peripheral or minor role in the infringement that could not be compared with that of the main players and granted it a 10% reduction of the basic amount of the fine (recitals 747 to 749 of the contested decision). Article 2(1)(b) of the contested decision therefore imposes on the applicants a fine of a final amount of EUR 33 606 000.

II. Procedure and forms of order sought

30 By application lodged at the Court Registry on 17 February 2017, the applicants brought the present action.

31 On a proposal from the Second Chamber of the Court, the Court decided, pursuant to Article 28 of the Rules of Procedure of the General Court, to assign the case to a Chamber sitting in extended composition.

32 On a proposal from the Judge-Rapporteur, the Court (Second Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put written questions to the parties on 30 January 2019. On 14 and 15 February 2019, the Commission and the applicants respectively replied to the questions put to them by the Court.

33 On 8 March 2019, the Court sent to the parties a further question to be answered at the hearing.

34 On 18 March 2019, the Court decided, after hearing the parties, to hold the hearing in camera pursuant to Article 109 of the Rules of Procedure.

35 At the hearing on 19 March 2019, the parties presented oral argument and replied to the Court's oral questions. At that hearing, the Commission was asked to provide additional explanations on the determination of the 98.849% reduction factor which it had applied to the cash receipts.

36 On 2 April 2019, the Commission replied to the Court's question.

37 On 10 May 2019, the applicants submitted their observations on the Commission's reply.

38 On 28 May 2019, the Commission submitted its observations.

39 By decision of 4 June 2019, the Court (Second Chamber, Extended Composition) closed the oral part of the procedure.

40 The applicants claim that the Court should:

– annul Article 1 of the contested decision;

– in the alternative, annul Article 1(b) of the contested decision;

– in the further alternative, annul in part Article 1(b) of the contested decision in so far as it holds that the applicants participated in a single and continuous infringement;

– annul Article 2(b) of the contested decision;

– in the alternative, substantially reduce the fine imposed on them under Article 2(b) of the contested decision to such amount as the Court may deem appropriate;

– order the Commission to pay the costs or, in the alternative, an appropriate proportion of their costs.

41 The Commission contends that the Court should:

– dismiss the application;

– order the applicants to pay the costs.

III. Law

42 In their action, the applicants seek both the annulment of Article 1 and Article 2(b) of the contested decision and a variation of the amount of the fine imposed by Article 2(b) of that decision. A distinction will be drawn between, on the one hand, the examination of the application for annulment of Article 1 of the contested decision and, in the alternative, Article 1(b) of that decision and, on the other hand, the examination of the application for annulment of Article 2(b) of that decision, by which the Commission imposed a fine of EUR 33 606 000 on the applicants, and the application for variation of the amount of that fine.

43 In so far as the applicants present both applications for annulment of the contested decision and for variation of the amount of the fine imposed, it should be noted, as a preliminary point, that the system of judicial review of Commission decisions relating to proceedings under Articles 101 and 102 TFEU consists in a review of the legality of the acts of the institutions for which provision is made in Article 263 TFEU, which may be supplemented, pursuant to Article 261 TFEU and at the request of applicants, by the General Court's exercise of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission (see judgment of 26 September 2018, *Infineon Technologies* v *Commission*, C-99/17 P, EU:C:2018:773, paragraph 47 and the case-law cited).

44 First, the scope of judicial review provided for in Article 263 TFEU extends to all the elements of Commission decisions relating to proceedings applying Articles 101 and 102 TFEU which are subject to in-depth review by the EU judicature, in law and in fact, in the light of the pleas raised by the applicant and taking into account all the relevant evidence submitted by the latter (see judgment of 26 September 2018, *Infineon Technologies* v *Commission*, C-99/17 P, EU:C:2018:773, paragraph 48 and the case-law cited).

45 Nevertheless, it should be noted that in the context of a review of legality referred to in Article 263 TFEU the EU judicature cannot substitute their own reasoning for that of the author of the act at issue (see, to that effect, judgment of 24 January

2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 89 and the case-law cited).

46 Second, the scope of the unlimited jurisdiction conferred on the EU judicature by Article 31 of Regulation No 1/2003 in accordance with Article 261 TFEU empowers the competent court, in addition to carrying out a mere review of legality with regard to the penalty, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (see judgment of 26 September 2018, *Infineon Technologies* v *Commission*, C-99/17 P, EU:C:2018:773, paragraph 193 and the case-law cited).

47 By contrast, the scope of that unlimited jurisdiction is strictly limited, unlike the review of legality provided for in Article 263 TFEU, to determining the amount of the fine (see judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraph 76 and the case-law cited).

A. The applications for annulment of Article 1 of the contested decision and, in the alternative, Article 1(b) of that decision

48 In support of their applications for annulment of Article 1 of the contested decision and, in the alternative, Article 1(b) of that decision, the applicants put forward five pleas in law.

49 The first plea concerns the Commission's finding of an infringement by object.

50 By the second, third and fourth pleas, the applicants challenge the Commission's finding of a single and continuous infringement. The second plea concerns the Commission's finding that the collusive arrangements established by HSBC and the other parties formed part of an overall plan pursuing a single aim. The third and fourth pleas concern, respectively, HSBC's intention to contribute to that aim and its awareness of the conduct of the other participants in the infringement.

51 The fifth plea concerns the adoption of the contested decision subsequent to a settlement decision in which the Commission had already adopted a position on HSBC's participation in the infringement at issue. The applicants infer from this that the Commission breached the principles of the presumption of innocence, good administration and rights of the defence.

1. The first plea in law, concerning the finding of an infringement by object within the meaning of Article 101(1) TFEU

52 Since the matter at issue is the Commission's characterisation of the infringement as an infringement by object, it should be noted that, in order to be caught by the prohibition laid down in Article 101(1) TFEU, an agreement, decision by an association of undertakings or concerted practice must have 'as [its] object or effect' the prevention, restriction or distortion of competition within the internal market.

53 In that regard, it is apparent from the Court of Justice's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (judgments of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 49, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 113; see also, to that effect, judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 34).

54 The distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain types of collusion between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (judgments of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 114; see also, to that effect, judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 35).

55 Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 101(1) TFEU, to prove that they have actual effects on the market. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers (judgments of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 51, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 115).

56 Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (judgments of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 34; of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 52; and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 116).

57 According to the case-law of the Court of Justice, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning

and structure of the market or markets in question (judgments of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 117; see also, to that effect, judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 36).

58 In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account (judgments of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 37; of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 54; and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 118).

59 With regard, in particular, to the exchange of information between competitors, it should be recalled that the criteria of coordination and cooperation necessary for determining the existence of a concerted practice are to be understood in the light of the notion inherent in the Treaty provisions on competition, according to which each economic operator must determine independently the policy which it intends to adopt on the common market (judgments of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 32, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 119).

60 While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, nonetheless, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market (judgments of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 33, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 120).

61 The Court of Justice has accordingly held that the exchange of information between competitors was liable to be incompatible with the competition rules if it reduced or removed the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings was restricted (judgments of 2 October 2003, *Thyssen Stahl* v *Commission*, C-194/99 P, EU:C:2003:527, paragraph 89; of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 35; and of 19 March 2015, *Dole Food and*

Dole Fresh Fruit Europe v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 121).

62 In particular, an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object (judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 122; see also, to that effect, judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 41).

63 Moreover, a concerted practice may have an anticompetitive object even though there is no direct connection between that practice and consumer prices. Indeed, it is not possible on the basis of the wording of Article 101(1) TFEU to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited (judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 123; see also, to that effect, judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 36).

64 On the contrary, it is apparent from Article 101(1)(a) TFEU that concerted practices may have an anticompetitive object if they 'directly or indirectly fix purchase or selling prices or any other trading conditions' (judgments of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 37, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 124).

65 In any event, Article 101 TFEU, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such. Therefore, in order to find that a concerted practice has an anticompetitive object, there does not need to be a direct link between that practice and consumer prices (judgments of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 38 and 39, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 125).

66 Lastly, it should be pointed out that the concept of a concerted practice, as it derives from the actual terms of Article 101(1) TFEU, implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two (judgments of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 51, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 126).

67 In that regard, the Court of Justice has held that, subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. In particular, the Court of Justice has concluded that such a concerted practice is caught by Article 101(1) TFEU, even in the absence of anticompetitive effects on that market (judgments of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 51, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 127).

68 It is in the light of those considerations that the Court must examine the first plea, in which the applicants challenge the finding of an infringement by object applied to each of the categories of conduct alleged by the Commission. They divide their argument into two parts, the first of which deals with conduct connected to the manipulation of submissions to Euribor on 19 March 2007 and the second of which deals with conduct not connected to that manipulation, namely exchanges between HSBC traders and traders from other banks relating to their trading positions and mids.

69 In Article 1 of the contested decision the Commission found that there had been an infringement of Article 101 TFEU consisting of 'agreements and/or concerted practices that had as their object the distortion of the normal course of pricing components in the EIRD sector'.

70 Those agreements and/or concerted practices alleged against the banks, including HSBC, were described in recitals 113, 358 and 392 of the contested decision. As the applicants rightly state, those agreements and practices can be sorted into three groups: first, those relating to the manipulations of submissions to Euribor (recitals 113(a), 358(a) and 392(a): exchanges relating to their preference of level of Euribor benchmark; recitals 113(d), 358(d) and 392(d): exchanges relating to the possibility of aligning their Euribor submissions; recitals 113(e), 358(e) and 392(e): contact between the trader involved and the Euribor submitter within the same bank; recitals 113(f), 358(f) and 392(f): agreements to report back on attempts to influence Euribor submissions), second, those relating to exchanges about EIRD trading positions (recitals 113(b), 358(b) and 392(b): exchanges relating to their respective trading positions and exposures; recitals 113(c), 358(c) and 392(c): exchanges relating to the possibility of aligning their trading positions); and, third, those relating to exchanges about detailed and not publicly available information on their pricing intentions and pricing strategies concerning EIRDs (recitals 113(g), 358(g) and 392(g)).

71 The Court considers it appropriate to deal first with two comments from the Commission and the applicants.

72 In the first place, the Commission submits that the applicants are wrong to challenge the various forms of conduct alleged against HSBC on an individual

basis and highlights their interrelated nature. In essence, it claims that it is artificial to draw distinctions between (i) the manipulation of 19 March 2007, (ii) exchanges about trading positions and (iii) exchanges about detailed and not publicly available information on their pricing intentions and pricing strategies concerning EIRDs, more specifically EIRD mids in the present case.

73 However, such a criticism cannot be upheld. The distinction made by the applicants merely reproduces the distinction made by the Commission in the contested decision and referred to in paragraph 70 above. Moreover, it is apparent, in particular, from recitals 365, 387, 393 and 442 of the contested decision that the Commission considered that the object of that conduct was to restrict competition, not only collectively but also on an individual basis.

74 In the second place, the applicants observe that, in certain grounds of the contested decision, the Commission does not explain the existence of an object that restricts competition merely by stating that the practices at issue distorted the normal course of pricing components in the EIRD sector, but also by reference to a distortion of other trading conditions for EIRDs within the meaning of Article 101(1)(a) TFEU. They claim that, since no such finding appears in Article 1 of the contested decision, it cannot be taken into account for the purposes of explaining the Commission's finding of restriction by object.

75 The Commission submits that the wording of the operative part of the contested decision does not preclude it from relying on the finding that other trading conditions were distorted, since that finding is clearly set out in the recitals of that decision.

76 It should also be pointed out that the enacting terms of an act are inextricably linked to the statement of reasons for them in the recitals, so that, if that act has to be interpreted, account must be taken of the reasons which led to its adoption (see order of 30 April 2007, *EnBW Energie Baden-Württemberg* v *Commission*, T-387/04, EU:T:2007:117, paragraph 127 and the case-law cited). While it is true that only the operative part of a decision is capable of producing legal effects, the fact remains that assessments made in the grounds of a decision can be subject to judicial review by the EU judicature to the extent that, as grounds of a measure adversely affecting the interests of those concerned, they constitute the essential basis for the operative part of that measure or if those grounds are likely to alter the substance of what was decided in the operative part of the measure in question (see judgment of 1 July 2009, *KG Holding and Others* v *Commission*, T-81/07 to T-83/07, EU:T:2009:237, paragraph 46 and the case-law cited).

77 Consequently, in so far as the Commission highlighted, in support of its finding that competition had been restricted, not only price coordination and/or price fixing, but also distortion of other trading conditions in the EIRD sector, in particular in recitals 384, 388, 393, 415, 423 and 488 of the contested decision, there is nothing, in principle, to preclude that reasoning from being taken into account for the purposes of assessing the legality of Article 1 of the contested

decision, even though the latter does not expressly refer to those trading conditions.

(a) First part of the plea, disputing the finding of restriction of competition by object applied to the manipulation of Euribor on 19 March 2007

78 As a preliminary point, the applicants submit that the banks compete on the EIRD market only when those contracts are entered into and only on the basis of the fixed rate which is the price of those contracts. They consider that the Commission's argument that the objective of the parties to an EIRD is to optimise their cash flow ignores market making and hedging activities. They submit that the present case differs from that which gave rise to the judgment of 10 November 2017, *Icap and Others* v *Commission* (T-180/15, EU:T:2017:795), in which the significance of market making activities was not discussed, whereas it follows therefrom that, for banks operating in that capacity, the fixed rate is determined differently and competition takes place only on the basis of that fixed rate.

79 As regards the manipulation of 19 March 2007, the applicants acknowledge, in essence, that the objective of the manipulation was to lower the three-month Euribor ('3m Euribor') on 19 March 2007 and that, in that context, a Barclays trader asked an HSBC trader to request the person responsible for submitting rates to issue a low quote on 19 March 2007, which he did. However, first, they deny that the objective of that manipulation was to distort EIRD pricing components and/or trading conditions and, second, they argue that the objective of manipulating cash flow is not anticompetitive.

