# JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

27 November 2024 (*) (1)

( Competition – Agreements, decisions and concerted practices – Euro Interest Rate Derivatives sector – Decision establishing an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Failure to discharge the obligation to state reasons – Annulment in part of the decision by a judgment of the General Court – Amending decision – Fines – Limitation – Basic amount – Value of sales – Article 23(2) and (3) of Regulation (EC) No 1/2003 – Equal treatment – Proportionality – Unlimited jurisdiction )

In Case T-561/21,

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

HSBC Bank plc, established in London,

HSBC Continental Europe, established in Paris (France),

represented by M. Demetriou and D. Bailey, Barristers-at-Law, C. Angeli, M. Giner Asins and C. Chevreste, lawyers, and by M. Simpson, Solicitor,

applicants,

v

European Commission, represented by T. Baumé, P. Berghe and M. Farley, acting as Agents,

defendant,

THE GENERAL COURT (Seventh Chamber),

composed of K. Kowalik-Bańczyk, President, E. Buttigieg (Rapporteur) and G. Hesse, Judges,

Registrar: M. Zwozdziak-Carbonne, Administrator,

having regard to the written part of the procedure, in particular:

– the decision of 21 December 2021 to stay the proceedings pursuant to Article 69(d) of the Rules of Procedure of the General Court until delivery of the judgment in Case C-883/19 P, HSBC Holdings and Others v Commission,

– the judgment of 12 January 2023, HSBC Holdings and Others v Commission (C-883/19 P, EU:C:2023:11), and the observations of the parties on that judgment, submitted in the reply and rejoinder,

– the judgments of 20 December 2023, JPMorgan Chase and Others v Commission (T-106/17, under appeal, EU:T:2023:832), and of 20 December 2023, Crédit agricole and Crédit agricole Corporate and Investment Bank v Commission (T-113/17, under appeal, EU:T:2023:847), and the observations of the parties on those judgments,

further to the hearing on 25 January 2024,

gives the following

## Judgment

1 By their action based on Article 263 TFEU, the applicants, HSBC Holdings plc, HSBC Bank plc and HSBC Continental Europe (together ‘HSBC’), seek, first, the annulment of Article 1 of Commission Decision C(2021) 4600 final of 28 June 2021 amending Commission Decision C(2016) 8530 final of 7 December 2016 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39914 – Euro Interest Rate Derivatives) (‘the 2021 Decision’) and the annulment of Article 2(b) of Commission Decision C(2016) 8530 final of 7 December 2016 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39914 – Euro Interest Rate Derivatives (EIRD)) (‘the 2016 Decision’), as amended, and, second, in the alternative,

a reduction in the amount of the fine imposed on them in the 2021 Decision.

Background to the dispute

2 On 7 December 2016, the European Commission adopted, on the basis of Articles 7 and 23 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), the 2016 Decision. In that decision, among other things, it found that HSBC Holdings, HSBC Bank and HSBC France, which has since changed its name to HSBC Continental Europe, had infringed Article 101 TFEU and Article 53 of the European Economic Area (EEA) Agreement by taking part, from 12 February to 27 March 2007, in a single and continuous infringement with the object of distorting the normal course of pricing on the market for EIRDs (Article 1(b) of the 2016 Decision) and imposed on them jointly and severally a fine of EUR 33 606 000 (Article 2(b) of the 2016 Decision).

3 By application lodged at the Court Registry on 17 February 2017, HSBC Holdings, HSBC Bank and HSBC France brought an action against the 2016 Decision, registered under case number T-105/17.

4 By judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675), the Court, in the first place, dismissed the action in so far as it sought annulment of Article 1 of the 2016 Decision, and, in particular, Article 1(b) of that decision.

