EUROPEAN COMMISSION
Competition DG

CASE AT.39914 – EURO INTEREST RATE DERIVATES

(Only the English text is authentic)

CARTEL PROCEDURE

Council Regulation (EC) No 1/2003

Article 7 and 23 Regulation (EC) 1/2003

Date: 28/06/2021

EUROPEAN
COMMISSION

Brussels, 28.6.2021
C(2021) 4600 final

COMMISSION DECISION

of 28.6.2021

amending Commission Decision C(2016) 8530 final of 7 December 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement

(AT.39914 – Euro Interest Rate Derivatives)

(Text with EEA relevance)

(Only the English text is authentic)

TABLE OF CONTENTS

COMMISSION DECISION

of 28.6.2021

amending Commission Decision C(2016) 8530 final of 7 December 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement

(AT.39914 – Euro Interest Rate Derivatives)

(Text with EEA relevance)

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union[1],

Having regard to the Agreement on the European Economic Area[2],

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty[3], and in particular Article 7 and Article 23(2) thereof,

Having regard to Commission Decision C(2013) 1372 final of 5 March 2013 relating to the initiation of proceedings in case AT.39914 – *Euro Interest Rate Derivatives (EIRD)*,

Having regard to Commission Decision C(2016) 8530 final of 7 December 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement in case AT.39914 – Euro Interest Rate Derivatives (EIRD),

---

1 OJ, C 115, 9.5.2008, p.47.
For the purposes of this Decision, although the United Kingdom withdrew from the European Union as of 1 February 2020, according to Article 92 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 29, 31.1.2020, p. 7), the Commission continues to be competent to apply EU competition law as regards the United Kingdom for administrative procedures which were initiated before the end of the transition period.

2 For the purposes of this Decision, the EEA is understood to cover the 27 Member States of the European Union (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden) and the United Kingdom, as well as Iceland, Liechtenstein and Norway. Accordingly, any references made to the EEA in this Decision are meant to also include the United Kingdom (UK).

3 OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty on the Functioning of the European Union should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. Both are referred to hereinafter as the “Treaty”.

Having regard to the Judgment of the General Court of 24 September 2019 in Case T-105/17 *HSBC Holdings plc, HSBC Bank plc, HSBC France* v *Commission*,[4] annulling Article 2(b) of Commission Decision C(2016) 8530 final of 7 December 2016, while upholding Article 1(b) thereof,

Having given the undertaking concerned the opportunity to make known its views,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the hearing officer in this case,

Whereas:

1. INTRODUCTION

(1) Article 1 of Commission Decision C(2016) 8530 final[5] (the "2016 Decision") states that the addressees of that Decision infringed Article 101 of the Treaty on the Functioning of the European Union (the "Treaty") and Article 53 of the Agreement on the European Economic Area (the "EEA Agreement")[6] by participating in a single and continuous infringement regarding Euro interest rate derivatives ("EIRD") 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.

(2) Article 1(b) of the 2016 Decision states that HSBC Holdings plc, HSBC Bank and HSBC France, the latter now renamed HSBC Continental Europe (collectively "HSBC") participated in the single and continuous infringement from 12 February 2007 to 27 March 2007.

(3) Article 2(b) of the 2016 Decision imposed a fine of EUR 33 606 000 jointly and severally on HSBC Holdings plc, HSBC Bank plc and HSBC France, the latter now renamed HSBC Continental Europe.

(4) Following an application pursuant to Article 263 of the Treaty for the annulment of the 2016 Decision, on 24 September 2019, the General Court delivered its judgment in Case T-105/17[7] (the "Judgment").

(5) In the Judgment, the General Court found that two discussions in which HSBC was involved could not be regarded as having an object that restricts competition within the meaning of Article 101(1) of the Treaty[8] and that HSBC's participation in a single and continuous infringement could be upheld only in respect, first, of its own conduct and, second, the conduct of other banks involved in the infringement to the extent that their conduct related to the manipulation of the Euribor rate on 19 March

---

4 ECLI:EU:T:2019:675.

5 Commission Decision C(2016) 8530 final of 7 December 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (AT.39914 – *Euro Interest Rate Derivatives*) (the "2016 Decision).

6 Unless otherwise stated, references to Article 101 of the Treaty should be read as including Article 53 of the EEA Agreement

7 Case T-105/17, *HSBC Holdings plc, HSBC Bank plc, HSBC France* v *Commission*, ECLI:EU:T:2019:675 (the "Judgment").

8 Judgment, paragraph 194.

2007 and any potential repetition of such manipulation.[9] However, the General Court found that these errors do not affect the lawfulness of Article 1(b) of the 2016 Decision. Rather, such findings would, at most, be potentially relevant as part of the assessment of whether the amount of the fine imposed under Article 2(b) of the 2016 Decision is proportionate in light of the number and intensity of the remaining incidents of anticompetitive conduct.[10] Consequently, the General Court upheld Article 1(b) of the 2016 Decision.

(6) As regards the fines, the General Court annulled Article 2(b) of the 2016 Decision.[11] The General Court concluded that the Commission did not err in choosing to use discounted cash receipts as a proxy for calculating HSBC's value of sales for the purposes of point 13 of the Fining Guidelines,[12] but found that the Commission had failed to provide sufficient explanations in the 2016 Decision of the reasons why the reduction factor applied for discounting HSBC's cash receipts was set at 98.849%. The General Court found that this failure breached the Commission's obligations under Article 296 of the Treaty.

(7) As a consequence, despite the General Court having confirmed that HSBC had breached Article 101 of the Treaty and Article 53 of the EEA Agreement and having upheld Article 1(b) of the 2016 Decision, no penalty has been imposed on HSBC for its participation in the infringement by virtue of Article 2(b) of the 2016 Decision having been annulled.

(8) That situation, whereby the Commission's finding of an infringement remains in effect, while the fines for that infringement have been annulled on the ground that the reasoning to set that fine has been found insufficient, is remedied by this Decision. Accordingly, this Decision complements the grounds set out in the 2016 Decision, in so far as they have not been affected by the Judgment, and are not contradicted by the wording of this Decision.

(9) The adoption of this Decision is permitted by the Union Courts' case-law, given that Article 2(b) of the 2016 Decision was annulled for a lack of sufficient reasoning in relation to the setting of the fine, which qualifies as a procedural rather than a substantive error.[13] The Commission considers that a fine should be imposed on HSBC that reflects its involvement in the infringement (as confirmed by the Judgment).

(10) Given that the annulment of Article 2(b) of the 2016 Decision does not affect the legality of the preparatory acts adopted prior to the 2016 Decision, the Commission may take up the procedure at the point at which the illegality occurred, i.e. the adoption of the 2016 Decision, this being the document vitiated by a defective statement of reasons.[14]

---

9 Judgment, paragraph 273.

10 Judgment, paragraphs 295 to 297.

11 Judgment, paragraphs 336 to 353.

12 Judgment, paragraph 324. See Guidelines on the method of setting fines pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006, p. 2-5, (the "Fining Guidelines").

13 See Joined Cases C-238/99, 244, 245, 247, 250-252 and 254/99 P, *Limburgse Vinyl Maatschappij e.a. v Commission* ("PVC II"), ECLI:EU:C:2002:582, paragraphs 59-63, 693, 695. See also, more recently, Case T-466/17 *Printeos* v *Commission*, EU:T:2019:671.

14 See Joined Cases T-472/09 and T-55/10 *SP v Commission*, ECLI:EU:T:2014:1040, paragraph 277; and Case T-91/10 *Lucchini v Commission*, ECLI:EU:T:2014:1033, paragraph 173.

(11) The Commission informed HSBC by letter dated 8 May 2020[15] that Executive Vice-President Vestager intended to propose to the College of Commissioners the adoption of a new decision addressed to HSBC for having infringed Article 101 TFEU and Article 53 of the EEA Agreement, during the period indicated in Article 1(b) of the 2016 Decision, by participating – to the extent confirmed in the Judgment – in a single and continuous infringement regarding EIRD 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. In this letter, the Commission informed HSBC that the Executive Vice-President would propose to the College of Commissioners that the fine be based on the same methodology that was applied when setting the basic amount of the fine in the 2016 Decision, but provided HSBC with further explanations of the parameters used for setting the reduction factor of 98.849% applied to HSBC's cash receipts. The Commission provided HSBC with further explanations of these parameters in a letter of 16 April 2021.[16] HSBC set out its observations on the Commission's explanations in letters of 14 July 2020 (the "HSBC Response")[17] and 14 May 2021 (the "HSBC Additional Response").[18]

(12) Following receipt of the letter of 16 April 2021, on 30 April 2021 HSBC requested access[19] to the underlying financial data submitted by the banks involved in the EIRD infringement, which had previously been disclosed to its legal and economic advisers in a data room procedure in October 2014, and also to the equivalent financial information submitted by the addressee banks of the Commission Decision of 4 December 2013 in the Yen Interest Rate Derivatives (YIRD) case, on the grounds that such access was required for HSBC to effectively exercise its right to be heard.[20] This request was refused by the Directorate General for Competition ("DG Competition") on 3 May 2021[21] on the basis that such access was not necessary because the information provided in the letters of 8 May 2020 and 16 April 2021 sufficiently explained the methodology used to determine the reduction factor when calculating the proxy for the value of sales in this case and allowed HSBC to effectively present its observations on this additional reasoning. On 11 May 2021, HSBC made a request for additional access to the file to the Hearing Officer.[22] By decision of 20 May 2021,[23] the Hearing Officer rejected HSBC's request for access.

(13) This Decision is only addressed to HSBC and does not contain any new objections. The sole purpose of this Decision is to remedy the situation following the Judgment by imposing a fine on HSBC for the infringement found at Article 1(b) of the 2016 Decision, as described in Sections 2 to 7 thereof, taking account of the General Court's findings in the Judgment. This Decision does not concern in any way the other addressees of the 2016 Decision.

---

15 […]

16 […]

17 […]

18 […]

19 […]
[…]

20 Commission Decision C(2013) 8602/7 of 04.12.2013 in Case AT.39861 Yen Interest Rate Derivatives (YIRD).

21 […]

22 […]

23 Decision of 20 May 2021 based on Article 7(1) of Decision 2011/695/EU […].

2. REMEDIES

(14) Under Article 23(2) of Regulation (EC) No 1/2003 the Commission may impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 101 of the Treaty or Article 53 of the EEA Agreement. For each undertaking participating in the infringement, the fine shall not exceed 10% of its total worldwide turnover in the preceding business year. Pursuant to Article 23(3) of Regulation (EC) No 1/2003, the Commission shall, in fixing the amount of the fine to be imposed, have regard to the gravity and duration of the infringement.

(15) The principles used by the Commission to set fines are laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003[24] (the "Fining Guidelines"). The Commission determines a basic amount for each party. The basic amount can then be increased or reduced for each party if either aggravating or mitigating circumstances are found. The Commission sets the fines at a level sufficient to ensure deterrence. The Commission assesses the role played by each undertaking party to the infringement on an individual basis. Finally, the Commission applies, as appropriate, the provisions of the 2006 Leniency Notice. The Commission may use rounded figures in its calculation. The Commission may depart from the general methodology of the Fining Guidelines when justified by the particularities of a given case.[25]

(16) According to settled case law, the condition that the infringement be committed intentionally or negligently is satisfied where the undertaking concerned cannot be unaware of the anticompetitive nature of its conduct, whether or not it is aware that it is infringing the competition rules.[26]

(17) With respect to the type of infringement to which Article 1(b) of the 2016 Decision relates, HSBC cannot claim that it did not act intentionally.[27] Indeed, as the General Court held in the Judgment, the impact of the Euribor manipulation on cash flows generated by the derivatives at issue is clear, with the participants seeking artificially to reduce or increase the Euribor rates so that the sums they had to pay or receive in respect of the 'variable leg' of futures and other derivatives linked to Euribor would be lower or higher. That conduct necessarily restricted competition to their advantage and to the detriment of other operators on the market.[28] Furthermore, the General Court also found that: "[HSBC's] *intention to participate in a single infringement is clear from the evidence put forward by the Commission*".[29] Moreover, the individuals involved in the anticompetitive discussions were skilled professionals who were well

---

24 OJ C 210 1.9.2006 p.2.

25 Point 37 of the Fining Guidelines.

26 See Judgment of the General Court of 26 October 2017 in Case T-704/14 *Marine Harvest*, ECLI:EU:T:2017:753, paragraph 237, upheld in Case C-10/18 P *Mowi ASA* ECLI:EU:C:2020:149. See also Judgment of 18 June 2013 in Case C-681/11 *Schenker & Co. and Others*, ECLI:EU:C:2013:404, paragraph 37 and the case-law cited.