80 In the first place, the applicants deny that that manipulation had as its object the coordination and/or fixing of EIRD pricing components, as the Commission pointed out in recital 411 of the contested decision, since that manipulation relates to the variable rate of EIRDs, whereas the price of the EIRD is the fixed rate. Similarly, the 3m Euribor is not a relevant factor for the determination of the price of EIRDs or a component of that price. In that regard, they maintain that the Commission's argument that the variable rate is an element in the setting of the fixed rate when new EIRDs are entered into is necessarily based on new contracts being entered into following the manipulation. On the basis of a financial expert's report compiled at their request, they maintain that it was disadvantageous to the traders concerned to adapt their trading positions in the light of planned manipulation. They conclude from this that recital 411 of the contested decision is vitiated by an error of law, a manifest error of assessment or an inadequate statement of reasons.

81 In the second place, the applicants argue that the contested decision seems to imply that the manipulation of 19 March 2007 — in addition to price fixing — constitutes an exchange of information on traders' intentions with the result that the uncertainty inherent in the EIRD market was reduced. They claim that proof of that conduct with regard to HSBC's traders was not adduced by the Commission. It has not been shown that those traders benefited from an informational

asymmetry which would have enabled them to offer better conditions than their rivals. They deny that they are required to show that the collusion did not influence HSBC's conduct in any way and state that it is for the Commission to prove the existence of an anticompetitive object.

82 In the third place, the applicants maintain that the reference in recital 388 of the contested decision to the fact that the manipulation constitutes the fixing of trading conditions within the meaning of Article 101(1)(a) TFEU cannot be taken into account since it does not appear in the operative part of the contested decision. They add that this aspect of the Commission's reasoning is, in any event, vitiated by insufficient reasoning, since no explanation is provided. The use of that term is also incorrect since the rights and obligations of the parties under an agreement are not at issue.

83 In the fourth place, the applicants maintain that the objective of manipulating cash flows is not anticompetitive, since it was not achieved by an agreement that restricted competition between traders. They state that competition on the EIRD market occurs at the time EIRDs are concluded and not at the level of the cash flow that is paid or received under EIRDs. In essence, they deny that cash flows may have an indirect effect on the price of EIRDs.

84 The Commission contends that this part of the plea should be rejected.

85 This part of the plea concerns the characterisation of the manipulation of Euribor of 19 March 2007 as having an object that restricts competition. How HSBC participated in that manipulation is discussed, in particular, in recitals 271, 275, 289, 322, 328 and 329 of the contested decision.

86 It is apparent from those recitals that, in essence, that conduct consisted in submitting low quotes on 19 March 2007 for the 3m Euribor with a view to reducing that rate on that date for the purpose of making a gain on a category of derivatives falling due on that date as a result of the difference in rates ('spread') as compared with derivatives linked to EONIA.

87 More particularly, that manipulation consists principally in the manipulation of one type of EIRD, interest rate futures linked to the 3m Euribor. Essentially, under this type of contract one party, termed the buyer, receives the fixed rate during the contract, while the other party, termed the seller, receives a variable rate. The manipulation consisted of gradually gaining a very large 'buyer' exposure, in respect of which the bank thus receives the fixed rate and pays the variable rate, and reducing the level of the variable rate at the maturity date by concerted action.

88 The reference to derivatives linked to EONIA relates to the fact that participants in the cartel covered their 'buyer' exposure to futures linked to the 3m Euribor by opposite exposure, namely, in the present case, a swap with the same tenor linked to EONIA. As mentioned in paragraph 14 above, EONIA is a daily rate calculated by the ECB.

89 Thus, by artificially reducing the Euribor rate as compared with that of EONIA on 19 March 2007, the banks participating in the cartel could expect to make a financial gain.

90 It is apparent from recitals 257 and 258 of the contested decision that the idea for such manipulation dates from at least 1 February 2007, in discussions between traders from Deutsche Bank, Barclays and Société générale. It is apparent from recital 271 of that decision that, on 12 February 2007, a trader from Barclays informed a trader from HSBC of that plan and from recital 275 of that decision that a discussion also took place on the following day concerning that manipulation. In recital 289 of the contested decision, mention is made of a conversation of 28 February 2007 between those two same traders concerning the reduction of the spread between the 3m Euribor and EONIA. Lastly, in recital 322 of the contested decision, reference is made to a discussion of 19 March 2007 in which the trader from Barclays asks the trader from HSBC to request HSBC submitters to contribute a very low 3m Euribor quote, which the latter trader allegedly did successfully.

91 The applicants do not contest the truth of the facts found by the Commission. They take the view, rather, that those facts are not capable of explaining the Commission's finding of restriction of competition by object.

92 It is apparent from recital 384 of the contested decision that the Commission concluded that the object of the manipulation of 19 March 2007 was to influence the cash flows payable under EIRDs in a manner favourable to the parties to that manipulation. In recital 411 of the contested decision, in response to an argument put forward by the applicants contesting the finding of restriction of competition by object in respect of the conduct imputed to HSBC, the Commission stated, in essence, that Euribor directly determined the cash flows payable under the 'variable leg' of EIRDs and was also relevant for the determination of the cash flows payable under the 'fixed leg' of EIRDs, since it was indirectly taken into account at the time when the fixed rate was determined by reference to the yield curve, which was based on expected variable rates.

93 In recital 394 of the contested decision, the Commission stated that all of the forms of conduct described in recital 392 of its decision, including the manipulation of 19 March 2007, restricted competition by creating an informational asymmetry between market participants, since participants in the infringement, first, were better able to know in advance with a certain accuracy at what level Euribor would be and/or was intended to be set by their colluding competitors and, second, knew whether or not the Euribor on a given day was at artificial levels.

94 That line of reasoning does not contain any error of law or assessment.

95 In this regard, it should be noted that the impact of the Euribor manipulation on cash flows generated by the derivatives at issue is clear. On 19 March 2007, the

participants artificially reduced the Euribor rates so that the sums they had to pay in respect of the 'variable leg' of futures linked to Euribor would be lower.

96 Therefore, when the HSBC traders negotiated the 'fixed leg' of those futures, that is to say, the fixed rate determining the payments which they were to receive, they were in a position to do so knowing that the variable rate, which determines the payments which they were going to have to make, would be low. They were therefore in a position to propose a more competitive rate than that of their competitors, since they knew that the cash flows associated with those contracts would remain positive.

97 That conduct necessarily restricted competition to their advantage and to the detriment of other operators on the market. This was also to the detriment not only of their counterparties who saw the payments that they received under the 'variable leg' of the EIRDs artificially reduced, but also to the banks that wanted to adopt a 'buyer' position in respect of the type of EIRD at issue, but which did not enter into a trade because of the more competitive rate offered by the participants in the manipulation. Such manipulation was also to the detriment of the market operators who, not being aware of that manipulation, took trading positions against those of HSBC and Barclays. In that regard, it is possible to note that the terms used by the traders from those two banks in a telephone conversation that took place immediately after the manipulation of 19 March 2007, referred to in recital 329 of the contested decision, are unequivocal as to the perception by those two traders of the negative effects of their manipulation on their competitors.

98 The various arguments put forward by the applicants are not such as to call into question the merits of that finding.

99 The first set of arguments put forward by the applicants is that the manipulation of Euribor cannot constitute a restriction of competition since, in essence, there is competition between the banks only when the EIRDs are entered into and solely on the basis of the rate of their 'fixed leg', which constitutes the only 'price' of EIRDs.

100 Such criticism is based on the premiss that EIRDs are entered into solely on the basis of competition in respect of the fixed rate. However, as the Commission rightly stated in the contested decision, the cash flows generated by an EIRD result from the netting of payments payable under the 'fixed leg' and the 'variable leg' of the EIRD. Thus, not only will a trader be in a position to improve the cash flows from existing EIRDs by manipulating the reference rate on the basis of its overall credit or debit position, but he will also be able to negotiate the fixed rate of the contracts which he enters into by having advanced information with regard to the variable rate applicable to the relevant dates for the determination of cash flows. His competitive position can only be improved as compared with that of his competitors who do not have such information.

101 The applicants claim that it was not in the interests of the banks participating in the manipulation of 19 March 2007 to adapt their trading positions according to that manipulation and make reference to paragraphs 347 to 351 of the financial expert's report (see paragraph 80 above). However, that line of argument and the relevant passages of that financial expert's report contain only general assertions claiming that it is not in the banks' interest to offer better terms than those of their competitors on the ground that that would reduce the profitability of the EIRDs. Nevertheless, the fact remains that, where a trader has advanced information on the variable rate that applies to the relevant dates, he is able to determine the fixed rate that he should propose in order to ensure, first, the profitability of the EIRD, that is to say so that it generates positive cash flows for its bank and negative cash flows for its counterparty and, second, that that fixed rate will appear more attractive to the counterparty than that offered by its competitors.

102 In that regard, there is no contradiction between, on the one hand, the fact that it is possible for the banks concerned to offer better conditions than their competitors and, on the other hand, the finding of an infringement by object. In the circumstances of the present case, that possibility is instead the expression of a change in the competitive process on the EIRD market solely for the benefit of the banks that participated in the collusion.

103 That conclusion is all the more justified in the light of the characteristics of the manipulation of 19 March 2007. Those characteristics show that it was in the banks' interest to modify their trading positions in the light of that manipulation by acquiring a 'buyer' exposure to futures linked to the 3m Euribor that was as large as possible in anticipation of the orchestration of a low rate. It is telling that, during the telephone conversation between the HSBC trader and the Barclays trader that took place on 19 March 2007 directly after the manipulation and is referred to in recital 329 of the contested decision, the HSBC trader appears to regret the fact that he had not benefited from the manipulation as much as the Barclays trader, who had built up a greater 'buyer' position.

104 Therefore, in the light of the significance of Euribor in determining the cash flows payable under those contracts, it is necessary to reject the first set of arguments, which seek to show that the Commission erred when it found that the conduct which had as its purpose the manipulation of the 3m Euribor rate on 19 March 2007 had an object that restricted competition. It also follows from the above that the Court has been able to carry out its review of lawfulness in this regard and that, consequently, the Court finds that that aspect of the Commission's reasoning does not contain an insufficient statement of reasons, contrary to what is claimed by the applicants.

105 In a second set of arguments, the applicants complain that the Commission focused only on the proprietary trading of EIRDs, omitting the fact that HSBC traded EIRDs for hedging and market making purposes.

106 The term ‘market maker’ is defined in recital 40 of the contested decision as follows: ‘Market makers are individuals or companies which hold themselves out as able and willing to sell or to buy financial products, such as securities or financial derivative products, at prices determined by them generally and continuously (through firm bids and offers), rather than in respect of each particular transaction.’ That definition is not contested by the applicants.

107 Since they are generally and continuously active on the EIRD market, ‘market makers’ enter into a larger number of transactions than other market participants, always with the objective of making a profit. The applicants’ line of argument is that, for a market maker, that search for profit is based mainly on the difference between the purchase and selling prices of the numerous contracts which it enters into, that is to say, the difference between its overall ‘buyer’ and ‘seller’ positions, rather than by the difference between the fixed rate and the variable rate of each of those contracts.

108 However, if a market maker can make a profit by taking advantage of the difference between the price at which he buys and sells EIRDs, that does not preclude him from seeking to make a profit from the difference between the fixed rate and the variable rate of a single EIRD. It seems unlikely that a trader who makes a particularly large number of trades does not take into account what the variable rate will be when he offers a price based on the fixed rate.

109 Further, the HSBC trader’s role as a market maker bears out the implausible nature of the applicants’ argument that it was not in HSBC’s interest to adapt its trading positions according to the manipulation of 19 March 2007, which was dealt with in paragraphs 101 to 103 above. Accepting a lower level of profitability per transaction is entirely logical where a greater number of transactions are entered into.

110 Lastly, as regards the emphasis that the applicants’ place on the fact that the EIRDs were also entered into for hedging purposes, it need only be pointed out that using EIRDs in such a way does not detract from the fact that the EIRDs can also be used by market makers for speculation purposes, as the Commission pointed out in recital 38 of the contested decision.

111 In the light of the foregoing, the second set of arguments put forward by the applicants should be rejected and it must be concluded that the Commission was right to find that the manipulation of 19 March 2007 in which HSBC participated, fell within the definition of an infringement by object under Article 101(1) TFEU.

112 In the third set of arguments, the applicants criticise the Commission for having characterised the manipulation of 19 March 2007 as constituting a fixing of trading conditions within the meaning of Article 101(1)(a) TFEU.

113 However, since the finding of an infringement by object applied to the manipulation of 19 March 2007 is substantiated to the requisite legal standard for the reasons set out in paragraphs 94 to 111 above, those arguments must be

rejected as irrelevant. With regard to those arguments, it is appropriate to apply the settled case-law according to which where some of the grounds in a decision on their own provide a sufficient legal basis for the decision, any errors in the other grounds of the decision have no effect on its operative part (see, to that effect and by analogy, judgments of 12 July 2001, *Commission and France* v *TF1*, C-302/99 P and C-308/99 P, EU:C:2001:408, paragraph 27, and of 12 December 2006, *SELEX Sistemi Integrati* v *Commission*, T-155/04, EU:T:2006:387, paragraph 47).

114 In view of the foregoing, the first part of the plea must be rejected.

(b) Second part of the plea, relating to the finding of an infringement by object applied to other forms of conduct alleged against HSBC

115 In this part of the plea, the applicants dispute the finding of an infringement by object applied by the Commission to forms of conduct which do not concern the Euribor manipulation of 19 March 2007 and are referred to in the contested decision as exchanges relating, first, to 'trading positions' and, second, to 'detailed and not publicly available information on their pricing intentions and pricing strategies concerning EIRDs'. With regard to that second category, HSBC was found to have taken part in exchanges which allegedly relate to EIRD 'mids'.