5 In that respect, the Court found, inter alia, that two of the exchanges in which HSBC had participated, namely the chats of 9 and 14 March 2007, did not constitute restrictions of competition by object (judgment of 24 September 2019, HSBC Holdings and Others v Commission, T-105/17, EU:T:2019:675, paragraph 195). In addition, it noted that the Commission had failed to demonstrate to the requisite legal standard that HSBC was aware, or should have been aware, of the existence of an ‘overall plan’ with a single aim that gives a reason why HSBC is to be held liable for all forms of conduct forming part of that single aim, regardless of whether or not it was directly involved in it (judgment of 24 September 2019, HSBC Holdings and Others v Commission, T-105/17, EU:T:2019:675, paragraph 266). Consequently, the Court held that HSBC’s participation in the single and continuous infringement can be upheld only in respect, first, of its own conduct in that infringement and, second, of the conduct of other banks forming part of the manipulation of 19 March 2007 and any potential repeat of that manipulation (judgment of 24 September 2019, HSBC Holdings and Others v Commission, T-105/17, EU:T:2019:675, paragraph 273).

6 However, the Court noted that those errors made by the Commission had no effect on the lawfulness of Article 1(b) of the 2016 Decision, since the conclusion set out therein remains substantiated by other elements appearing in the 2016 Decision, but that they might be taken into account when assessing the proportionality of the fine (judgment of 24 September 2019, HSBC Holdings and Others v Commission, T-105/17, EU:T:2019:675, paragraphs 295 to 297).

7 In the second place, the Court annulled Article 2(b) of the 2016 Decision, by which the Commission imposed a fine on HSBC, on the ground that the Commission had failed to state, to the requisite legal standard, the reasons as to why the uniform reduction factor applied to

the cash receipts of the undertakings concerned for the purposes of calculating the fines imposed on them ('the reduction factor') was set at 98.849% rather than at a higher level (judgment of 24 September 2019, HSBC Holdings and Others v Commission, T-105/17, EU:T:2019:675, paragraphs 344 to 353).

8 On 31 October 2019, the Commission lodged an appeal against the judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675), which was registered under case number C-806/19 P, by which it sought to have that judgment set aside in part in so far as the General Court annulled Article 2(b) of the 2016 Decision which imposed the fine. On 3 December 2019, the applicants brought an appeal against the same judgment, which was registered under case number C-883/19 P, by which it also sought to have that judgment set aside in part in so far as the General Court had dismissed their action for annulment of Article 1(b) of the 2016 Decision.

9 By letter of 8 May 2020, the Commission informed the applicants of its intention to adopt a new decision in the light of the judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675). By the same letter, and by letter of 16 April 2021, the Commission provided to all the addressees of the 2016 Decision further information and explanations on why the level of the discount factor was set at 98.849%. The applicants submitted their observations on those letters on 14 July 2020 and on 14 May 2021.

10 On 28 June 2021, the Commission adopted the 2021 Decision.

11 In recitals 8, 13, 157 and 158 of the 2021 Decision, the Commission stated, in essence, that the sole purpose of that decision was to remedy the situation following the judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675), by imposing a fine on HSBC for the infringement found in Article 1(b) of the 2016 Decision, taking account of the findings in that judgment, as recalled in paragraph 5 to 7 above, and by supplementing the reasoning set out in the 2016 Decision, which the Court deemed inadequate.

12 Article 2(b) of the 2016 Decision is worded as follows:

'Article 2

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

…

(b) HSBC Holdings plc, HSBC Bank plc and HSBC France jointly and severally liable: 33 606 600 EUR'

13 Article 1 of the 2021 Decision is worded as follows:

'Article 1

In Article 2 of [the 2016 Decision], the following point (b) is inserted:

"(b) [the applicants] jointly and severally liable: 31 739 000 EUR"'.

14 On 23 July 2021, the Commission withdrew its appeal in Case C-806/19 P, which was removed from the register of the Court of Justice by the order of 1 September 2021, Commission v HSBC Holdings and Others (C-806/19 P, not published, EU:C:2021:703).