27 See Judgment of the General Court of 19 May 2010 Case T-11/05; *Wieland-Werke AG v Commission*, ECLI:EU:T:2010:201 (summary publication), paragraph 140; see also Judgment of the General Court of 6 April 1995, Case T-143/89 *Ferriere Nord v Commission*, ECLI:EU:T:1995:64, paragraph 42 and Judgment of the Court of Justice of 17 July 1997, Case C-219/95 P *Ferriere Nord SpA v Commission*, ECLI:EU:C:1997:375 paragraph 50.

28 Judgment paragraphs 95 to 97.

29 Judgment, paragraph 279.

aware of the commercial value and usefulness of the information disclosed.[30] The efforts to manipulate benchmark rates and a series of discussions about pricing strategies and trading positions, required the involvement of more than one departments within certain banks[31] and this happened despite the existence of supervisory mechanisms within the trading desks, treasury departments and compliance departments whose task was to ensure the respective banks' compliance with regulatory requirements[32]. Finally, some of the parties to the infringement also took precautions to conceal their arrangement and to avoid its detection.[33]

(18) In any event, even if it were found that HSBC did not act intentionally, the circumstances set out at recital (17) above, indicate that it acted at the very least negligently.

2.1. Basic amount of the fine

(19) In applying the Fining Guidelines,[34] the basic amount for each party results from the addition of a variable amount and an additional amount (also called the entry fee). The variable amount in principle results from a proportion of the value of sales to which the infringement relates in a given year multiplied by the number of years of the undertaking's participation in the infringement. The additional amount is determined as a proportion of the value of sales of goods or services to which the infringement relates in a given year.

2.1.1. Value of sales

2.1.1.1. Principles and application

(20) Pursuant to points 12 and 13 of the Fining Guidelines, the basic amount of the fine is to be set by reference to the value of sales, that is, the value of the undertakings' sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area in the EEA.

(21) In determining the value of sales, the Commission will take the best available figures.[35]

(22) Given that interest rate derivatives do not generate any sales in the usual sense, the Commission applies in the present case a specific proxy for the value of sales as a starting point for its determination of the fines. This proxy is based on HSBC's discounted cash receipts.

Cash receipts

(23) Sales in the usual sense correspond to inflows of economic benefit, the form of which being in most cases cash or cash equivalent.[36] In addition, the anti-competitive conduct of this case concerns, notably, the collusion on price components relevant for the cash-flows of EIRDs. For these reasons, in the present case the Commission determines the proxy for the value of sales on the basis of the cash-flows that each

---

[30] See, for example, recitals (397), (457) and (498) of the 2016 Decision.

[31] Including HSBC, in which EIRD traders and an interest rate submitter were involved in the infringement and which was aware that in other participants several departments were involved. See recitals (740) and (741) of the 2016 Decision.

[32] See, for example, recitals (458) and (465) of the 2016 Decision.

[33] See recital (455) of the 2016 Decision.

[34] Fining Guidelines, points 24-25.

[35] Fining Guidelines, point 15.

[36] See International Accounting Standard, Section 18 - Revenue.

bank received from their respective portfolio of EIRDs linked to any EURIBOR tenor and/or the EONIA and entered into with EEA-located counterparties ("cash receipts").

(24) In view of the short duration of the infringement and the varying market size of the EIRD business over the infringement period, the Commission does not use HSBC's cash receipts of the last full business year of participation in the infringement, but considers it more appropriate to calculate an annualised sales proxy on the basis of the value of sales actually made during the period corresponding to HSBC's participation in the infringement.[37]

(25) Accordingly, based on HSBC's submission, the Commission takes into account cash receipts of EUR 16 688 253 649.[38]

Reduction factor

(26) In view of the particularities of derivatives markets, including the EIRD market – in particular the netting inherent in derivatives trading (i.e. that cash flows are based on the net difference between the fixed and the floating rates as established on the fixing date),[39] and the calculation of price variations using basis points (i.e. one hundredth of one percentage point) instead of full percentage points – the Commission considers that cash receipts alone cannot form the basis for the proxy of the value of sales. Rather, the annualised cash receipts should be discounted (i.e. reduced) by an adequate percentage (a "reduction factor") to take account of the levels of netting in the EIRD market and of the scale of price variations. It is this resulting "discounted cash receipts" figure that the Commission uses as the proxy for HSBC's value of sales.

(27) In the Judgment, the General Court noted that the Commission's favoured approach of calculating the proxy for the value of sales on the basis of discounted cash receipts "*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*".[40]

(28) The level of the reduction factor is determined by taking into account the following elements.

---

[37] In line with the Statement of Objections of 19.5.2014, the annualised sales proxy is based on the value of sales actually made by the undertakings during the months corresponding to their respective participation in the infringement and on the following approach: full calendar months of infringement are taken into account in the proxy, starting months are taken into account only if the end date of participation is on or after the 15th of the month. Accordingly, for HSBC the Commission based the annualised sales proxy on the period from 1 February 2007 to 31 March 2007. For annualisation, this amount was multiplied by 12 and divided by 2.

[38] […] In line with the Statement of Objections of 19.5.2014, the Commission includes both 'cash receipts' from EEA-located counterparties and 'Futures cash Receipts (London only)' data provided by HSBC. The latter inclusion assumes all HSBC futures data related to the EEA, which the Commission considers justified because HSBC did not provide data for EEA-located counterparties and because the datasets submitted by two other banks involved in the infringement showed data for futures/listed products, which are very similar for EEA-located counterparties and for all counterparties. In any event, HSBC futures data are extremely small in comparison to its OTC-traded EIRDs.

[39] 2016 Decision, recitals (7)-(8).

[40] Judgment, paragraph 322.

(29) The first element taken into account is the netting in derivatives trading in general. This element arises from the particularity that banks both sell and buy derivatives so that the incoming payments are netted against outgoing payments. Data from the International Swap Dealer Association (ISDA) indicates that the level of netting inherent in the derivatives industry in general was around 85% to 90% in the relevant period.

(30) From the ISDA Research Note, Number 1 of 1 February 2010 on 'The Importance of Close-Out Netting', it appears that 85% to 90% is a conservative approach, as it is stated on page 1 that "*Close-out netting has reduced over-the-counter derivatives credit exposure by over 85%.*" ISDA refers in Figure 1 of that Research Note to data from the Bank for International Settlements on the Netting benefit, where the netting measured as the difference between gross mark-to-market value and credit exposure after netting, was over 85% but not over 90% as of mid-2009. The Research Note, including the figure with the data from the Bank for International Settlement, is publicly available.[41]

(31) On the basis of this conservative conclusion from public data, the Commission considers it appropriate to apply the figure at the top-end of the approximation (90%). An additional security buffer of 0.5% is then added to bring the reduction factor to 90.5%.[42]

(32) The second element taken into account by the Commission consists of the netting inherent to the EIRD industry in particular.

(33) For this purpose, the Commission calculated the median point of the individual netting figures of the banks involved in the infringement on the basis of their submitted cash receipt and net cash settlement data.[43] The individual netting ratio is obtained by offsetting the sum of the absolute value of the individual bank's monthly net cash settlements against the sum of the individual bank's cash receipts[44], for the relevant geographic area and the period of the bank's involvement in the infringement.[45] This ratio is expressed as a percentage.

---

41 https://www.isda.org/2010/02/01/the-importance-of-close-out-netting/, page 1.

42 The Commission has used the same figure in similar financial services cases: Commission Decision C(2013)8602 of 4.12.2013 in Case AT.39861 – *Yen Interest Rate Derivatives (YIRD)*; and Commission Decisions (C(2014)7602 and C(2014)7605 of 21.10.2014 in Case AT.39924 – *Swiss Franc Interest Rate Derivatives*.

43 The data used for the calculation are the responses of the banks involved in the infringement to the request for information of 12 October 2012.
[…]

44 Cash receipts are 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. Cash settlements are the these inflows minus outflows, that is, payments. As explained in recital (645) and footnote 845 of the 2016 Decision, because net cash settlements can be negative and the collusive conduct aimed at manipulating the rate either upwards (in case the exposure was net receiver, so as to receive more) or downwards (in case the exposure was net payer, so as to pay less), the Commission computed, for each bank, the ratio between the annualised sum of the absolute values of its relevant monthly net cash settlements against the annualised cash receipts.

45 See recital (91) of the 2013 Settlement Decision and recital (641) of the 2016 Decision.

Bank	Cash receipts	Absolute value of net cash settlements	Individual netting ratio
(A)	2 781 375 608	393 391 216	85.9 %
(B)	88 661 785 138	4 332 798 490	95.1 %
(C)	63 486 298 858	2 985 426 577	95.3 %
(D)	18 170 763 021	829 984 767	95.4 %
(E)	273 052 241 530	12 298 847 672	95.5 %
(G)	64 127 448 379	2 693 990 165	95.8 %

(34) From these individual netting ratios, the median is the middle point between the 3rd and 4th observation of 6 banks ranked in ascending order. On this basis, the netting factor inherent for the EIRD industry is 95.36%.

(35) In order to verify the appropriateness of the netting factor to be applied for the purposes of calculating the proxy for the value of sales for the EIRD industry , and in the exercise of its discretionary margin of appreciation for setting the amount of the fines, the Commission considered it useful to compare the netting factor calculated for the EIRD industry with that of a comparable industry.

(36) The Commission used the Yen Interest Rate Derivatives ("YIRD") industry as the comparison industry.[46] This is because the Commission had carried out a similar but separate investigation in that industry and therefore had access to the netting factor, computed on a similar basis, for that industry.

(37) Using an equivalent method to that described at recitals (33) to (34) above, the Commission calculated the relevant netting factor in the YIRD industry as 93%.[47]

(38) The median netting factor of the EIRD industry during the period of the infringement was, therefore, 2.36% higher than that in the comparison industry.

(39) The resulting calculations of the netting factors in the EIRD and YIRD industries indicate that using a reduction factor of 90.5% (as had been done in previous cases)[48] would under-represent the level of netting in the EIRD sector and give rise to the application of an inappropriately high proxy for the value of sales, thus leading to a

---

46 Commission Decision C(2013)8602 of 4 December 2013 in Case AT.39861 – *Yen Interest Rate Derivatives* (YIRD) concerned similar anti-competitive practices to those in the present case with respect to the submission of JPY LIBOR rates and the exchange of commercially sensitive information in the YIRD industry. The starting point for the calculation of the reduction factor applied to the participant banks (i.e. the ISDA Report on netting) was the same in both Case AT.39861 and the 2013 Settlement Decision.

47 Based on 9 observations from 4 banks for the different infringements in that case, excluding the data provided by the immunity applicant, the median corresponded to the 5th observation in ascending order.

Bank	Individual netting ratio
(A)	85.0 %
(B)	88.5 %
(A)	91.9 %
(C)	92.5 %
(A)	93.0 %
(C)	93.9 %
(C)	94.4 %
(D)	95.1 %
(B)	95.7 %

48 See footnote 42 above.

correspondingly higher level of fines than would be proportionate in the context of the EIRD industry. As such, the Commission considers that it is appropriate to increase the level of the reduction factor to take account of the higher netting in the EIRD industry than the netting in derivatives markets generally.

(40) During the course of the settlement procedure in 2013, DG Competition had estimated the difference between the median netting factors of the EIRD and YIRD industries as being 3% higher in the EIRD industry. For the purposes of the 2013 Settlement Decision, the Commission continued to use the 3% difference in netting factors rather than the actual 2.36% (which thus resulted in a lower proxy for the value of sales, and, consequently, lower fines). As such, and in order to reflect the calculated difference in netting factors between the EIRD and YIRD industries, in the 2013 Settlement Decision the Commission increased the reduction factor calculated on the basis of the first element by three percentage points, to give an intermediate reduction factor of 93.5%.

(41) In conformity with the principle of equal treatment,[49] the Commission considers it appropriate to apply the same methodology as that used for the 2013 Settlement Decision. As such, the Commission adds three percentage points to the reduction factor of 90.5% calculated on the basis of the first element, as described in recital (31) above, giving a figure of 93.5%.

