Reports of Cases

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

10 November 2017*

(Competition — Agreements, decisions and concerted practices — Yen interest rate derivatives sector — Decision finding six infringements of Article 101 TFEU and Article 53 of the EEA Agreement — Manipulation of the JPY LIBOR and Euroyen TIBOR interbank reference rates — Restriction of competition by object — Participation of a broker in the infringements — 'Hybrid' settlement procedure — Principle of the presumption of innocence — Principle of sound administration — Fines — Basic amount — Exceptional adjustment — Article 23(2) of Regulation (EC) No 1/2003 — Obligation to state reasons)

In Case T-180/15,

Icap plc, established in London (United Kingdom),

Icap Management Services Ltd, established in London,

Icap New Zealand Ltd, established in Wellington (New Zealand),

represented by C. Riis-Madsen and S. Frank, lawyers,

applicants,

v

European Commission, represented by V. Bottka, B. Mongin and J. Norris-Usher, acting as Agents,

defendant,

ACTION brought under Article 263 TFEU for annulment of Commission Decision C(2015) 432 final of 4 February 2015 relating to proceedings under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39861 — Yen Interest Rate Derivatives), and, in the alternative, for a reduction in the amount of the fines imposed on the applicants in that decision,

THE GENERAL COURT (Second Chamber, Extended Composition),

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

Registrar: L. Grzegorczyk, Administrator,

having regard to the written part of the procedure and further to the hearing on 10 January 2017,

gives the following

* Language of the case: English.

Judgment

I. Background to the dispute

1 The applicants, Icap plc, Icap Management Services Ltd and Icap New Zealand Ltd, are part of a voice and electronic interdealer broker which is also a provider of post-trade services ('Icap').

2 By its Decision C(2015) 432 final of 4 February 2015 relating to proceedings under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39861 — Yen Interest Rate Derivatives) ('the contested decision'), the European Commission held that Icap had participated in the commission of six infringements of Article 101 TFEU and Article 53 of the EEA Agreement in connection with the manipulation of the *London Interbank Offered Rate* (LIBOR) and the *Tokyo Interbank Offered Rate* (TIBOR) interbank reference rates on the Japanese Yen interest rate derivatives market; those infringements had been previously found by Commission Decision C(2013) 8602 final of 4 December 2013 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39861 — Yen Interest Rate Derivatives) ('the 2013 decision').

3 On 17 December 2010, UBS AG and UBS Securities Japan (together 'UBS') applied to the Commission for a marker under the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17, 'the Leniency Notice'), informing it of the existence of a cartel in the Japanese Yen interest rate derivatives sector.

4 On 24 April 2011, 18 November 2011, 28 September 2012 and 3 December 2012, Citigroup Inc. and Citigroup Global Markets Japan Inc. (together 'Citi'), Deutsche Bank Aktiengesellschaft ('DB'), R.P. Martin Holdings and Martin Brokers (UK) Ltd. and The Royal Bank of Scotland (RBS) respectively submitted applications under the Leniency Notice (recitals 47 to 50 of the contested decision). On 29 June 2011 and 12 February 2013, the Commission granted UBS and Citi conditional immunity pursuant to point 8(a) of that notice (recitals 45 and 47 of the contested decision).

5 On 12 February 2013, pursuant to Article 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1), the Commission initiated infringement proceedings against UBS, RBS, DB, Citi, R. P. Martin Holdings and Martin Brokers (UK) and JP Morgan Chase & Co., JP Morgan Chase Bank, National Association and J. P. Morgan Europe Ltd (recital 51 of the contested decision).

6 On 29 October 2013, the Commission addressed a statement of objections to the companies referred to in paragraph 5 above (recital 52 of the contested decision).

7 On the basis of the settlement procedure under Article 10a of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU] and [102 TFEU] (OJ 2004 L 123, p. 18), as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 (OJ 2008 L 171, p. 3), the Commission adopted the 2013 decision by which it found that the companies referred to in paragraph 5 above had infringed the provisions of Article 101 TFEU and Article 53 of the EEA Agreement by participating in agreements or concerted practices which had as their object the restriction or distortion of competition in the Japanese Yen interest rate derivatives sector.

A. Administrative procedure prior to the contested decision

8 On 29 October 2013, the Commission initiated infringement proceedings against the applicants pursuant to Article 11(6) of Regulation No 1/2003 (recital 53 of the contested decision).

9 On 31 October 2013, a settlement meeting was held in accordance with Article 10a of Regulation No 773/2004, in the course of which the Commission informed the applicants of the objections it envisaged raising against Icap and disclosed the main pieces of evidence in its file underlying those objections (recital 54 of the contested decision).

10 On 12 November 2013, the applicants informed the Commission of their intention not to opt for a settlement procedure (recital 55 of the contested decision).

11 On 6 June 2014, the Commission addressed a statement of objections to the applicants. The applicants responded on 14 August 2014 and during the hearing which took place on 12 September 2014 (recitals 58 and 59 of the contested decision).

12 On 4 February 2015, the Commission adopted the contested decision, finding Icap guilty of having 'facilitated' six infringements and imposing on it six fines of EUR 14 960 000 in total.

B. Contested decision

1. The products at issue

13 The infringements at issue relate to Japanese Yen Interest Rate Derivatives referencing the JPY LIBOR or the Euroyen TIBOR. The JPY LIBOR is a set of reference interest rates set in London (United Kingdom) which, at the time that the contested decision was adopted, was set and published by the British Bankers Association (BBA) and used for many financial instruments denominated in Japanese Yen. It is calculated on the basis of the rate estimates submitted daily by a panel of banks which are members of that association ('the JPY LIBOR panel'). Those submissions reflect the 'average' rate from which each panel bank could borrow funds by asking for and then accepting interbank offers in a reasonable size. On the basis of the submissions from those banks and excluding the four highest references and the four lowest references, the BBA thus set the daily JPY LIBOR rates. The Euroyen TIBOR is a set of reference interest rates used in Tokyo (Japan) which fulfils an equivalent function but is calculated by the Japanese Bankers Association (JBA) on the basis of the submissions from a panel of the members of that association and excluding the two highest references and the two lowest ones. The Commission found that the JPY LIBOR and Euroyen TIBOR rates are reflected in the pricing of Japanese Yen interest rate derivatives. They may affect the cash flow that a bank will either pay or receive on the expiry of the term of its counterparty or at specific intervals. The most common derivatives are forward rate agreements, interest rate swaps, interest rate options and interest rate futures (see recitals 9 to 19 of the contested decision).

2. Conduct of which Icap was found guilty

14 The conduct of which Icap was found guilty consists in the 'facilitation' of six infringements, namely:

– 'the UBS/RBS 2007 infringement', from 14 August until 1 November 2007;

– 'the UBS/RBS 2008 infringement', from 28 August until 3 November 2008;

– 'the UBS/DB infringement', from 22 May until 10 August 2009;

– 'the Citi/RBS infringement', from 3 March until 22 June 2010;

– 'the Citi/DB infringement', from 7 April until 7 June 2010;

– 'the Citi/UBS infringement', from 28 April until 2 June 2010.

15 In the first place, the Commission noted in particular that Icap participated in the cash deposit Japanese Yen active market as a broker, through its 'Cash/Money Market desk', which is based in London. As part of that activity, it distributed quotes to participants on that market showing both the volumes available and the price, the purpose of which was to facilitate the conclusion of agreements between those participants. With regard, more specifically, to the quotes provided by Icap to those participants, the Commission stated, in essence, that they included quotes for the daily JPY LIBOR rates in the form of a spreadsheet circulated to financial institutions, including members of the JPY LIBOR panel. The Commission considered that that spreadsheet had a decisive influence over the conduct of the banks when they circulated their rate submissions (recitals 98 to 101 of the contested decision).

16 In the second place, the Commission held that Icap was also a broker in the Japanese Yen interest rate derivatives market, that role being performed by a specific desk. It considered that some of the traders on that desk, in addition to legitimate transactions with Mr H., a trader for UBS and later for Citi, also attempted, at his request, to affect the JPY LIBOR rate by adjusting the spreadsheet in question and by using Icap's contacts with certain JPY LIBOR panel banks (recitals 102 and 103 of the contested decision).

17 In the third place, the Commission considered that this had led Icap to facilitate the commission of the six infringements found in the 2013 decision (recitals 165 to 171 of the contested decision). With regard, first, to the UBS/RBS 2007, UBS/RBS 2008 and UBS/DB infringements, the Commission stated that a trader of UBS had used Icap's services with the aim of influencing the submissions of certain JPY LIBOR panel banks that did not participate in those three cartels. In this regard, the Commission found that Icap had used its contacts with those panel banks in a direction desired by UBS and had disseminated misleading information on future JPY LIBOR rates (recital 77(a) and (b) and recitals 106 to 141 of that decision). With regard, second, to the Citi/UBS and Citi/DB infringements, the Commission held that a trader of Citi used Icap's services with the aim of influencing the submissions of certain JPY LIBOR panel banks that did not participate in those two infringements. In this connection, the Commission also found that Icap had used its contacts with banks that were members of that panel and disseminated misleading information (recital 83(a) and (b) and recitals 154 to 164 of that decision). With regard, third, to the Citi/RBS infringement, the Commission found that Icap had served as a communication channel between a trader of Citi and a trader of UBS with the aim of facilitating its implementation (recitals 84 and 142 to 153 of that decision).

3. Calculation of the fine

18 The Commission made the preliminary observation that, under the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2, 'the 2006 Guidelines'), the basic amount of the fine must be determined having regard to the context in which the infringement was committed and in particular the gravity and duration of the infringement and that the role played by each participant must be assessed on an individual basis, reflecting any aggravating and attenuating circumstances (recital 284 of the contested decision).

19 The Commission observed that the 2006 Guidelines provided only limited guidance on the calculation of the fine for facilitators. Since Icap was an operator active on the brokerage services markets, and not on the interest rate derivatives market, the Commission held that it could not substitute brokerage fees for those for the prices of Japanese Yen interest rate derivatives in determining the value of sales and setting the fine, as such substitution does not reflect the gravity and nature of the infringement. It inferred, in essence, that it was necessary to apply point 37 of the 2006 Guidelines, which makes it possible to depart from those Guidelines for the determination of the basic amount of the fine (recital 287 of the contested decision).

20 In view of the gravity of the conduct at issue and the duration of the Icap's participation in each of the six infringements at issue, the Commission set, for each infringement, a basic amount of the fine, namely EUR 1 040 000 for the UBS/RBS 2007 infringement, EUR 1 950 000 for the UBS/RBS 2008 infringement, EUR 8 170 000 for the UBS/DB infringement, EUR 1 930 000 for the Citi/RBS infringement, EUR 1 150 000 for the Citi/DB infringement and EUR 720 000 for the Citi/UBS infringement (recital 296 of the contested decision).

21 In determining the final amount of the fine, the Commission found that there were no aggravating or mitigating circumstances and noted that the ceiling of 10% of annual turnover had not been exceeded (recital 299 of the contested decision). Article 2 of the operative part of the contested decision therefore imposes on the applicants fines whose final amount is equivalent to their basic amount.

II. Procedure and forms of order sought

22 By application lodged at the Court Registry on 14 April 2015, the applicants brought the present action.

23 On 15 February 2016, on a proposal from the Judge-Rapporteur, by way of measures of organisation of procedure provided for in Article 89 of its Rules of Procedure, the Court (Fourth Chamber) invited the applicants to reply to a question concerning their second plea in law, following the delivery of the judgment of 22 October 2015, *AC-Treuhand* v *Commission* (C-194/14 P, EU:C:2015:717).

24 On 29 February 2016, the applicants replied to the question put by the General Court, abandoning a part of their second plea in law.

25 When the composition of the chambers of the Court was altered, the Judge-Rapporteur was assigned to the Second Chamber, to which this case was, consequently, assigned.

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

27 On a proposal from the Judge-Rapporteur, the Court (Second Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure provided for in Article 89 of its Rules of Procedure, put written questions to the parties and asked the Commission to produce the applications for settlement submitted by UBS in respect of the UBS/RBS 2007 and UBS/RBS 2008 infringements.

28 On 30 November 2016, the Commission declined to accede to the request for production of documents. By an order of 1 December 2016, the General Court ordered the Commission to provide it with those two documents. In accordance with the first subparagraph of Article 92(3) of the Rules of Procedure, and with a view to reconciling the adversarial principle and the characteristics of the settlement procedure, the order of 1 December 2016 limited inspection of those two documents to the parties' representatives at the Registry, without the possibility of any copies being made. On 7 December 2016, the Commission complied with the measure of inquiry.

29 On 8 and 9 December 2016, the applicants and the Commission respectively replied to the questions put by the Court. On 31 December 2016 and 5 January 2017, the Commission and the applicants respectively submitted their observations on the replies submitted by the other party.