15 By judgment of 12 January 2023, HSBC Holdings and Others v Commission (C-883/19 P, EU:C:2023:11), first, the Court of Justice set aside the judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675), in so far as the

General Court had rejected the primary claim for annulment of Article 1 of the 2016 Decision and the claim in the alternative for annulment of Article 1(b) of that decision. Second, the Court of Justice gave a ruling on the action in Case T-105/17 – in so far as it sought the annulment of Article 1 of the 2016 Decision and, in the alternative, Article 1(b) of that decision – and dismissed that action.

Forms of order sought

16 The applicants claim, in essence, that the Court should:

– annul Article 1 of the 2021 Decision and Article 2(b) of the 2016 Decision, as amended;

– in the alternative, substantially reduce the fine imposed on the applicants to such amount as the Court may deem appropriate; and

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

17 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

Law

18 In support of their action, the applicants put forward five pleas in law. The first plea alleges that the Commission infringed the rules on the limitation period for imposing a fine on HSBC in that the Commission adopted the 2021 Decision outside the 10-year limitation period provided for in Article 25(5) of Regulation No 1/2003. The second plea alleges an error of law and an error of assessment in that the Commission used discounted cash receipts as a proxy for the value of HSBC's sales within the meaning of paragraph 13 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the Guidelines on the method of setting fines'), and failure to discharge the obligation to state reasons. The third plea alleges errors of assessment and inadequate reasoning in so far as it concerns the calculation of the reduction factor that the Commission applied to the cash receipts. The fourth plea alleges an error of assessment regarding the gravity of the infringement HSBC was found to have committed, and, specifically, the gravity factor applied and the imposition of the 'additional amount', which led to a disproportionate sanction that is contrary to the principle of equal treatment. By their fifth plea, the applicants submit that the amount of the fine is disproportionate, in particular, in so far as the Commission erred in its assessment when calculating the level of the reduction on account of mitigating circumstances.

19 As its principle claim, the applicants seek the annulment of the 2021 Decision and therefore of the fine imposed by the 2016 Decision, as amended. In the alternative, they request that the Court exercise its unlimited jurisdiction to reduce substantially the fine imposed on them in the 2021 Decision.

20 As a preliminary point, the Court notes that the system of judicial review of Commission decisions relating to proceedings under Articles 101 and 102 TFEU consists in a review of the legality of the acts of the institutions for which provision is made in Article 263 TFEU, which may be supplemented, pursuant to Article 261 TFEU and at the request of applicants, by the Court's exercise of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission (judgment of 10 July 2014, Telefónica and Telefónica de España v Commission,

C-295/12 P, EU:C:2014:2062, paragraph 42; see also, judgment of 26 September 2018, Infineon Technologies v Commission, C-99/17 P, EU:C:2018:773, paragraph 47 and the case-law cited).

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

22 Specifically, with regard to a review of the legality of a decision imposing a fine, the EU Courts must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, the EU Courts cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines on the method of setting fines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts (judgment of 8 December 2011, Chalkor v Commission, C-386/10 P, EU:C:2011:815, paragraph 62).

23 However, the Court recalls that it is settled case-law that the EU Courts cannot, in the context of a review of legality as referred to in Article 263 TFEU, substitute their own reasoning for that of the author of the act at issue (see, to that effect, judgment of 24 January 2013, Frucona Košice v Commission, C-73/11 P, EU:C:2013:32, paragraph 89 and the case-law cited).

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

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

26 In the present case, the Commission's reasoning concerning the amount of the fine imposed on HSBC is set out in recitals 19 to 158 of the 2021 Decision.

27 In the first place, with regard to the basic amount of the fine, first, the Commission determined the value of sales using a proxy because EIRDs do not generate sales in the usual sense of the term. Furthermore, in the light of the circumstances in the present case, it concluded that it was preferable not to use an annualised proxy, but to take as its basis a proxy based on the months corresponding to the banks' participation in the infringement (recitals 22 and 24 of the 2021 Decision).