(42) The <u>third element</u> taken into account by the Commission consists of the specific scale of price variations in both the EIRD and YIRD industries over the period of the infringement. Having calculated the 3% increase in the reduction factor further to a comparison between the netting rates in the EIRD industry and the YIRD industry, it is, as a result, necessary to take into account the specific scale of price variations between the EIRD and YIRD sectors over the period of the infringement.[50] This is because, simply increasing the reduction factor by three percentage points on the basis of the difference between the median ratios in the EIRD and YIRD ratios does not – in itself – take into account the scale of EIRD industry price variations relative to the scale of YIRD industry price variations. Such second step was necessary, therefore, to ensure that the comparison reflected the relative differences between the two comparator industries.[51]

(43) In order to do this, the Commission compared the levels of the scale of price variations between two benchmark tenors in the EIRD and YIRD sectors, expressed in relative terms to the underlying rate. The benchmark tenors used for the

---

49 See Case T-456/10 *Timab Industries a.o. v Commission*, EU:T:2015:296, paras 72 and 74.

50 In this respect, increasing the reduction factor by three percentage points on the basis of the higher netting factor in the EIRD industry as compared to the YIRD industry, and further adjusting the reduction factor to take account of the scale of price variations between the two industries go hand-in-hand. If the adjustment is to be appropriate then both elements need to be applied together. In contrast, had the Commission chosen to calculate the discount factor exclusively on the median netting figure of the banks involved in the EIRD infringement (i.e. 95.36% – see recitals (33) and (34) above) rather than conducting a comparison between the resulting EIRD netting levels and the netting levels in the YIRD industry (thereby resulting in a lower intermediate reduction factor), it would not have been necessary for the Commission to examine the relative scaling of price variations between the EIRD industry and the YIRD industry.

51 In the same way: had the Commission chosen to calculate a netting ratio for the EIRD industry directly on the median of the netting ratios reported by the banks involved in the infringement (i.e. 95.36%) then such further adjustment based on a comparison of price variations between the EIRD and YIRD industries would not have been required.

comparison were the Yen Libor 6 month rate and the Euribor 6 month rate. The Yen Libor and Euribor 6 month tenors are common tenors used in both industry sectors, as corroborated by the fact that these tenors played an important role in the conduct described in the respective decisions.[52]

(44) The price variations are publicly available.[53] The average level of price variations of the Yen Libor 6 month rate was circa 0.75% during the overall period of the YIRD infringements. The average level of price variations of the Euribor 6 month rate during the overall period of the EIRD infringement was circa 4%.[54]

(45) The scale of price variation of any given basis point shift in the infringement identified in the 2016 Decision was therefore 5.3 times lower than the scale of price variation of the 6 month Yen Libor.[55] In other words, an identical hypothetical overcharge ("X") would have had 5.3 times more impact in the YIRD industry than in the EIRD industry, as (X/0.75)/(X/4) = 5.3 (rounded). Applying this relatively lower impact of an overcharge in the EIRD industry to the discount factor of 93.5% (see recital (41) above), i.e. (100% – ((100-93.5)/5.3)%), leads to a rounded adjustment to 98.77%, or to an increase of 5.27% in the reduction factor.

(46) The resulting combined adjustment of 98.77% following the comparison with the YIRD sector results in a higher reduction factor (and consequently a lower fine) than if the reduction factor were solely based on the netting factor calculated as inherent for the EIRD industry (i.e. 95.36% - see recitals (33) and (34) above).

(47) The application of a reduction factor over and above that representing the netting factor inherent in the EIRD industry also has the effect of taking into account the potential lower price overcharge in the derivatives industry than in traditional cartel cases where no such reduction factor is usually applied. This is particularly so given that the increase in the reduction factor on account of the lower scale of price variations in the EIRD industry compared to the YIRD industry results in a reduction factor that is 3.41 percentage points higher than the Commission's calculation of the netting factor inherent in the EIRD industry,[56] and significantly higher than any of the banks' individual netting ratios.

(48) In the 2013 Settlement Decision, therefore, the Commission applied an intermediate reduction factor of 98.77%.

(49) In the interests of ensuring that the principle of equal treatment is respected, the Commission adopts the same approach in this Decision. Consequently, the

---

52 See for instance recitals (121), (131), (160), (162), (165), (173), (208), (217), (224), (265) and (338) of the 2016 Decision. This is also confirmed for EIRD by the data on file, as listed in footnote 3 of the April 2021 Letter, to which all addressees of the 2016 Decision have been given access in non-confidential form and in confidential form in a data room procedure, which was accessible to each party's legal and economic advisers and, from which it can be seen that the 6m EURIBOR tenor is the most important tenor in terms of cash receipts throughout for all banks.

53 Data available on Bloomberg, to which all banks have access.

54 See recital (646) of the 2016 Decision.
The calculated average for the overall period of the infringement is lower than the average level used for the 2013 Settlement Decision. In the interests of equal treatment, the Commission applies the same average level as that used in the 2013 Settlement Decision (thereby resulting in a lower fine that would otherwise have been the case).

55 4/0.75 = 5.3 (rounded to the first decimal place)

56 The difference is further increased to 3.489 percentage points when the adjustments described in recitals (50)-(52) are included.

Commission adds 5.27 percentage points to the reduction factor calculated on the basis of the first and second elements, giving a figure of 98.77%.

(50) Finally, as a <u>fourth element</u>, the Commission further adjusts the reduction factor upwards to match the reduction factor that was applied in the 2013 Settlement Decision.

(51) In the settlement procedure leading to the 2013 Settlement Decision, the Commission had communicated fines ranges to the settling parties on the basis of the methodology explained above.[57] The lowest point of the fines range communicated to the settling parties[58] and to HSBC, which at that time was still involved in the settlement procedure, corresponded to the application of a higher reduction factor than that calculated purely on the basis of the three elements above. The Commission, in the exercise of its discretion when setting fines, decided to set the fines towards the lower end of the ranges communicated and therefore set the final reduction factor for the 2013 Settlement Decision at a higher level of 98.849% (thereby resulting in lower fines for the settling parties as compared to those that would have been imposed had the reduction factor of 98.77% been used).[59]

(52) In the standard administrative procedure, the Commission is in principle not bound by the fines range communicated during the settlement procedure. A fines range is an instrument solely and specifically related to the settlement procedure.[60] The Commission is required to review the file and, where appropriate re-adjust the method for the calculation of the fine, taking into account all of the relevant circumstances at the time when the non-settlement decision is adopted.[61] However, in the absence of circumstances justifying otherwise, the fines calculation adopted in the standard procedure should follow the same methodology as that used in the settlement procedure.[62] Since no new circumstances arose during the standard administrative procedure, and in light of the principle of equal treatment, the Commission therefore also further increases the reduction factor applied to HSBC by 0.079 percentage points, to give the same reduction factor as that applied in the 2013 Settlement Decision: namely 98.849%.

(53) The resulting discounted cash receipts figure for HSBC, which constitutes the proxy for HSBC's value of sales is, therefore, set at EUR 192 081 799.

2.1.1.2 HSBC's arguments and the Commission's findings

Arguments concerning the Procedure

(54) HSBC asserts[63] that it should have had a chance to verify the Commission's calculations by having renewed access to the underlying EIRD cash receipts data

---

57 In accordance with points 16 and 17 of the Settlement Notice (OJ, C 167, 2.7.2008, p.1).

58 That is, the parties to whom the 2013 Settlement Decision is addressed.

59 The lowest end of the fines range communicated to the parties corresponded to a reduction factor of 98.85%. In its discretion, the College of Commissioners ultimately chose to impose fines on the addressees of the 2013 Settlement Decision on the basis of a reduction factor set close to the lowest end of the fines range, but not at the lowest end itself, i.e. at 98.849%.

60 Case T-456/10 *Timab Industries, CFPR v Commission,* ECLI:EU:T:2016:296, paragraphs 96 and 101.

61 Case T-456/10, *Timab Industries, CFPR v Commission,* ECLI:EU:T:2016:296, paragraph 90.

62 Case C-411/15 P *Timab Industries, CFPR*, ECLI:EU:C:2017:11, paragraph 123. See also the Opinion of Advocate-General Saugmansgaard in Case C-411/15 P *Timab Industries, CFPR*, ECLI:EU:2016:620, paragraphs 37 and 57.

63 […]

(despite access having been granted in 2014 and 2016)[64] and access to the YIRD cash receipts data used for comparison.

(55) The Commission recalls, however, that with regard in particular to the exercise of the rights of the defence in respect of the imposition of fines, it is settled case-law that, provided the Commission indicates expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed 'intentionally or negligently', it fulfils its obligation to respect the undertakings' right to be heard. In doing so, the Commission provides them with the necessary means to defend themselves not only against the finding of an infringement but also against the imposition of fines. The Commission is not required, once it has indicated the main factual and legal criteria on which it will base its calculation of the amount of the fines, to specify the way in which it will use each of those elements in order to determine their level.[65]

(56) Furthermore, and in any event, in the context of the present readoption process, HSBC did not need access, let alone renewed access,[66] to the cash receipt and net cash settlement data underlying the netting factors to verify whether this data was correct or correctly applied. The simple provision of additional explanations to HSBC on the methodology applied for calculating an element in that calculation does not mean that HSBC has a right to verify the accuracy of this data (again). Moreover, HSBC fails to demonstrate if and how such renewed access would have changed the outcome of this Decision.

(57) HSBC did not need access to the YIRD cash receipt data underlying the figures from the YIRD investigation that the Commission used in its calculation. As can be seen from recitals (35)-(39) above, these figures, from another investigation, are simply used for comparative purposes, to determine whether the first element relied upon for calculating the reduction factor is sufficient to reflect the netting inherent in the EIRD industry. They are not used as incriminating or exculpatory evidence. There is, therefore, no compelling reason to verify the accuracy of the data underlying these figures[67].

---

64 See recitals (101), (565) and (653) and footnote (124) of the 2016 Decision. The addressees of the 2016 Decision received access to the non-confidential version of the data of all other settling and non-settling parties.

65 Case T-240/17 *Campine NV and Campine Recycling NV v Commission* EU:T:2019:778, paragraphs 355 and 356 and case law cited.

66 HSBC had already received access to this underlying data in 2014 and in 2016 in a data room procedure, where they could verify the accuracy of the data used by the Commission for its calculations and assess that the Commission was not applying a discriminatory approach. See Recitals (101), (565) and (653) and footnote (124) of the 2016 Decision

67 The Commission further notes that it does not rely on these figures in and of themselves, but rather the difference between the median figures calculated for the EIRD industry and the YIRD industry, which it then further increases by 0.64%, (to the advantage of the parties – see recitals (40)-(41)above) and 5.27% on the basis of the third element (recitals (42)-(45)above). The reduction factor is then still further increased on the basis of the fourth element (recitals (50)-(52) above). Any potential inaccuracy in the Commission's calculations based on the YIRD data is, therefore, in any event, rendered moot by virtue of the subsequent elements relied upon (and in particular the fourth element), which result in a reduction factor that is significantly higher than the netting ratio calculated for the EIRD industry, and the individual netting figures of each of the parties (i.e. it more than adequately accounts for the

(58) In any event, by virtue of the Letters of 8 May 2020 and 16 April 2021 the Commission provided HSBC with information and details of its proposed fining methodology going well beyond that required by the case-law, and granted HSBC the opportunity to make its views known on that methodology. In this regard, despite the Commission's refusal to grant further access to the underlying data,[68] HSBC submitted extensive observations in its Response and Additional Response, which demonstrates that HSBC has understood the Commission's chosen fining methodology and has been able effectively to make its views known on the factors on which the Commission has based that methodology.

Arguments concerning the methodology

(59) HSBC puts forward two arguments with regard to the Commission's fining methodology. Its primary contention is that, rather than using a proxy for the value of sales: "*the appropriate approach is to depart from the methodology in the Fining Guidelines to consider potential effects*".[69] Secondly, HSBC considers that, in the event that the Fining Guidelines are applied and a proxy for the value of sales is calculated, both the cash receipts and the reduction factor should be adjusted.

(60) HSBC argues[70] that a proxy for value of sales based on discounted cash receipts "[is] *not an appropriate measure of the value of annual sales"*. It argues that, because of the particular features of the EIRD market, in which a bank can sometimes be a buyer and sometimes a seller when it trades an EIRD with a counterparty, there is no meaningful proxy for the value of sales. Moreover, HSBC rejects the use of EIRD profit and loss accounting data as a suitable basis for calculating a fine as: "*If the Commission uses them for this purpose, it will lead to a paradoxical outcome that a bank with a longer duration of infringement, or a bank engaging in more trades, could receive a lower fine*"[71]. HSBC contends that the use of discounted cash receipts: *"does not accord with a logical consideration of economic importance of the infringement or a comparative assessment of the significance of the undertakings involved*"[72]. Whilst maintaining in its Response that it is not for the undertaking to propose a more appropriate alternative method[73], HSBC considers that the fine should instead be based only on: "*the potential economic importance of the manipulation attempted on 19 March 2007*" and not on any other aspect of HSBC's infringing conduct, notably the exchanges on mid prices (or 'mids') of 14 and 16 February 2007 as: *"HSBC's unchallenged evidence showed that the Commission had wrongly assumed that such exchanges could have similar effects to exchanges in conventional markets*".[74] In its Additional Response[75], HSBC argues that the discounted cash receipts approach: "*entirely ignores cash payments*" and therefore provides "*an incomplete and distorted picture of EIRD trading activity*", particularly for market makers who hedge their trades. As a justification for the deduction of cash

particularities of the EIRD industry, which is the purpose of the use of discounted cash receipts (see recitals (20)-(22) above and recital (643) of the 2016 Decision)).