30 The parties presented oral argument and replied to the Court's oral questions at the hearing on 10 January 2017.

31 The applicants claim that the Court should:

– annul in whole or in part the contested decision;

– in the alternative, annul or reduce the amount of the fines imposed;

– order the Commission to pay the legal and other costs and expenses incurred in relation to this matter;

– take any other measures that the Court considers appropriate.

32 The Commission contends that the Court should:

– dismiss the action in its entirety;

– order the applicants to pay the costs.

III. Law

A. The admissibility of a document and of a head of claim

33 The Commission contests the admissibility of the applicants' fourth head of claim and the admissibility of a letter addressed to the Court.

1. Admissibility of the applicants' fourth head of claim

34 By their fourth head of claim, the applicants request the Court to 'take any other measures that [it] considers appropriate'.

35 In so far as such a head of claim must be interpreted as a request that the Court should issue directions to the Commission, it must be recalled that it is settled case-law that the Courts of the European Union are not entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them. It is for the institution concerned, under Article 266 TFEU, to adopt the measures required to give effect to a judgment delivered in an action for annulment (see judgment of 30 May 2013, *Omnis Group* v *Commission*, T-74/11, not published, EU:T:2013:283, paragraph 26 and the case-law cited).

36 In so far as the fourth head of claim includes a request for an instruction to be issued, it must therefore be declared inadmissible.

2. The challenge to the admissibility of a letter from the applicants

37 In the rejoinder, the Commission contends that a letter from the applicants addressed to the General Court and a copy of which was communicated directly to the Commission by the applicants must be declared inadmissible because it fails to comply with the provisions of the Rules of Procedure.

38 It is sufficient in that regard to note that, by a decision of 2 March 2016, it was decided not to place that letter on the case file. The Commission's challenge of admissibility is therefore devoid of purpose.

B. The action for annulment

39 In support of its action for annulment of the contested decision, the applicants put forward six pleas in law. The first four pleas in law concern, respectively: first, the interpretation and application of the concept of restriction or distortion of competition 'by object' within the meaning of Article 101(1) TFEU; second, the application of the concept of 'facilitation' to the facts of the present case; third, the duration of the six infringements at issue and; fourth, a breach of the principles of presumption of innocence and good administration, regarding the legality of Article 1 of that decision, relating to the existence of those infringements. The fifth and sixth pleas in law, relating, respectively, to the determination of the amount of the fines and a breach of the *ne bis in idem* principle, concern the legality of Article 2 of that decision, relating to the fines imposed by the Commission for each of those infringements.

1. The first plea in law, alleging errors in the interpretation of the concept of restriction or distortion of competition 'by object' within the meaning of Article 101(1) TFEU

40 In the first plea, the applicants challenge the characterisation of the conduct with which the Commission takes issue as an infringement by object, inasmuch as that conduct is not likely to influence competition, and infer from this that Icap cannot be held liable for the 'facilitation' of any infringement.

41 The Commission contends that this plea should be dismissed.

42 In so far as the Commission's characterisation as infringements by object is at issue, it must be recalled that, to be caught by the prohibition laid down in Article 101(1) TFEU, an agreement must have 'as [its] object or effect' the prevention, restriction or distortion of competition within the internal market.

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

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

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

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

47 According to the case-law of the Court of Justice, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (judgments of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 117; see also, to that effect, judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 36).

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

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

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

51 The Court of Justice has therefore held that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted (judgments of 2 October 2003, *Thyssen Stahl* v *Commission*, C-194/99 P, EU:C:2003:527,

paragraph 89; of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 35, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 121).

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

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

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

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

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

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

58 In the present case, in recitals 77 and 78 of the contested decision, the Commission found that the six infringements at issue all included two types of conduct, namely, first, discussion of the submissions of at least one of the banks in order to influence the direction of that submission and, second, the communication or receipt of commercially sensitive information relating either to trading positions or to the future submissions of at least one of the respective banks. Moreover, as regards the UBS/DB

infringement, the Commission also stated, in recital 78 of that decision, that the banks explored the possibility of executing trades designed to align their trading interests in respect of derivatives, and may on a few occasions have entered into such trades.

59 The Commission found that the conduct at issue had as its object a manipulation of the JPY LIBOR rates, which enabled an improvement of the position of the participating banks on the Japanese Yen interest rate derivatives market.

60 In recitals 13 to 17 of the contested decision, the Commission stated that derivatives and in particular forward rate agreements and interest rate swaps had two 'legs', one corresponding to a flow to be paid, the other to a flow to be received. One is made up of a fixed rate, the other of a floating rate. One party makes a payment calculated on the basis of the floating rate to the other party and receives a payment determined on the basis of the fixed rate set when the agreement is entered into, and vice versa.

61 The Commission observed that the manipulation of the JPY LIBOR rates had a direct effect on the cash-flow received or paid in respect of the 'floating' leg of the contracts referred to in paragraph 60 above (recitals 199 and 201 of the contested decision), since those contracts were calculated directly by reference to those rates.

62 The Commission took the view that the manipulation of the JPY LIBOR rates had also had an effect on the 'fixed' leg of the contracts referred to in paragraph 60 above, in so far as the current level of those rates was indirectly reflected in the fixed rate of future contracts, since, in essence, those contracts constituted an estimate of what those rates would be in the future (recitals 200 and 201 of the contested decision).

63 In the contested decision, the Commission found that the coordination of the JPY LIBOR panel submissions and the exchange of confidential information among the participating banks resulted in a restriction of the competition that would normally have prevailed among them, which led to a distortion of competition to their advantage and to the detriment of the non-participating banks. That also enabled the creation of a situation of 'asymmetrical information' to the advantage only of the participating banks, allowing them to offer contracts on better terms than other banks operating on the Japanese Yen interest rate derivatives market (recitals 202 to 204 of that decision). The conduct at issue thus distorted competition to the advantage of the participating banks and to the detriment of the other players on that market. The Commission inferred from this that the six infringements at issue were sufficiently harmful to be classified as infringements by object (recitals 219 and 220 of that decision).

64 In response to this analysis, the applicants highlight the restrictive definition of the concept of infringement by object adopted in the case-law of the Court of Justice. They assert that the conduct at issue does not reveal a degree of harm to the proper functioning of normal competition in the Japanese Yen interest rate derivatives market such as to justify its classification as an infringement by object. They add that the information exchanges complained of do not amount to a restriction or distortion of competition 'by object'. They further state that certain material relevant for the classification of infringement by object was put forward for the first time in recital 200 of the contested decision. Lastly, they maintain that, with regard to the UBS/DB infringement, the Commission did not prove that trades were entered into between the banks to align their commercial interests in respect of derivatives and did not classify that conduct as constituting an information exchange.

65 In so far as, for the six infringements at issue, the Commission found the existence of both coordination of the JPY LIBOR panel submissions and of an exchange of confidential information, it is sufficient to ascertain whether one of those two types of conduct has an anticompetitive object.

66 As regards the first type of conduct common to the six infringements at issue, namely the coordination of the JPY LIBOR panel submissions, it must be stated that the Commission was right to find that the payments due by one financial establishment to another one, in respect of a derivative, were either directly or indirectly linked to the level of the JPY LIBOR rates.

67 Thus, as regards, in the first place, the payments due in respect of the ongoing contracts, the effect of the JPY LIBOR rates may be regarded as self-evident. It relates to the payments due in respect of the 'floating' leg of the contracts referred to in paragraph 60 above, which are based directly on those rates. Thus, with regard to them, a coordination of the JPY LIBOR panel submissions was capable of influencing the level of those rates in a manner favourable to the interests of the banks which were behind that coordination, as the Commission essentially found in recitals 199 and 201 of the contested decision.

68 As regards, in the second place, the payments due in respect of the future contracts, it must be stated that the Commission was also right to find that the coordination of the JPY LIBOR panel submissions had an effect on the payments due in respect of the 'fixed' leg of the contracts referred to in paragraph 60 above.

69 It should first be noted that in recitals 34 to 44 and 200 of the contested decision, the Commission set out in detail the reasons why the level of the JPY LIBOR rates had an effect on the 'fixed' leg of the contracts referred to in paragraph 60 above. The Commission stated in essence that the fixed rates were determined by a projection, based on a mathematical formula, of the current yield curve of the derivatives, which was itself dependent on the current levels of the JPY LIBOR rates.

70 Moreover and consequently, it may be considered that coordination of the JPY LIBOR panel submissions enabled the banks participating in the coordination to reduce considerably the uncertainty as to the levels of the JPY LIBOR rates and, therefore, gave them a competitive advantage when negotiating and offering derivatives over the banks that did not participate in that coordination, which the Commission correctly found in recitals 201 to 204 of the contested decision.

71 It is apparent from the foregoing that the coordination of the JPY LIBOR panel submissions is relevant for the payments due in respect of the contracts referred to in paragraph 60 above as regards both their 'floating' leg and their 'fixed' leg.

72 Inasmuch as such coordination of the JPY LIBOR panel submissions is intended to influence the extent of the payments due by, or due to, the banks concerned, it clearly has an anticompetitive object.

73 In so far as the six infringements at issue all involve coordination of the JPY LIBOR panel submissions — that coordination being capable of justifying the Commission's classification of infringement by object — it is not necessary to examine whether the other conduct common to those infringements, namely the exchange of confidential information, is also capable of justifying such classification.

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

75 In any event, in the light of the significance of the impact of the level of the JPY LIBOR rates on the amount of the payments effected in respect of both the 'floating' leg and the 'fixed' leg of the contracts referred to in paragraph 60 above, it must be stated that the mere communication of information regarding the future submissions of a bank which is a member of the JPY LIBOR panel was capable of giving an advantage to the banks concerned, removing them from the application of

normal competition on the Japanese Yen interest rate derivatives market in a manner such that that exchange of information may be considered as having as its object the restriction of competition within the meaning of Article 101(1) TFEU, under the case-law cited in paragraphs 49 to 52 above. The same reasoning is applicable to the conduct relating to the exchange of confidential information regarding the future submissions relating to the Euroyen TIBOR, found by the Commission only in connection with the Citi/UBS infringement.

76 In the light of the foregoing, it must be concluded that the Commission did not commit an error of law or assessment in finding that the six infringements at issue were restrictive of competition by their object.

77 That conclusion is not affected by the various arguments put forward by the applicants.

78 That is the case, in the first place, with the applicants' rebuttal of the harmfulness to normal competition of the conduct at issue.

79 First, the applicants are wrong to claim that there is no competitive relationship among the banks on the Japanese Yen interest rate derivatives market. Since the conclusion of contracts on that market entails negotiation of those products, and more particularly of the applicable fixed rate, there is necessarily a competitive process with regard to the offer of those products among the various banks operating on that market.

80 Second, and consequently, nor can the Court accept the applicants' assertion that there is a contradiction between (i) the possibility for the banks concerned to offer better conditions than their competitors and (ii) the classification as an infringement by object. On the contrary, that possibility demonstrates rather that the competitive process on the Japanese Yen interest rate derivatives market was distorted to the advantage of the banks participating in the collusion.

81 Third, the applicant's emphasis on the fact that the banks conclude a large number of transactions in which they adopt opposing positions is irrelevant. Indeed, one of the attractions of manipulating the JPY LIBOR rates, with regard in particular to ongoing contracts, is to enable those rates to reflect as effectively as possible the interests of the banks concerned, namely a high rate in the event of a net credit position and a low rate in the event of a net debit position.

82 In the second place, the applicants allege, in essence, a breach of their rights of defence in so far as certain material relevant for the classification of infringement by object was put forward for the first time in recital 200 of the contested decision.

83 It is true that, according to settled case-law, respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, properly to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty (see judgment of 24 May 2012, *MasterCard and Others* v *Commission*, T-111/08, EU:T:2012:260, paragraph 265 and the case-law cited).

84 Article 27(1) of Regulation No 1/2003 reflects that principle in so far as it provides that the parties are to be sent a statement of objections which must clearly set out all the essential matters on which the Commission relies at that stage of the procedure, to enable the parties concerned properly to identify the conduct complained of by the Commission and to defend themselves properly before the Commission adopts a final decision. That obligation is satisfied if the final decision does not allege that the persons concerned have committed infringements other than those referred to in the statement of objections and takes into consideration only facts on which the persons concerned have had the opportunity of stating their views (see judgment of 24 May 2012, *MasterCard and Others* v *Commission*, T-111/08, EU:T:2012:260, paragraph 266 and the case-law cited).

85 However, that may be done summarily and the final decision is not necessarily required to be a replica of the statement of objections, since the statement is a preparatory document containing assessments of fact and of law which are purely provisional in nature. Thus, it is permissible for the Commission to supplement the statement of objections in the light of the response of the parties, whose arguments show that they have actually been able to exercise their rights of defence. The Commission may also, in the light of the administrative procedure, revise or supplement its arguments of fact or law in support of its objections (see judgment of 24 May 2012, *MasterCard and Others* v *Commission*, T-111/08, EU:T:2012:260, paragraph 267 and the case-law cited).