28 The Commission considered it appropriate to use as its proxy the cash receipts generated by the cash flows that each bank received from its portfolio of EIRDs linked to any Euribor tenor and/or EONIA and entered into with EEA-located counterparties (recital 23 of the 2021 Decision), to which a uniform discount factor of 98.849% was applied in order to take account of the particularities of the EIRD market, and in particular the netting inherent in the negotiation of derivatives (recitals 26 to 52 of the 2021 Decision).

29 The Commission therefore used the amount of EUR 192 081 799, that is to say an amount obtained by applying a discount of 98.849% to EUR 16 688 253 649, as its proxy for HSBC's value of sales (recitals 25 and 53 of the 2021 Decision).

30 As regards, second, the gravity of the infringement, the Commission used a gravity factor of 15% as the infringement related to price coordination and price-fixing arrangements. It added a gravity factor of 3% by reference to the fact that the cartel covered the entire EEA and had affected rates that were relevant for all EIRDs and that, as those rates related to the euro, they were of paramount importance for the harmonisation of financial conditions in the internal market and for banking activities in Member States (recitals 107 and 108 of the 2021 Decision).

31 As regards, third, the duration of the infringement, the Commission stated that it had taken into account the duration of the participation of each participant in the cartel on 'a rounded down monthly and pro rata basis', which led to a multiplier of 0.08 being applied in respect of HSBC (recitals 112 to 113 of the 2021 Decision).

32 Fourth, the Commission added an additional amount of 18% of the value of sales, described as an 'entry fee', since the infringement consisted of horizontal price-fixing and in the light of the factors taken into account in the assessment of gravity (see paragraph 30 above), in order to deter undertakings from participating in such practices, irrespective of the duration of the infringement (recitals 116 to 118 of the 2021 Decision).

33 The Commission thus set the basic amount of the fine to be imposed on the applicants at EUR 37 340 000 (recital 125 of the 2021 Decision).

34 In the second place, as regards the setting of the final amount of the fine, the Commission found that HSBC's participation in the infringement had a lower intensity of collusive contacts than that of the main players and found that HSBC had played a more peripheral or minor role in the infringement, which could not be compared to that of the main players. The Commission granted a 10% reduction of the basic amount of the fine (recitals 128 and 129 of the 2021 Decision). Next, the Commission examined the impact of the Court's findings in the judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675), concerning the intensity of the contacts forming part of the infringement and HSBC's awareness of the involvement of the other banks in the single and continuous infringement and, in the light of those findings, granted a further reduction of 5%, bringing the reduction of the basic amount of the fine on account of mitigating circumstances to 15% (recitals 137 to 143 of the 2021 Decision).

35 The Commission therefore reduced the amount of the fine as compared with the amount of the fine imposed in Article 2(1)(b) of the 2016 Decision by setting it, in Article 1 of the 2021 Decision, at EUR 31 739 000.

The claim seeking annulment of Article 1 of the 2021 Decision and Article 2(b) of the 2016 Decision, as amended

The first plea, alleging infringement of the limitation period for imposing a fine on HSBC

36 In the first plea, the applicants submit that the 2021 Decision was adopted outside the 10-year limitation period provided for in Article 25(5) of Regulation No 1/2003. They submit, in essence, that that limitation period was not suspended pursuant to Article 25(6) of Regulation No 1/2003, by the Commission bringing an appeal in Case C-806/19 P (see paragraph 8 above), in so far as, already on that date, the Commission intended to adopt a new decision against HSBC without awaiting the outcome of the appeal. According to the applicants, the Commission could not bring the appeal with the sole objective of suspending the limitation period in order to obtain an additional period to adopt a new decision in the meantime. That appeal, brought for an inappropriate purpose, is moot and did not suspend the limitation period.

37 In addition, according to the applicants, even if the appeal brought by the Commission had suspended the limitation period from 31 October 2019, that suspension came to an end in any event upon the sending of the letter of 8 May 2020 when the Member of the Commission responsible for competition notified HSBC of her intention to propose to the College of Commissioners that a new decision addressed to HSBC be adopted (see paragraph 9 above). According to the applicants, on that date, the Commission demonstrated that it was not 'prevented' from acting notwithstanding the extant appeal. Its interest in the outcome of the appeal disappeared when it took steps to adopt a new decision against HSBC.