68 See recital (12).

69 […]

70 […]

71 […]

72 […]

73 […]

74 […]

75 […]

payments from cash receipts, HSBC claims that[76]: *Whereas in a conventional price-fixing cartel the gains of cartelists are proportionate to their relative sales, this case does not involve price-fixing and there is no such link*"

(61) As regards the estimated potential effects of the attempted 19 March 2007 manipulation, HSBC refers to an estimate by its economic consultants[77] of a potential reduction in the 3 month EURIBOR fixing of 0.2-0.3 basis points and, on the basis of an indication by the Barclays trader to the HSBC trader of the number of contracts accumulated, a net effect (i.e. profit for the participating six banks) of EUR 2.5 - 3.75 million. HSBC divides this sum by six (i.e. the total number of addressees of the 2013 Settlement Decision and the 2016 Decision), to produce a fine of EUR 625 000 per bank, whilst arguing that its own fine should be reduced further because of its lack of awareness of the scheme.

(62) The Commission rejects HSBC's proposal to set the fines for an infringement of Article 101 of the Treaty on the basis the alleged net effect of the settlements on 19 March 2007, divided by the number of banks involved. This alternative approach attempts to estimate the one off net profits of the settlements of EIRD on that day.

(63) As set out in the Fining Guidelines, "[f]ines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings...".[78] In this regard, "[t]he 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".[79] Consequently, the economic importance of an infringement goes beyond its presumed or calculated effects in terms of net profits to the participants and simply relieving the undertakings concerned of the net estimated 'settlement date' profits of their anti-competitive behaviour over differing time periods would not have a sufficient deterrent effect for the undertakings concerned or serve to deter other undertakings from engaging in anti-competitive conduct.

(64) As set out in recital (27), the General Court concluded at paragraphs 322-324 of the Judgment that the approach favoured by the Commission tends to give a better reflection of the economic importance of the infringement than an alternative based on net cash receipts and payments. To the extent that HSBC considers that its proposed 'net effect' approach differs from that considered by the General Court in the Judgment, the same conclusion nevertheless applies (i.e. HSBC's proposed approach is inappropriate for calculating a proxy for the value of sales).

(65) First, fines must have the requisite degree of deterrent effect,[80] which can relate only to future conduct, and the punitive nature of such a measure in relation to the actual infringement committed.[81] These objectives could not be achieved if the Commission's fining powers were limited to only being able to take account of the

76 […]
77 […]
78 Fining Guidelines, point 4.
79 Fining Guidelines, point 6.
80 Decision, recital (29), Article 23(3) of Regulation 1/2003 and points 1 to 4 of the 2006 Fining Guidelines.
81 Case 41/69 *Chemiefarma v Commission* EU:C:1970:71, paragraph 173, and Case 49/69 *BASF v Commission* EU:C:1972:71, paragraph 38.

profit expected by the undertaking in question,[82] which is the essential effect of HSBC's proposed approach.

(66) Second, and in any event, HSBC's alternative approach focusses exclusively on the events of 19 March 2007 and ignores the fact that it was involved in a series of anticompetitive bilateral contacts between 12 February 2007 and 27 March 2007. The series of bilateral contacts in which HSBC participated (excluding those of 9 and 14 March 2007) involved a number of elements of anti-competitive behaviour as noted in recitals (113) and (358) of the 2016 Decision, namely:

(a) On occasions, certain traders employed by different parties communicated and/or received preferences for unchanged, low or high fixing of certain EURIBOR tenors. These preferences depended on their trading positions/exposures.[83]

(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.[84]

(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).[85]

(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).[86]

(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 European Banking Federation (EBF)'s calculation agent towards a certain direction or at a specific level.[87]

(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.[88]

---

82 Case C-444/11 P *Team Relocations and Others v Commission* EU:C:2013:464, paragraphs 76 and 88; and C-580/12 P *Guardian Industries and Guardian Europe v Commission* EU:C:2014:2363, paragraph 57; Case C-227/14 P *LG Display a.o. v Commission* EU:C:2015:258, paragraph 53.

83 See the contacts of 12 February 2007, 19 March 2007 and 20 March 2007 in recitals (271)-(276), (322)-(331) and (338) of the 2016 Decision.

84 See the contacts of 12 February 2007, 16 February 2007 and 28 February 2007, 19 March 2007 and 27 March 2007 in recitals (271)-(276), (286)-(288), (289)-(291), (322)-(331) and (339)-(341) of the 2016 Decision.

85 See the contact of 28 February 2007 in recitals (289)-(291) of the 2016 Decision.

86 See the contacts of 19 and 20 March 2007 in recitals (322)-(331) and (338) of the 2016 Decision.

87 See the contact of 19 March 2007 in recitals (322)-(331) of the 2016 Decision.

88 See the contact of 19 March 2007 in recitals (322)-(331) of the 2016 Decision.

(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.[89]

(67) Third, HSBC's statement in its Additional Response that: "*this case does not involve price-fixing*" is incorrect. As noted in recitals (409)-(411) of the 2016 Decision, benchmark rates are a pricing component for EIRDs and conduct aimed at influencing the EURIBOR, which is an element of the price of EIRDs, constitutes an infringement of Article 101(1)(a) of the Treaty. The use of a proxy for the value of sales of EIRDs, rather than a form of profit measure, is entirely consistent with fining principles for a price-fixing cartel.[90]

(68) Fourth, as the General Court noted in the Judgment,[91] the discussions in which HSBC was involved (excluding the contacts of 9 and 14 March 2007) meant that they were: "*in a position to propose a more competitive rate* [for EIRDs] *than that offered by their competitors*". Whilst 19 March 2007 was a significant contract settlement date and the manipulation of submissions relating to EURIBOR on that day was a significant part of the infringement, a one-off estimate of total net profits for settlements on that date only, divided by the banks involved, is an inappropriate basis for calculating the fine to be imposed for a broader infringement in which HSBC participated for more than 5 weeks.

(69) Fifth, even under HSBC's mistaken assumption that it would be appropriate to base the proxy of the value of sales on the effects of the infringement, HSBC's alternative approach would be inappropriate. As noted by the General Court,[92] the HSBC trader appears to have regretted the fact that he had not benefitted as much as another participating trader, who had built up a greater 'buyer' position. This observation reinforces the fact that a simple *ex-post* net profit estimate does not represent - contrary to HSBC's advocacy of '*potential*' effects as a fines basis - either the potential gains of the infringement for the participants or the economic importance of manipulation of a benchmark Euro interest rate in global financial markets, nor, *a fortiori*, the economic importance of the entire infringement in this case and HSBC's part therein (see recital (65)).

(70) Finally, HSBC's alternative approach ignores the anti-competitive implications of the discussions concerning pricing strategy for EIRDs, namely mid prices, of 14 and 16 February 2007. HSBC claims[93] that it showed that: "*the Commission had wrongly assumed that such exchanges could have similar effects to exchanges in conventional markets*". In fact, as the General Court noted:[94] "*The exchanges on mids contained in those two discussions had an object that restricted competition";* that *"information relating to mids is relevant for pricing in the EIRD sector*" and the "*arguments that the exchanges of information between market makers on mids are 'pro-competitive' cannot be upheld*". Any fine must take account of the economic importance of all of HSBC's infringing behaviour in the period from 12 February 2007 to 27 March 2007, including the exchanges on mid prices.

89 See the contacts of 14 and 16 February 2007 in recitals (283)-(285) and (286)-(288) of the 2016 Decision.
90 See to this effect, point 23 of the Fining Guidelines.
91 Judgment, paragraph 96.
92 Judgment, paragraph 103.
93 […]
94 Judgment, paragraphs 138, 139 and 149.

(71) In summary, HSBC's alternative approach does not, therefore, provide a better reflection of the value of sales – and therefore the economic importance of the infringement – than the Commission's approach based on discounted cash receipts. An *ex post* estimate of the one off net profits of the settlements of EIRD on 19 March 2007 is neither an appropriate proxy to reflect the economic importance of the infringement nor does it satisfy the requirement that fines have sufficient deterrence, and is therefore not a valid basis for a fine calculation.

Arguments concerning the cash receipts data used by the Commission

(72) As set out at recital (23) above, the Commission determines the starting point for the proxy for the value of sales on the basis of the cash receipts. The cash receipts are 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.

(73) HSBC complains that this starting point contains all cash receipts achieved by HSBC in EIRD trading as a whole. HSBC asserts that only revenue concerning trading activities for EIRDs traded by the participating trader and linked to the 3 month EURIBOR should be included. This is justified, HSBC claims,[95] because: "*In contrast to traditional cartel cases, where there is a presumption that collusion is a company-wide strategy, or that collusion by one or more employees would benefit the whole company, the incentives and benefits that may derive in this case from certain behaviour vary between traders or desks belonging to the same bank and are often conflicting*" and the fact that: "*the only HSBC trader involved took part in just one manipulation and only with respect to EIRD positions that used 3m EURIBOR as a benchmark*".

(74) The Commission rejects the claim that only cash receipts for 3 month EURIBOR related instruments traded by one single HSBC trader should be taken into account.

(75) First, the infringement in which HSBC participated between 12 February 2007 and 27 March 2007 did not simply involve the attempted rate manipulation of 19 March and, moreover, did not only concern EIRDs linked to the 3 month EURIBOR tenor (see also recitals (65) and (68) above). The infringement consisted of a number of elements and, as noted in recital (670) of the 2016 Decision, the evidence on the file does not exclude any maturity and there is no evidence that the infringement only covered some short term or long-term maturities.[96] The discussions on mid prices in which the HSBC trader was involved, for example,[97] related to, firstly, an enquiry on 14 February 2007 from another trader "*aug tas quoi mid*" (what do you have as a mid price for an August contract?), i.e. linked to six months EURIBOR, and secondly, to an enquiry on 16 February 2007 related to an EONIA contract.

(76) Second, the claim that EIRDs related to the 3 month EURIBOR tenor should be isolated also ignores the relationship between the differing tenors via the yield curve.[98] When, in agreement with a trader of another bank, the participating HSBC

95 […]

96 Unlike the Swiss Franc Interest Rate Derivatives (Bid Ask Spread Infringement of 21 October 2014, to which HSBC refers as an example in which not all Interest Rate Derivatives were included. […] That case only concerned Swiss Franc Libor related OTC derivatives of up to two years maturity (based on evidence on the file in that case).

97 2016 Decision, recitals (283) to (288).

98 2016 Decision, recitals (18) and (411).

trader requested the HSBC EURIBOR submitters if they could: "*peux me coller à la cave le fixing 3 mois*" (that is, to put the 3 month fixing as low as possible) on the 19 March 2007 and received their assent,[99] the resulting downward pressure, in concert with other banks, would have affected the yield curve structure as expectations of future interest rates were revised.[100]

Arguments concerning the reduction factor

(77) HSBC not only considers that the discounted cash receipts approach is incorrect but also asserts that the Commission has wrongly set the discount factor at 98.849%. In its Response, HSBC argues that in a discounted cash receipts approach, the discount factor should be as high as 99.9675%.[101] In its Additional Response HSBC adjusts this figure to 99.9768%.[102] HSBC asserts that this percentage more appropriately takes into account the scale of price variations in the EIRD industry compared to other more traditional industries and thus better reflects the economic importance of HSBC's participation in the infringement.

(78) The Commission notes that a discount factor of 99.9768% would reduce HSBC's proxy for the value of sales to EUR 3 871 674 and eventually lead to a hypothetical fine for HSBC of EUR 639 000 in an industry that has an estimated gross market value of USD 4 747 billion for the Euro instruments.[103]

First Element – Netting in the Derivatives Industry in General

(79) HSBC argues that[104] the Commission has failed to explain why it has used ISDA close-out netting statistics, designed to deal with credit risks, to estimate payment netting as described at recital (643) of the 2016 Decision. HSBC also asserts that the Commission has failed to explain why the security buffer of 0.5% was not set at a higher level.