116 They observe that the exchanges at issue in this part of the plea are limited to six online discussions between 12 February and 27 March 2007, which do not relate to the manipulation of Euribor.

117 They maintain that the discussions described in the contested decision as exchanges on trading positions were insufficient to enable the traders in question to coordinate their trading positions. The applicants dispute the Commission's assessment of the discussions of 12 and 16 February 2007 and 9 and 14 March 2007.

118 As regards the discussions described in the contested decision as exchanges on pricing strategies, the applicants deny that the mid constitutes a 'price', a 'price list' or a 'pricing component' that allows such characterisation and claim that the mid is not confidential information and that, from a certain perspective, such discussions encourage competition. They dispute the Commission's assessment of the discussions of 14 and 16 February 2007.

119 The Commission's reply is that the matters contested in the application are not the only examples of exchanges of sensitive information in which HSBC participated.

120 It states, as regards the discussions described in the contested decision as exchanges on trading positions, that, although some of them are related directly to the manipulation of 19 March 2007, they are intended, as such, to influence the cash flows under EIRDs, thereby distorting the normal course of competition.

121 As regards the discussions described in the contested decision as exchanges on pricing strategies, the Commission concludes that mids make it possible to anticipate bid and offer prices and, therefore, that those exchanges reduce uncertainty as to the likely level of those prices and that the holding of such discussions does not constitute one of the normal circumstances for the functioning of the market in question and is not favourable to consumers.

122 It retains the assessment that it made in the contested decision on the discussions of 12, 14 and 16 February 2007 and 9 and 14 March 2007.

123 As a preliminary point, it should be noted that, although it follows from the examination of the first part of this plea that HSBC's participation in an infringement by object is established to the requisite legal standard, it is nevertheless still appropriate to examine the second part. The existence of other anticompetitive conduct attributable to HSBC is relevant for the purposes of assessing the gravity of the infringement of Article 101(1) TFEU committed by HSBC and, consequently, the proportionality of the fine imposed on it. The factors capable of affecting the assessment of the gravity of an infringement include the number and intensity of the incidents of anticompetitive conduct (see, to that effect, judgments of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 57 and the case-law cited, and of 26 September 2018, *Infineon Technologies* v *Commission*, C-99/17 P, EU:C:2018:773, paragraph 197).

124 The Court notes that the applicants' line of argument can be divided into two grounds for complaint, the first of which relates to the merits of the finding of restriction by object applied by the Commission to discussions that it described as exchanges on mids and the second of which relates to the merits of the equivalent finding applied to discussions that it described as exchanges on trading positions.

(1) Ground for complaint contesting the merits of the finding of restriction by object applied to the exchanges on mids

125 At issue are two discussions in which HSBC participated and which allegedly related to the mid-point prices (described as 'mids' in the contested decision) of EIRDs; the first of those discussions occurred on 14 February 2007 (recitals 283 to 285 of the contested decision), and the second occurred on 16 February 2007 (recitals 286 to 288 of that decision). Those discussions fall within the category of anticompetitive conduct contemplated in recitals 113(g), 358(g) and 392(g) of the contested decision (exchanges about detailed and not publicly available information on their pricing intentions and pricing strategies concerning EIRDs).

126 As it did with regard to the manipulation of 19 March 2007, the Commission explained its finding of restriction by object with regard to such exchanges in recital 394 of the contested decision by reference to the creation of informational asymmetry between market participants, since the participants in the infringement, first, were better placed to know in advance with a certain accuracy at what level

Euribor would be and/or was intended to be set by their colluding competitors, and, second, knew whether or not the Euribor on a given day was at artificial levels.

127 Reasons relating more specifically to mids appear in other passages of the contested decision.

128 Thus, in recital 32 of the contested decision, it is made clear that the terms 'run' or 'mids', 'in simple terms … can be described as price lists of a trader, a trading desk or a bank regarding certain standard financial products'. In recital 34 of that decision, it is stated that the term 'mid' 'refers to the mid-point or average of the bid and offer prices (for example perceived, modelled, quoted or traded) for a particular product. The mid often serves as a reliable approximation of where a market maker would trade with a client, in particular where the market is liquid and the bid-offer spread is narrow'.

129 Also in recital 34 of the contested decision, the Commission referred to the fact that one bank explained to it that 'derivatives traders [used] the mid points on their yield curves to help determine the bid or offer prices they are to make to the market. Through knowing a competitor's mid point, although it is not actually the dealing price, a derivatives trader is more easily able to work out the actual bid or offer prices of its competitors. Mids are used for pricing, managing trading positions and appreciation of a portfolio.'

130 In recital 419 of the contested decision, in response to the applicants' arguments, the Commission stated that the mid constituted each trader's estimate for the actual price of the EIRD and that there are as many estimates of the mid as there are market players 'as the mid represents an individual perception of the price, and therefore reveals a price intention'. In that regard, it pointed out that the applicants themselves had stated that the 'offer price' was typically set slightly above the mid and the bid price is typically set slightly below the mid, and that changes in the mid 'tend to result in a parallel change of both the bid and the offer' and, therefore, that the mid is a close proxy to the price.

131 The Commission also analysed the question whether the information exchanged was secret and the degree of market transparency.

132 Thus, in recital 395 of the contested decision, the Commission emphasised that those exchanges went beyond an exchange of information in the public domain and had the objective of increasing transparency between the parties and therefore significantly reducing normal market uncertainties to benefit the parties to the detriment of other market participants.

133 Similarly, in recitals 399 to 402 of the contested decision, the Commission rejected the argument that the information exchanged was not sensitive because it was widely available to the public. The Commission concluded that accurate pricing information was not widely available on the EIRD market, arguing that it was apparent from the documents before the Court that unreliable information was

sometimes knowingly communicated to the public platforms of market players and that the traders needed the pricing information of other traders to adjust their own pricing curves.

134 In recital 403 of the contested decision, the Commission did not accept the arguments that the exchanges pursued a legitimate purpose, essentially on the ground that those exchanges did not play a role in the conclusion of transactions between the traders concerned. It also highlighted that such exchanges between market makers gave rise to greater transparency only between themselves and did not benefit all market participants.

135 In addition, in recital 431 of the contested decision, the Commission denied that certain characteristics of the EIRD market, and in particular its fast-moving and transitory nature, implied that collusion could arise only with frequent communication on specific details of individual trades, such as precise information on future individual transactions. It reiterated that 'the information exchanged on transaction data (prices and volumes) for most over the counter EIRDs was not publicly available and accurate pieces of information were valuable information to traders'.

136 The conversation of 14 February 2007 is referred to in recitals 283 to 285 of the contested decision. In that conversation, the HSBC trader tells the Barclays trader that the Deutsche Bank trader publishes some of his prices on his Bloomberg screen, to which the Barclays trader replies that those prices are merely indicative. The contested decision then states that '[the Barclays trader] then inquires just about [the HSBC trader]'s exact price for August[; … HSBC trader] obliges and replies "4.012" and that he has been offered 4.005-4.015 on this in the market shortly before leaving the chat.' The Commission concludes from this conversation that '[the Barclays trader] asks [the HSBC trader] for a precise pricing information outside of the context of a potential transaction, a request which [the HSBC trader] satisfies …'.

137 With regard to the discussion of 16 February 2007, in recitals 286 to 288 of the contested decision, the Commission found that '[the HSBC trader] and [the Barclays trader] disclose[d] to each other their respective mid prices on an EONIA swap ("t'as quoi 10/11 sp eonia?") and a [forward rate agreement] ("et sur le 10/11 sp fra?"). [The HSBC trader] is not sure about his price on the EONIA swap ("je dois etre a la rue … 4.06?" "g 4.0625 en mid") but [the Barclays trader] reassures him ("non ca va") and then reveals the deal prices and that he has gained on the [forward rate agreement] from trades with two other market players who had different prices for the same contract.'

138 The Commission did not err in finding that the exchanges on mids contained in those two discussions had an object that restricted competition.

139 In the first place, it should be noted that, contrary to the applicants' assertions, information relating to mids is relevant for pricing in the EIRD sector.

140 First, it is common ground between the parties that a trader determines the fixed rate of EIRDs by reference to what it considers to be the mid, namely slightly below it for its 'bid price' and slightly above it for its 'offer price', as the Commission pointed out in recital 419 of the contested decision.

141 Second, it must also be concluded that knowledge of a competitor's mid makes it possible to assess that competitor's perception of what the variable rate of the EIRD will be on the fixing date, by applying the yield curve referred to in recital 34 of the contested decision, at least as regards EIRDs with a short maturity. When questioned at the hearing as to whether the yield curve of an EIRD is known to all market operators or depends on the individual perception of each operator, the applicants themselves stated that that yield curve was objective and was not based on an individual assessment of that type of derivative.

142 In the second place, it should be noted that information on mids for over-the-counter ('OTC') derivatives is not public, unlike the equivalent information for derivatives traded on a regulated market. While it is common ground between the parties that the latter information is available or may be deduced in respect of all parties operating on a regulated market, that is not the case for OTC derivatives.

143 It is true that information on mids relating to such derivatives may be made public directly by certain traders or indirectly through brokerage companies. However, the fact remains that such information is not generally available and is not necessarily reliable, as is shown by the discussion of 14 February 2007, referred to in paragraph 136 above, between the HSBC trader and the Barclays trader in relation to the mids published by the Deutsche Bank trader on his Bloomberg page.

144 In the third place, it should be noted that a distinction may be drawn between, on the one hand, competitors gleaning information independently or discussing future pricing with customers and third parties and, on the other hand, competitors discussing price-setting factors and the evolution of prices with other competitors before setting their quotation prices. Although the first type of conduct does not raise any difficulty in terms of the exercise of free and undistorted competition, the same cannot be said of the second type, which runs counter to the requirement that each economic operator must determine independently the policy which it intends to adopt on the internal market, since that requirement of independence strictly precludes any direct or indirect contact between such operators with the object or effect either of influencing the conduct on the market of an actual or potential competitor or of disclosing to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (see judgment of 14 March 2013, *Dole Food and Dole Germany* v *Commission*, T-588/08, EU:T:2013:130, paragraphs 291 and 292 and the case-law cited).

145 Further, an exchange between competitors on a factor that is relevant for pricing and is not publicly available is all the more sensitive in terms of competition

where it takes place between traders acting as 'market makers', in the light of the importance of such traders on the EIRD market. As was stated in paragraphs 106 and 107 above, 'market makers' are generally and continuously active on the EIRD market and therefore enter into a larger number of transactions than other market participants. From the point of view of competition on the market, it is particularly fundamental that prices be determined independently.

146 In the fourth place, it must be concluded that the discussions between the HSBC and Barclays traders of 14 and 16 February 2007 concerned precise information which could have been exploited by the other party.

147 Thus, it is apparent from reading the entire discussion of 14 February 2007 that not only did the HSBC trader disclose the level of his mid (4.012) and the prices of transactions that had been offered to him (4.004/4.0015), but both traders also shared their impressions on the level and evolution of prices.

148 With regard to the discussion of 16 February 2007, it is apparent from the explanations provided by the applicants themselves in their observations on the statement of objections that the HSBC and Barclays traders discussed their assessments of the mid for a one-month spot EONIA swap starting in 10 months ('10/11 sp eonia') and compared it with the mid for a forward rate agreement linked to Euribor covering the same dates. It is clear from that discussion, first, that the HSBC trader reassessed his mid for the EONIA swap after the Barclays trader shared his opinion and, second, that the parties exchanged views on what the price difference between those two derivatives should be.

149 In the fifth place, it should be noted that the applicants' arguments that the exchanges of information between market makers on mids are 'pro-competitive' cannot be upheld. In essence, the applicants claim that exchanges on mids are inherent in the activities of traders and, more specifically, of market makers operating on the EIRD market for the purposes of reducing risk and result in lower bid-offer spreads, to the benefit of customers.

150 It is true that, in accordance with the case-law cited in paragraph 57 above, examination of the finding of infringement by object must take into account the economic and legal context of the market in which the exchanges of information took place.

151 It is indeed also true that the EIRD market is somewhat unusual. Banks often enter into EIRDs with other banks on that market, in particular for hedging purposes. In other words, the very nature of the market means that banks, in particular those acting as a market makers, which are competitors as regards their EIRD offer to potential clients, also end up trading between themselves and, consequently, communicating confidential information to each other when they do so.

152 However, that aspect of the economic and legal context of the EIRD market was taken into account by the Commission, since it excluded from its analysis the information exchanged in the context of contractual negotiations.

153 The applicants' line of argument goes beyond merely criticising the failure to take into account the economic and legal context of the EIRD market and alleges that the Commission failed to take account of any pro-competitive effects of discussions between traders.

154 In this regard, it should be noted that, with the exception of restrictions ancillary to a main operation (see judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89 and the case-law cited), it is only in the context of the assessment of Article 101(3) TFEU that any pro-competitive effects can be taken into account. It is clear from settled case-law that the existence of a 'rule of reason', that is to say an examination weighing up the pro- and anticompetitive effects of an agreement when characterising it for the purpose of Article 101(1) TFEU, cannot be upheld under EU competition law (judgment of 29 June 2012, *E.ON Ruhrgas and E.ON* v *Commission*, T-360/09, EU:T:2012:332, paragraph 65; see also, to that effect, judgment of 23 October 2003, *Van den Bergh Foods* v *Commission*, T-65/98, EU:T:2003:281, paragraph 106).

155 It was therefore for the applicants either to show that the discussions on mids were directly related and necessary to the functioning of the EIRD market or that they meet the conditions in Article 101(3) TFEU.