38 The Commission disputes the applicants' arguments.

39 In that regard, the Court notes that the object of Article 25 of Regulation No 1/2003 is to introduce rules governing the time limits within which the Commission is entitled, without undermining the fundamental requirement of legal certainty, to impose fines and periodic penalty payments on undertakings which are the subject of procedures for the application of the EU competition rules (judgment of 21 January 2021, Whiteland Import Export, C-308/19, EU:C:2021:47, paragraph 38). That provision is the result of the reconciliation by the EU legislature, in the exercise of the powers conferred on it, of two objectives potentially requiring conflicting measures, namely, first, the need to ensure legal certainty by preventing situations which arose a long time previously from being indefinitely brought into question and, second, the requirement to ensure observance of the law by pursuing, establishing and penalising infringements of EU law (see, to that effect, judgment of 9 November 2022, Ferriere Nord v Commission, T-667/19, under appeal, EU:T:2022:692, paragraph 354 and the case-law cited).

40 Under Article 25(2), (3) and (5) of Regulation No 1/2003, the Commission's power to impose a fine is to expire, where the Commission has taken actions to investigate or bring proceedings in respect of an infringement, at the latest ten years from the day when the continuing or

repeated infringement ended. In addition, Article 25(6) of Regulation No 1/2003 provides that the limitation period is to be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Union. Under paragraph 5 of that article, the limitation period of 10 years is to be extended by the time during which limitation is suspended pursuant to paragraph 6 of that article.

41 In the present case, the parties are in agreement that the limitation period began to run, in accordance with Article 25(2) of Regulation No 1/2003, on 27 March 2007, that is to say, on the date on which the single and continuous infringement the applicants were found to have committed came to an end. The Commission adopted the 2016 Decision on 7 December 2016, which was 9 years, 8 months and 10 days after the infringement came to an end. The parties are also in agreement that the limitation period was suspended, in application of Article 25(6) of Regulation No 1/2003, with effect from 17 February 2017, the date on which the action in Case T-105/17 was brought, that is to say, 9 years, 10 months and 20 days after the infringement came to an end, until the judgment in that case was delivered on 24 September 2019. On that date, in the light of the maximum limitation period of 10 years laid down in Article 25(5) of Regulation No 1/2003, the Commission had 1 month and 11 days to adopt a new decision imposing a fine.

42 On 31 October 2019, that is to say, 1 month and 7 days after the delivery of the judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675), the Commission brought the appeal in Case C-806/19 P.

43 The 2021 Decision was adopted on 28 June 2021 while the proceedings in Case C-806/19 P concerning the appeal lodged by the Commission were pending before the Court of Justice.

44 In order to determine whether the limitation period had expired when the 2021 Decision was adopted, as the applicants submit, it is necessary to determine, in the light of the arguments which they put forward in that regard, first, whether the appeal brought by the Commission in Case C-806/19 P had the effect of suspending the limitation period at issue and, second, whether that suspension, if established, continued until that decision was adopted. It is not disputed that, on the date on which the Commission brought the appeal, the limitation period had not yet expired.

45 In that regard, the Court notes that, under Article 25(6) of Regulation No 1/2003, the limitation period is to be suspended for as long as the decision of the Commission is the subject of proceedings pending before one of the EU Courts. It is unambiguously clear from the above that a suspension of the limitation period under that provision is based on an objective circumstance, which exists in the present case, where court proceedings are pending (see, to that effect, judgment of 29 March 2011, ArcelorMittal Luxembourg v Commission and Commission v ArcelorMittal Luxembourg and Others, C-201/09 P and C-216/09 P, EU:C:2011:190, paragraph 141 and the case-law cited). Contrary to what emerges, in essence, from the applicants' arguments, that provision does not make that suspension subject to any subjective condition, such as an 'objective' pursued by the lodging of the action or the 'intention' of the party bringing it.