(80) These claims must be rejected. First, the ISDA netting statistics are public data respected throughout industry. These are facts based data, with values for close-out netting that reflect the underlying payments and thus may serve as a basis for estimating industry wide netting. Most derivatives are negotiated on a bilateral basis.[105] Banks trade derivatives on the basis of master agreements.[106] The ISDA master agreements are the market standard and they foresee netting.[107] Netting is a method for mitigating risks in the derivatives industry and, in this respect, the ISDA master agreements foresee both the payment netting and the close-out netting, with values for close-out netting that reflect the underlying payments.[108] The two netting concepts are thus related. This data has been used throughout by the Commission,

---

99 2016 Decision, recitals (322) to (327).

100 As explained in recital (18) of the 2016 Decision, the yield curve at any moment in time reflects expectations of future interest rates. If expectations of longer term rates remained unchanged despite a reduction in short term rates, this would steepen the yield curve. In reality, expectations of longer term rates are likely to be adjusted downwards to some extent by a sudden reduction in shorter term rates.

101 […]

102 […]

103 For the estimations of the size of the market, see Recital (48) of the 2016 Decision.

104 […]

105 Recital (45) of the 2016 Decision.

106 Recital (702) of the 2016 Decision.

107 Recital (702) of the 2016 Decision.

108 See the example of ISDA master agreement referred to in footnote 733 of the 2016 Decision, in particular its section 2 (c), section 6 and definition of close-out amount. See also the section 'What is netting?' of the ISDA Research Note, Number 1 of 1 February 2010 on 'The Importance of Close-Out Netting'.

including in the settlement procedure in this case and in other cases. It is correct that the close-out netting is a way to mitigate settlement risk, but the Commission has no indication that close-out nerting produces a smaller netting factor than payments netting.

(81) Second, and more importantly, in the Commission's methodology, the various elements taken into consideration are cumulative and inter-dependent. If the Commission had directly used the netting inherent to the EIRD industry (95.36%) or the individual netting percentages of the various individual banks (between 85.9% and 95.8%) in its calculation, it would have been no longer necessary either to take into account of the ISDA netting data for the wider industry (element 1), or to make a comparison with YIRD for the netting and the scale of price variations (elements 2 and 3).[109]

(82) The Commission, however, opted for an alternative methodology based on derivatives industry-wide netting data that is adjusted on the basis of a comparison between the netting ratios of the banks involved in the EIRD case and those involved in the Yen Interest Rate Derivatives case (i.e. two global derivatives industries), which the Commission considers provides a more reliable and robust basis (as well as more favourable) on which to determine an appropriate netting factor for the EIRD industry overall than solely relying on the netting figures of the banks involved in the infringement. In addition, and in conformity with the principle of equal treatment, the Commission further increased the reduction factor (thereby resulting in lower fines) to match the reduction factor applied in the 2013 Settlement Decision.[110]

(83) Ultimately, the Commission's chosen methodology was more favourable to the parties than an approach based directly on the banks' netting ratios because the Commission's fining methodology applied a reduction factor that was higher than both the median netting ratio calculated on the basis of the banks' submitted figures, and the highest reported netting ratio reported by the banks. Consequently, the Commission's chosen approach resulted in fines that are significantly lower than those that would have been imposed (assuming that all other elements remain constant) had the Commission used a reduction factor of 95.36% based directly on the banks' netting ratios.

(84) Finally, as regards the additional 0.5%, this provided an additional security margin, in the interests of the addressees of the 2016 Decision, on top of the maximum of the range identified in ISDA's Research Note, which the Commission decided to apply in the exercise of its discretion when setting the fine. In that regard, it should be noted that the choice of the highest end of the 85%-90% range means that any additional security margin may be limited. The Commission maintains that this security buffer respects the deterrence purpose of the fines methodology whilst taking a conservative approach to the public data.

Second Element – Netting in the EIRD industry

(85) In relation to the Commission's determination of an additional factor for netting in the EIRD industry in particular, HSBC makes several assertions.[111] First, HSBC argues that using the sum of absolute values of net cash settlement over the entire two months used for the purposes of setting a fine (February and March 2007), rather

---

[109] See further, recital (42) and footnote 51.
[110] See further, recitals (103)-(104).
[111] […]

than on a monthly basis as in the Commission's calculation, would have resulted in an individual netting ratio of 95.2% for HSBC, nearly 10% higher than that determined by the Commission. HSBC also argues that using a longer time period would help to smooth out fluctutations. Second, HSBC questions why, having determined a median netting ratio of 95.36% for the banks involved in the EIRD infringement, the Commission does not use this as a representative ratio but instead adds 3% to the 90.5% netting factor derived from the ISDA statistics, by comparing the EIRD median figure with that of data from the Yen Libor Interest rate derivatives industry. HSBC asserts that this comparison, rather than simply using the median ratio: "*leads to a lower discount in the second step of 93.5% instead of 95.36%".*

(86) The Commission's use of a monthly basis for deriving the individual netting ratios of the banks provides consistency in a situation in which the banks were involved in the infringement over significantly varying time periods. Moreover, it should be noted that HSBC's own proposed netting ratio of 95.2% would not alter the result of the calculation of the median ratio of 95.36%. Finally its own figure is substantially below the 98.849% final reduction factor applied to its cash receipts.

(87) As regards the two step process, it should be underlined that the second element taken into account in the calculation of the reduction factor is the netting inherent to the EIRD industry, and not only that of a particular group of banks. The use of derivatives industry-wide netting data that is adjusted on the basis of a comparison between the netting ratios of the banks involved in the EIRD case and those involved in the Yen Interest Rate Derivatives case (i.e. two global derivatives industries), provides a more reliable and robust basis on which to determine an appropriate netting factor for the EIRD industry overall, than solely relying on the netting figures of the banks involved in the infringement. In addition, in conformity with the principle of equal treatment and in the interests of the parties, the Commission increased the 2.36% figure reflecting the difference between the two industries to the 3% discount granted to the addressees of the 2013 Settlement Decision.

(88) Furthermore, HSBC's contention that the three percentage point increase in the reduction factor as a result of the comparison, leads to a lower discount on the basis of the second element than if the Commission had relied on the participating banks' netting ratios in the EIRD industry is without merit. As set out at recital (42) above, it is necessary to take the difference in the scale of price variations between the EIRD and YIRD industries into account because of the comparison between the individual netting ratios of the banks involved in the EIRD and YIRD infringements. If the Commission had used the EIRD-specific median netting ratio of 95.36% instead of comparing that EIRD median with the YIRD median, there would have been no reason to also compare the scale of price variations between EIRD and YIRD as the Commission has done under the third element.

(89) The use of a netting factor to reduce HSBC's cash receipts has already 'netted' most of the price variations made from the increased cash receipts pursuant to a favourable interest rate movement and therefore accounted for any difference in price variations relative to other industries. Furthermore, the more the netting ratio applied to these cash receipts is increased (by increasing it from 93.5% to 95.36%, for example), the more any price variations are already netted. Simply applying the 5.3 factor denominator determined by the Commission on the basis of the 93.5% netting ratio derived after a comparison with the YIRD industry to the median netting ratio of 95.36% would significantly over-compensate for any lower price variations in the EIRD industry and increase the reduction factor to possibly over 100% .. Such a reduction level not only fails to reflect reality (because it would mean that the EIRD

industry is inherently unprofitable, which is not the case); but would result in a proxy for the value of sales of EUR 0, thereby preventing the Commission from imposing fines.

(90) The Commission preferred to take into account both the netting inherent in the EIRD industry and the impact that netting has on the scales of price variations, but in a methodology where they are offset against another comparable industry (YIRD) so as to ensure that the resulting figure took account of both the particularities of the EIRD sector and the need to respect the deterrence principle. When assessing the netting for EIRD, therefore, the Commission did not directly use that level in its calculation, but compared it with the comparable industry (YIRD). Subsequently, the Commission compared the scale of price variations in both industries. The combined result of both factors – the netting level in EIRD industry and the scale of price variations – eventually led to an increase of the reduction factor of 8.27 basis points to 98.77%. This is considerably higher than using the netting level in the EIRD industry (95.36%) or the scale of price variations (95.77%), but avoids double counting and an unrealistic reduction factor above 100%.

(91) As regards both elements two and three, having determined a reduction factor for the derivatives industry as a whole, the comparison with another major global derivatives sector provides a sound basis against which to gauge the particularities of the EIRD industry.

Third Element – Relative Scale of Price Variations in the EIRD industry

(92) In relation to the further adjustment made by the Commission to reflect the relative scale of price variations in the EIRD industry, HSBC asserts in its Response that: "*it is clear that the Commission only took into account the fact that the scale of price variations appeared to be 5.3 times lower in the EIRD industry than it had determined in the YIRD industry in its investigation into certain conduct in that market.*"[112] HSBC argues that, because of the relative sizes of the Yen Libor and EURIBOR Panels, an analysis of daily Yen Libor submissions between 1 January and 31 December 2007 shows that: "*three banks seeking to manipulate their 3m or 6m submissions could on most days achieve a distortion of…10 times higher than the potential effects of the 19 March manipulation*".[113]

(93) HSBC asserts in its Response that: "However, it is not apparent that the Commission has considered the lower scale of price variations in the EIRD and YIRD industries compared to 'traditional cartel cases' in relation to other/classic industries".[114] In its Additional Response, HSBC notes that at paragraph (18) of the April Letter "the Commission appears to argue that this difference would have been considered when calculating the netting factor inherent in the industry without giving any indication as to how or to which extent".[115]

(94) On the basis of its own estimate that six banks could have moved the 3 month EURIBOR only by 0.2-0.3 basis points on 19 March 2007,[116] together with its own assumed hypothetical overcharge of 0.1% to 6 month EURIBOR in 2007, HSBC contends that: "*the scale of price variations in the EIRD market at the relevant time*

112 […]
113 […]
114 […]
115 […]
116 […]

was therefore around 200 times smaller than the assumed average cartel overcharge of 20%" (i.e. 0.1% rather than 20%) and concludes that: "*the intermediate Discount Factor should be adjusted by a factor of 200 instead of 5.3.* [117]

(95) In its Additional Response,[118] HSBC applies this 200 factor adjustment to the median netting ratio of 95.36% for the banks involved in the EIRD infringement to give a reduction factor of 99.9768%.[119] This would lead to a proxy for the value of sales of EUR 3 871 674 compared to EUR 192 081 799, and, assuming that all other elements of the fining methodology remained constant, it would reduce HSBC's fine to EUR 639 000. However, even if HSBC were correct in its calculations (*quod non*) such a figure would neither reflect the economic importance of the EIRD industry, as explained in the 2016 Decision (for instance, a gross market value of USD 4 747 billion for the Euro instruments), nor HSBC's weight in the infringement, and a fine calculated on that basis would neither properly reflect the gravity and duration of HSBC's infringement nor have sufficient deterrent effect.[120]

(96) Apart from these considerations on the level of the fine, the Commission also rejects HSBC's arguments with respect to the calculation in respect of the third element for the following reasons.

(97) Concerning HSBC's claim that the Commission only took into account the lower scale of price variations in the EIRD industry compared to the YIRD industry, and not the lower scale of price variations in the derivatives industries compared to 'traditional cartel cases' in relation to other/classic industries, this assertion is based on a misreading of the parameters for establishing the reduction factor, as set out in the 2016 Decision, and further explained in the Letters of 8 May 2020 and 16 April 2021.

(98) As noted at recitals (29)-(38) above, the Commission has taken into account the differences between the derivatives industries in general and 'traditional' industries by, firstly, applying a 90.5% reduction factor to take account of netting in the derivatives industry in general and, secondly, increasing this factor by a further 8.27 percentage points to take into account the specific netting in the EIRD derivatives industry and the scale of price variations in both the EIRD and YIRD industries.This reduction of all cash receipts 'nets' any cartel related gains and thus takes account of the relative differences in cartel related price variations in EIRD financial derivatives versus 'traditional' industries. Finally, it should be noted that whilst the normal price overcharge is around 20% in traditional cartel cases, actual price variations in differing industries vary considerably, and any deviation from the average is not normally taken into account in the determination of a fine for an infringement.

(99) In light of these elements, and as per recital (47) above, the application of a reduction factor, over and above that representing the netting factor inherent in the EIRD industry, also has the effect of taking into account the potential lower price overcharge in the derivatives industry than in traditional cartel cases where no such reduction factor is usually used. This is particularly so given that the increase in the reduction factor on account of the lower scale of price variations in the EIRD industry compared to the YIRD industry results in a reduction factor that is 3.41

---

117 […]

118 […]

119 100% - ((100-95.36)/200)%.