86 Thus, communication to the parties concerned of further objections is necessary only if the result of the investigations leads the Commission to take new facts into account against the undertakings or to alter materially the evidence for the contested infringements (see judgment of 24 May 2012, *MasterCard and Others* v *Commission*, T-111/08, EU:T:2012:260, paragraph 268 and the case-law cited).

87 Lastly, it should be recalled that, according to the case-law, the rights of the defence are infringed where it is possible that the outcome of the administrative procedure conducted by the Commission might have been different as a result of an error committed by it. An applicant undertaking establishes that there has been such an infringement where it adequately demonstrates, not that the Commission's decision would have been different in content, but rather that it would have been better able to ensure its defence had there been no error, for example because it would have been able to use for its defence documents to which it was denied access during the administrative procedure (see judgment of 24 May 2012, *MasterCard and Others* v *Commission*, T-111/08, EU:T:2012:260, paragraph 269 and the case-law cited).

88 In the present case, it must be held that the reference to indirect price fixing in recital 200 of the contested decision is not novel in character, as alleged by the applicants. Admittedly, paragraphs 137 and 175 of the Statement of Objections to which the Commission refers cannot be regarded as the clarification of an objection alleging indirect price fixing inasmuch as those paragraphs merely recall the legal principles governing the application of Article 101(1) TFEU. Nevertheless, it is apparent from reading the Statement of Objections that the substance of the arguments set out therein was the same as that presented in that decision, and in particular in recital 200 thereof, namely the effect of the level of the JPY LIBOR on the level of the rates applicable to future contracts (see, in particular, paragraph 157 of the Statement of Objections). The applicants were therefore in a position to submit their observations on that objection during the administrative procedure.

89 Moreover, as regards the alleged novel character of the reference, in recital 200 of the contested decision, to the fact that the manipulation of the JPY LIBOR also constitutes a fixing of trading conditions within the meaning of Article 101(1)(a) TFEU, it should be observed that, for the reasons set out in paragraphs 66 to 76 above, the effects of that manipulation on the level of the payments due in respect of derivatives suffice to justify the classification as infringements by object found by the Commission. Accordingly, the view cannot be taken that the possibility that the applicants may have been unable to submit their observations on the objection alleging a fixing of trading conditions prevented them from being better able to ensure their defence within the meaning of the case-law cited in paragraph 87 above.

90 In the third place, with respect to the applicants' criticisms of the Commission's finding of the existence of conduct consisting in the banks' exploring the possibility of executing trades designed to align their trading interests in respect of derivatives, and that they may on a few occasions have entered into such trades — a finding which relates solely to the UBS/DB infringement — it is apparent from reading recital 78 of the contested decision that that conduct was considered by the Commission only as aimed at facilitating future JPY LIBOR panel submissions. In so far as that

conduct does not appear to be independent of that of that coordination whose anticompetitive object has been established to the requisite legal standard, it is not necessary to respond to that aspect of the applicants' line of argument.

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

2. The second plea in law, alleging errors in the application of the concept of 'facilitation' within the meaning of Article 101(1) TFEU and related case-law

92 The applicants assert that the Commission wrongly found that Icap had 'facilitated' the six infringements at issue. After the judgment was delivered in *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, the applicants withdrew parts of their arguments with the result that this plea in law now consists of three limbs.

93 By the first limb of the second plea in law, which does not relate to the Citi/RBS infringement, but solely to the five other infringements at issue, the applicants claim that the 'facilitation' test applied to Icap is too broad and a novelty and breaches the principle of legal certainty. By the second limb of that plea, which relates to those five infringements, the applicants submit that the role played by Icap does not meet the 'facilitation' tests set out by case-law. Lastly, by the third limb of that plea, which relates only to the UBS/RBS 2007, Citi/UBS and Citi/DB infringements, the applicants contest the validity of the grounds of the contested decision concerning the use by Icap of its contacts with certain banks to try to influence their JPY LIBOR panel submissions.

94 The Court considers that it is appropriate to analyse, first, the second and third limbs of this plea, since they relate, in essence, to the unlawful nature of the conduct alleged against Icap, and, next, the challenge — contained in the first limb of that plea — to the compatibility with the principle of legal certainty of the unlawful nature found.

(a) The second limb, alleging that the Commission misconstrued the 'facilitation' tests set out by case-law

95 In the context of this limb, the applicants submit in essence that the finding that Icap's conduct fell within the scope of Article 101 TFEU is incorrect.

96 The Commission contends that this limb should be rejected.

97 It should be recalled that there is nothing in the wording of Article 101(1) TFEU that indicates that the prohibition laid down therein is directed only at parties to agreements or concerted practices who are active on the markets affected by those agreements or practices (judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 27).

98 Moreover, according to the case-law of the Court of Justice, in order for there to be an 'agreement', there must be the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive (see judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 28 and the case-law cited).

99 As regards the term 'concerted practice', it is apparent from the case-law of the Court of Justice that Article 101(1) TFEU makes a distinction between that term and, in particular, the terms 'agreement' and 'decision by an association of undertakings', with the sole intention of catching various forms of collusion between undertakings which, from a subjective point of view, have the same nature and are distinguishable from each other only by their intensity and the forms in which they manifest themselves (see judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 29 and the case-law cited).

100 Moreover, when the infringement involves anticompetitive agreements and concerted practices, it is apparent from the case-law of the Court of Justice that the Commission must demonstrate, in order to be able to find that an undertaking participated in an infringement and was liable for all the various elements comprising the infringement, that the undertaking concerned intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (see judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 30 and the case-law cited).

101 In that regard, the Court of Justice has inter alia held that passive modes of participation in the infringement, such as the presence of an undertaking in meetings at which anticompetitive agreements were concluded, without that undertaking clearly opposing them, are indicative of collusion capable of rendering the undertaking liable under Article 101(1) TFEU, since a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, encourages the continuation of the infringement and compromises its discovery (see judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 31 and the case-law cited).

102 Although the Court has already stated that an 'agreement' within the meaning of Article 101(1) TFEU referred to whether the parties had expressed their concurrent intention to conduct themselves on the market in a particular manner and that the criteria of coordination and cooperation which are constituent elements of a 'concerted practice' within the meaning of that provision must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, to the effect that each economic operator must determine independently the policy which he intends to adopt on the common market, it cannot be inferred from those considerations that the terms agreement and concerted practice presuppose a mutual restriction of freedom of action on one and the same market on which all the parties are present (judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraphs 32 and 33).

103 Moreover, it cannot be inferred from the Court's case-law that Article 101(1) TFEU concerns only either (i) the undertakings operating on the market affected by the restrictions of competition or indeed the markets upstream or downstream of that market or neighbouring markets or (ii) undertakings which restrict their freedom of action on a particular market under an agreement or as a result of a concerted practice. Indeed, it is apparent from the Court's well established case-law that the text of Article 101(1) TFEU refers generally to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition on the common market, irrespective of the market on which the parties operate, and that only the commercial conduct of one of the parties need be affected by the terms of the arrangements in question (see judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraphs 34 and 35 and the case-law cited).

104 It should also be noted that the main objective of the prohibition laid down in Article 101(1) TFEU is to ensure that competition remains undistorted within the common market and that its full effectiveness entails that the active contribution of an undertaking to a restriction of competition is caught even if that contribution does not relate to an economic activity forming part of the relevant market on which that restriction comes about or is intended to come about (see judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 36 and the case-law cited).

105 In the present case, it should be noted at the outset that the Commission did not find the existence of separate infringements between Icap and UBS, then Icap and Citi, whose object was to manipulate the level of the submissions of the banks in a manner consistent with the interests of UBS, and then of

Citi, by means of the dissemination by Icap of incorrect information. In the contested decision, Icap's liability is incurred on the basis of its participation in the anticompetitive conduct found by the Commission, which it classified as 'facilitation'.

106 In view of the reasoning followed by the Commission in the contested decision, it is necessary to ascertain whether Icap's participation satisfies the criteria highlighted in the case-law cited in paragraph 100 above; only the fulfilment of those criteria is capable of justifying Icap's liability being incurred in respect of the infringements committed by the banks concerned.

107 In that regard, it should be pointed out that the applicants dispute that those criteria have been fulfilled in the context of three complaints alleging that the Commission did not prove, first, that Icap had knowledge of the existence of collusion between the banks concerned in connection with some of the six infringements at issue (first complaint), second, that Icap intended to contribute to the common objective pursued by the banks concerned (second complaint) and, third, that Icap contributed to the common objectives pursued by the banks concerned (third complaint). The Court considers that it is appropriate to examine, first of all, the first complaint, next, the third complaint and, lastly, the second complaint.

(1) The first complaint: the Commission did not prove that Icap had knowledge of the existence of collusion between the banks concerned in connection with some of the six infringements at issue

108 In the first complaint, the applicants submit that the Commission did not prove to the requisite legal standard that Icap had knowledge of the existence of collusion between the banks concerned in connection with the UBS/RBS 2007, UBS/RBS 2008, Citi/DB and Citi/UBS infringements, but only, where relevant, of unilateral attempts by a trader to manipulate the JPY LIBOR rates.

109 This complaint therefore relates only to four of the six infringements at issue.

110 The applicants claim that the short messages used as evidence by the Commission could demonstrate only that a trader of one of the banks concerned was aware of the future submissions of another bank. In a context characterised, inter alia, by the existence of legitimate contacts between those banks, it cannot be inferred from this that Icap was made aware of those banks' joint intention to coordinate their JPY LIBOR panel submissions. That is the case in respect of the UBS/RBS 2007, UBS/RBS 2008, Citi/DB and Citi/UBS infringements.

111 The applicants submit that the structure of the Japanese Yen interest rate derivatives market, which entails continuous negotiations between the banks concerned, may explain why a given bank had knowledge of the direction of the submissions of another bank, without that knowledge being the product of an information exchange. The applicants infer from this that Icap could reasonably take the view that references to the future position of another bank in the communications of a trader were not the result of an unlawful cartel. They take issue with the Commission for having failed to take account of that possible interpretation of the evidence, in respect of both the UBS/RBS 2007 infringement and the UBS/RBS 2008 infringement. As regards the Commission's reference to UBS's acknowledgement of Icap's facilitator role in UBS's application for settlement, the applicants claim, in particular, that the Settlement Decision expressly states that the facts accepted by the parties cannot establish any liability as far as Icap is concerned. As regards the Citi/DB and Citi/UBS infringements, the applicants reiterate that the evidence put forward does not prove the existence of collusion between the banks concerned during the infringement period found.

112 The Commission contends that recitals 214 to 221 of the contested decision show to the requisite legal standard that Icap was aware or should have been aware that its actions contributed to infringements restricting competition. For each of the six infringements at issue, Icap was made aware by UBS and then Citi of the identity of the other JPY LIBOR panel bank with which UBS and Citi were in

anticompetitive contact. That was the case in respect of both the UBS/RBS 2007 infringement and the UBS/RBS 2008 infringement. As regards those two infringements, the Commission observes that the evidence that Icap was aware of the collusion between the banks concerned is also based on the acknowledgement of UBS in its application for settlement of Icap's facilitator role, set out in recitals 115 and 126 of the contested decision, an acknowledgment that the applicants do not challenge. The Commission also refers to Icap's knowledge of the Japanese Yen interest rate derivatives market and its status of principal broker on this market in arguing that Icap could not have been unaware of the anticompetitive nature of that collusion. As regards the Citi/DB and Citi/UBS infringements, the Commission observes that the applicants do not dispute that Icap was aware of the collusion between the banks concerned, but only the temporal scope of that collusion. It notes, in that regard, that the date on which an infringement begins is that of the collusion and not of its implementation.

113 In that regard, it should be noted that, under the case-law cited in paragraph 100 above, it was for the Commission to demonstrate that Icap was aware of the actual conduct planned or put into effect by each of the banks concerned or could reasonably have foreseen it.

114 Moreover, it should be recalled that, in the field of competition law, where there is a dispute as to the existence of an infringement, the Commission must prove the infringement found by it and adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (see judgment of 22 November 2012, *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraph 71 and the case-law cited).

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

116 Moreover, where the Court still has a doubt, the benefit of that doubt must be given to the undertakings accused of the infringement. Indeed, the presumption of innocence constitutes a general principle of EU law, currently laid down in Article 48(1) of the Charter of Fundamental Rights of the European Union (see judgment of 22 November 2012, *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraph 72 and the case-law cited).

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

118 Moreover, according to settled case-law, in order to assess the probative value of a document, regard should be had to the credibility of the account it contains and, in particular, to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears to be sound and reliable (see judgment of 14 April 2011, *Visa Europe and Visa International Service* v *Commission*, T-461/07, EU:T:2011:181, paragraph 182 and the case-law cited).