46 In that context, the Court also recalls that Article 25(6) of Regulation No 1/2003 protects the Commission against the effect of the limitation period in situations in which it must await the decision of the EU Courts in proceedings beyond its control before it knows whether the contested measure is or is not unlawful (see, to that effect, judgment of 15 October 2002, Limburgse Vinyl Maatschappij and Others v Commission, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraphs 144 and 151).

47 The notion that the Commission is 'prevented' from taking action, to which reference is made in the case-law (see, to that effect, judgment of 15 October 2002, Limburgse Vinyl Maatschappij and Others v Commission, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 144), as relied on by the applicants, is not to be understood as referring to situations where it is absolutely impossible for the Commission to undertake preparatory actions, as it did in the present case, with a view to the potential adoption of a new decision in order to comply with a judgment of the Court in which it found the Commission's decision to be unlawful. That notion of being 'prevented' is an objective circumstance that relates to whether there are pending court proceedings as a result of which there is uncertainty as to the lawfulness of the Commission's decision.

48 In the present case, by bringing the appeal in Case C-806/19 P, the Commission asked the Court of Justice to assess the lawfulness of Article 2(b) of the 2016 Decision, which was called into question by the General Court in the judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675). While the proceedings relating to that appeal were pending, there was uncertainty as to the lawfulness of that provision of the 2016 Decision.

49 It is true, as the applicants submit, in essence, that the Court has consistently held that for an appellant to have an interest in bringing proceedings the appeal must be capable, if successful, of procuring an advantage to the party bringing it (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 46 and the case-law cited). However, while the absence of such an interest in bringing proceedings at the time when the action was brought – assuming that it were established – could lead an appeal to be dismissed as inadmissible, and while, if the interest in bringing proceedings were to fall away in the course of the proceedings, this could lead the Court of Justice to rule that there was no need to give judgment, such a circumstance cannot retroactively cancel the suspension of the running of the limitation period in respect of the Commission's power to impose fines which occurred because appeal proceedings were initiated. It is precisely the fact that an action is pending before the General Court or the Court of Justice that justifies the suspension, and not the conclusions reached by those courts in their decision bringing the proceedings to an end (see, to that effect, judgment of 15 October 2002, Limburgse Vinyl Maatschappij and Others v Commission, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 153).

50 It follows that, contrary to what the applicants claim, the Commission's lodging of the appeal had the effect of suspending the limitation period in respect of its power to impose fines on them until the Court of Justice adopted a decision bringing the proceedings in that case to an end (see, to that effect, judgment of 15 October 2002, Limburgse Vinyl Maatschappij and Others v Commission, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraphs 147 and 157), irrespective of the steps it took with a view to adopting the 2021 Decision while those appeal proceedings were pending.

51 In any event, the applicants cannot validly claim that the Commission's interest in knowing the outcome of its appeal ceased on 8 May 2020, the date on which it expressed its intention to adopt a new decision against HSBC. The Court of Justice has acknowledged that the mere act of proposing a measure in order to comply with a judgment of the General Court cannot, as such, be interpreted as definitive and formal acquiescence on the part of the Commission to the judgment of the General Court concerned and does not, as such, mean that any interest on the part of the Commission in bringing an appeal and in the result of the case has ceased (see, to that effect, judgments of 8 January 2002, France v Monsanto and Commission, C-248/99 P, EU:C:2002:1, paragraph 31, and of 13 June 2013, Versalis v Commission, C-511/11 P, EU:C:2013:386, paragraph 125).

52 Similarly, in the present case, the mere fact of having taken steps to adopt a new decision following the delivery of the judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675), does not show that the Commission lost all interest in seeking a declaration that Article 2(b) of the 2016 Decision was lawful, since that interest continued until the Court of Justice adopted a decision bringing the proceedings to an end or, at the very least, until that new decision was adopted. The fact that, after the 2021 Decision was adopted, the Commission withdrew its appeal in Case C-806/19 P (see paragraph 14 above) does not in any way alter that conclusion.