120 Recital (48) of the 2016 Decision.

percentage points higher than the Commission's calculation of the netting factor inherent in the EIRD industry,[121] and significantly higher than any of the banks' individual netting ratios.

(100) Moreover, at the point at which this further reduction of a magnitude of 5.3 is applied[122], HSBC's cash receipts, including those relating to any potential gains from price variations caused by anti-competitive behaviour, have already been reduced by 93.5%, to an amount which is over fifteen times smaller than their original value (i.e. reduced from EUR 16 688 253 649 to EUR 1 084 736 487). Applying a further reduction factor of 200 to what HSBC terms as the "intermediate discount factor" of 93.5% (thereby increasing it to 99.9675%), would significantly overcompensate for differences in relative price variations and therefore impose a smaller fine relative to that imposed in any 'traditional' industry.[123] The resulting penalty would be inadequate, both in terms of reflecting the economic importance of the infringement and in having a sufficiently deterrent effect. Applying a reduction factor of 200 to HSBC's own preferred choice of netting ratio for the EIRD industry, that is, 95.36%, would result in an even smaller and even more inadequate penalty.

(101) HSBC's proposed adjustment of 200 is based on HSBC's own estimates of the degree to which six banks could move the EURIBOR rate, i.e. a maximum of 0.4 basis points to an average 2007 level of 4%, namely 0.1%.[124] As set out in recitals (406) and (407) of the 2016 Decision, however, those working in the market during the period of the infringement were confident of their ability to move the rate further if acting in concert[125] and in 2009 the European Banking Federation was sufficiently concerned about differences between submissions by certain banks for EURIBOR and Euro Libor to send a letter to EURIBOR panel banks, reminding them of their obligations under the EURIBOR Code of Conduct, because, as stated in the letter, the EURIBOR contributions of certain banks had been *"significantly"* different from Euro LIBOR contributions of the same contributing banks.[126]

(102) HSBC's calculation of a one-off estimate of a variation in the EURIBOR rate also ignores the other potential price variations resulting from anticompetitive behaviour, such as the exchanges of 14 and 16 February 2007 on mid prices, which were relevant for pricing in the EIRD sector and which reduced normal market uncertainties to the benefit of those exchanging the sensitive information. In contrast to HSBC's attempt to estimate a one-day market variation, by using derivatives industry statistics and an analysis of the differences between the EIRD and YIRD sectors throughout the overall period of the infringement, the Commission establishes a credible and consistent[127] reduction factor that takes account of the differences in potential cartel induced price variations between the EIRD industry and 'traditional' industries.

Fourth Element – Equal Treatment

---

121 The difference is further increased to 3.489 percentage points when the adjustments described in recitals (50)-(52) are included.

122 See recitals (44)-(45).

123 […]

124 […]

125 2016 Decision, recital (407), in which a submitter of a participating bank explains in June 2006 that: "*if we jointly try to push*" 3 month EURIBOR it can move up to 1.5 basis points.

126 See recital (407) of the 2016 Decision.

127 The infringement took place before the financial markets crisis which began in the autumn of 2007 and had a significant effect on market rates.

(103) HSBC argues that it is not necessary for the same methodology for determining the proxy for the annual value of sales (including the reduction factor) to be applied to the settling and non-settling parties as its submissions on the scale of price variations are 'objective reasons' to apply a different factor to HSBC's cash receipts, given its submissions on the scale of price variations, and that, in any case, application of a pre-determined factor to HSBC's cash receipts in the staggered hybrid approach in Case 39914 would be a breach of its rights of defence.[128]

(104) Given that HSBC has not established objective reasons for a different reduction factor to be applied to HSBC's cash receipts, there is no need to depart from the approach applied to the settling parties as regards the reduction factor[129]. The mere fact that the Commission applies the same reduction factor to HSBC as it applied to the settling parties does not constitute a breach of HSBC's rights of defence – in particular when such decision is taken after the Commission has heard HSBC on the parameters applied,[130] as it has done in the present case through the letters of 8 May 2020 and 16 April 2021.

2.1.2. Gravity

2.1.2.1. Principles and application

(105) The basic amount consists of an amount of up to 30% of an undertaking's value of sales in the EEA, depending on the gravity of the infringement, multiplied by the number of years of the undertaking's participation in the infringement ('the variable amount') and, where appropriate, an additional amount of between 15% and 25% of the value of an undertaking's relevant sales, irrespective of the duration.[131]

(106) The gravity of the infringement determines the percentage of the value of sales taken into account when setting the fine. When assessing the gravity of the infringement, the Commission will have regard to a number of factors, such as the nature of the infringement and its geographic scope.

(107) The 2016 Decision – to the extent confirmed by the Judgment – found that HSBC had participated in an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement. The infringement consisted of price coordination and price-fixing arrangements, which are, by their very nature, among the most harmful restrictions of competition, as this practice restricts or distorts competition with regard to the main parameters of competition. According to point 23 of the Fining Guidelines, these practices will, as a matter of policy, be heavily fined and the gravity percentage is generally set at the higher end of the scale of the value of sales. In this case, the Commission considers that this element would justify a gravity percentage of 15%.

(108) In addition, the Commission's assessment takes into account: (i) that the cartel covered at least the entire EEA; (ii) that the affected benchmark rates which are reflected in the pricing of EIRDs and serve as uniform market prices apply to all participants in the EIRD market; and (iii) that the affected benchmark rates are Euro-based and have a paramount importance for the harmonisation of financial conditions in the internal market and for banking activities in the Member States. These factors further increase the harm to competition and therefore the gravity percentage. In line

---

128 […]
129 Case T-456/10 *Timab Industries and CFPR v Commission*, , EU:T:2015:296, paragraph 82.
130 See to that effect, Case T-762/14, *Philips v Commission*, EU:T:2016:738, paragraphs 256-257.
131 Fining Guidelines, points 19 to 26.

with the 2013 Settlement Decision,[132] the further distortion caused by these facts taken together justifies an increase in the gravity percentage of 3% to 18%.

[132] Commission Decision C(2013) 8512 final of 4.12.2013 in Case AT.39914 - *Euro Interest Rate Derivatives* (EIRD) (the "2013 Settlement Decision").

2.1.2.2. HSBC's arguments and the Commission's findings

(109) HSBC argues that the gravity factor should be below 15%. According to HSBC: *"the application of a conventional gravity factor would bear no reasonable relationship to any harm caused*".[133] It denies that the infringement had any price coordination or price fixing elements and argues that: "*the Contested Decision and the judgment have relied on theories as to how the traders might have behaved in light of their discussions regarding the 19 March 2007 manipulation, or how the traders might have reacted to the information given in the other unrelated chats. Being merely theories, these hypotheses do not show that prices were in fact fixed, coordinated or affected in any way*".

(110) The Commission maintains that the arrangements, by their very nature, justify a gravity factor of at least 15%. As both the 2016 Decision[134] and the Judgment[135] have determined, the infringement in which HSBC participated involved price coordination and constituted an infringement that had as its object the distortion of competition. HSBC's argument that the gravity factor should be effects-based runs counter to the principle that the Commission is not required to demonstrate effects where the conduct in question constitutes an infringement of Article 101 of the Treaty "by object".[136] As the General Court noted in its judgment of 20 May 2015 in *Timab Industries* and *CFPR v Commission "…in order to determine the gravity of the infringement and therefore the fine, the 2006 Guidelines do not attach decisive importance to the existence or absence of effects of the cartel.*" The multiplier for gravity is based on a number of factors including the nature of the infringement: "*it being understood that price-fixing, market-sharing and output-limitation agreements are, by their very nature, among the most harmful restrictions of competition"*[137]. This justifies a gravity factor at the higher end of the scale. As explained in recital (725) of the 2016 Decision even if "*the impact of the manipulation may seem small at first sight, this industry is characterised by large volumes and low price variations (in basis points) and as such even a small movement in EURIBOR is of great significance*." Moreover, as noted in recital (101) and explained in recital (407) of the 2016 Decision, the participants in the infringement were confident of their ability to influence the benchmark rates.

(111) In its response to the May 2020 Letter, HSBC did not contest the factors that justified an increase of the gravity factor by a further 3% (see recital (108) above).

2.1.3. Duration

2.1.3.1. Principles and application

(112) For the duration multiplier, the Commission takes into account the duration of HSBC's participation in the infringement on a rounded down monthly and pro rata basis. In doing so, the Commission applies the same methodology to determine the duration multipliers as that used in the 2013 Settlement Decision.

---

133 […]
134 2016 Decision, recitals (411), (413) and (417).
135 Judgment, for example at paragraphs 108, 139, 144.
136 Case C-307/18 *Generics (UK) and Others* EU:C:2020:52, paragraph 64.
137 Case T-456/10 *Timab Industries and CFPR v Commission*, EU:T:2015:296 paragraphs 152 and 153.

(113) HSBC took part in anticompetitive contacts between 12 February 2007 and 27 March 2007. HSBC participated in the infringement for a rounded down time period of 1 month. The duration multiplier for HSBC is set accordingly at 0.08.

2.1.3.2. HSBC arguments and findings

(114) HSBC again relies on an "effects based" principle to argue that the duration multiplier: "should reflect exactly the single day of the 19 March 2007 manipulation"[138] on the basis that any potential effects were limited in time to that date. Once again HSBC claims that the infringement did not involve price fixing and that any contacts before or after 19 March 2007 (whether related to attempted EURIBOR manipulation or otherwise) could not have had anti-competitive effects other than on that date or were not anti-competitive in the context of the EIRD market.[139]

(115) The Commission rejects this claim. HSBC participated in a single and continuous infringement and the Commission Guidelines on Fines apply on the basis of a period of participation, not on the basis of specific facts within that period. HSBC's claim that it only participated in a one day infringement also ignores the fact that the infringement is limited neither to rate manipulation nor to the arrangements concerning the 19 March 2007 scheme. The established infringement is described in recitals (392) and (393) of the 2016 Decision and the series of bilateral contacts in which HSBC participated (excluding those of 9 and 14 March 2007) involved elements of anti-competitive behaviour as noted in recital (65) and as confirmed by the General Court in the Judgment. The evidence demonstrates – and the General Court has accepted in the Judgment – that HSBC's participation in the infringement lasted from 12 February 2007 to 27 March 2007.

2.1.4. Additional Amount

2.1.4.1. Principles and application

(116) Pursuant to point 25 of the Fining Guidelines, irrespective of the duration of the undertaking's participation in the infringement, the Commission includes in the basic amount a sum of between 15% and 25% of the value of sales to deter undertakings from even entering into horizontal price-fixing, market-sharing and output limitation agreements.

(117) As HSBC was involved in horizontal price-fixing the Commission considers it appropriate to apply an additional amount to the fines calculated by reference to the value of sales as defined in Section 2.1.1.1 above. In deciding the specific percentage to be applied, and consistently with the methodology used to determine the additional amount in the 2013 Settlement Decision, the Commission has taken account of the factors referred to in Section 2.1.2.1.[140]

(118) Accordingly, the percentage for the additional amount is set at 18%.

2.1.4.2. HSBC arguments and findings

(119) HSBC submits that: "there is no need for an additional amount".[141] It reiterates the claim that it was not involved in: "any form of horizontal price fixing" and argues

---

138 […]
139 […]
140 Fining Guidelines, point 25.
141 […]

that: “unlike a normal price-fixing cartel, traders had no incentive to restrict or distort the EIRD trading prices that were offered to counterparties absent of the knowledge of the 19 March 2007 manipulation. To do so would have been unprofitable, because they would have achieved fewer trades. This fact reduces the need for any deterrent effect…”.[142] HSBC argues that using knowledge of an intended manipulation to quote more favourable prices to counterparties than competitors would have been costly for participating traders, in that they would have lower profits per trade. It also asserts that the Commission should have produced evidence to show that traders had an incentive to offer better terms of trade than non-participating competitors.

(120) Furthermore, HSBC argues that the imposition of an additional amount is disproportionate because this is based on an annual value of sales proxy, which HSBC claims breaches the principle of equal treatment between HSBC and the other participating banks given that HSBC’s involvement in the infringement was of a lesser duration. It submits that the annual element forming the basis of the additional amount therefore penalises HSBC much more severely and argues that the Commission should therefore use its discretion to depart from the usual methodology of calculation and impose either no additional amount or a significantly reduced percentage.