119 It is in the light of those considerations that it is necessary to ascertain whether, in respect of each of the four infringements at issue, the Commission proved to the requisite legal standard that Icap was aware or could reasonably have foreseen that the requests addressed to it by UBS, and then Citi, were not effected in the sole interest of its interlocutor, but were the result of collusion between the banks concerned.

120 In that regard, although it is apparent from the case-law cited in paragraph 100 above that it was open to the Commission to prove either (i) that Icap was aware of the participation of the other bank concerned in each of the four infringements at issue or (ii) that Icap could reasonably have foreseen such participation, that second possibility must be considered taking into account the context in which the exchanges between UBS, and then Citi, and Icap took place.

121 As the applicants essentially submit, the requests addressed by UBS, and then Citi, to Icap with the aim of manipulating the JPY LIBOR rates did not imply, by their very nature, the existence of prior concerted action with another bank. Such requests could be legitimately interpreted by Icap as being made by UBS, and then by Citi, for the purposes of manipulating those rates in pursuit of their interests alone. It must be held that that circumstance makes it harder for the Commission to prove that Icap should reasonably have inferred from the requests of UBS, and then of Citi, that those requests formed part of collusion with another bank.

(i) The Commission's evidence that Icap was aware of the role played by RBS in the UBS/RBS 2007 infringement

122 With respect to the UBS/RBS 2007 infringement, the material evidence on which the Commission relied in order to find unlawful conduct by Icap is set out in paragraph 5.3.2 of the contested decision.

123 In the first place, the Commission relied on the reference, in a conversation between Mr H., at the time a UBS trader, and Mr R., an Icap member of staff, on 14 August 2007 ('the conversation of 14 August 2007'), that 'RBS and UBS are going high 6m', in order to find that, as of this discussion, '[Icap] was, or at least should have been, aware of the fact that [UBS] was coordinating future JPY LIBOR submissions with RBS and that assistance provided to [UBS] after this chat was, or could have been, facilitating the anticompetitive practices between UBS and RBS' (recital 106 of the contested decision).

124 In the second place, the Commission drew attention to various communications between Mr H. and Mr R. or between Mr R. and other members of Icap's staff which took place on 15 August 2007 and 1 November 2007, for the purposes of demonstrating the role played by Icap in the manipulation of the JPY LIBOR rates (recitals 107 to 114 of the contested decision).

125 Lastly, in the third place, the Commission referred to UBS's acknowledgment, in its application for settlement, that it used Icap's services with the aim of influencing the future JPY LIBOR submissions of certain JPY LIBOR panel banks. The Commission found that RBS was not aware of the role played by Icap (recital 115 of the contested decision).

126 Thus, the contested decision mentions only two items of evidence that might be capable of proving that Icap knew of RBS's participation in the UBS/RBS 2007 infringement, namely (i) the conversation of 14 August 2007 and (ii) UBS's statements in its application for settlement. It is common ground between the parties that the exchanges between Icap and UBS after 14 August 2017 made no reference to RBS.

127 As regards UBS's statements in its application for settlement, examination of that document does not show that UBS acknowledges therein that it informed Icap of RBS's participation in the UBS/RBS 2007 infringement, UBS merely stating that it had used Icap's services.

128 It follows that the only item of evidence capable of showing that Icap knew of the role played by RBS in the UBS/RBS 2007 infringement is to be found in a passage of the conversation of 14 August 2017, in which Mr H. informs Mr R. that 'RBS and UBS [are] going high 6m'. In recital 106 of the contested

decision, the Commission interpreted that sentence as meaning that Mr H., at the time a UBS trader, had informed Mr R., a member of Icap's staff, of his ongoing discussions of future JPY LIBOR submissions with RBS.

129 By way of measures of organisation of procedure, the parties were requested to give their opinion on the interpretation of that sentence in view of the following part of the conversation: '[Icap:] good that will help:); [UBS:] will doing me a favour; [Icap:] so he [should]', and to clarify whether the word 'will' referred to an RBS employee. It emerged from this that that conversation was referring to W. H., an RBS trader, whose exchanges with Mr H. were taken into account for the purposes of finding the existence of the UBS/RBS 2007 infringement.

130 It must be inferred from this that, following that conversation, Mr R., an Icap member of staff, was informed in unambiguous terms by Mr H., at the time a UBS trader, that he had agreed with W. H., an RBS trader, on an increase of their submissions relating to six-month interest rates. In so far as that item of evidence is made up of a conversation in which Mr R. directly participated and in view of its content, it must be acknowledged, pursuant to the case-law mentioned in paragraph 118 above, that it has high probative value.

131 In those circumstances, the conversation of 14 August 2017 demonstrates on its own that Icap knew of the role played by RBS in the UBS/RBS 2007 infringement.

132 Accordingly, in so far as the first complaint relates to the UBS/RBS 2007 infringement, it must be rejected.

(ii) The Commission's evidence that Icap was aware of the role played by RBS in the UBS/RBS 2008 infringement

133 In point 5.3.3 of the contested decision, entitled 'Icap's facilitation of the UBS/RBS 2008 infringement', the Commission referred, in the first place, to a conversation of 28 August 2008 in which Mr H., at the time a UBS trader, allegedly disclosed to Mr R., an Icap member of staff, the direction of RBS's JPY LIBOR panel submissions, namely submissions that were 'low across the board' ('the conversation of 28 August 2008') (recital 116 of the contested decision).

134 In the second place, the Commission drew attention to various communications between Mr H. and Mr R. or between Mr R. and other members of Icap's staff which took place on 28 August 2008 and 3 November 2008, for the purposes of demonstrating the role played by Icap in the manipulation of the JPY LIBOR rates (recitals 117 to 125 of the contested decision). Among those items of evidence is an internal Icap email of 5 September 2008, in which it was stated that UBS and RBS had a vested interest in a low three-month JPY LIBOR rate.

135 In the third place, the Commission referred to the acknowledgment by UBS, in its application for settlement, that it used Icap's services for the purposes of influencing future JPY LIBOR panel submissions. It found that RBS was not aware of the role played by Icap (recital 126 of the contested decision).

136 Thus, the contested decision mentions three items of evidence that might demonstrate that Icap knew of the role played by RBS in the UBS/RBS 2008 infringement, namely, first of all, the conversation of 28 August 2008, next, the internal Icap email of 5 September 2008 (see paragraph 134 above) and, lastly, UBS's statements in its application for settlement.

137 As regards, in the first place, UBS's statements in its application for settlement, it must be stated that, with regard to that infringement also, examination of that document merely shows that UBS acknowledges having used Icap's services, but not that UBS claims to have informed Icap of RBS's participation in the UBS/RBS 2008 infringement.

138 As regards, in the second place, the conversation of 28 August 2008, the Commission took the view that the fact that Mr H., at the time a UBS trader, mentioned that RBS's submission would be 'low across the board' should have led Mr R., an Icap member of staff, to conclude that there were contacts between UBS and RBS and that assistance provided after this point to Mr H. in moving JPY LIBOR rates was, or could have been, also assistance to anticompetitive practices between UBS and RBS (recital 118 of the contested decision).

139 It must be stated that the passage of the conversation of 28 August 2008 highlighted by the Commission does not have an unequivocal meaning, which could have only led Icap to suspect that UBS had received confidential information relating to the level of RBS's future JPY LIBOR panel submissions. That passage could also be interpreted as an analysis or opinion of Mr H. on the probable future positions of one of its competitors.

140 Moreover, examination of the passage of the conversation of 28 August 2008 highlighted by the Commission does not make it possible, in the more general context of that conversation, to clarify its meaning. Although it appears from that passage that UBS and Icap shared an intention to distort the normal course of setting the JPY LIBOR rates, no additional material is provided regarding any participation by RBS in the UBS/RBS 2008 infringement.

141 Accordingly, that item of evidence on its own does not prove that Icap knew of the role played by RBS in the UBS/RBS 2008 infringement. It must nevertheless be ascertained whether, in conjunction with other evidence, that item of evidence may constitute a body of evidence within the meaning of the case-law cited in paragraph 115 above.

142 As regards, in the third place, the email exchanged between two members of Icap's staff, it is written in that email that 'UBS and RBS had a vested interest in low 3m JPY LIBOR' (recital 121 of the contested decision). It must be held that the interpretation favoured by the Commission, namely that that email demonstrates that Icap knew of the existence of an infringement between RBS and UBS, is not the only possible interpretation. In so far as, through its functions, Icap is in permanent contact with the banks concerned, it cannot be ruled out that Icap forms its own view on the interests of each of the banks operating on the Japanese Yen interest rate derivatives market. The probability of that alternative interpretation may appear to be strengthened in the light of the truncated form of the quote used by the Commission, to which the applicants draw attention, since the exact wording of that email, namely '[I] think [UBS] and [RBS] have a vest[e]d interest in [the rates] being low', can be seen more as the expression of a personal opinion.

143 It must be stated that those two items cannot be classified as firm, precise and consistent evidence within the meaning of the case-law cited in paragraph 115 above. On the contrary, the ambiguity of the wording contained in those two items of evidence necessarily implies doubt as to whether Icap knew of the role played by RBS in the UBS/RBS 2008 infringement, the benefit of which must, under the case-law cited in paragraph 116 above, be given to Icap.

144 Moreover, for the reasons set out in paragraph 121 above, it cannot be concluded that Icap should have suspected that UBS's requests were part of the implementation of collusion with another bank, since it is entirely possible that such requests were made by Mr H. solely in pursuit of UBS's interests.

145 In the light of the foregoing, it is necessary to uphold the first complaint, so far as concerns the UBS/RBS 2008 infringement, and to annul Article 1(b) of the contested decision in so far as it finds that Icap participated in that infringement.

(iii) The evidence that Icap knew of the role played by DB and UBS in the Citi/DB and Citi/UBS infringements

146 In point 5.3.6 of the contested decision, entitled 'ICAP's facilitation of the Citi/DB … infringement', the Commission relied on the reference to a conversation between Mr H., by then a Citi trader, and Mr R., an Icap member of staff, of 7 April 2010, relating to a concerted future decrease in the rates submitted by Citi, UBS and DB to the JPY LIBOR panel after June 2010 ('the conversation of 7 April 2010'). The Commission also drew attention to two requests from Mr H. to Mr R. of 18 May 2010, one for low one-year rates and the other in a general manner for low JPY LIBOR rates until June, and a request of 23 May 2010 for low rates for the one-year JPY LIBOR and a high rate for the three-year JPY LIBOR (recital 155 of the contested decision).

147 Moreover, the Commission also relied on a communication of 1 June 2010 between Mr R. and Mr G., members of Icap's staff, relating to an adjustment of the spreadsheet referred to in paragraph 15 above (recital 157 of the contested decision), and on a conversation of 2 June 2010 in which Mr R. informed Mr H., by then a Citi trader, that Mr G. had carried out the desired adjustments (recital 156 of that decision).

148 Lastly, the contested decision mentions a conversation of 7 June 2010 in which Mr H., by then a Citi trader, requested from Mr R., an Icap member of staff, low rates for that month (recital 158) ('the conversation of 7 June 2010'). It should be pointed out that, in that conversation, Icap clearly alludes to the existence of collusion between Citi, DB and UBS.

149 In point 5.3.7 of the contested decision, entitled 'ICAP's facilitation of the Citi/UBS … infringement', the Commission relied exclusively on the material referred to in paragraphs 146 and 147 above (recitals 161 to 163), while the conversation of 7 June 2010 was not put forward as evidence with respect to that infringement.

150 In the first place, it should be pointed out that the key element on which the proof that Icap knew of the role played by DB and UBS in the Citi/DB and Citi/UBS infringements is based consists in the content of the conversation of 7 April 2010.

151 First, it must be stated that, in that conversation, Mr H., by then a Citi trader, explains to Mr R., an Icap member of staff, in unambiguous terms, that he had reached agreement with two DB and RBS traders with a view to obtaining a reduction in the rates submitted by Citi, UBS and DB to the JPY LIBOR panel after June 2010.

152 Second, it should be noted that the applicants do not contest the anticompetitive scope of the conversation of 7 April 2010, but its evidential value with respect to the Citi/UBS and Citi/DB infringements, since the Commission found that those infringements ceased on 2 June 2010 and 7 June 2010 respectively, that is prior to the reduction in the rates envisaged in the conversation of 7 April 2010, which related to the period after June 2010.

153 Whilst it is true, as the Commission essentially states, that the conversation of 7 April 2010 suffices to demonstrate that Icap knew of a concerted practice with a view to distorting the JPY LIBOR rates and, consequently, of the existence of unlawful conduct between Citi, DB and UBS, the fact remains that that conduct related to an infringement period which differed from those found by the Commission in respect of the Citi/DB and Citi/UBS infringements which Icap is accused of having encouraged.

154 According to the case-law, the duration of an infringement constitutes an integral part of that infringement and, as such, is inseparable from any finding of an infringement (judgment of 16 November 2006, *Peróxidos Orgánicos* v *Commission*, T-120/04, EU:T:2006:350, paragraph 21).