53 Furthermore, the Court finds that only a decision adopted by the College of Commissioners contains a definitive and formal position of the Commission, which is not the case for information provided or statements of intent made by the Commissioner responsible for competition matters regarding the adoption of such a decision, as the Commission correctly pointed out in its letter to the applicants of 8 May 2021.

54 In the light of all the findings above, the Commission's exercise of its power to impose penalties in respect of the applicants' unlawful conduct was not time-barred at the time of the adoption, on 28 June 2021, of the 2021 Decision, given that the appeal proceedings in Case C-806/19 P were pending before the Court of Justice.

55 Accordingly, the first plea must be rejected as unfounded.

The second plea, alleging an error of law or of assessment by reason of the use of discounted cash receipts for the purposes of calculating HSBC's value of sales and a failure to discharge the obligation to state reasons in that regard

56 In the second plea, the applicants claim that discounted cash receipts, which were taken into account in the present case by the Commission in order to determine the basic amount of the fines (see

paragraph 28 above), are not an appropriate value to use as a proxy for the value of sales within the meaning of point 13 of the Guidelines on the method of setting fines.

57 According to the applicants, discounted cash receipts do not reflect either the economic importance of the infringement or HSBC’s relative weight in it, in breach of the principles laid down in case-law. Discounted cash receipts do not reflect the specificities of EIRDs – namely that they are contracts that give rise to both receipts and payments – nor the strategy for trading them as adopted by market makers. In order to comply with the principle of proportionality when calculating the fine, the Commission should have considered the extent of the potential effects of the conduct which the applicants are alleged to have carried out, as HSBC proposed during the administrative procedure. The applicants further state that the method based on cash receipts, regardless of whether they are reduced, is inherently arbitrary as it fails to correspond to economic reality and is not used for any purpose in the normal course of EIRD business.

58 Consequently, according to the applicants, the Commission should, in the present case, have departed from the methodology envisaged in points 12 to 18 of the Guidelines on the method of setting fines, in application of point 37 of those guidelines, when setting the amount of the fine.

59 As regards the complaint, put forward in the second plea, alleging a failure by the Commission to discharge its obligation to state reasons, the applicants stated at the hearing that that complaint related solely to an alleged absence, in the 2021 Decision, of ‘adequate reasons’ for assuming that a trader would be a net recipient of cash flows on average across all EIRDs which he or she enters into or that net cash receipts could be calculated by discounting gross receipts by 98.849% or by any other figure on a particular EIRD or across all the EIRDs of a bank. According to the applicants, discounted cash receipts are an incorrect and inappropriate ‘proxy’ in the present case since they ignore the fact that a trader may be the payer or the recipient of cash flows on EIRDs.

60 The Commission disputes the applicants’ arguments.

61 As a preliminary point, the Court finds, as the applicants claim, that it is for the Commission to determine the method for calculating fines for infringements of the EU competition rules. In accordance with settled case-law, the Commission enjoys wide discretion in that respect. The method of calculating fines, set out in the Guidelines on the method of setting fines, displays flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Article 23(2) and (3) of Regulation No 1/2003 (see, to that effect, judgments of 5 December 2013, Solvay Solexis v Commission, C-449/11 P, not published, EU:C:2013:802, paragraph 100 and the case-law cited, and of 1 August 2022, Daimler (Cartels – Refuse collection trucks), C-588/20, EU:C:2022:607, paragraph 58 and the case-law cited).

62 Whereas Article 23(3) of Regulation No 1/2003 refers generally to the gravity and duration of the infringement, the methodology favoured by the Commission for the purposes of applying that provision in its Guidelines on the method of setting fines gives a central role to the concept of the ‘value of sales’, since it contributes to determining the economic importance of the infringement as well as the relative weight of each undertaking in the infringement (see, to that effect, judgments of

11 July 2013, Team Relocations and Others v Commission, C-444/11 P, not published, EU:C:2013:464, paragraph 76, and of 20 January 2016, Toshiba Corporation v Commission, C-373/14 P, EU:C:2016:26, paragraph 85 and the case-law cited).