156 First, the applicants do not allege that the Commission misapplied Article 101(3) TFEU in the present action.

157 Second, to the extent that the applicants' line of argument may be understood as being that exchanges of information on mids between market makers are inextricably linked to the functioning of the EIRD market, it should be noted that, according to settled case-law, if a given operation or activity is not covered by the prohibition rule laid down in Article 101(1) TFEU, owing to its neutrality or positive effect in terms of competition, a restriction of the commercial autonomy of one or more of the participants in that operation or activity is not covered by that prohibition rule either if that restriction is objectively necessary to the implementation of that operation or that activity and proportionate to the objectives of one or the other (see judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89 and the case-law cited). Where it is not possible to dissociate such a restriction, described as an ancillary restriction, from the main operation or activity without jeopardising its existence and aims, it is necessary to examine the compatibility of that restriction with Article 101 TFEU in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in Article 101(1) TFEU (judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 90).

158 In order for a restriction to classify as ancillary, it is necessary to establish, first, whether the restriction is objectively necessary for the implementation of the main

operation or activity and, secondly, whether it is proportionate to it (judgments of 18 September 2001, *M6 and Others* v *Commission*, T-112/99, EU:T:2001:215, paragraph 106, and of 29 June 2012, *E.ON Ruhrgas and E.ON* v *Commission*, T-360/09, EU:T:2012:332, paragraph 64).

159 As regards the first condition, according to the case-law, it is necessary to inquire whether that operation or activity would be impossible to carry out in the absence of the restriction in question. Thus, the fact that that operation or activity is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary. Such an interpretation would effectively extend that concept to restrictions which are not strictly indispensable to the implementation of the main operation or activity. Such an outcome would undermine the effectiveness of the prohibition laid down in Article 101(1) TFEU (see, to that effect, judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 91).

160 That first condition, when applied to the circumstances of the present case, means ascertaining whether the functioning of the EIRD market is made impossible without exchanges of information on mids between market makers. In this regard, it need only be noted that it is true that the applicants refer, in their written pleadings, to the pro-competitive effects that such exchanges between traders may have, in so far as they have allowed them to reduce the uncertainty about the level at which they might be able to hedge their positions and, consequently, to quote more favourable prices. However, the applicants do not establish that the OTC derivatives market could not function without such exchanges of information between traders acting as market makers. Therefore, the first condition is not satisfied in the present case.

161 For all of those reasons, the applicants' first complaint must be rejected.

(2) Ground for complaint contesting the merits of the finding of restriction by object applied to the exchanges on trading positions

162 At issue in this ground for complaint is the Commission's characterisation of the conduct described in recitals 271 to 276 (discussion of 12 February 2007), 286 to 288 (discussion of 16 February 2007), 295 (discussion of 9 March 2007) and 296 to 298 (discussion of 14 March 2007) of the contested decision. In its defence, the Commission maintains that discussions on trading positions also took place on 13 and 28 February and 19 March 2007.

163 With regard to the discussions of 13 and 28 February and 19 March 2007 to which the Commission makes reference, it need only be noted that they all took place in view of the Euribor manipulation of 19 March 2007 or had a connection to it and that, consequently, it has already been concluded that they pertain to conduct with an anticompetitive object. Moreover, the applicants do not dispute the finding of

restriction by object that was applied to them in the context of the present part of the plea.

164 A similar conclusion must be reached with regard to the discussions of 12 and 16 February 2007, since it has already been established that the Commission was entitled to characterise them as a restriction of competition by object. First, it is apparent from the first part of this plea that the Commission was correct to find that the discussion of 12 February 2007 was part of the Euribor manipulation of 19 March 2007 and, on that basis, constituted an infringement of Article 101(1) TFEU. Second, for the reasons set out in the context of the examination of the first ground for complaint in the present part of the plea, the Commission was also entitled to find that the discussion of 16 February 2007 constituted an infringement of Article 101(1) TFEU to the extent that the exchange related to mids. It is therefore unnecessary to ascertain whether the same form of conduct is also classified as an infringement by object for another reason.

165 Therefore all that remains at issue are the discussions of 9 and 14 March 2007.

166 Those discussions fall within the category of anticompetitive conduct contemplated in recitals 113(b), 358(b) and 392(b) of the contested decision (exchanges between traders relating to their respective EIRD trading positions and exposures) and in recitals 113(c), 358(c) and 392(c) of the contested decision (exchanges relating to the possibility of aligning their trading positions).

167 It is apparent from recitals 394 and 395 of the contested decision that the same considerations as those used with regard to the manipulation of 19 March 2007 and the exchanges on mids are used to explain the finding of infringement by object applied to the exchanges of information on trading positions, namely that they would put participants in a favourable position of informational asymmetry, by increasing transparency between the parties and significantly reducing normal market uncertainties.

168 There is no definition in the contested decision of the concept ‘trading position’. Nevertheless, it is apparent from the various places it is used in that decision that that expression covers the composition of a trader’s investment portfolio (his ‘book’), and the level and direction of his exposure on the EIRD market.

169 Reasoning relating more specifically to trading positions is set out in other passages of the contested decision.

170 Thus, in recital 390 of the contested decision, the Commission observed that, according to RBS, each market maker carries a trading book which consisted of an inventory of contracts and inferred from this that ‘by sharing their trading positions, market makers [were] able to infer each other’s demand and supply as regards these contracts and [could] use this information to their advantage. This [could] involve them adjusting their own trading patterns and [resulted] in them being better informed than their competitor market makers and other market participants’.

171 In recital 417 of the contested decision, the Commission stated that 'exchanges on trading positions … served the objective of checking whether the parties' commercial interests were aligned before they could take further concerted action to influence the value of EIRDs to the detriment of competitors not part of the cartel'. It added that 'in the context of an EIRD market which was not transparent … sharing such information allowed the colluding parties to be more informed than other market participants'. In the same recital, the Commission also stated that 'by sharing their trading positions and therefore, being able to adjust their own trading patterns, the colluding parties could influence the value of their portfolios, which in turn influenced the trading conditions within the meaning of Article 101(1)(a) [TFEU] and therefore affect the structure of competition in the EIRD market'.

172 The conversation of 9 March 2007, which took place between an HSBC trader and a Deutsche Bank trader is considered in recital 295 of the contested decision. The Commission concluded in that recital that it related to specific trading positions of important market players and the information exchange took place outside of the context of a potential transaction.

173 The discussion of 14 March 2007 is considered in recitals 296 to 298 of the contested decision. It is clear from those recitals that the conversation relates to past speculations on the rate difference between EONIA and the 1 month Euribor in the context of which the HSBC trader made a loss, while the Barclays trader made a significant financial gain. The Barclays trader goes on to explain how he believes the market worked and states that this should also apply to June tenors.

174 For the purpose of assessing the merits of the finding of restriction by object applied to those discussions, it must be borne in mind that the Commission found that those discussions had contributed to the distortion of the normal course of pricing components in the EIRD sector. In addition, in particular in recital 417 of the contested decision, the Commission also found that the conversations on trading positions had influenced other trading conditions within the meaning of Article 101(1)(a) TFEU.

175 As regards that second classification, although it may, in principle and for the reasons set out in paragraphs 74 to 77 above, be taken into account despite the fact that it does not appear in the operative part of the contested decision, this is on the condition that reasons are given to the requisite legal standard.

176 In that regard, it should be noted that, according to settled case-law, the statement of reasons required under Article 296 TFEU must be appropriate for the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court of the European Union to exercise its jurisdiction to review legality. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which an individual decision is based is,

therefore, in addition to permitting review by the Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged (see judgment of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, page 115 and the case-law cited).

177 As the applicants rightly observe in their written submissions, the contested decision does not make it possible to identify the 'other trading conditions' which were coordinated following the exchanges on trading positions involving HSBC. It follows that such reasoning fails to meet the criteria noted in the case-law referred to in paragraph 176 above and cannot, therefore, be taken into account when reviewing the merits of the finding of restriction by object applied to the exchanges on trading positions.

178 It is therefore necessary to investigate in the context of this ground for complaint whether the Commission was entitled to find that such exchanges distorted the normal course of pricing components in the EIRD sector.

179 In that regard, it should be noted, in the first place, that exchanges between competitors concerning the composition of their investment portfolio or the level of their exposures do not have the same relevance to pricing on the EIRD market as information on mids. Although, for the reasons set out in paragraphs 139 to 141 above, such information on mids makes it easier to identify the fixed rate proposed by a competitor for a derivative and his perception of what the variable rate will be at the fixing date, the same cannot be said for an exchange on trading positions which do not directly concern EIRD rates.

180 When questioned on that point at the hearing, the Commission itself acknowledged that exchanges on trading positions did not intrinsically have the same scope for restricting competition as exchanges on mids.

181 That conclusion is also supported by the contested decision. It is apparent from that decision that most of the exchanges on trading positions are instead complementary to other practices that restrict competition and have a proven object of restricting competition. Thus, in recital 417 of the contested decision, the Commission states that 'exchanges on trading positions … served the objective of checking whether the parties' commercial interests were aligned before they could take further concerted action to influence the value of EIRDs to the detriment of competitors not part of the cartel'.

182 Thus, the vast majority of discussions on trading positions in which HSBC traders participated had a link to the Euribor manipulation of 19 March 2007. This is the case for the discussions with the Barclays trader of 12, 13 and 28 February and 19 March 2007.

183 The same cannot be said for the discussions of 9 and 14 March 2007, which did not occur in view of the Euribor manipulation of 19 March 2007.

184 In the second place, it is apparent from the case-law cited in paragraphs 54, 55, 59 and 62 above that, although an exchange of information between competitors is likely to be incompatible with the competition rules if it reduced or removed the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings was restricted, a finding of infringement by object must be restricted to those exchanges that reveal a sufficient degree of harm to competition, meaning that it is not necessary to examine their effects. That is the case, in particular, for an exchange of information which is capable of removing uncertainty in the minds of the interested parties as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market.

185 In the third place, and consequently, it should be investigated whether the information exchanged during the discussions of 9 and 14 March 2007 reduced or removed the degree of uncertainty on the market in such a way that the Commission could infer therefrom an impact on the normal course of pricing components in the EIRD sector without having to examine their effects.

186 Turning first to the discussion of 9 March 2007, in recital 295 of the contested decision, the Commission criticises the HSBC trader for having informed the Deutsche Bank trader of his trading positions by stating, inter alia, '..j'ai fait la patte 5 ans …je suis en flattener a des niveaus imbattable!..et je reste short du court euro', to which the HSBC trader responds 'bravo bien joue'. It also complains that, during the same conversation, the HSBC trader wrote with regard to his portfolio 'flattener euro maintenant 2-5 ans short de juin et sep 7 euribor', which the Commission interpreted as meaning that he anticipates 'a decrease in the spread between the prices of EIRDs with a maturity between 2 and 5 years and [that the HSBC trader] has a short trading position on June and September 2007'. The Commission also noted that the Deutsche Bank trader responded to him with 'moi j'ai pas de h8 et de 2y !', which the Commission interpreted as meaning that he had no 'March 2008 futures nor EIRDs with 2 years maturity'.

187 The traders did indeed discuss the composition of their portfolios and in doing so exchanged confidential information, outside of the context of a potential transaction.

188 However, contrary to what is claimed by the Commission, that institution does not establish to the requisite legal standard that that discussion gave the traders an informational advantage that may have allowed them to adjust their trading strategies as a result.

189 First, the impression that emerges from that conversation is that the HSBC trader is boasting to the Deutsche Bank trader about a good trade that he made and the latter is congratulating him. The information provided, which is neither precise nor detailed, does not make it possible to read into that conversation the explanation of a 'strategy' which, as it was known by the Deutsche Bank trader in isolation, placed him in such a favourable situation as against his competitors that

the Commission was able to infer that the object of that conversation was to restrict competition.

190 Second, as the applicants note, without being contradicted by the Commission, the pieces of information provided by the traders on their portfolios do not cover the interest rate tenors concerned or the extent of the positions concerned.

191 In the absence of more precise information of that order, it cannot be concluded that that discussion reduced or removed the degree of uncertainty on the market in such a way that the Commission could infer therefrom an impact on the normal course of pricing components in the EIRD sector without having to examine its effects.

192 Turning secondly to the discussion of 14 March 2007, considered in recitals 296 to 298 of the contested decision, it is true that, unlike the previous conversation, the information exchanged between the traders is precise and clear. The Barclays trader informs the HSBC trader how to make a financial gain in the future by using the difference between the 1 month Euribor and EONIA rates.

193 However, by proceeding in that way, the Barclays trader did not provide any confidential information to the HSBC trader. He merely shares with him the observation that, in essence, the EONIA rate can have an impact on the 1 month Euribor rate. Even though the HSBC trader appears not to be aware of how those two rates interact, what the Barclays trader says is merely a simple observation which any market observer could make. The Court therefore cannot find that his explanation to a competitor reduces or removes the degree of uncertainty on the market in such a way that the Commission could infer therefrom an impact on the normal course of pricing components in the EIRD sector.

194 In the light of the foregoing, the Court finds that the discussions of 9 and 14 March 2007, either individually or jointly, cannot be regarded as having an object that restricts competition within the meaning of Article 101(1) TFEU.

195 Therefore, the applicants are right when they state, in the second part of the first plea, that the Commission was not entitled to find that the object of the discussions of 9 and 14 March 2007 was to restrict competition.

2. Second, third and fourth pleas in law, concerning the Commission's finding of a single and continuous infringement

196 In the second, third and fourth pleas in law the applicants contest the Commission's conclusion regarding HSBC's participation in a single and continuous infringement.

197 According to settled case-law, an infringement of Article 101(1) TFEU can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that

provision. Accordingly, if the different actions form part of an 'overall plan' because their identical object distorts competition on the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (see, to that effect, judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 156 and the case-law cited).

198 An undertaking which has participated in such a single and complex infringement, by its own conduct, which meets the definition of an agreement or concerted practice having an anticompetitive object within the meaning of Article 101(1) TFEU and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement. That is the position where it is shown that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk (see, to that effect, judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 157 and the case-law cited).