(121) HSBC's claim relies on its short duration, which, however, ignores the fact that the additional amount is applied irrespective of the duration of the participation in the infringement, in order to deter companies from even entering into illegal practices.[143] HSBC's short duration is sufficiently reflected in its duration multiplier used to calculate the variable amount.[144] As per point 25 of the Fining Guidelines, imposing an additional amount is automatic in the case of horizontal price fixing agreements.[145] It is standard practice to use the same percentage for setting the additional amount as for the gravity factor used in the calculation of the variable amount.

(122) As a participant in the various elements of the infringement from 12 February 2007 onwards, HSBC contributed to creating an informational asymmetry between market participants. In particular, in relation to the attempted manipulation of EURIBOR on 19 March 2007, when participating traders negotiated the ‘fixed leg’ of interest rate derivatives linked to EURIBOR, they were in a position to do so with greater certainty than non-participating traders with regard to the ‘variable leg’ which would determine the payments they were going to have to make. This enabled them to offer better terms than competitors. As the General Court underlined at paragraphs 101 to 104 of the Judgment, HSBC’s general assertions that it was not in the bank’s interest to offer better terms even if it were possible to do so with the benefit of its advance knowledge do not change the fact that there was “*a change in the competitive process on the EIRD market solely for the benefit of the banks that participated in the* collusion”.[146] Whether participating traders sought to offer better terms than

142 […]
143 Points 7 and 25 of the Fining Guidelines.
144 Point 19 of the Fining Guidelines provides that the variable amount is calculated by applying a gravity percentage to the value of sales multiplied by the duration of the infringement. The variable amount and additional amount together make up the basic amount of the fine.
145 Point 25 of the Fining Guidelines. Other cartel conduct, namely market sharing and output restrictions also lead to the automatic application of the additional amount. Its application is only discretionary for other types of infringements.
146 Judgment, paragraph 102.

competitors and make a larger number of trades at a lower profitability per trade or whether they chose not to offer better terms is irrelevant. In either scenario the participants' conduct has distorted the competitive process on the EIRD market.

(123) Similarly, in exchanging sensitive information on mid prices, participating traders were also better equipped to offer pricing terms as they had reduced uncertainties with respect to the market. Whether or not they chose, on the basis of the information gained, to offer better terms than non-participating traders or similar terms to other participants is irrelevant.

(124) Accordingly, the Commission sets the additional amount pursuant to point 25 of the Fining Guidelines at 18%.

2.1.5. Conclusion

(125) The application of the criteria set out in recitals (20)-(124) results in a basic amount of the fine to be imposed on HSBC of 37 340 000 EUR.

2.2. Adjustments to the basic amount

2.2.1. Aggravating circumstances

(126) In this specific case, the Commission does not take into account any aggravating circumstances.[147]

2.2.2. Mitigating circumstances

2.2.2.1. Principles and application

(127) When calculating the level of fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003, the Commission assesses whether mitigating circumstances such as those set out in point 29 of the Fining Guidelines would justify a reduction in the basic amount of the fine.[148]

(128) In this regard, whilst noting that HSBC's limited duration of involvement in the infringement was already duly reflected in the duration multiplier,[149] the Commission considered in the 2016 Decision that HSBC participated in the collusive arrangements in a different way to the main players, because it had a lower degree of intensity of collusive contacts than the main players.[150] The Commission also considered that HSBC had a more peripheral/minor role in the infringement. The Commission concluded, therefore, that, in the specific circumstances of the case, it was appropriate to grant HSBC a 10% reduction of the basic amount of the fine.

(129) Given that the same elements remain valid as at the date of this Decision, the Commission grants HSBC a 10% reduction of the basic amount of the fine indicated at recital (125).

2.2.2.2. Impact of the Judgment on the contacts forming part of the infringement

Intensity of the Contacts

(130) The Judgment upholds the 2016 Decision's findings that four discussions on trading positions on 12, 13 and 28 February 2007 and 19 March 2007, had a link to the EURIBOR manipulation of 19 March 2007 and pertained to conduct with an

[147] Fining Guidelines, point 28.
[148] Fining Guidelines, point 29, contains a non-exhaustive list of possible mitigating circumstances.
[149] 2016 Decision, recital (746).
[150] 2016 Decision, recital (748).

anticompetitive object. The General Court also confirmed that on 19 and 27 March 2007, HSBC and Barclays discussed the prospect of repeating the manipulation.[151] In addition, the General Court confirmed[152] that a further two discussions identified in the 2016 Decision, those of 14 and 16 February 2007, related to mid prices and had the object of restricting competition.

(131) However, the General Court also found that the Commission was not entitled to find that two of the contacts concerning trading positions identified in the 2016 Decision, those of 9 and 14 March 2007, had as their object the restriction of competition.[153] The number of anticompetitive contacts to be taken into account for the purposes of this Decision is therefore reduced by 2 in comparison to the 2016 Decision.

(132) As regards the reduction in the number of anticompetitive contacts, HSBC asserts that applying the same principles which led to the General Court's application of an additional 5% reduction of the fine in the Infineon judgment of 8 July 2020 supports a much higher reduction in HSBC's case.[154] In this respect, HSBC cites the bilateral nature of its contacts, the low number of contacts in which it was involved in proportion to the total number of contacts of all banks in the infringement (ten out of 390) and the fact that – according to HSBC – the contacts in which it was involved did not reduce market uncertainty and were of a limited impact because market prices evolved rapidly. [155]

(133) There is no binding list of criteria to be taken into consideration for the purposes of defining an undertaking's individual participation in the infringement and calculating the amount of the fine to be imposed for such participation. Each case must be analysed on the basis of the factual circumstances of that case and relevant factors other than the exact number and intensity of contacts may be decisive for the assessment of an undertaking's individual participation for the purposes of calculating the amount of the fine.[156]

(134) In the present case, excluding the contacts of 9 and 14 March 2007 from the number of HSBC's anticompetitive contacts does not alter the duration of HSBC's participation in the infringement; the gravity of the infringement; the role played by HSBC; the value of sales concerned; or the threat that infringements of the type covered by the 2016 Decision pose to competition in the EEA and the provision of financial services in the Union.[157] Furthermore, in view of the relatively short duration of the infringement found against HSBC, it must be observed that the contacts occurred with a certain regularity and that the frequency was still high. The

---

151 Judgment, paragraphs 256 and 262.

152 Judgment, paragraph 138.

153 Judgment, paragraph 195.

154 Case T-758/14 RENV, *Infineon Technologies v Commission*, ECLI:EU:T:2020:307.
The undertaking received an additional 5% reduction to the 20% already applied by the Commission.

155 […]

156 Case C-534/07 P, *Prym and Prym Consumer* v *Commission*, EU:C:2009:505, paragraph 54; see, also, Case C-511/11 P, *Versalis* v *Commission*, EU:C:2013:386, paragraph 82 and the case-law cited, Case C-99/17 P, *Infineon Technologies v Commission*, ECLI:EU:C:2018:773, paragraph 205, Case C-386/10 P, *Chalkor* v *Commission*, EU:C:2011:815, paragraph 57 and the case-law cited, Case C-280/08 P, 14 October 2010 *Deutsche Telekom v Commission*, ECLI:EU:C:2010:603, paragraph 277 and Case C-407/04 P, *Dalmine v Commission*,, EU:C:2007:53, paragraph 132.

157 See, to that effect, Case C-386/10 P, *Chalkor v. Commission* EU:C:2011:815, paragraph 56 and the case-law cited.

number of contacts[158] is considerable for a cartel participation of six weeks. The overall number of 390 contacts cited by HSBC relates to contacts between seven banks in the overall period of the cartel from 2005-2008. HSBC did not play a purely passive role in the cartel and its participation cannot be held to be sporadic.[159]

(135) As to HSBC's reliance on the *Infineon* case, in that case the undertaking concerned participated in 10 contacts in 18 months, whereas HSBC participated in a similar number of contacts in six weeks. HSBC's participation, albeit for a shorter duration, was thus much more frequent. Consequently, HSBC cannot rely upon the number of contacts for claiming a greater reduction than that granted in *Infineon*.

(136) Moreover, in relation to HSBC's arguments for a greater increase in the reduction than that granted in *Infineon*, it should be recalled that the Commission has already taken account of HSBC's lower degree of intensity of contacts and more minor/peripheral role in the infringement in granting a 10% reduction to the fine. HSBC's limited duration of involvement is also already taken into account in the duration multiplier. HSBC's claims regarding the alleged lack of effects of the infringement have already been rejected in Section 2.1.1.2.

Awareness

(137) In the Judgment, the General Court also found that the 2016 Decision's findings concerning HSBC's participation in a single and continuous infringement can be upheld only in respect, first, of its own conduct and, second, the conduct of other banks involved in the infringement to the extent that their conduct related to the manipulation of the Euribor rate on 19 March 2007 and any potential repetition of such manipulation.[160]

(138) On the issue of awareness, HSBC refers to the *Coppens* judgments[161] as a precedent and claims that it is entitled to a reduction of the same order of magnitude:[162] "*In Coppens, the Court held that, by taking part in an agreement on cover quotes, Coppens could not reasonably foresee that it was taking part in a wider SCI, including an agreement on commissions* [...] *The Court therefore concluded that Coppens could only be sanctioned for its participation in the agreement on cover quotes and not for the wider SCI identified by the Commission* [...] *The Court reduced Coppens fine by 65%*"[163]. HSBC therefore argues[164] that the overall reduction in its fine following the General Court's findings in relation to both the intensity of the contacts and its awareness of the single and continuous infringement: "*should be at least 65%*".

---

158 There are contacts on 12, 13 and 28 February 2007 in view of or in connection to the Euribor manipulation of 19 March 2007, contacts on 14 and 16 February in relation to mid prices, a series of contacts by Bloomberg chat and telephone on 19 March 2007 itself (see recitals (322)-(329) of the 2016 Decision) and contacts on 20 and 27 March 2007.

159 See, to that effect, Case T 83/08, *Denka Chemicals v Commission*, EU:T:2012:48, paragraphs 254 and 255.

160 Judgment, paragraph 273.

161 Case T-210/08 *Verhuizingen Coppens v Commission*, EU:T:2011:288, paragraph 31; and Case C-441/11 P *Commission v Verhuizingen Coppens,* EU:C:2012:778, paragraph 66.

162 […]

163 […]

164 […]

(139) Referring to the 10% additional reduction granted for mitigating circumstances by the Court of Justice in the *Galp*[165] judgment, HSBC argues that it should receive a far greater reduction on the grounds that:[166] "*In Galp, the Court of Justice adopted only a* [further] *10% reduction of the basic amount for Galp's fine…due to the lack of evidence of Galp's participation in a compensation mechanism and monitoring system. However, these practices were merely ancillary to the main conduct of market sharing and price coordination for which Galp was found liable. The position is very different in HSBC's case. In the Judgment, the General Court clearly distinguished the two main forms of conduct: the manipulation of 19 March 2007 and other (unrelated) forms of conduct. As a result, HSBC's reduced involvement did not concern practices supporting the main conduct in this case, but concerned a separate form of conduct altogether which has been used by the Commission to construct the SCI and link together isolated manipulation events contrary to the approach in the YIRD case*".[167]

(140) As regards HSBC's arguments on awareness, firstly it should be noted that the circumstances of the *Coppens* case are not comparable to HSBC's situation. Coppens participated in an agreement on cover quotes, which "*could not be regarded as forming part of the overall plan pursued by the participants in the cartel in question*"[168]. HSBC, however, participated in the 19 March manipulation, which formed an important part of the overall plan pursued by the participants in the cartel. The General Court found that: "[HSBC's] *intention to participate in a single infringement is clear from the evidence put forward by the Commission"*[169] and 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*". [170] The General Court confirmed that HSBC could be held liable for the 19 March manipulation and any repetition of that manipulation both as regards its own conduct and that of the other participants.[171]

(141) While the General Court found that HSBC was not aware, and could not have been aware,[172] that its anti-competitive conduct with respect to exchanges on mid prices and exchanges on trading positions formed part of the same single and continuous infringement as the 19 March 207 manipulation, HSBC participated in every element of the single and continuous infringement as outlined in recital (65) above from 12 February to 27 March 2007. A reduction in the fine on the scale of that determined by the General Court in *Coppens* would, therefore, be inappropriate.

---

165 Case C-603/13P *Galp Energia España and Others v Commission*, EU:C:2016:38.
The undertaking received an additional 10% reduction to the 10% already applied by the Commission.