155 Accordingly, it must be inferred from this that the conversation of 7 April 2010 concerned an infringement different from the Citi/DB and Citi/UBS infringements which Icap is accused of having facilitated and that the conversation cannot, in itself, prove that Icap knew of those two infringements.

156 In the second place, as regards the other evidence highlighted in the contested decision, a distinction must be drawn between the Citi/DB infringement and the Citi/UBS infringement.

157 With respect to the Citi/DB infringement, in so far as the Commission puts forward as evidence the conversation of 7 June 2010, in which Icap refers itself to concerted intervention by Citi, UBS and DB, it necessarily follows that Icap's knowledge of collusion between Citi and DB is demonstrated to the requisite legal standard.

158 As regards the Citi/UBS infringement, it should be noted that the Commission found that it ceased on 2 June 2010 and does not therefore rely on the conversation of 7 June 2010 as evidence.

159 It follows from this that, with respect to the Citi/UBS infringement, the Commission does not adduce any evidence demonstrating that Icap knew of the collusion between Citi and UBS.

160 Nevertheless, it is necessary to ascertain whether Icap, which was informed by the conversation of 7 April 2010 of future concerted manoeuvres by Citi, UBS and DB, should have 'reasonably foreseen', within the meaning of the case-law cited in paragraph 100 above, that some of the requests that Citi made to Icap from 18 May 2010 onwards were part of the implementation of collusion between the banks concerned.

161 In that regard, it should be noted that a reading of the conversation of 7 April 2010, as a whole, gives the impression that the aim of Citi, UBS and DB, as far as Icap was made aware, was a drop in certain JPY LIBOR rates until December, followed by an increase in those rates, at the very least the three-month rates.

162 It is therefore necessary to ascertain whether some of the requests of Mr H., by then a Citi trader, to Mr R., an Icap member of staff, during the infringement period should reasonably have led Icap to consider that they formed part of the preparation of the collusion between the banks concerned referred to in the conversation of 7 April 2010.

163 It must be stated that it is apparent from recitals 161 to 163 of the contested decision that, with the exception of a reference to high three-year rates, the requests addressed by Mr H., by then a Citi trader, to Icap on 18 May 2010 and 23 May 2010 were aimed at maintaining low rates. Accordingly, Icap could reasonably have foreseen that requests for a reduction or a stabilisation of the JPY LIBOR rates sent in April and May formed part of the preparation of the collusion between Citi, DB and UBS, of which Icap was made aware on 7 April 2010.

164 The first complaint must consequently be rejected so far as concerns the Citi/DB and Citi/UBS infringements.

(2) The third complaint, contesting Icap's contribution to the common objectives pursued by the banks concerned

165 By the third complaint, the applicants submit that the conduct of which Icap is accused in five of the infringements at issue differs too much from that found in respect of the banks concerned for the existence of common objectives for the purposes of the case-law mentioned in paragraph 100 above to be found. Since the contested decision, inasmuch as it finds that Icap participated in the UBS/RBS

2008 infringement, must be annulled for the reasons set out in paragraphs 133 to 145 above, it is sufficient to examine this complaint in relation to the UBS/RBS 2007, UBS/DB, Citi/DB and Citi/UBS infringements.

166 In essence, the applicants submit that, for each of the four infringements referred to in paragraph 165 above, a distinction should be drawn between, on the one hand, the conduct of the two banks concerned by each of the infringements, which concerns the manipulation of their own JPY LIBOR panel submissions, and, on the other, the conduct of which Icap is accused, which relates to an attempt to manipulate the JPY LIBOR submissions of other banks on that panel. The applicants note, moreover, that, in each of those infringements, one of the two banks concerned was not aware of the role played by Icap.

167 The applicants submit that the Commission was wrong to take the view that the two types of conduct mentioned in paragraph 166 above formed part of the same infringement. Thus, the references to a common objective to restrict or distort competition on the Japanese Yen interest rate derivatives market or to shift the JPY LIBOR are vague, erroneous and unsupported. The applicants add that the fact that, with the exception of Mr H., those two types of conduct did not involve the same participants amounts to an objective ground for a finding that they constitute separate occurrences. Similarly, the applicants submit that the methods used in each of those two types of conduct are radically different, which would preclude their falling within the same infringement.

168 Moreover, the applicants claim that the Commission undertook, at a meeting held during the administrative procedure, not to rely in the contested decision on the complaint that Icap amplified the effects of the infringements at issue. In the reply, they complain that the Commission failed to prepare minutes of that meeting and request that the Commission provide the Court with the notes that it had prepared for that meeting, and submit, in essence, that the failure to honour such a commitment is akin to a breach of the principle of the protection of legitimate expectations.

169 The Commission contends that that complaint should be rejected.

170 In the first place, it should be noted that, for the four infringements referred to in paragraph 165 above, the Commission accused Icap of having influenced, in particular by altering the spreadsheet referred to in paragraph 15 above, the level of the rate submissions of certain banks which were members of the JPY LIBOR panel (see paragraphs 15 to 16 above) and that the applicants do not dispute that that conduct was engaged in.

171 In the second place, it is clear that there is a complementary relationship between the conduct of which Icap is accused and that of which the banks concerned are accused, since the JPY LIBOR rates are calculated on the basis of the submissions of the banks which are members of the JPY LIBOR panel. The alteration of those rates would therefore have had a much lesser probability of success if the four infringements referred to in paragraph 165 above had been based only on the alignment of the submissions of the two banks concerned by each infringement. It follows that Icap had a key role in the implementation of those infringements by influencing some of the JPY LIBOR panel submissions in the direction desired by the banks concerned.

172 The Commission was therefore right to find that the conduct of which Icap is accused contributed to the common objectives pursued by the banks concerned by each of the four infringements referred to in paragraph 165 above.

173 That finding is not called into question by the applicants' line of argument that it had a legitimate expectation in the fact that the Commission would not rely, in the contested decision, on the amplification of the effects of the manipulations of the JPY LIBOR by Icap.

174 That line of argument is based on the existence of assurances allegedly provided by Commission officials to Icap's representatives during a meeting subsequent to the Statement of Objections.

175 However, without there being any need to consider whether assurances provided in the informal setting of a Commission meeting are capable of giving rise to a legitimate expectation on the part of the applicants, it is sufficient to observe that such a line of argument is based on a factually incorrect premiss. It is apparent from Annex C.1, provided by the applicants and made up of the handwritten notes of their representatives during that meeting, that such assurances were given by the Commission only as regards the calculation of the fine and not in connection with the recognition of the existence of an infringement. Each of the three sets of notes shows that that issue was dealt with during the discussion on the amount of the fine and in reaction to the terms used in paragraph 248 of the Statement of Objections, which concerned that calculation.

176 The third complaint must therefore be rejected, without there being any need to proceed with the measure of organisation of procedure sought by the applicants.

(3) The second complaint, disputing that Icap intended to contribute to the achievement of the common objectives pursued by the banks concerned

177 By the second complaint, the applicants submit that the Commission did not prove that Icap intended to contribute to the common objectives pursued by the banks concerned in the context of the five infringements. For the same reasons as those set out in paragraph 165 above, it is sufficient to examine this complaint with regard to the UBS/RBS 2007, UBS/DB, Citi/DB and Citi/UBS infringements.

178 The only thing that emerges from the evidence is Icap's desire to satisfy the wishes of a trader who was the sole customer of one of its brokers. The applicants submit that the Commission's line of argument seeks to call in question the intention test set out in the relevant case-law.

179 The Commission contends that this complaint should be rejected.

180 Since, first, for the four infringements which remain at issue, the Commission was right to find that Icap knew of the existence of collusion between the banks concerned and, second, it was found that there was a very high degree of complementarity between the conduct of the banks concerned and that of Icap, it necessarily follows that Icap intended to contribute to the achievement of the common objectives pursued by those banks.

181 It must be held that the applicants' line of argument is based on a confusion between the motives of Icap, which may indeed have consisted in the desire to satisfy the requests of a trader, and the knowledge that its conduct had the objective of facilitating the manipulation of the JPY LIBOR rates by influencing the JPY LIBOR panel submissions in the direction desired by the banks concerned by the infringement.

182 The second complaint must therefore be rejected.

(b) The third limb, alleging that the grounds of the contested decision relating to the use by Icap of its contacts with the aim of influencing the submissions of certain banks were incorrect

183 By this limb, which relates only to the UBS/RBS 2007, Citi/UBS and Citi/DB infringements, the applicants contest the Commission's interpretation of certain Icap communications with its customers. First, the Commission fails to explain how the communications taken into account as evidence are relevant to the infringements concerned. Second, it misconstrued those communications, which do not disclose an intention to manipulate the submissions of other JPY LIBOR panel banks.

184 The Commission contends that this limb should be rejected.

185 In the context of the UBS/RBS 2007 infringement, the Commission found in recital 79(a) of the contested decision that, on 24 October 2007, Icap had used its contacts to try to influence the conduct of a panel bank. In the context of the Citi/UBS and Citi/DB infringements, the Commission found, in recital 83(a) of that decision, that Icap had engaged in similar conduct on 30 April 2010.

186 In the present case, it is sufficient to note, on the one hand, that it is apparent from recital 79(b) and recital 83(b) of the contested decision that the Commission did not limit itself to finding Icap's participation in those three infringements solely on the basis that it used its contacts, but also based that finding on the dissemination of misleading information to JPY LIBOR panel banks via the spreadsheet referred to in paragraph 15 above, and, on the other, that the applicants do not contest that aspect of the Commission's reasoning.

187 Thus, in so far as the dissemination of misleading information is, in itself, capable of demonstrating Icap's participation in those three infringements, it is necessary, under the case-law cited in paragraph 74 above, to reject that limb as ineffective.

(c) The first limb, alleging breach of the principle of legal certainty

188 By this limb, the applicants claim that the 'facilitation' test applied to Icap is too broad and a novelty and breaches the principle of legal certainty. The classification of 'facilitator' applied to Icap could not reasonably have been inferred from the judgment of 8 July 2008, *AC-Treuhand* v *Commission* (T-99/04, EU:T:2008:256), and is therefore contrary to both the principle of legal certainty and the principle that offences and penalties must be defined by law.

189 The applicants claim, in that regard, that the notion of 'facilitation' is recent and undeveloped. They add that Icap's situation clearly differs from the role played by AC-Treuhand both in the case which gave rise to the judgment of 8 July 2008, *AC-Treuhand* v *Commission* (T-99/04, EU:T:2008:256), and in that which gave rise to the judgment of 6 February 2014, *AC-Treuhand* v *Commission* (T-27/10, EU:T:2014:59). Whereas AC-Treuhand made the collusion possible, Icap is merely accused of having acted in furtherance of the collusion or having contributed to the collusion. In that regard, the applicants observe that, in the present case, the collusion between the banks concerned would have existed even in the absence of any intervention by Icap.

190 Rather than 'facilitating' a horizontal agreement, Icap's role was limited to a vertical restriction with a trader; that restriction neither restricted nor distorted competition in itself. The applicants add that, in five out of the six infringements at issue, the other bank which was party to the collusion was unaware of Icap's involvement. They submit that the application of a test as broad as the notion of 'facilitation' has particularly serious effects on undertakings which are third parties to collusion.

191 The Commission contends that this limb should be rejected.

192 Since the contested decision, inasmuch as it finds that Icap participated in the UBS/RBS 2008 infringement, must be annulled for the reasons set out in paragraphs 133 to 145 above, it is sufficient to examine this limb of the plea with regard to the UBS/RBS 2007, UBS/DB, Citi/DB and Citi/UBS infringements.

193 It should be recalled that the principle of legal certainty requires, inter alia, that rules of law be clear, precise and predictable in their effects, especially where they may have negative consequences on individuals and undertakings (see judgment of 17 December 2015, *X-Steuerberatungsgesellschaft*, C-342/14, EU:C:2015:827, paragraph 59 and the case-law cited).

194 In criminal law, the principle of legal certainty finds specific expression in the principle of the legality of criminal offences and penalties enshrined in Article 49(1) of the Charter of Fundamental Rights (see, to that effect, judgment of 3 June 2008, *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraph 70), which implies that the law must define clearly offences and the penalties which they attract, this requirement being satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see, to that effect, judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 40 and the case-law cited).

195 The principle that offences and penalties must be defined by law cannot therefore be interpreted as precluding the gradual, case-by-case clarification of the rules on criminal liability by judicial interpretation, provided that the result was reasonably foreseeable at the time the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time (see judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 41 and the case-law cited).

196 The scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it covers and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. Such persons can therefore be expected to take special care in evaluating the risk that such an activity entails (see judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 42 and the case-law cited).