199 An undertaking may thus have participated directly in all the forms of anticompetitive conduct comprising the single and continuous infringement, in which case the Commission is entitled to attribute liability to it in relation to that conduct as a whole and, therefore, in relation to the infringement as a whole. Equally, the undertaking may have participated directly in only some of the forms of anticompetitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk. In such cases, the Commission is also entitled to attribute liability to that undertaking in relation to all the forms of anticompetitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole (see judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 158 and the case-law cited).

200 On the other hand, if an undertaking has directly taken part in one or more of the forms of anticompetitive conduct comprising a single and continuous infringement, but it has not been shown that that undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel and that it was aware of all the other offending conduct planned or put into effect by those other participants in pursuit of the same objectives, or that it could reasonably have foreseen all that conduct and was prepared to take the risk, the Commission is entitled to attribute to that

undertaking liability only for the conduct in which it had participated directly and for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself, where it has been shown that the undertaking was aware of that conduct or was able reasonably to foresee it and prepared to take the risk (see judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 159 and the case-law cited).

201 Furthermore, for the purposes of characterising various instances of conduct as a single and continuous infringement, it is not necessary to establish whether they present a link of complementarity, in that each of them is intended to deal with one or more consequences of the normal pattern of competition, and through that interaction, they contribute to the attainment of the set of anticompetitive effects desired by those responsible, within the framework of an overall plan having a single objective. On the other hand, the condition relating to a single objective requires that it be ascertained whether there are any elements characterising the various instances of conduct forming part of the infringement which are capable of indicating that the conduct in fact implemented by other participating undertakings does not have an identical object or identical anticompetitive effect and, consequently, do not form part of an 'overall plan' as a result of an identical object distorting the normal pattern of competition within the internal market (see, to that effect, judgment of 19 December 2013, *Siemens and Others* v *Commission*, C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraph 247 and 248).

202 In addition, to the extent that a finding of a single and continuous infringement leads to an undertaking being held responsible for an infringement of competition law, it should be noted that, in the field of competition law, where there is a dispute as to the existence of an infringement, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (see judgment of 22 November 2012, *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraph 71 and the case-law cited).

203 In order to establish that there has been an infringement of Article 101(1) TFEU, the Commission must produce firm, precise and consistent evidence. However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by that institution, viewed as a whole, meets that requirement (see judgment of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraph 47 and the case-law cited).

204 Moreover, where the Court still has a doubt, the benefit of that doubt must be given to the undertakings accused of the infringement. Indeed, the presumption of innocence constitutes a general principle of EU law, currently laid down in Article 48(1) of the Charter of Fundamental Rights of the European Union (see

judgment of 22 November 2012, *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraph 72 and the case-law cited).

205 It is also apparent from the case-law of the Court of Justice that the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see judgment of 22 November 2012, *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraph 73 and the case-law cited).

206 In the present case, as was pointed out in paragraph 70 above, the Commission applied the characterisation of a single and continuous infringement to three groups of forms of conduct: first, those relating to the manipulations of submissions to Euribor (point (a) of recitals 113, 358 and 392: exchanges relating to preference of level of Euribor benchmark; point (d) of recitals 113, 358 and 392: exchanges relating to the possibility of aligning their Euribor submissions; point (e) of recitals 113, 358 and 392: contact between the trader involved and the Euribor submitter within the same bank; point (f) of recitals 113, 358 and 392: agreements to report back on attempts to influence Euribor submissions), second, those relating to exchanges about EIRD trading positions (point (b) of recitals 113, 358 and 392: exchanges relating to respective trading positions and exposures; point (c) of recitals 113, 358 and 392: exchanges relating to the possibility of aligning trading positions); and, third, those relating to exchanges about detailed and not publicly available information on pricing intentions and pricing strategies concerning EIRDs (point (g) of recitals 113, 358 and 392).

207 The reasons put forward in the contested decision to explain such characterisation as a single and continuous infringement are set out in recitals 442 to 492 of the contested decision and summarised in paragraph 19 above. The Commission found that there was a single economic aim (recitals 444 to 450), that the various forms of conduct at issue formed part of a common pattern of behaviour (recitals 451 to 456) and that the traders of the banks at issue knew or should have been aware of the general scope and the essential characteristics of the cartel as a whole (recitals 457 to 483).

208 As is apparent from the case-law cited in paragraphs 197 and 198 above, three factors are decisive for the purpose of concluding that an undertaking participated in a single and continuous infringement. The first concerns the very existence of the single and continuous infringement. The various forms of conduct in question must form part of an 'overall plan' with a single objective. The second and third elements concern whether or not the single and continuous infringement can be attributed to an undertaking. First, that undertaking must have intended, through its own conduct, to contribute to the common objectives pursued by all the participants. Second, it must have been aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or could reasonably have foreseen all that conduct and was prepared to take the risks. The

existence of those three elements is disputed, respectively, in the applicants' second, third and fourth pleas in law.

(a) The second plea in law, disputing the existence of an 'overall plan' with a single aim

209 In their second plea, the applicants dispute the existence of an 'overall plan' with a single aim and conclude from this that the Commission's finding of a single and continuous infringement is incorrect.

210 The relevant grounds in the contested decision appear in recitals 444 to 456 of the contested decision under the heading 'Single economic aim' and 'Common pattern of behaviour' and were summarised in paragraph 19 above.

211 The applicants' arguments in the second plea in law can be divided into two parts; in essence, the first part relates to the single aim of the infringement and the second part relates to the existence of an 'overall plan'.

(1) The first part of the plea, relating to the single aim of the infringement

212 According to the applicants, discussions between traders on issues unconnected to the manipulation of reference rates cannot have the same single aim as discussions relating to the manipulation of those rates.

213 The Commission submits that all the forms of conduct in question can be linked to the single aim which it has identified.

214 In recital 445 of the contested decision the single aim found by the Commission was described as being '[to reduce] the cash flows [colluding parties] would have to pay (or [to increase] those they would receive) and thereby [to increase] the value of the EIRDs they had in their portfolio, to the detriment of the counterparties to these EIRDs'.

215 As explained in paragraph 100 above, the cash flow linked to an EIRD results from the difference between the fixed rate of the contract, that is to say, the rate negotiated between the parties, and the variable rate, which depends on the reference rate.

216 As a preliminary point, it should be noted that the concept of a single aim cannot be determined by a general reference to the distortion of competition in a given sector, since an impact on competition, whether as object or effect, is an essential element of any conduct covered by Article 101(1) TFEU. Such a definition of the concept of a single aim is likely to deprive the concept of a single and continuous infringement of a part of its meaning, since it would have the consequence that different types of conduct which relate to a particular economic sector and are prohibited by Article 101(1) TFEU would have to be systematically characterised as constituent elements of a single infringement (judgments of 12 December 2007,

BASF and UCB v *Commission*, T-101/05 and T-111/05, EU:T:2007:380, paragraph 180; of 28 April 2010, *Amann & Söhne and Cousin Filterie* v *Commission*, T-446/05, EU:T:2010:165, paragraph 92; and of 30 November 2011, *Quinn Barlo and Others* v *Commission*, T-208/06, EU:T:2011:701, paragraph 149).

217 It must follow that only restrictions of competition whose aim has been established to be the distortion of the normal course of either the fixed rate or the variable rate of EIRDs can have the single aim found by the Commission. It would be contrary to the case-law referred to in paragraph 216 above to find that instances of conduct that restrict competition but do not have a sufficiently close link with the fixing of those rates also have that aim.

218 Accordingly, it is appropriate to examine whether the three groups of forms of conduct highlighted by the Commission and referred to in paragraphs 70 and 206 can be associated with that single aim. In that regard, it is necessary to distinguish between, on the one hand, forms of conduct relating to the manipulation of Euribor submissions and, on the other hand, exchanges on EIRD trading positions and exchanges about detailed and not publicly available information on their pricing intentions and pricing strategies concerning EIRDs.

219 In the first place, with regard to manipulations of the Euribor submissions, since the variable rate of an EIRD is based directly on the reference rate, those manipulations necessarily have the single aim identified by the Commission.

220 With regard to HSBC, it is therefore unproblematic to conclude that the discussions of 12, 13 and 28 February and 19 March 2007 referred to in paragraphs 85, 163 and 164 above, which form part of the manipulation of 19 March 2007, do have that aim.

221 In their reply, the applicants submit, in essence, that the Commission failed to show that manipulations concerning different tenors of reference rate were sufficiently interlinked to form part of the same single infringement.

222 In that regard, it should be noted that the Commission found that HSBC participated in a discussion of 27 March 2007, described in recital 339 of the contested decision, in which the Barclays trader considered the future manipulation of reference rates. As a result of that discussion — which, as the applicants accept, had as its objective the restriction of competition — the end of the period of the applicant's participation in the infringement was declared to be 27 March 2007.

223 Although the applicants' criticism in that respect is presented in summary form and only at the reply stage, it can nevertheless be examined by the Court. First, the Court understands the sense of this criticism and, second, it is merely a development of the line of argument already appearing in the application and does not constitute the submission of a new plea in law, which is prohibited by Article 84(1) of the Rules of Procedure. This criticism has a connection with the

application that is sufficiently close to allow it to be considered as forming part of the normal evolution of debate in proceedings before the Court (see, to that effect, judgment of 20 November 2017, *Petrov and Others* v *Parliament*, T-452/15, EU:T:2017:822, paragraph 46 and the case-law cited).

224 With regard to the merits of that criticism, while the case-law referred to in paragraph 216 above prevents the Commission from adopting a definition of the single aim that is so broad as to be similar to a general reference to the distortion of competition in a given sector, it would be contrary to the logic of the concept of a single infringement to require the Commission, when defining that single aim, to be so precise that it de facto prevents it from including in that same infringement different forms of conduct.

225 Accordingly, it must be concluded that various manipulations of reference rates can have the same single aim.

226 In the second place, as regards the exchanges relating to trading positions and those about detailed and not publicly available information on EIRD pricing intentions and strategies, it should be noted, at the outset, that the exchanges at issue here are only those that did not take place either in view of a manipulation of reference rates or jointly with such manipulation.

227 The discussions between traders that occurred in view of a manipulation of reference rates or jointly with such manipulation have the single aim of the infringement for the reasons set out in paragraphs 219 to 225 above. As regards HSBC, this is also the case for the discussions on trading positions which the traders participated in on 12, 13 and 28 February and 19 March 2007, for the reasons set out in paragraphs 181 and 182 above.

228 Contrary to what the applicants seem to claim, it cannot be automatically excluded that exchanges on trading positions and those about detailed and not publicly available information on EIRD pricing intentions and strategies have the single aim found by the Commission, despite the fact that they did not occur in view of manipulation of reference rates or jointly with such manipulation. Nevertheless, for the reasons explained in paragraphs 216 and 217 above, they can be found to have that aim only if the Commission has demonstrated that the purpose of those exchanges is to distort the normal course of either the fixed rate or the variable rate of EIRDs. With regard to HSBC, it is clear from paragraphs 139 to 161 above that that was the case for the discussions of 14 and 16 February 2007 in which its traders participated.

229 In the light of the foregoing, the first part of the plea in law must be rejected.

(2) The second part of the plea, disputing the existence of an 'overall plan'

230 In essence, the applicants dispute the Commission's assertion that the various forms of collusive conduct formed part of an overall plan with the aim of

improving their bank's current and future trading positions, on the ground that there is no evidence of a global plan. In that regard, they submit, in essence, that the evidence that there was a 'stable group of individuals' that were involved in the conduct does not apply to HSBC. Additionally, the reference to secrecy in the contested decision is insufficient to establish that forms of conduct which are, by their nature, very different share a single economic aim. They also submit that, at least with regard to HSBC, the Commission's assertions that the discussions had 'the same or almost the same content' or were 'always for the same types of operations' are incorrect as a matter of fact.

231 The Commission claims, in essence, that it established to the requisite legal standard the existence of an 'overall plan' in the contested decision.

232 In the contested decision, the Commission essentially based the existence of an 'overall plan', in recital 446 of the contested decision, on the fact that the parties clearly adhered to a common strategy which limited their individual commercial conduct by determining the course of their mutual action or abstention from action in the market thereby replacing the competition between themselves with cooperation, to the detriment of other market participants. It also stated, in recital 451, that the cartel was 'controlled and maintained' by a stable group of persons and, in recital 452, that the parties had followed a very similar pattern in their anticompetitive activities. In that regard, it highlighted, in recitals 452 to 456, that the contacts between the banks had often taken place in parallel or in close proximity, that the language used showed that those communications were commonly used by the individuals participating in the cartel, that the parties took precautions to conceal their contacts and that the various communications had the same or almost the same content.

233 Among the various reasons highlighted by the Commission in the contested decision, the Court finds that the central element which establishes that there was an 'overall plan', as referred to in recital 451 of the contested decision, is the fact that the cartel was 'controlled and maintained' by a stable group of individuals.

234 While the other reasons appearing in the contested decision and summarised in paragraph 232 above — such as the similarity of the anticompetitive activities of the traders in the market, the frequency of those activities and the will of those traders to maintain the secrecy of that conduct — do bolster the impression that there was an 'overall plan', in the absence of more conclusive evidence, they do not in themselves prove that such a plan existed.

235 Consequently, it is only to the extent that those various forms of conduct can be considered to have been controlled or directed by the same group of individuals that the Court can find in favour of the existence of such an 'overall plan' which would substantiate a finding of a single infringement.

236 The applicants do not dispute the correctness of the ground that the cartel was controlled and maintained by a stable group of traders, but rather claim that none

of HSBC's traders formed part of that group. That line of argument does not relate to the merits of the Commission's finding of a single infringement, but rather to whether it is imputable to HSBC, which falls within the scope of the fourth plea.