166 […]

167 In addition to its claim concerning the elements of the single and continuous infringement in the EIRD case, HSBC is referring to the fact that the YIRD case involved seven bilateral infringements of Article 101 TFEU and Article 53 of the EEA Agreement rather than one single and continuous infringement. The facts of the two cases are different. In the YIRD case the infringements involved differing combinations of two banks out of a total of five banks, rather than, as in the EIRD case, a single and continuous infringement in which up to seven banks participated over differing periods.

168 Case C-441/11 P *Commission v Verhuizingen Coppens*, ECLI:EU:C:2012:778, paragraph 82.

169 Judgment, paragraph 279.

170 Judgment, paragraph 262.

171 Judgment, paragraph 273.

172 Judgment, paragraph 269.

(142) As to HSBC's comparison with the *Galp* case, such interpretation of the Judgment (and the 2016 Decision) is at odds with the General Court's ruling as shown in recital (130) above. Even if HSBC's contacts on 9 and 14 March 2007 did not restrict competition by object and HSBC is held liable only, first, for its own conduct and, second, for the conduct of other banks involved in the infringement to the extent that their conduct related to the manipulation of the Euribor rate on 19 March 2007 and any potential repetition of such manipulation, the nature of HSBC's participation has not materially changed in comparison to the 2016 Decision. HSBC's participation is still based on its collusive bilateral contacts with Barclays and the attempted EURIBOR manipulation of 19 March 2007 is still at the centre of HSBC's participation in the infringement.

(143) Nevertheless, in the light of the General Court's findings concerning the 9 and 14 March 2007 contacts and that HSBC could not be held liable for the conduct of other banks involved in the infringement other than to the extent that such conduct related to the manipulation of the Euribor rate on 19 March 2007 and any potential repetition of such manipulation, the Commission considers it appropriate, in the specific circumstances of the case, to grant a further reduction of 5% to the basic amount of the fine to be imposed on HSBC, thus resulting in a 15% overall reduction (when combined with the 10% reduction applied in Recital (129)) in the basic amount of the fine to take account of mitigating circumstances.

2.2.2.3. HSBC's additional arguments on mitigating circumstances

(144) HSBC also claims that, in addition to the General Court's findings, there are four additional mitigating circumstances, which are relevant to the calculation of its fine.

(145) HSBC argues, firstly, that it had a passive and limited role in the infringement and that its involvement was: "*even more limited than that recognised by the General Cour*t".[173] It claims that through one trader it played only a passive role in the manipulation of 19 March 2007 and that this event was in any case: "disconnected from the overall plan designed by the ringleaders". HSBC also argues that its role was more limited than that of the other non-settling banks.

(146) HSBC's contention that the manipulation of 19 March was "disconnected" from the overall plan of the cartel is contradicted by the evidence, which demonstrates that the 19 March manipulation was an important part of the overall infringement and one which was planned weeks ahead. This was confirmed in the Judgment. The scheme was presented to HSBC on 12 February 2007[174] and the anti-competitive discussions between the various cartel participants in this period indicate its importance to them. Furthermore, whilst HSBC might not have been aware of the overall scope of the single and continuous infringement, its role in the period from 12 February to 27 March 2007 is far from passive. On 19 March 2007 the HSBC trader actively confirms his agreement to speak to the HSBC submitter (to ask him to submit a low rate), then calls the submitter and finally reports back that the HSBC submitter will contribute a low submission. As noted in the 2016 Decision,[175] after having been informed of the 19 March 2007 scheme, the HSBC trader states that he will closely watch the events and he later states that he has been careful not to have the opposite trading position (i.e. he has actively ensured that he will benefit). That HSBC

173 […]
174 2016 Decision, recital (271).
175 2016 Decision, recital (745).

participated for a shorter period than the two other non-settling banks has already been taken into account in the calculation of the fine by virtue of the smaller duration multiplier.

(147) HSBC argues secondly, that its infringement was committed by a rogue employee [the HSBC trader] whose incentives and benefits did not necessarily align with those of the bank and for whose conduct HSBC should not be held responsible.[176] HSBC contends that its EURIBOR submitter had no knowledge of [the HSBC trader]'s contacts with a Barclays trader nor knew that other banks were intending to submit particular EURIBOR submissions on 19 March 2007. HSBC further contests that a contact involving a second HSBC trader on 27 March 2007 had an anti-competitive nature.

(148) HSBC's statement that its participation was solely the result of the actions of a rogue employee is incorrect. Whatever his awareness or otherwise of the attempted manipulation, the HSBC submitter agrees to [the HSBC trader]'s request to put the 3 month EURIBOR submission "*à la cave*", suggests a rate which is agreeable to [the HSBC trader] and follows up on their agreement.[177] In addition, as noted above, a second HSBC trader is involved in the contact of 27 March 2007.[178] An undertaking is responsible for the actions of its employees[179] and even if an employee is acting without authorisation the undertaking can be held liable for an infringement of Article 101(1) of the Treaty.[180] Furthermore, it should be noted in this regard that, as set out in the 2016 Decision[181], the banking industry is characterised by a high level of recording and supervision of individual employees which, compared to other industries, considerably facilitates the detection of illicit behaviour by employees. Finally, the assertion that [the HSBC trader]'s incentives and actions were not necessarily aligned with those of his colleagues or the bank as a whole is both irrelevant and contradicted by the evidence. In the first place, Article 23(1) and (2) of Regulation 1/2003 empower the Commission to impose fines on undertakings where, intentionally or negligently, they have committed an infringement of the EU competition rules.[182] HSBC's intentional (or at the very least, negligent) participation in an infringement has been established in the 2016 Decision and confirmed in the Judgment. In the second place, the colleague, who congratulated a participating trader at another bank on 27 March 2007, clearly shared the general congratulatory mood in response to the profit generated by the cartel participants on 19 March 2007.

(149) HSBC argues thirdly that it had 'reasonable doubt' as to whether its conduct constituted an infringement as: "*the application of Article 101(1) to the EIRD market and the conduct in question is difficult and without precedent*".[183] HSBC dismisses the statements of the immunity and leniency applicants which: "*described the facts of*

---

176 […]

177 2016 Decision, recital (325).

178 2016 Decision, recital (339).

179 Joined Cases T-389/10 and T-419/10, *Siderurgica Latina Matin SpA (SLM) v Commission*, ECLI:EU:T:2015:513, paragraph 410.

180 Judgment of the Court of 7 February 2013, *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.,* C-68/12, ECLI:EU:C:2013:71, paragraphs 25-26; Judgment of the Court of 7 June 1983, *Musique Diffusion française a.o.* v *Commission,* Joined Cases 100/80 to 103/80, ECLI:EU:C:1983:158, paragraph 97.

181 2016 Decision, recital (599).

182 See Judgment of the Court of Justice of 10 September 2009, *Akzo Nobel and others v Commission*, C-97/08 P, ECLI:EU:C:2009:536, paragraph 54.

183 […]

the case (insofar as they were involved) as horizontal practices relating to coordination and fixing of prices" as being "*self-serving by their very nature. Applicants are aware that if they fail to establish that the practices relate to cartel-like behaviour they will not get any reduction in fine under the Leniency Notice*."

(150) HSBC asserts in this regard that the General Court ruling in the *Fresh Del Monte Produce* case[184] allows for the application of mitigating circumstances which were available under the 1998 fining guidelines and that these circumstances can still justify the adoption of a reduction in the fine and states that the Court referred specifically to two circumstances: the passive role of the undertaking in the infringement; and reasonable doubt as to whether the conduct of the undertaking qualified as an infringement of Article 101(1) TFEU[185].

(151) As noted in recital (146),[186] HSBC did not have a passive role in the infringement.

(152) Concerning the issue of reasonable doubt, the General Court stated in the Fresh Del Monte Produce case that: "the fact that that provision[187] is no longer included in the Guidelines does not mean that the circumstances referred to can no longer give rise to a reduction of a fine on account of mitigating circumstances".[188] In the Fresh Del Monte Produce case, however, the circumstances referred to (but which, nevertheless, were not accepted by the Court as grounds for a reduction in the fine) related primarily to the applicant's claims that, firstly, information relating to official prices (of bananas) was shared with customers, the Commission and other public authorities and, secondly,: "the Commission had failed to take into account that [the applicant] had legitimate expectations that the conduct in question was lawful".[189] The allusion to a form of 'non-secret' longstanding pricing arrangement involving all the major market operators, which might potentially endow legitimate expectations of legality on its participants, is entirely removed from the circumstances of the secretive cartel in which HSBC participated.

(153) As to HSBC's additional arguments concerning 'reasonable doubt', as stated in the 2016 Decision,[190] the Commission does not consider that the anticompetitive nature of the conduct was doubtful or novel, or that HSBC could not have contemplated that the conduct established would be characterised as anticompetitive horizontal practices relating to prices. As noted in recital (17), the General Court found that HSBC had a clear intention to participate in an infringement.[191] Even if the conduct was novel, this would not entitle HSBC to a reduction in the fine.[192] Equally, the notion that the four leniency applications made during the investigation were all "*self-serving*" is wholly unjustified, given that an application under the Leniency Notice requires disclosure of participation in a cartel and exposure to private claims for damages.

---

184 T-587/08 *Fresh Del Monte Produce v Commission*, EU:T:2013:129

185 […]

186 See also recital (745) of the 2016 Decision.

187 T-587/08 *Fresh Del Monte Produce v Commission*, EU:T:2013:129 para 824: "*the earlier version of the* [Fining] *Guidelines provided for the possibility of a reduction of a fine on account of mitigating circumstances owing to the existence 'of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement'*".

188 T-587/08 *Fresh Del Monte Produce v Commission*, paragraph 825.

189 T-587/08 *Fresh Del Monte Produce v Commission*, paragraph 819.

190 2016 Decision, recital (742).

191 Judgment paragraph 279.

192 T-704/14 *Marine Harvest v Commission* ECLI :EU :T :2017 :753, paragraphs 388-393.

(154) Finally, HSBC argues that it has effectively cooperated with the Commission outside of the scope of the Leniency Notice and beyond its legal obligation by taking intensive efforts to respond to the Commission's requests for information, in particular in identifying and providing relevant phone communications to the Commission.[193]

(155) As regards the issue of HSBC's cooperation, replying correctly to a request for information simply amounts to adherence to legal requirements and does not constitute voluntary cooperation outside the Leniency Notice warranting a further reduction of the fine.[194]

(156) In conclusion, the Commission rejects HSBC's claims that there are additional mitigating circumstances and does not grant any further reduction.

3. CONCLUSION

(157) In conclusion, for the above-mentioned reasons, and having regard to the 2016 Decision and the General Court's findings in its Judgment of 24 September 2019 in Case T-105/17 *HSBC Holdings plc, HSBC Bank plc, HSBC France* v *Commission,* ECLI:EU:T:2019:675, a fine of 31 739 000 EUR should be imposed on HSBC for the infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement found at Article 1(b) of the 2016 Decision.

(158) This Decision does not raise any new objections against HSBC nor does it alter the substance of the objections as set out in the Statement of Objections of 19 May 2014 except insofar as it takes into account the General Court's findings in the Judgment 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 and 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, the conduct of other banks involved in the infringement to the extent that their conduct related to the manipulation of the Euribor rate on 19 March 2007 and any potential repetition of such manipulation.

HAS ADOPTED THIS DECISION:

Article 1

In Article 2 of Decision C (2016) 8530 of 7 December 2016, the following point (b) is inserted:

" (b) HSBC Holdings plc, HSBC Bank plc and HSBC Continental Europe jointly and severally liable: 31 739 000 EUR"

---

193 […]

194 Joined cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce v Commission,* ECLI:EU:C:2015:416, paragraph 184 where it was confirmed that a reduction of a fine: "*is justified only where an undertaking provides information to the Commission without being asked to do so*".

Article 2

The fine shall be credited, in euros, within six months of the date of notification of this Decision, to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: EC/BUFI/AT.39914

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where the undertaking referred to in Article 1(b) of Decision C (2016) 8530 of 7 December 2016 lodges an appeal against this Decision, that undertaking shall cover the fines by the due date, either by providing an acceptable financial guarantee or by making a provisional payment of the fines in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046.[195]

---

[195] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the European Union (OJ L 193, 30.7.2018, p. 80).

Article 3

This Decision is addressed to

HSBC Holdings plc
Level 26, 8 Canada Square
London E14 5HQ
United Kingdom

HSBC Bank plc
Level 26, 8 Canada Square
London E14 5HQ
United Kingdom

HSBC Continental Europe
38, avenue Kléber
75116 Paris
France

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 28.6.2021

For the Commission

(Signed)

Margrethe VESTAGER
Executive Vice-President