197 In the present case, it must be held that Icap should have expected, if necessary after taking appropriate legal advice, its conduct to be declared incompatible with the EU competition rules, especially in the light of the broad scope of the terms 'agreement' and 'concerted practice' established by the case-law of the Court of Justice.

198 As regards the applicants' line of argument aimed at playing down Icap's role in the infringements at issue by comparing it with the role attributed to AC-Treuhand in the cartels which were the subject of the cases which gave rise to the judgment of 8 July 2008, *AC-Treuhand* v *Commission* (T-99/04, EU:T:2008:256), and to the judgment of 6 February 2014, *AC-Treuhand* v *Commission* (T-27/10, EU:T:2014:59), it is necessary, on the contrary, to point out the significance of that participation for some of those infringements. In so far as JPY LIBOR rates are calculated on the basis of the submissions of the panel members, the influence exerted by Icap over its customers which were members of that panel via the spreadsheet referred to in paragraph 15 above made it possible to amplify the manipulations of those rates to a much greater extent than if those manipulations had remained confined only to the submissions of the two banks concerned by each of those infringements.

199 The first limb of the plea must therefore be rejected.

200 In the light of the foregoing, this plea must be upheld so far as concerns the UBS/RBS 2008 infringement and rejected as to the remainder.

3. The third plea in law, alleging that the duration of the infringements at issue was incorrect

201 The applicants take issue with the Commission for failing to adduce evidence justifying the choice of the duration of the infringements at issue. In the applicants' submission, the Commission fails to show, first, that Icap's participation in those infringements was of equivalent duration to that of the

banks concerned and, second, that that participation continued unabated between the dates for which the Commission considers that it has evidence. In particular, the Commission is required to demonstrate continued knowledge by Icap of the offending conduct of the banks concerned throughout the period in question in respect of each of those infringements.

202 That is all the more necessary in view of both the fact that interest rates were set on a daily basis and the Commission's admission that Icap was not aware of all the measures adopted by the banks concerned. Moreover, in essence, the applicants stress the diversity in tenor, and even the contradictory nature, of the unilateral requests from UBS, and later from Citi, in arguing that it was reasonable for Icap to regard those requests as not being part of the offending conduct of the banks concerned.

203 The Commission asserts that the evidence put forward in the contested decision is relevant as regards both the existence of the infringements and their duration. It is apparent from that evidence that regular contacts occurred at intermittent periods based on the needs of the banks concerned. It would therefore be artificial to split up a series of interrelated occurrences into individual instances of a few days' duration merely because JPY LIBOR rates are set on a daily basis. The Commission refers, in that regard, to the line of argument set out in recital 234(c) of the contested decision and observes that Icap's intentional adherence to the common objectives of the infringements concerned has been demonstrated.

204 The Commission further states that, for each of the infringements at issue, the banks concerned have all admitted to the same duration as held against Icap and that for each infringement one of the banks concerned acknowledged the role played by Icap. That renders irrelevant the line of argument that Icap could have thought that each infringement was over after a short initial period.

205 According to settled case-law, an infringement of Article 101(1) TFEU can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. Accordingly, if the different actions form part of an 'overall plan' because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (see judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 156 and the case-law cited).

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

207 An undertaking may thus have participated directly in all the forms of anticompetitive conduct comprising the single and continuous infringement, in which case the Commission is entitled to attribute liability to it in relation to that conduct as a whole and, therefore, in relation to the infringement as a whole. Equally, the undertaking may have participated directly in only some of the forms of anticompetitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the

cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk. In such cases, the Commission is also entitled to attribute liability to that undertaking in relation to all the forms of anticompetitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole (see judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 158 and the case-law cited).

208 On the other hand, if an undertaking has directly taken part in one or more of the forms of anticompetitive conduct comprising a single and continuous infringement, but it has not been shown that that undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel and that it was aware of all the other offending conduct planned or put into effect by those other participants in pursuit of the same objectives, or that it could reasonably have foreseen all that conduct and was prepared to take the risk, the Commission is entitled to attribute to that undertaking liability only for the conduct in which it had participated directly and for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself, where it has been shown that the undertaking was aware of that conduct or was able reasonably to foresee it and prepared to take the risk (see judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 159 and the case-law cited).

209 In the present case, in order to determine the duration of the infringements at issue, the Commission relied on their classification as single and continuous infringements, as is apparent from recitals 210 to 217 of the contested decision. In recital 234(c) of that decision, the Commission took the view that the evidence adduced demonstrated the existence of regular contacts that occurred at intermittent periods based on the needs of the individual participants and concluded from this that it would be artificial to split them up into individual instances of a few days' duration, on the ground that the JPY LIBOR rate-setting process occurs on a daily basis. In recital 234(d) of that decision, the Commission considered that the awareness of contacts between UBS, then Citi, and the other bank concerned implied that Icap was in a position to assume that all of its routine actions for the benefit of UBS and then of Citi could also be in support of a scheme between these banks and the other banks concerned by those infringements.

210 The applicants' line of argument can be divided into two complaints. They contest, first, the relevance of some of Icap's conduct on which the Commission relied and, second, the inclusion in the infringement periods of intervals for which no evidence of Icap's participation has been adduced.

211 Since the contested decision, inasmuch as it finds that Icap participated in the UBS/RBS 2008 infringement, must be annulled for the reasons set out in paragraphs 133 to 145 above, it is sufficient to examine this plea with regard to the UBS/RBS 2007, UBS/DB, Citi/RBS, Citi/DB and Citi/UBS infringements.

212 It is necessary to make two preliminary observations before assessing the legality of the contested decision in relation to each of the infringement periods found by the Commission.

213 As regards the first complaint, it is necessary to recall the finding made in paragraph 105 above that, in the contested decision, the Commission did not find the existence of separate infringements between Icap and UBS, then between Icap and Citi, whose object was to manipulate the JPY LIBOR rates at issue in a manner consistent with the interests of UBS, and then of Citi, by means of the dissemination by Icap of incorrect information. The Commission relied on Icap's implementation of infringements decided upon each time between two banks. Accordingly, for reasons similar to those set out in paragraphs 119 to 121 above, only evidence capable of proving that Icap was aware of or

could reasonably have foreseen that the requests addressed to it by UBS, and then Citi, formed part of the common objectives pursued by the two banks concerned by each of the infringements could be taken into account as proof of its participation in those infringements.

214 As regards the second complaint, it should be noted that the applicants' line of argument is based essentially on the fact that JPY LIBOR rates are set on a daily basis and that, therefore, the manipulation had to be repeated each day in order to continue to produce its effects.

215 It must be stated that such a line of argument is tantamount to contesting the merits of the Commission's finding of the continuous nature of Icap's participation in the infringements at issue.

216 In that regard, it should be pointed out that, depending on the circumstances, a single infringement may be continuous or repeated.

217 Although the notion of a single infringement covers a situation in which several undertakings participated in an infringement in which continuous conduct in pursuit of a single economic aim was intended to distort competition and also individual infringements linked to one another by the same object and the same undertakings, the way in which the infringement was committed determines whether it may be categorised as a single, continuing infringement or a single, repeated infringement (see, to that effect, judgments of 17 May 2013, *Trelleborg Industrie and Trelleborg* v *Commission*, T-147/09 and T-148/09, EU:T:2013:259, paragraphs 85 and 86, and of 16 June 2015, *FSL and Others* v *Commission*, T-655/11, EU:T:2015:383, paragraph 484).

218 With regard to a continuous infringement, the concept of an overall plan means that the Commission may assume that an infringement has not been interrupted even if, in relation to a specific period, it has no evidence of the participation of the undertaking concerned in that infringement, provided that that undertaking participated in the infringement prior to and after that period and provided that there is no proof or indication that the infringement was interrupted so far as concerns that undertaking. In that case, it will be able to impose a fine in respect of the whole of the period of infringement, including the period in respect of which it does not have evidence of the participation of the undertaking concerned (see, to that effect, judgments of 17 May 2013, *Trelleborg Industrie and Trelleborg* v *Commission*, T-147/09 and T-148/09, EU:T:2013:259, paragraph 87, and of 16 June 2015, *FSL and Others* v *Commission*, T-655/11, EU:T:2015:383, paragraph 481).

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

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

221 Lastly, if the participation of an undertaking in the infringement may be regarded as having been interrupted and the undertaking may be regarded as having participated in the infringement prior to and after that interruption, that infringement may be categorised as repeated if — as in the case of a continuing infringement — there is a single objective which it pursued both before and after the interruption, a circumstance which may be deduced from the identical nature of the objectives of the practices at issue, of the goods concerned, of the undertakings which participated in the collusion, of the main rules for its implementation, of the natural persons involved on behalf of the undertakings

and, lastly, of the geographical scope of those practices. The infringement is then single and repeated and, although the Commission may impose a fine in respect of the whole of the period of the infringement, it may not do so for the period during which the infringement was interrupted (judgments of 17 May 2013, *Trelleborg Industrie and Trelleborg* v *Commission*, T-147/09 and T-148/09, EU:T:2013:259, paragraph 88, and of 16 June 2015, *FSL and Others* v *Commission*, T-655/11, EU:T:2015:383, paragraph 484).

222 In the present case, in terms of the context of the functioning of the cartel in question, which is relevant for the purposes of assessing whether the period separating two manifestations of unlawful conduct means that there has been an interruption in an undertaking's participation under the case-law cited in paragraph 220 above, it is indeed necessary to take into account that JPY LIBOR rates are set on a daily basis. It necessarily follows that the effects of manipulating those rates are limited in time and that the manipulation needs to be repeated in order for those effects to continue.

223 In that regard, it should be recalled that, in circumstances where the pursuit of an agreement or of concerted practices requires special positive measures, the Commission cannot assume that the cartel has been pursued in the absence of evidence that those measures were adopted (see, to that effect, judgment of 15 March 2000, *Cimenteries CBR and Others* v *Commission*, T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77, paragraphs 2803 and 2804).

224 It follows that proof of Icap's participation in single and continuous infringements and, therefore, the incurring of its liability for the whole of the infringement periods required the Commission to produce evidence of positive measures adopted by Icap, if not on a daily basis, at least sufficiently limited in time. Otherwise, it was for the Commission to find the existence of single and repeated infringements and not to include in the infringement periods found against Icap the intervals in respect of which it does not possess evidence of its participation.

225 It is appropriate to examine jointly, for each of the infringements at issue, the two complaints put forward by the applicants.

(a) The duration of Icap's participation in the UBS/RBS 2007 infringement

226 As regards the infringement period found with respect to Icap for the UBS/RBS 2007 infringement, as was already explained in paragraphs 128 to 131 above, Icap's knowledge of the common objectives pursued by UBS and RBS is based on the conversation of 14 August 2007 alone, mentioned in recital 106 of the contested decision. Although that conversation enabled Icap to learn of the existence of an infringement between UBS and RBS, the fact remains that the information referred to in that conversation was limited in two respects. First, it concerned only manipulations relating to the six-month JPY LIBOR rate. Second, it referred solely to an upwards manipulation of that rate.

227 In the first place, it should be pointed out that attention is drawn in recital 107 of the contested decision to requests from Mr H., at the time a UBS trader, to Mr R., an Icap member of staff, made on 15, 16 and 17 August 2007 and referring to high six-month rates. It must be stated that such requests are consistent with the tenor of the conversation of 14 August 2007 and all occur within a short period of time. It necessarily follows that they are capable of proving Icap's participation in a single and continuous infringement until that date.

228 In the second place, it should however be pointed out that the subsequent evidence taken into account by the Commission against Icap relates either to rates with maturities different from those referred to in the conversation of 14 August 2007, or rate manipulations which ran counter to the content of that conversation.

229 Thus, the request of Mr H., at the time a UBS trader, to Mr R., an Icap member of staff, of 20 August 2007, mentioned in recital 107 of the contested decision, sought high rates for the three-month JPY LIBOR, whereas Icap had been informed only of an agreement between UBS and RBS on an increase in the six-month rates. Furthermore, Mr H.'s request to Mr R. of 22 August 2007, mentioned in recital 108 of that decision, sought low rates for the six-month JPY LIBOR, that is the opposite of the content of the agreement between UBS and RBS, as brought to Icap's attention.

230 Thus, at the very least from 22 August 2007 onwards, Icap could have reasonably taken the view that the UBS/RBS infringement had ceased. Accordingly, in the absence of any subsequent information brought to Icap's attention regarding a continuation or repetition of the collusion between UBS and RBS, Icap cannot be accused of having participated in that infringement from that date onwards.

231 Accordingly, the third plea must be upheld to the extent that the contested decision found that Icap had participated in the UBS/RBS 2007 infringement after 22 August 2007.

(b) The duration of Icap's participation in the Citi/RBS infringement

232 As regards the infringement period found with respect to Icap for the Citi/RBS infringement, it should be noted that the applicants do not contest Icap's participation in that infringement for the dates in relation to which the Commission adduces evidence. Their line of argument seeks solely to contest the continuous nature of that participation for the whole of the infringement period found, namely from 3 March until 22 June 2010.