237 Subject to that reservation, the second part of the plea must be rejected, as, accordingly, must the second plea in law.

(b) The fourth plea, disputing HSBC's awareness of the offending conduct of the other participants

238 The applicants criticise the Commission for concluding that HSBC was or ought to have been aware of the allegedly unlawful conduct of the other banks. They claim that neither the grounds of the contested decision relating to all the banks, nor those specific to HSBC, show that HSBC was or ought to have been aware of the general scope and the essential characteristics of the cartel as a whole.

239 The applicants claim, inter alia, that it can be concluded from the discussion of 12 February 2007 only that the HSBC trader had a rough idea of the broad plan to manipulate the 3m Euribor on 19 March 2007 without, however, knowing which banks were participating, and, further, dispute the fact that the Barclays trader made the involvement of other banks in the manipulation clear to the HSBC trader or, alternatively, that the HSBC trader was fully aware of it. In any event, any knowledge of the participation of other banks in the manipulation of 19 March 2007 is not tantamount to awareness of the wider pattern of contacts between other banks which took place over an extended period of time. Moreover, the situation of 27 March 2007 referred to in recital 491 of the contested decision, in which the Barclays trader mentioned to an HSBC trader the prospect of repeating the manipulation of 19 March 2007 at some time in the future, is irrelevant in the context of an overall cartel between 12 February and 26 March 2007.

240 The Commission submits, as a preliminary point, that, through its contact with Barclays, HSBC participated in all of the anticompetitive conduct comprising the single and continuous infringement and that that situation is sufficient to render it liable for the entirety of that conduct.

241 The Commission claims that it has nevertheless proved that HSBC was aware or could reasonably have foreseen the offending conduct of the other undertakings. In this respect, that institution refers to the content of the exchanges between HSBC and Barclays on 12 February and 7 and 19 March 2007. The Commission refutes the applicants' argument that HSBC's awareness of the manipulation of 19 March 2007 does not mean that it was aware of other anticompetitive conduct.

242 The grounds of the contested decision relating to awareness of the offending conduct appear in recitals 457 to 465 of the contested decision, which cover grounds common to all the banks, and in recitals 471 to 476 of that decision, which cover grounds relating to HSBC alone.

243 As regards the grounds common to all the banks, they are based on the premiss, set out in recital 457 of the contested decision, that traders participating in the anticompetitive exchanges were skilled professionals and were aware or should have been aware of the general scope and characteristics of the cartel. In that regard, the Commission referred, first, in recital 458, to the very specific context in which the traders operate, characterised by bilateral, recorded and controlled exchanges. It claimed, second, in recital 459 of the contested decision, that the traders involved in the arrangements were aware that traders from other banks were ready to engage in the same type of collusive behaviour concerning pricing components and other trading conditions of EIRDs. It argued, third, in recitals 460 to 461 of the contested decision, that the evidence showed a wide-spread general awareness of the declaratory nature of the mechanism for setting the Euribor rate and, consequently, of the fact that it could be distorted by the panel banks' submissions. Fourth, in recital 463 of that decision, it highlighted the fact that each of the banks in question had been active on the market in question for many years and that the traders had not expressed any surprise when they were asked to act in concert. In recitals 462 to 464 of that decision, it concluded, in essence, from the combination of those factors that the traders who participated in those bilateral exchanges were aware or could reasonably have foreseen that it was likely that several banks were involved in the collusive arrangements, even if that information was never explicitly disclosed to them. The Commission also stated, in recital 465, that the traders were subject to a high level of recording and supervision, which means that their management must be considered to have been aware or should have been aware of the essential characteristics of the collusive scheme and their employees' involvement in it. It added that it had to take into account the precautions taken by traders to conceal their arrangements.

244 With regard to the grounds relating to HSBC alone, the Commission first highlighted, in recital 471 of the contested decision, that from the beginning of HSBC's involvement in the infringement of 12 February 2007, the Barclays trader explained the scheme to the HSBC trader with a view to the manipulation of 19 March 2007 in a manner that implied that other banks were involved. Second, in recital 472, the Commission claimed that the HSBC trader was aware of the close relationship between the Barclays trader and the traders from JP Morgan, Société générale and Deutsche Bank. Third, in recital 472, it noted that the traders from Deutsche Bank and Barclays regarded the HSBC trader as a reliable partner for the cartel. It inferred from this, in recital 473, that the HSBC traders knew or, at least, should have known that their discussions with Barclays were part of a network of anticompetitive contacts that comprised at least Barclays, Deutsche Bank, Société générale, HSBC and one or more other banks that are not mentioned which would help to bring about the anticompetitive effects intended through the manipulation of 19 March 2007. In addition, in recitals 475 and 476, it added that, in view of the short period during which HSBC was involved in the collusive exchanges, its participation in the scheme had been continuous.

245 As a preliminary point, it should be noted that the Commission's argument, set out in paragraph 240 above, that HSBC participated in all of the anticompetitive

conduct at issue, which is sufficient to render it liable for the entirety of that conduct, cannot be upheld.

246 In that regard, it should be noted that, at least in the case of HSBC, the alleged anticompetitive conduct took place in bilateral discussions. Therefore, the submission that the discussions in which HSBC participated may have fallen within each of the categories referred to in recitals 113, 358 and 392 of the contested decision, if proved, cannot, in itself, be sufficient to render HSBC liable for the offending conduct of the banks with which it did not have direct contact. In accordance with the case-law cited in paragraph 198 above, it was for the Commission to show that HSBC was aware of the offending conduct planned or put into effect by other banks or that it could reasonably have foreseen it.

247 In that regard, a distinction must be drawn between, on the one hand, the manipulation of 19 March 2007 and the possibility of it being repeated and, on the other hand, the other conduct taken into account by the Commission in respect of the single infringement.

(1) HSBC's knowledge of the participation of other banks in the manipulation of 19 March 2007 and the possibility of it being repeated

248 From 12 February until 19 March 2007 HSBC participated in the manipulation described in paragraphs 85 to 90 above and sought to profit from the submission of low quotes on 19 March 2007 for the 3m Euribor. In addition, the prospect of repeating that manipulation was mentioned in a conversation of 19 March 2007 which took place between one of the HSBC traders and the Barclays trader, referred to in recital 329 of the contested decision. The Barclays trader mentions the prospect of repeating that manipulation in a discussion with another HSBC trader on 27 March 2007, referred to in recital 339 of the contested decision.

249 With regard to the manipulation of 19 March 2007, the Commission has direct evidence showing HSBC's awareness that it was participating in a single and continuous infringement with other banks.

250 The Commission is right in identifying, in recital 471 of the contested decision, the conversation of 12 February 2007 as being indicative of HSBC's awareness of the participation of other banks.

251 That exchange shows that the Barclays trader turns the conversation towards the profit that could be made from manipulating the spread between two derivatives, specifically futures linked to the 3m Euribor and swaps linked to EONIA on 19 March 2007.

252 First, it follows from that discussion that it is here that the Barclays trader discloses to HSBC the 'overall plan' for the manipulation envisaged: namely, a gradual increase of the 'buyer' position on futures linked to the 3m Euribor, followed by concerted action to reduce that rate on 19 March 2007.

253 In that respect, contrary to what is claimed by the applicants, the later conversation on 13 February 2007, in which the HSBC trader notes that the Barclays trader's conduct is not coherent with the plan explained the day before, reveals that the HSBC trader has a good comprehension of how the manipulation is to function. The HSBC trader finds it suspicious that the conduct of Barclays departs from the defined strategy. Although the reply from Barclays ('je clean juste quelque truc') does not seem to convince him ('mouai'), the fact remains that the HSBC trader's focus on the fact that the conduct of Barclays seems to run counter to the envisaged manipulation is a sign of his thorough comprehension.

254 Second, the Barclays trader made it clear in the conversation of 12 February 2007 that other banks were participating in that manipulation, even though he did not wish to disclose their identity. It is apparent from this that the HSBC trader was entirely aware that other banks were participating in that manipulation.

255 Thus, even if their identity was not disclosed by the Barclays trader, after that conversation, the HSBC trader was aware of the fact that a certain number of banks were going to lower the Euribor rate on 19 March 2007 by means of concerted action. Accordingly, HSBC must have been aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives within the meaning of the case-law cited in paragraph 198 above.

256 That conclusion must also be extended to the discussions on the prospect of repeating that manipulation which took place on 19 and 27 March 2007. The HSBC traders who participated in those discussions could reasonably foresee that such repetition would be done in an equivalent manner and thus with other banks.

257 Furthermore, it must be concluded that HSBC's participation in that single infringement continued from 12 until 27 March 2007.

258 In this respect, it is apparent from the settled case-law that the principle of legal certainty requires that, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (see judgment of 16 June 2015, *FSL and Others* v *Commission*, T-655/11, EU:T:2015:383, paragraph 482 and the case-law cited).

259 Although the period separating two manifestations of infringing conduct is a relevant criterion in order to establish the continuous nature of an infringement, the fact remains that the question whether or not that period is long enough to constitute an interruption of the infringement cannot be examined in the abstract. On the contrary, it needs to be assessed in the context of the functioning of the cartel in question (see judgment of 16 June 2015, *FSL and Others* v *Commission*, T-655/11, EU:T:2015:383, paragraph 483 and the case-law cited).

260 In the context of the functioning of the infringement at issue, it is indeed necessary to take into account that the Euribor rate is set on a daily basis. It

necessarily follows that the effects of manipulating those rates are limited in time and that the manipulation needs to be repeated in order for those effects to continue (see, to that effect, judgment of 10 November 2017, *Icap and Others* v *Commission*, T-180/15, EU:T:2017:795, paragraph 222).

261 Further, it should be recalled that, in circumstances where the pursuit of an agreement or of concerted practices requires special positive measures, the Commission cannot assume that the cartel has been pursued in the absence of evidence that those measures were adopted (see judgment of 10 November 2017, *Icap and Others* v *Commission*, T-180/15, EU:T:2017:795, paragraph 223 and the case-law cited).

262 However, in the present case, it should be noted that on 19 March 2007 not only did HSBC participate in the manipulation planned for that date while being aware of the participation of other banks, but, through their traders, it also discussed the prospect of repeating that manipulation with Barclays, a discussion which was pursued by another HSBC trader on 27 March 2007. It can therefore be concluded that special positive measures were adopted within the meaning of the case-law cited in paragraph 261 above.

(2) HSBC's knowledge of the participation of other banks in the other conduct forming part of the single infringement

263 The point at issue here is whether, by virtue of HSBC's participation in the single infringement, the Commission was entitled to attribute to it all the conduct of the other banks concerned.

264 It is apparent from the case-law cited in paragraphs 198 and 199 above that it was permissible for the Commission to show either that HSBC was aware of the existence of other offending conduct or that HSBC could reasonably foresee it. Similarly, in accordance with the case-law cited in paragraph 203 above, the Commission is entitled to rely on a body of evidence.

265 However, it is clear from that case-law that that body of evidence, viewed as a whole, must correspond to firm, precise and consistent evidence. Furthermore, in accordance with the case-law cited in paragraph 204 above, the presumption of innocence means that where the Court still has a doubt, the benefit of that doubt must be given to the undertakings accused of the infringement.

266 In the first place, it must be stated that the applicants are correct to claim, in essence, that the Commission has failed to demonstrate to the requisite legal standard in the contested decision that HSBC was aware, or should have been aware, of the existence of an 'overall plan' with a single aim that gives a reason why HSBC is to be held liable for all forms of conduct forming part of that single aim, regardless of whether or not it was directly involved in it.

267 For the reasons set out in paragraphs 233 to 235 above, it must be noted that the central element substantiating the existence of such an 'overall plan' is that the various forms of conduct referred to in the single infringement found were controlled or directed by the same group of persons.

268 The applicants are correct to point out that none of HSBC's traders was in that group of persons. On the contrary, it is apparent from the contested decision that HSBC traders received from the Barclays trader only very fragmented information, which was limited to what was strictly necessary merely for its participation in the manipulation of 19 March 2007 and then in order to repeat that manipulation.

269 It cannot therefore be concluded that the HSBC traders ought themselves to have extrapolated from the pieces of information which had been communicated to them in the course of well-defined conduct — namely the manipulation of 19 March 2007 — that a stable group of traders whose identity was not disclosed to them was participating in other conduct restricting competition on the EIRD market.

270 In the second place and for similar reasons, the grounds of the contested decision, summarised in paragraphs 242 to 244 above, do not show that HSBC was aware of the offending conduct of other undertakings or could reasonably foresee it.

271 Aside from the Commission's reference to the fact that the Barclays trader explained to the HSBC trader the plan for the manipulation of 19 March 2007 in a way that implied the involvement of other banks, the other evidence put forward by the Commission is, in fact, based on the premiss that the HSBC traders should have been able to infer from that fact that traders from other banks who operate on the EIRD market know each other and that they would undertake other practices which restrict competition that may have an influence on the cash flows generated by EIRDs.

272 Such a premiss cannot be accepted without disregarding the case-law cited in paragraph 203 above.

273 In the light of the foregoing, it must be concluded that HSBC's participation in a single and continuous infringement can be upheld only in respect, first, of its own conduct in that infringement and, second, of the conduct of other banks forming part of the manipulation of 19 March 2007 and any potential repeat of that manipulation.

274 The Commission was, therefore, wrong to hold HSBC liable for conduct other than that identified in paragraph 273 above.

(c) The third plea, relating to HSBC's intention to participate in the single and continuous infringement

275 In their third plea, the applicants claim, in essence, that the condition set out in paragraph 198 above — that an undertaking must intend, through its own conduct, to contribute to the common objectives pursued by all the participants — is not satisfied in so far as it relates to them.

276 In that context, they submit, in essence, that HSBC could not have been aware that it was participating in a single infringement in view of the diverse nature of the conduct of which it is accused. The applicants also highlight the fact that HSBC participated in the infringement in a different and more secondary way as compared with the main players.