233 In that regard, it should be observed that it is apparent from point 5.3.5 of the contested decision, relating to ICAP's 'facilitation' of the Citi/RBS infringement, that the Commission adduces evidence only with respect to the following dates: 3 and 4 March 2010 (recitals 142 to 144), 28 and 29 April 2010 (recitals 146 and 147), 4 May 2010 (recital 149), 12 May 2010 (recital 148), 13 May 2010 (recital 149), 25 May 2010 (recital 150), 15 June 2010 (recital 151) and 22 June 2010 (recital 152).

234 In the first place, since all the forms of conduct of which Icap is accused consisted in obtaining, at the request of Mr H., by then a Citi trader, information from RBS relating to the level of its future JPY LIBOR panel submissions as well as, sometimes, influencing them, it necessarily follows that they form part of a single infringement.

235 In the second place, as regards whether the classification of continuous infringement applied to the infringement at issue is well founded, it should be pointed out that, although, from 28 April until 22 June 2010, the Commission adduces evidence of regular intervention by Icap and at relatively frequent intervals, no evidence is adduced for the period from 5 March until 27 April 2010, that is for more than seven weeks.

236 In addition, although the evidence pertaining to 3 and 4 March 2010 shows clearly that Icap intervened at the request of Mr H., by then a Citi trader, with a view to obtaining a reduction in RBS's JPY LIBOR panel submissions, it is also apparent from that evidence that Mr H. sought a one-off reduction in the three-month JPY LIBOR with a view to improving his positions on 3 March 2010. It is not possible to infer from this the existence of a framework agreement by which RBS agreed to alter over a longer period its submissions in the direction desired by Mr H.

237 It follows that, for the reasons set out in paragraphs 222 to 223 above and in the light in particular of the fact that JPY LIBOR rates are set on a daily basis, the absence of evidence of intervention by Icap for a period of that length should have led the Commission to conclude that there was an interruption in its participation between 5 March and 27 April 2010.

238 Accordingly, the third plea must be upheld to the extent that the contested decision found that Icap had participated in the Citi/RBS infringement between 5 March and 27 April 2010.

(c) The duration of Icap's participation in the Citi/DB and Citi/UBS infringements

239 So far as concerns the legality of the infringement periods found against Icap in respect of the Citi/DB and Citi/UBS infringements, the applicants contest both the relevance of the evidence used against Icap and the continuous nature of its participation in those infringements.

240 As regards, in the first place, the relevance of the evidence taken into account by the Commission in the case of the Citi/UBS infringement and the Citi/DB infringement, the Court makes the following observations.

241 As regards, first, the conversation of 7 April 2010 mentioned in recitals 154 and 160 of the contested decision, for reasons similar to those set out in paragraphs 152 to 155 above, it should be noted that the conversation related to an infringement different from those found by the Commission. Thus, just as it was held that that conversation was in itself incapable of proving that Icap knew of the infringements at issue, it must be inferred that that conversation cannot constitute proof of its participation in the Citi/DB infringement.

242 With regard, second, to the requests of Mr H. (by then a Citi trader) to Mr R. (an Icap member of staff) of 18 May and of 23 May 2010 considered in recitals 155 and 161 of the contested decision, for reasons similar to those explained in paragraph 163 above, it must be concluded that Icap could reasonably have foreseen that those requests formed part of the implementation of collusion between Citi, DB and RBS. The Commission was therefore right to take those requests into account.

243 The same is true, third, of the communication between Mr R. and Mr G., members of Icap's staff, seeking an adjustment of the spreadsheet referred to in paragraph 15 above of 1 June 2010, considered in recitals 157 and 163 of the contested decision, in so far as that communication postdates the requests mentioned in paragraph 242 above and may, therefore, appear to implement them. That is, moreover, confirmed by the conversation of the following day, on 2 June 2010, between Mr R. and Mr H. (by then a Citi trader), mentioned in recitals 156 and 162 of that decision, in which Mr R. informs Mr H. that Mr G. had effected the desired adjustments.

244 Lastly, fourth, and with regard to the Citi/DB infringement, the Commission was also right to take account of the conversation of 7 June 2010, mentioned in recital 158 of the contested decision, since, for the reasons set out in paragraph 157 above, the content of that conversation clearly demonstrates that Icap knew of the existence of collusion between Citi and DB.

245 As regards, in the second place, the examination of whether the Commission's finding of the continuous nature of Icap's participation in the Citi/DB infringement between 7 April and 7 June 2010 is well founded, it must be stated that the contested decision is not based on any evidence of any request addressed to Icap to manipulate the JPY LIBOR panel submissions before 18 May 2010. By contrast, after that date, it is apparent from paragraphs 242 to 244 above that the Commission adduces evidence of regular intervention by Icap and at relatively frequent intervals until 7 June 2010.

246 It follows that the Commission was wrong to fix 7 April 2010 as the starting point for Icap's participation in the Citi/DB infringement when it is able to prove such participation only from 18 May 2010.

247 Accordingly, the third plea must be upheld to the extent that the contested decision found that the applicants participated in the Citi/DB infringement between 7 April and 18 May 2010.

248 As regards, in the third place, the examination of whether the Commission's finding of the continuous nature of Icap's participation in the Citi/UBS infringement between 28 April and 2 June 2010 is well founded, it is sufficient to note that the Commission relies on the same items of evidence as those put forward in the context of the Citi/DB infringement. It necessarily follows that the Commission was wrong to fix 28 April 2010 as the starting point of that participation when it is able to prove such participation only from 18 May 2010.

249 Accordingly, the third plea must be upheld to the extent that the contested decision found that Icap participated in the Citi/UBS infringement between 28 April and 18 May 2010.

(d) The duration of Icap's participation in the UBS/DB infringement

250 As regards the legality of the contested decision with respect to the infringement period found against Icap for the UBS/DB infringement, namely from 22 May to 10 August 2009, it must be observed, in the first place, that the applicants do not contest the relevance of the evidence used against Icap.

251 In the second place, it is apparent from point 5.3.4 of the contested decision and in particular from recitals 129 to 139 of that decision that the Commission adduces evidence of regular intervention by Icap, at very frequent intervals and over the whole of the infringement period found. The Commission was therefore right to find that Icap participated continuously in the UBS/DB infringement from 22 May to 10 August 2009.

252 In the light of the foregoing, it is necessary to uphold this plea and annul Article 1(a) of the contested decision inasmuch as it finds that Icap participated in the UBS/RBS 2007 infringement after 22 August 2007, Article 1(d) of that decision inasmuch as it finds that Icap participated in the Citi/RBS infringement between 5 March and 27 April 2010 and Article 1(e) and (f) of that decision inasmuch as it finds that Icap participated in the Citi/DB and Citi/UBS infringements prior to 18 May 2010.

4. The fourth plea, alleging breach of the principles of presumption of innocence and good administration

253 In the context of this plea, the applicants submit that the contested decision should be annulled on account of the references as of the 2013 decision to Icap's conduct and put forward two complaints alleging breach of (i) the principle of presumption of innocence and (ii) the principle of good administration.

254 The Commission contends that this plea should be rejected.

255 Since the contested decision, inasmuch as it finds that Icap participated in the UBS/RBS 2008 infringement, must be annulled for the reasons set out in paragraphs 133 to 145 above, it is sufficient to examine this plea with regard to the UBS/RBS 2007, UBS/DB, Citi/RBS, Citi/DB and Citi/UBS infringements.

256 As regards the complaint alleging that the 2013 decision was adopted in breach of the principle of presumption of innocence, it should be recalled that that principle constitutes a general principle of EU law, currently laid down in Article 48(1) of the Charter of Fundamental Rights, which applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see judgment of 22 November 2012, *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraphs 72 and 73 and the case-law cited).

257 The principle of the presumption of innocence implies that every person accused is presumed to be innocent until his guilt has been established according to law. It thus precludes any formal finding and even any allusion to the liability of an accused person for a particular infringement in a final

decision unless that person has enjoyed all the usual guarantees accorded for the exercise of the rights of defence in the normal course of proceedings resulting in a decision on the merits of the case (judgments of 6 October 2005, *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission*, T-22/02 and T-23/02, EU:T:2005:349, paragraph 106; of 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission*, T-474/04, EU:T:2007:306, paragraph 76, and of 16 September 2013, *Villeroy & Boch Austria* v *Commission*, T-373/10 and T-374/10, not published, EU:T:2013:455, paragraph 158).

258 In the present case, first, it should be noted that, in the part of the 2013 decision entitled 'Description of the events', the Commission specifies, in particular in recitals 43, 45, 46, 49, 50, 54, 56, 59, 60, 62 and 64, how Icap 'facilitated' the infringements at issue imputed to the banks participating in the settlement procedure.

259 It must be stated that although those passages appear in the part of the 2013 decision setting out the facts and do not include as such a legal classification under Article 101(1) TFEU, they nonetheless reveal very clearly the Commission's position on Icap's participation in the unlawful conduct found with respect to the banks concerned. In that regard, recital 45 of that decision is particularly revealing of the existence of a position adopted by the Commission on that question, since it is stated therein as follows:

'… Icap sought to influence [its] JPY LIBOR submissions in directions desired by the trader at UBS; … [o]n certain occasions, by disseminating misleading information to certain JPY LIBOR panel banks via the so-called "run-throughs", which were veiled as "predictions" or "expectations" of where the JPY LIBOR rates would be set. This misleading information was aimed at influencing certain panel banks that did not participate in these infringements, to submit JPY LIBOR rates in line with the adjusted "predictions" or "expectations."'

260 Second, although recital 51 of the 2013 decision states that that decision does not make any finding as regards the legal qualification of, and Icap's liability for, its conduct, the fact remains that the Commission's position on the legal classification of Icap's conduct and the incurring of its liability of the six infringements at issue could easily be inferred from a reading of that decision.

261 First, in recital 69 of the 2013 decision, the Commission reproduces the content of paragraph 130 of the judgment of 8 July 2008, *AC-Treuhand* v *Commission* (T-99/04, EU:T:2008:256), to which it refers, in which the Court clarified the conditions under which the liability of an undertaking is incurred in respect of what the Commission classifies as 'facilitation' of an infringement. Moreover, that decision refers, in particular, in the title of its points 4.1.2.1, 4.1.2.3, 4.1.2.4 and 4.1.3, to the 'facilitation' of the infringements concerned by Icap.

262 Third, it should be pointed out that the 2013 decision constitutes a 'final decision' within the meaning of the case-law cited in paragraph 257 above.

263 In that regard, the parallel drawn by the Commission at the hearing between the expression of a view on the legality of Icap's conduct in the 2013 decision with the view that might appear in a statement of objections is irrelevant. In a statement of objections, the undertaking concerned is able to defend itself properly before the Commission adopts a final decision. Having decided not to participate in the settlement procedure, the applicants were not afforded an opportunity to make known their view before the adoption of that decision. Similarly, the possibility for the applicants to exercise their rights of defence in the action against the contested decision in no way detracts from the fact that, in a final decision prior to the contested decision, the Commission had already made a formal finding that Icap had participated in six infringements of Article 101 TFEU.

264 Lastly, fourth, that conclusion is not called in question by the Commission's line of argument alleging, in essence, that references to the participation of third persons may be necessary for the assessment of the guilt of those participating in a settlement procedure. The Commission observes that one of the objectives of the settlement procedure is to ensure greater rapidity and efficiency and infers from this that it would be contrary to the achievement of those objectives to allow a party which does not wish to enter into a settlement to delay the adoption of the settlement decision with regard to the other parties.

265 In that regard, it should be pointed out that, although the principle of presumption of innocence is enshrined in Article 48 of the Charter of Fundamental Rights, which, pursuant to Article 6 TEU, has the same legal value as the Treaties, the origin of the settlement procedure is to be found in a regulation adopted by the Commission alone, on the basis of Article 33 of Regulation No 1/2003, namely Regulation No 622/2008, and that the procedure is optional for both the Commission and the undertakings concerned.

266 Accordingly, the requirements relating to compliance with the principle of presumption of innocence cannot be distorted by considerations linked to the safeguarding of the objectives of rapidity and efficiency of the settlement procedure, no matter how laudable those objectives may be. On the contrary, it is for the Commission to apply its settlement procedure in a manner that is compatible with the requirements of Article 48 of the Charter of Fundamental Rights.

267 It is true, as the Court noted in its judgment of 20 May 2015, *Timab Industries and CFPR* v *Commission* (T-456/10, EU:T:2015:296, paragraph 71), that where the settlement does not involve all the participants in an infringement, the Commission is entitled to adopt, on the one hand, following a simplified procedure, a decision addressed to the participants in the infringement who have decided to enter into a settlement and reflecting the commitment of each of them and, on the other hand, according to the standard procedure, a decision addressed to participants in the infringement who have decided not to enter into a settlement.

268 However, the implementation of such a 'hybrid' settlement procedure must be carried out in compliance with the presumption of innocence of the undertaking which has decided not to enter into a settlement. Accordingly, in circumstances where the Commission considers that it is not in a position to determine the liability of the undertakings participating in the settlement without also taking a view on the participation in the infringement of the undertaking which has decided not to enter into a settlement, it is for the Commission to take the necessary measures — including possible adoption on the same date of the decisions relating to all the undertakings concerned by the cartel, as it did in the case which gave rise to the judgment of 20 May 2015, *Timab Industries and CFPR* v *Commission* (T-456/10, EU:T:2015:296) — enabling that presumption of innocence to be safeguarded.

269 In the light of the foregoing, it must be held that the Commission infringed the presumption of Icap's innocence when adopting the 2013 decision. Admittedly, that breach of the presumption of its innocence at the time of the adoption of the 2013 decision cannot have a direct impact on the legality of the contested decision, in view of the separate and independent nature of the proceedings which gave rise to those two decisions.

270 However, it is necessary to ascertain whether such a finding by the Commission prior to the contested decision of Icap's participation in the infringements at issue is capable of vitiating that decision with a lack of objective impartiality by the Commission and, accordingly, with a breach of the principle of good administration set out in Article 41 of the Charter of Fundamental Rights, as the applicants submit in the context of their second complaint.

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

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

273 This plea is concerned solely with the concept of objective impartiality. The applicants submit, in essence, that there are legitimate doubts as to the Commission's objective impartiality, since it was required to take a view on whether its own assessments were well founded.

274 However, it is clear that, in the circumstances of the present case, such a complaint cannot in itself lead to the annulment of the contested decision. It should be pointed out that the Commission did not exercise any discretion when classifying the infringements at issue or when examining Icap's participation which could have been vitiated by a lack of objective impartiality, as is shown in the comprehensive review carried out by the Court in the context of the examination of the first, second and third pleas.

275 In that regard, it should be pointed out that the applicants' criticisms related to the merits of the classification as infringements by object found by the Commission (first plea) and the merits of the findings of Icap's participation in those infringements (second and third pleas).

276 As regards, first, Icap's participation in the infringements at issue, the issue whether a possible lack of objective impartiality on the part of the Commission could have affected the legality of the contested decision is indissociable from the question whether the findings made in that decision are properly supported by the evidence adduced by the Commission (see, to that effect, judgments of 6 July 2000, *Volkswagen* v *Commission*, T-62/98, EU:T:2000:180, paragraph 270, and of 16 June 2011, *Bavaria* v *Commission*, T-235/07, EU:T:2011:283, paragraph 226), a question which was reviewed in the context of the examination of the second and third pleas.

277 Thus, even if a possible lack of objective impartiality on the part of the Commission might have led it to find wrongly that Icap participated in the UBS/RBS 2008 infringement or for certain periods of the UBS/RBS 2007, Citi/RBS, Citi/DB and Citi/UBS infringements, it should be pointed out that the contested decision must already be annulled in that regard.

278 As regards the other findings made in the contested decision, the irregularity relating to a possible lack of objective impartiality on the part of the Commission would entail the annulment of that decision only if it were established that, were it not for that irregularity, that decision would have been different in content (judgment of 6 July 2000, *Volkswagen* v *Commission*, T-62/98, EU:T:2000:180, paragraph 283). In the present case, in the context of the exercise of the comprehensive review of the relevant grounds of that decision, it was found that, with the exception of the aspects mentioned in paragraph 277 above, the Commission had established to the requisite legal standard Icap's participation in five of the six infringements at issue.

279 As regards, second, the classification as infringements by object used in the contested decision, it must, similarly, be held that the irregularity arising from a possible lack of objective impartiality on the part of the Commission could not have had an impact on the content of that decision, since, in response to the first plea, it was held that the application of such a classification to the infringements at issue was not vitiated by any error of law or assessment.

280 The fourth plea in law must therefore be rejected.

5. The fifth plea, relating to the determination of the amount of the fines

281 By this plea, the applicants contest the amount of the fines imposed on them. In that context, they put forward several complaints including that of insufficient reasoning of the contested decision.

282 The Court considers that that latter complaint should be examined first.

283 The applicants submit that the Commission was bound by its 2006 Guidelines and that the application of point 37 of those Guidelines requires the Commission to provide justification as to why it departs from its general methodology. They submit that the contested decision does not contain any proper justification in that regard and that the fines should have been set based on Icap's brokerage fees. They add that the Commission also fails to state adequate reasons for the determination of the level of the fines imposed. The applicants submit that the methodology outlined by the Commission in its written submissions or at a meeting held in the administrative procedure is too complex, arbitrary and unsuitable.

284 The Commission counters, in reply to the claim that the choice not to calculate the fine based on the brokerage fees was insufficiently reasoned, by saying that its reasons are clearly set out in recital 287 of the contested decision.

285 As regards the claim that the method applied of calculating the fines was insufficiently reasoned, the Commission observes that, during the administrative procedure, the applicants were informed of the method that would be applied. The Commission adds that the contested decision contains a sufficient statement of reasons, since reference is made to the gravity, duration and the nature of Icap's involvement in the infringements at issue. In its pleadings it provides additional explanations on the methodology that it followed in that decision, whilst noting that it was not required to do so.

286 It should be observed that, in point 9.3 of the contested decision, relating to the calculation of the fines, the Commission first stated that it applied point 37 of its 2006 Guidelines, which specifies that the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from the methodology set out in those guidelines (recitals 286 to 288). Second, the Commission specified in point 9.3 that it applied an appropriate reduction when determining the basic amount of the fine for the Citi/UBS and Citi/DB infringements, in respect of which the Commission assumes that Icap adopted the same conduct, in order to prevent a disproportionate level of sanctions, without providing any details on the level of that reduction (recital 289). Third, as regards the determination of the basic amount of the fine, the Commission stated that it took account of the gravity and duration of the infringements at issue and the nature of Icap's involvement, without providing any explanations on the effect of those factors on the basic amounts applied (recitals 290 to 296). Fourth, regarding the determination of the final amount of the fines, in the absence of aggravating or mitigating circumstances or of the ceiling of 10% of turnover being exceeded, it was set at the same level as the basic amount (recitals 297 to 300).

287 It is established case-law that the obligation to state reasons laid down in the second paragraph of Article 296 TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. From that

point of view, the statement of reasons required must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which such a decision is based is, therefore, in addition to permitting review by the Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged (see judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraphs 146 to 148 and the case-law cited; of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraphs 114 and 115, and of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 44).

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

289 When the Commission decides to depart from the general methodology set out in the 2006 Guidelines, by which it limited the discretion it may itself exercise in setting the amount of fines, and relies, as in the present case, on point 37 of those guidelines, the requirements relating to the duty to state reasons must be complied with all the more rigorously (judgment of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 48). In that regard, it is appropriate to refer to the settled case-law to the effect that the Guidelines lay down a rule of conduct indicating the approach to be adopted from which the Commission cannot depart, in an individual case, without giving reasons which are compatible with, inter alia, the principle of equal treatment (see, to that effect, judgments of 30 May 2013, *Quinn Barlo and Others* v *Commission*, C-70/12 P, not published, EU:C:2013:351, paragraph 53, and of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 60 and the case-law cited). Those reasons must be all the more specific because point 37 of the Guidelines simply makes a vague reference to 'the particularities of a given case' and thus leaves the Commission a broad discretion where it decides to make an exceptional adjustment of basic amount of the fines to be imposed on the undertakings concerned. In such a case, the Commission's respect for the rights guaranteed by the EU legal order in administrative procedures, including the obligation to state reasons, is of even more fundamental importance (see, to that effect, judgment of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 14).

290 It is also settled case-law that the statement of reasons must, therefore, in principle be notified to the person concerned at the same time as the decision adversely affecting him. A failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the EU courts (judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 149; of 19 July 2012, *Alliance One International and Standard Commercial Tobacco* v *Commission*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 74, and of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 46).

291 With respect to a decision imposing a fine, the Commission is required to provide a statement of reasons, inter alia for the amount of the fine imposed and for the method chosen in that regard (judgment of 27 September 2006, *Jungbunzlauer* v *Commission*, T-43/02, EU:T:2006:270, paragraph 91). The Commission must indicate in its decision the factors which enabled it to

determine the gravity of the infringement and its duration, there being no requirement for any more detailed explanation or indication of the figures relating to the method of calculating the fine (judgment of 13 July 2011, *Schindler Holding and Others* v *Commission*, T-138/07, EU:T:2011:362, paragraph 243). It must nevertheless explain the weighting and assessment of the factors taken into account (judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 61).

292 In the present case, in the first place, it should be pointed out that the reasons why the Commission decided to depart from the methodology set out in the 2006 Guidelines, by applying point 37 thereof, can be inferred from a reading of recital 287 of the contested decision. Those reasons stem from the fact that Icap was not active on the Japanese Yen interest rate derivatives market and that, therefore, taking into account the value of sales, namely the brokerage fees received, would not make it possible to reflect the gravity and nature of the infringements at issue.

293 In the second place, it must however be stated that recital 287 of the contested decision does not provide details on the alternative method favoured by the Commission, but is limited to a general assurance that the basic amounts reflect the gravity, duration and nature of Icap's involvement in the infringements at issue, as well as the need to ensure that fines have a sufficiently deterrent effect.

294 Drafted in that manner, recital 287 of the contested decision does not enable the applicants to understand the justification for the methodology favoured by the Commission, or the Court to verify that justification. That insufficient reasoning is also to be found in recitals 290 to 296 of that decision, which do not provide the minimum information which might have made it possible to understand and ascertain the relevance and weighting of the factors taken into consideration by the Commission in the determination of the basic amount of the fines, in breach of the case-law cited in paragraph 291 above.

295 It is apparent from the parties' pleadings that the question of the methodology that the Commission envisaged using for the purposes of calculating the amount of the fines was broached during a discussion with the applicants' representatives, during the administrative procedure. Although, under the case-law cited in paragraph 288 above, the reasoning of a contested act must be examined taking into account its context, the view cannot be taken that holding such exploratory and informal discussions can relieve the Commission of its obligation to explain, in the contested decision, the methodology that it applied for the purposes of determining the amounts of the fines imposed.

296 In paragraph 176 of the defence, the Commission highlights the existence of a five-stage test designed to calculate the basic amount of the fines. However, pursuant to the case-law cited in paragraph 290 above, such an explanation provided at the stage of the proceedings before the Court cannot be taken into account for the purposes of assessing whether the Commission has complied with its obligation to state reasons.

297 In the light of the foregoing, it must be held that, so far as concerns the determination of the fines imposed on Icap for the infringements at issue, the contested decision is vitiated by insufficient reasoning.

298 The fifth plea must, therefore, be upheld and Article 2 of the contested decision must be annulled in its entirety, there being no need to examine the other complaints of that plea or those of the sixth plea, which relates exclusively to the legality of that article.

299 Moreover, in so far as Article 2 of the contested decision is annulled in its entirety, it is not necessary to examine the applicants' claim for variation of the contested decision, which the applicants submitted in the alternative.

Costs

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

301 In the present case, the applicants have been successful in respect of a substantial part of their claims. In those circumstances, the Court will make an equitable assessment of the case in ruling that the Commission is to bear its own costs and to pay three quarters of the applicants' costs.

302 Lastly, in so far as the applicants claim that the Commission should be ordered to pay the legal and 'other costs and expenses incurred in relation to this matter', it should be pointed out that, pursuant to Article 140(b) of the Rules of Procedure, expenses necessarily incurred by the parties for the purpose of the proceedings are regarded as recoverable costs.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. **Annuls Article 1(a) of European Commission Decision C(2015) 432 final of 4 February 2015 relating to proceedings under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39861 — Yen Interest Rate Derivatives), inasmuch as it relates to the period after 22 August 2007;**

2. **Annuls Article 1(b) of Decision C(2015) 432 final;**

3. **Annuls Article 1(d) of Decision C(2015) 432 final inasmuch as it relates to the period from 5 March to 27 April 2010;**

4. **Annuls Article 1(e) of Decision C(2015) 432 final inasmuch as it relates to the period prior to 18 May 2010;**

5. **Annuls Article 1(f) of Decision C(2015) 432 final inasmuch as it relates to the period prior to 18 May 2010;**

6. **Annuls Article 2 of Decision C(2015) 432 final;**

7. **Dismisses the action as to the remainder;**

8. **Orders Icap plc, Icap Management Services Ltd and Icap New Zealand Ltd to bear one quarter of their own costs;**

9. **Orders the Commission to bear its own costs and to pay three quarters of the costs of Icap, Icap Management Services and Icap New Zealand.**

Prek Buttigieg Schalin

Berke Costeira

Delivered in open court in Luxembourg on 10 November 2017.

E. Coulon
Registrar

M. Prek
President

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