277 The Commission submits that this plea must be rejected.

278 In the light of the Court's finding regarding the fourth plea, as set out in paragraph 274 above, it is sufficient to examine the present plea in relation to the manipulation of 19 March 2007 and the repetition of that manipulation.

279 In so far as it relates to them, the intention to participate in a single infringement is clear from the evidence put forward by the Commission. With regard, more particularly, to the manipulation of 19 March 2007, while it is true that the HSBC trader seems to have had doubts as to the functioning of that manipulation — as is borne out by the discussion of 13 February 2007 and the regret that he seems to have then felt for having failed to have built up a greater 'buyer' position on futures linked to the 3m Euribor — the fact remains that he participated, jointly with traders from other banks, in the conduct that reduced the 3m Euribor rate on 19 March 2007 by asking the person responsible for submissions in his bank to submit low quotes on that day, which that person went on to do.

280 The third plea in law must therefore be rejected.

3. The fifth plea, alleging an error in law and an infringement of the essential procedural requirements in the course of the administrative procedure

281 The applicants maintain that the settlement decision prejudged HSBC's liability and irremediably impaired the applicants' right to be heard. They conclude that the contested decision should be annulled on account of an infringement, first, of the principle of the presumption of innocence and, second, of the principles of good administration and of respect for the rights of the defence. They also refer to the statements by Commissioner Almunia on the outcome of the EIRD investigation given prior to the adoption of the contested decision. They also note that they were not given the opportunity to give comments on the statement of objections sent to the parties who decided to settle.

282 The Commission claims that this plea in law should be rejected.

283 As regards the ground for complaint alleging that the settlement decision was adopted in breach of the principle of the presumption of innocence, it should be recalled that that principle is a general principle of EU law, currently laid down in Article 48(1) of the Charter of Fundamental Rights, which applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see judgment of 22 November 2012, *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraphs 72 and 73 and the case-law cited).

284 The principle of the presumption of innocence means that every person accused is presumed to be innocent until his guilt has been established according to law. It thus precludes any formal finding and even any allusion to the liability of an accused person for a particular infringement in a final decision unless that person has enjoyed all the usual guarantees accorded for the exercise of the rights of defence in the normal course of proceedings resulting in a decision on the merits of the case (see judgment of 10 November 2017, *Icap and Others* v *Commission*, T-180/15, EU:T:2017:795, paragraph 257 and the case-law cited).

285 In addition, it is settled case-law that the Commission is required during the administrative procedure relating to restrictive practices to respect the right to good administration, enshrined in Article 41 of the Charter of Fundamental Rights (see, to that effect, judgment of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 154 and the case-law cited).

286 Article 41 of the Charter of Fundamental Rights provides that every person has the right, inter alia, to have his affairs handled impartially by the institutions of the European Union. That requirement of impartiality encompasses, on the one hand, subjective impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice, and, on the other hand, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned (see judgment of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 155 and the case-law cited).

287 However, the issue whether any lack of objective impartiality on the part of the Commission which may have arisen from an infringement of the principle of the presumption of innocence with respect to HSBC when the settlement decision was adopted was able to impact the lawfulness of the contested decision is indissociable from the question whether the findings made in that decision are properly supported by the evidence adduced by the Commission (see, to that effect, judgments of 6 July 2000, *Volkswagen* v *Commission*, T-62/98, EU:T:2000:180, paragraph 270, and of 16 June 2011, *Bavaria* v *Commission*, T-235/07, EU:T:2011:283, paragraph 226).

288 Thus, even if a lack of objective impartiality on the part of the Commission may have led it to find — wrongly — first, that the discussions of 9 and 14 March 2007 in which HSBC participated had an object that restricted competition or,

second, that HSBC could be held responsible for certain forms of conduct of other banks which are not linked to the manipulation of 19 March 2007 or any repeat thereof by virtue of the single and continuous infringement, it should be pointed out that the unlawfulness of those aspects of the contested decision has already been established following the examinations of, respectively, the second part of the first plea and the fourth plea.

289 As regards the other findings made in the contested decision, the irregularity relating to a possible lack of objective impartiality on the part of the Commission would lead to annulment of that decision only if it is established that the content of that decision would have differed if that irregularity had not occurred (judgment of 6 July 2000, *Volkswagen* v *Commission*, T-62/98, EU:T:2000:180, paragraph 283). In the present case, as a result of a comprehensive review of the relevant grounds of that decision, it was found that, with the exception of the aspects mentioned in paragraph 288 above, the Commission had established to the requisite legal standard HSBC's participation in the infringement at issue. Therefore, there is no reason to assume that, if the settlement decision had not been adopted before the contested decision, the content of the latter would have been different.

290 In their reply, the applicants claim that, in the circumstances of the present case, the Commission's lack of objective impartiality is more serious than in the cases that gave rise to the judgments of 6 July 2000, *Volkswagen* v *Commission* (T-62/98, EU:T:2000:180, paragraphs 270 and 283) and of 16 June 2011, *Bavaria* v *Commission* (T-235/07, EU:T:2011:283, paragraph 226), since, in those cases, the lack of impartiality arose after the parties had been heard.

291 However, it must be found that the principle that an irregularity of that type can lead to the annulment of the contested decision only if it has been established that the content of that decision would have differed if that irregularity had not occurred has its origin in the judgment of 16 December 1975, *Suiker Unie and Others* v *Commission* (40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174, paragraphs 90 and 91). In that regard, it should be noted that that judgment was delivered against a background that is relatively similar to that of the present case, since the applicants were arguing that the Commission had infringed the principle of the right to a fair hearing by issuing certain public statements making the existence of the alleged infringements appear to have been established at a time when the parties concerned had not yet had an opportunity to express a view on the allegations against them.

292 For similar reasons, the other arguments put forward by the applicants in support of their ground for complaint alleging infringement of the principle of good administration and the ground for complaint alleging infringement of their rights of defence must also be rejected as ineffective.

293 In the light of the foregoing, the fifth plea in law must be rejected.

4. The effects of the errors established in the context of the first and fourth pleas in law on the lawfulness of Article 1 of the contested decision

294 According to Article 1 of the contested decision, 'the following undertakings have infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, during the periods indicated, in a single and continuous infringement regarding Euro Interest Rate Derivatives covering the entire EEA, which consisted of agreements and/or concerted practices that had as their object the distortion of the normal course of pricing components in the EIRD sector: … (b) [the applicants] from 12 February 2007 to 27 March 2007'.

295 It should be noted that the errors made by the Commission in its finding relating to the discussions of 9 and 14 March 2007, referred to in paragraphs 166 to 195 above, have no effect on the lawfulness of Article 1 of the contested decision and, in particular, on Article 1(b) of the contested decision, since the conclusion it contains remains substantiated even if those discussions are discounted.

296 The same applies to the errors made by the Commission relating to the precise determination of the conduct for which HSBC could be held liable by virtue of its participation in a single and continuous infringement, as referred to in paragraphs 263 to 274 above. HSBC's participation, along with other banks, in the manipulation of 19 March 2007 and the fact that HSBC considered repeating that manipulation in themselves substantiate Article 1(b) of the contested decision to the sufficient legal standard.

297 However, to the extent that the factors capable of affecting the assessment of the gravity of an infringement include the number and intensity of the incidents of anticompetitive conduct and for the reasons set out in paragraph 123 above, it is in its assessment of whether the amount of the fine is proportionate that the Court may give due effect to the fact that those assessments were vitiated by error.

B. Application for annulment of Article 2(b) of the contested decision and, in the alternative, for variation of the amount of the fine imposed

298 The applicants contest the lawfulness of Article 2(b) of the contested decision, in which the Commission imposed on them a fine on account of HSBC's participation in the infringement. That plea can be divided into four parts, since the applicants dispute, first, the use of discounted cash receipts for the purposes of assessing the value of sales, second, the gravity factor applied, third, the additional amount applied and, fourth, the assessment of the mitigating circumstances. The applicants seek, principally, annulment of Article 2(b) of the contested decision and, in the alternative, request that the Court exercise its unlimited jurisdiction in order to reduce the amount of the fine imposed on them.

299 In the context of the first part of this plea, the applicants complain that the Commission based the value of sales on the basis of cash receipts under EIRDs

received by HSBC during the period of the infringement, to which a factor of 98.849% was applied.

300 The Commission's reasoning is set out in recitals 639 to 648 of the contested decision.

301 In the first place, the Commission stated, in recital 639 of the contested decision, that interest rate derivatives did not generate any sales in the usual sense and, consequently, applied a specific proxy for the value of sales, which constitutes a starting point for its determination of the amounts of the fines. In recital 640, the Commission considered it to be preferable not to take as its basis the proxy value of the sales made during the last year and, in view of the short duration of the infringement of some parties, the varying market size of the EIRD business over the infringement period and the differences in the duration of the involvement of the banks concerned, concluded that it was more appropriate to take as its basis the value of sales actually made by the undertakings during the months corresponding to their respective participation in the infringement.

302 In recital 641 of the contested decision, it stated that sales in the usual sense corresponded to inflows of economic benefit, the form of which was in most cases in cash or cash equivalent and noted that the anticompetitive conduct of this case concerned, notably, the collusion on price components relevant for the cash-flows of EIRDs. For these reasons, it decided to determine the annual value of sales for all parties on the basis of cash receipts, that is to say 'the cash flows that each bank received from their respective portfolio of EIRDs linked to any Euribor tenor and/or the EONIA and entered into with EEA-located counterparties'.

303 In recital 642 of the contested decision, it found that, with respect to HSBC, the amount of cash receipts was EUR 16 688 253 649.

304 In the second place, in recital 643 of the contested decision, the Commission concluded that it was it appropriate to discount the cash receipts figures found in respect of HSBC and the other banks by an appropriate, uniform factor in order to take account of the particularities of the EIRD market, and in particular the netting inherent in derivatives trading. In recital 648 of the contested decision, that uniform factor was set at 98.849%.

305 The justification for the level of that reduction factor in the contested decision is based on five sets of reasons. First, in recital 644, the Commission took into account the netting inherent in derivatives trading in general, assessed by the International Swap Dealer Association as involving a reduction of between 85% and 90%.

306 Second, in recital 645, it highlighted the specific nature of EIRD netting, since a comparison of the parties' cash receipts with the net EIRD cash settlements shows that the application of a rate of between 85% and 90% would lead to fines that were over-deterrent.

307 Third, in recital 646, it found that the EIRD cartel caused an overcharge that was much lower than the 20% usually caused by that type of cartel in classical industries.

308 Fourth, in recital 647, the Commission stated that it was not required to apply a precise mathematical formula and had a margin of discretion when determining the amount of each fine.

309 Fifth, in recital 648, the Commission stated that it had applied to the addressees of the contested decision the same rate as that used to calculate the amounts of the fines imposed on the addressees of the settlement decision.

310 In the third place, the Commission responded to the criticisms made during the administrative procedure. In that context, in recitals 656 to 662 of the contested decision, it refuted the assertion that the use of discounted cash receipts was inappropriate. In that respect, it claimed that, as compared with net cash receipts and payments suggested by the applicants — which could lead to negative values — the use of discounted cash receipts was more consistent with the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) ('the 2006 Guidelines'), according to which sales are the starting point for calculating fines, not profits.

311 As regards the criticism of the reduction factor, the Commission claimed, inter alia, in recital 710 of the contested decision, that it had been transparent about its intention to discount cash receipts by a uniform factor of at least 97.5%. It also claimed, in recital 713, that it had not applied individual discount factors because they could have given rise to unequal treatment.

312 In this part of the plea, the applicants essentially put forward three grounds for complaint challenging the legality of the calculation of the value of sales. First, they challenge the very principle of using cash receipts to which a reduction factor of 98.849% is applied. Second, they consider that the Commission was wrong to include the cash receipts arising from contracts that predated the cartel. Third and last, they dispute the statement of reasons on which the reduction factor is based.

1. First ground for complaint, alleging that the Commission was wrong to take discounted cash receipts as its basis

313 The applicants state that, while the Commission was right in observing, in recital 639 of the contested decision, that derivatives '[did] not generate any sales in the usual sense', it erred in its assessment of the value of those sales by taking as its basis cash receipts received under EIRDs to which a reduction factor of 98.849% was applied. They complain that the Commission took into account only incoming payments under EIRDs and not outgoing payments, whereas a manipulation of reference rates has effects on both of those aspects. That approach helped vastly to overstate the revenues a bank generates from EIRD trading. They claim that the ground, set out in recital 659 of the contested decision, that using

incoming payments cannot lead to no sales or negative sales, does not make cash receipts an appropriate proxy for the value of sales. They argue that the same is true of the statement, in recital 660 of that decision, that it is sales that are the starting point for calculating fines in the 2006 Guidelines.

314 The Commission contends that it was fully entitled to assess the value of sales by reference to the cash receipts to which a reduction factor has been applied.

315 It claims that outgoing payments under EIRDs have not been ignored. The purpose of applying the reduction factor is precisely to take account of the netting inherent in derivatives trading. From a deterrence perspective, such an approach would be more appropriate than the net cash receipts and payments approach suggested by the applicants, which could lead to negative values.

316 As a preliminary point, the Court notes that, with regard to the lawfulness of a decision imposing a fine, the in-depth review, in law and in fact, that the EU judicature is to carry out of all the factors of Commission decisions relating to proceedings applying Articles 101 and 102 TFEU, as referred to in paragraph 44 above, means that it cannot use the Commission's margin of discretion — either as regards the choice of factors taken into account in the application of the criteria mentioned in the 2006 Guidelines or as regards the assessment of those factors — as a basis for dispensing with the conduct of an in-depth review of the law and of the facts (see, to that effect, judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 62).

317 In the first place, it must be borne in mind that it is common ground between the parties that EIRDs 'do not generate any sales in the usual sense', as is noted in recital 639 of the contested decision.

318 In the second place, although Article 23(3) of Regulation No 1/2003 refers in general terms to the gravity and duration of the infringement, the methodology favoured by the Commission for the application of that provision in its 2006 Guidelines gives a central role to the concept of 'value of sales', as it is used to determine the economic significance of the infringement and the relative size of each undertaking participating in the infringement (see, to that effect, judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 76). As provided in paragraph 13 of the 2006 Guidelines: 'in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly … relates in the relevant geographic area within the EEA'. In the introduction, those guidelines lay down, in point 6 thereof, that 'the combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement'.

319 In the third place, the Commission may refrain from applying the method laid down in the 2006 Guidelines where it has reason to do so. The obligation on the Commission to carry out a specific review of each particular situation when imposing sanctions under Article 23 of Regulation No 1/2003 means that it must, where appropriate, depart from the methodology in the 2006 Guidelines if the specific nature of the particular situation so requires. That principle, which is noted in the case-law (judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 209 and 210) is now specifically enshrined in paragraph 37 of the 2006 Guidelines.

320 In the present case, it must be ascertained whether the Commission did not make an error of assessment when it appraised the value of sales of EIRDs on the basis of discounted cash receipts. That involves, inter alia, examining whether the approach favoured by the Commission made it possible to take into account the netting inherent in EIRDs, since those contracts give rise to both receipts and payments.

321 It should be borne in mind that, according to paragraphs 15 and 16 of the 2006 Guidelines, in determining the value of sales by an undertaking, the Commission will take that undertaking's best available figures. Where the figures made available by an undertaking are incomplete or not reliable, the Commission may determine the value of its sales on the basis of the partial figures it has obtained or any other information which it regards as relevant and appropriate.

322 The approach favoured by the Commission tends to give a better reflection of the value of sales — and therefore the economic importance of the infringement — than the alternative approach proposed by the applicants during the administrative procedure based on net cash receipts and payments. This involves, in essence, taking into account only the balance of the cash flow during the infringement period, namely a figure which is comparable to the profit derived from trading activities.

323 As the Commission rightly noted in recital 659 of the contested decision, such a limitation would run counter to the logic it applied in the methodology in the 2006 Guidelines when it set the basic amount by reference to the value of sales, namely to reflect the economic significance of the infringement and the size of the involvement of the undertaking concerned.

324 Thus, since, first, the approach favoured by the Commission is consistent with the logic underlying the choice of value of sales and, second, the applicants did not propose a more appropriate alternative method during the administrative procedure, it cannot be concluded that the principle of using discounted cash receipts is inherently incorrect.

325 The fact remains that, in the approach favoured by the Commission, ensuring that the determination of the amount of cash receipts is free from flaws is not the only

important matter. The determination of the rate of the reduction factor applied is also important.

326 The latter has an essential role in determining the value of sales, due to the particularly high amount that results from taking account only of cash receipts, that is to say without deducting corresponding payments.

327 Thus, by way of illustration, by applying the factors relating to the gravity, duration, additional amount and mitigating circumstances found by the Commission in the contested decision, and without prejudice to the assessment of the substance of those factors, the Court notes that a variation of 0.1% in the rate of that factor would affect the final amount of the fine by almost EUR 16 221 000.

328 It follows from the foregoing that, in the model favoured by the Commission for the purposes of determining the value of sales, precision in the rate of the reduction factor is fundamental, since the tiniest variation in that factor may have a significant impact on the amount of the fine imposed on the undertakings concerned.

329 Subject to that reservation, the first ground for complaint must be rejected.

2. Second ground for complaint, alleging that the Commission was wrong to take into account cash receipts from contracts concluded before the start of HSBC's participation in the infringement

330 The applicants argue that the Commission was wrong to take into account discounted cash receipts generated by contracts concluded before HSBC's alleged conduct.

331 The Commission contends that that ground for complaint should be rejected.

332 As the Court has held previously, paragraph 13 of the 2006 Guidelines pursues the objective of adopting, as the starting point for the calculation of the fine imposed on an undertaking, an amount which reflects the economic significance of the infringement and the size of the undertaking's contribution to it. Consequently, while the concept of the 'value of sales' referred to in paragraph 13 of the Guidelines admittedly cannot extend to encompassing sales made by the undertaking in question which do not come within the scope of the alleged cartel, it would, however, be contrary to the goal pursued by that provision if that concept were to be understood as applying only to turnover achieved by the sales in respect of which it is established that they were actually affected by that cartel (judgment of 7 September 2016, *Pilkington Group and Others* v *Commission*, C-101/15 P, EU:C:2016:631, paragraph 19).

333 Consequently, sales made pursuant to contracts which predate the infringement period, can be included in the value of the sales calculated in accordance with paragraph 13 of the 2006 Guidelines, for the purpose of determining the basic amount of the fine, on the same basis as the sales made pursuant to contracts

concluded during the infringement period but which were not shown to have specifically been the subject of collusion (judgment of 7 September 2016, *Pilkington Group and Others* v *Commission*, C-101/15 P, EU:C:2016:631, paragraph 20).

334 Such a solution is particularly applicable to the circumstances of the present case because the Euribor manipulation in which HSBC participated affected the variable rate of contracts linked to the 3m Euribor falling due on 19 March 2007, regardless of whether they were concluded before or after 12 February 2007, the starting point of HSBC's participation in the infringement.

335 The second ground for complaint must therefore be rejected.

3. Third ground for complaint, alleging that insufficient reasons were given for the 98.849% reduction factor applied by the Commission

336 The applicants submit that the determination of the reduction factor is vitiated by an inadequate statement of reasons, in that it does not enable them to understand the reasons why the basic amount of the fine was set at that level. They claim, inter alia, that that amount takes into account the situation of a hypothetical overcharge of 2 to 4 basis points, without explaining how such an overcharge was realistic in circumstances where one bank could actually move a reference rate by no more than 0.1 basis point, as is made clear in footnote 441 of the contested decision. The applicants state that the fact that the Commission applied a novel and unprecedented approach for determining the value of sales means that observance of the obligation to state reasons was particularly necessary.

337 The Commission claims that the statement of reasons in respect of the 98.849% reduction factor is sufficient, since the reasons set out in recitals 643 to 646 of the contested decision enable the applicants to understand why that factor was considered appropriate. With regard to the reference to the overcharge of 2 to 4 basis points referred to in recital 646, it is stated in the contested decision that this is a hypothetical overcharge. The Commission states, in this respect, that it has a margin of discretion when determining the amount of each fine and is not required to apply a precise mathematical approach.

338 It is established case-law that the obligation laid down in the second paragraph of Article 296 TFEU to state adequate reasons is an essential procedural requirement that must be distinguished from the question whether the reasons are well founded, which goes to the substantive legality of the measure at issue. In that vein, the statement of reasons required must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court of the European Union to exercise its jurisdiction to review legality. As regards, in particular, the statement of reasons in individual decisions, the purpose of the obligation to state the reasons on which such decisions are based is therefore, in

addition to permitting review by the Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged (see judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraphs 146 to 148 and the case-law cited; judgments of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraphs 114 and 115, and of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 44).

339 In addition, the requirement to state reasons must be assessed by reference to the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom that measure is of concern within the meaning of the fourth paragraph of Article 263 TFEU, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraphs 150; of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 116; and of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 45).

340 It is also settled case-law that the statement of reasons needed, therefore, in principle to be notified to the person concerned at the same time as the decision adversely affecting him. The absence of reasoning cannot be legitimised by the fact that the person concerned becomes aware of the reasons for the decision during the procedure before the Courts of the European Union (judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraphs 149; of 19 July 2012, *Alliance One International and Standard Commercial Tobacco* v *Commission*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 74; and of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 46).

341 With respect to a decision imposing a fine, the Commission must state the reasons, particularly with regard to the amount of the fine and the method of calculation (judgment of 27 September 2006, *Jungbunzlauer* v *Commission*, T-43/02, EU:T:2006:270, paragraph 91). The Commission must indicate in its decision the factors which enabled it to determine the gravity of the infringement and its duration, there being no requirement for any more detailed explanation or indication of the figures relating to the method of calculating the fine (judgment of 13 July 2011, *Schindler Holding and Others* v *Commission*, T-138/07, EU:T:2011:362, paragraph 243). It must nevertheless explain the weighting and assessment of the factors taken into account (judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 61).

342 Where the author of a contested decision provides explanations during the proceedings before the Court to supplement a statement of reasons which is

already adequate in itself, that does not go to the question whether the duty to state reasons has been complied with, though it may serve a useful purpose in relation to review by the EU Courts of the adequacy of the grounds of the decision, since it enables the institution to explain the reasons underlying its decision. Thus, additional explanations going beyond its duty to state reasons may enable undertakings to acquire a detailed knowledge of the method of calculating the fine imposed on them and, more generally, serve to render the administrative act more transparent and facilitate the exercise by the Court of its unlimited jurisdiction, which enables it to review not only the legality of the contested decision, but also the appropriateness of the fine imposed. However, the availability of that possibility is not such as to alter the scope of the requirements resulting from the duty to state reasons (judgment of 16 November 2000, *Cascades* v *Commission*, C-279/98 P, EU:C:2000:626, paragraphs 45 and 47).

343 The Commission refers to the case-law cited in paragraph 341 above in order to make clear, in essence, that it was not required to explain precisely in the contested decision the figures-based assessment which led to the application of a reduction factor of 98.849%.

344 In that respect, the Court finds that, in accordance with the case-law referred to in paragraph 339 above, the requirement to state reasons must be assessed by reference to the circumstances of the case. This case has two notable specific features.

345 First, in the present case the Commission decided to apply the methodology in the 2006 Guidelines rather than departing from it, which it would have been entitled to do in accordance with the case-law referred to in paragraph 319 above and paragraph 37 of the 2006 Guidelines. It therefore chose to apply a methodology in which, for the reasons set out in paragraph 318 above, the determination of the 'value of sales' plays a central role, even though it had noted in recital 639 of the contested decision that EIRDs do not generate any sales in the usual sense.

346 Therefore, it was essential that the statement of reasons in the contested decision should enable the applicants to verify whether the proxy chosen by the Commission may be vitiated by an error enabling its validity to be challenged and the Court to exercise its jurisdiction to review legality.

347 Second, as has been pointed out in paragraph 325 above, in the approach taken by the Commission the reduction factor plays an essential role because the amount of cash receipts to which it applies is particularly large.

348 It follows that, in the circumstances of the present case, since the Commission decided to determine the basic amount of the fine by applying a figures-based model in which the reduction factor plays an essential role, it was necessary that the undertakings concerned be placed in a position to understand how it had arrived at a reduction factor set precisely at 98.849% and that the Court be in a

position to carry out an in-depth review, in law and in fact, of that factor of the contested decision, in accordance with the case-law cited in paragraph 316 above.

349 Only recitals 643, 644 to 646 and 648 of the contested decision show that the reduction factor had to be greater than 90%, since, first, the comparison of the cash receipts of parties with the net cash settlements under EIRDs showed that the application of a rate between 85% and 90% would lead to fines that were over-deterrent and, second, the cartel at issue gave rise to a much lower overcharge than the 20% usually caused by that type of cartel in classic industries. In recital 648 of the contested decision, the Commission states, first, that it carried out an estimate of the factors mentioned in recitals 643 to 646 without, however, specifying which value it attributed to those various factors in order to set the rate of reduction precisely at 98.849%. Second, it states that it applied the same methodology in determining the values of sales as that used to calculate the amounts of the fines in the settlement decision. However, no further indication as to the determination of the 98.849% reduction rate is apparent from the settlement decision.

350 The only other indication in the contested decision appears in recital 710, where the Commission points out that it stated during the administrative procedure that the uniform reduction factor would be at least 97.5%.

351 Those considerations do not provide the applicants with an explanation of the reasons why the reduction factor was set at 98.849% rather than at a higher level. Further, in the absence of a more detailed explanation of the reasons why those considerations led the reduction factor to be set at that precise level, the Court is unable to conduct an in-depth review, in law and in fact, on a factor of the decision which could have had a significant effect on the amount of the fine imposed on the applicants.

352 It is true that, following the hearing, the Commission provided the Court with additional explanations concerning the determination of that reduction factor of 98.849%. However, it is apparent from a combined reading of the case-law cited in paragraphs 340 and 342 above that such additional explanations may be taken into account by the Court, as regards the review by the EU Courts of the grounds of the decision, only on the condition that they supplement a statement of reasons which is already sufficient in itself. However, that is not the case here.

353 In the light of the foregoing, the third ground for complaint in the first part of the plea must be upheld, and Article 2(b) of the contested decision must be annulled, without it being necessary to examine the other parts of the plea.

354 Since the principal head of claim seeking the annulment of Article 2(b) of the contested decision has been granted, there is no need to examine the form of order sought in the alternative by the applicants.

Costs

355 Under Article 134(3) of the Rules of Procedure of the Court, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing his own costs, pay a proportion of the costs of the other party.

356 In the present case, the applicants have been unsuccessful as regards their head of claim seeking the annulment of Article 1 of the contested decision and have been successful as regards their head of claim seeking the annulment of Article 2(b) of that decision. In view of those factors, on a fair assessment of the circumstances of the case, each party should be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. Annuls Article 2(b) of Commission Decision C(2016) 8530 final of 7 December 2016 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39914 — Euro Interest Rate Derivatives (EIRD));

2. Dismisses the action as to the remainder;

3. Orders HSBC Holdings plc, HSBC Bank plc and HSBC France to bear their own costs;

4. Orders the European Commission to bear its own costs.

Prek Buttigieg Schalin

Berke Costeira

Delivered in open court in Luxembourg on 24 September 2019.

E. Coulon

Registrar President