63 Point 13 of the Guidelines on the method of setting fines states as follows: 'in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA'. In the introduction, those guidelines stipulate, in point 6 thereof, that 'the combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement'.

64 However, in accordance with point 37 of the Guidelines on the method of setting fines, it is open to the Commission not to apply the methodology for calculating fines set out in those guidelines where, inter alia, the particularities of a given case so justify.

65 In the present case, while the Commission acknowledged in recital 22 of the 2021 Decision that EIRDs 'do not generate any sales in the usual sense', which is also noted by the applicants, it nevertheless decided, in the exercise of its discretion, not to depart from the methodology for setting fines set out in the Guidelines on the method of setting fines.

66 Thus, as regards the basic amount of the fine, the Commission first of all determined the value of sales in recitals 22 to 53 of the 2021 Decision by means of a proxy. That proxy corresponds to the cash receipts generated by the cash flows that each bank received from its portfolio of EIRDs linked to any Euribor tenor and/or EONIA and entered into with EEA-located counterparties, to which a uniform discount factor of 98.849% was applied in order to take account of the particularities of the EIRD market, and in particular the netting inherent in the trading of derivatives (see paragraphs 27 to 29 above).

67 In recital 27 of the 2021 Decision, the Commission also recalled that, in its judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675, paragraph 322), the Court had already held that the approach which it had favoured in the present case, seeking to base the proxy for the value of sales on discounted cash receipts, tended to give a better reflection of the value of sales – and therefore of the economic importance of the infringement – than the alternative approach proposed by the applicants during the administrative procedure that led to the adoption of the 2016 Decision, based on net cash receipts and payments. The alternative approach proposed by the applicants involved, in essence, using only the cash flow balance during the infringement period, namely a piece of data which was close to the profit derived from trading activities.

68 In addition, in recitals 62 to 71 of the 2021 Decision, the Commission refuted the criticisms made by the applicants during the administrative procedure calling into question the appropriateness of discounted cash receipts as a proxy for the value of sales. In that regard, it rejected the applicants' proposal to base the proxy, in essence, on the 'alleged net effect' of the settlements on 19 March 2007, divided by the

number of banks involved, inasmuch as that approach, which sought to estimate the one-off net profits of the settlements of EIRDs on that day, did not, according to the Commission, meet the deterrent and sanction objectives referred to in the Guidelines on the method of setting fines. The Commission observed that the economic importance of an infringement went beyond its presumed or calculated effects in terms of net 'settlement date' profits. It also noted that, in any event, HSBC's proposed approach focused exclusively on 'the events' of 19 March 2007 and ignored the anticompetitive implications of the other bilateral contacts in which it had participated, in particular those of 14 and 16 February 2007, relating to mids. Lastly, it concluded that the Court's conclusion in paragraphs 322 to 324 of the judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675), also made it possible to reject that new approach proposed by the applicants.

69 In that respect, in the first place, with regard to the complaint alleging a failure by the Commission to discharge its obligation to state reasons, the applicants stated at the hearing that, by their argument – as summarised in paragraph 59 above – they were claiming in essence that the 2021 Decision did not contain adequate grounds to reach the conclusion that discounted cash receipts reflected the relative weight of the undertakings in the infringement at issue.

70 Indeed, such claims are in reality indissociable from the arguments put forward by the applicants to challenge the Commission's use of discounted cash receipts as the appropriate proxy for determining, in the present case, the 'value of sales' within the meaning of point 13 of the Guidelines on the method of setting fines, in particular in the light of the fact that they do not reflect the relative weight of the undertakings in the infringement. Those arguments therefore relate to the merits of the Commission's use of discounted cash receipts as a proxy for the value of sales.

71 According to settled case-law, the obligation to state adequate reasons is an essential procedural requirement, which must be distinguished from the question whether the reasoning is well founded, which goes to the substantive legality of the measure at issue (see judgment of 29 September 2011, Elf Aquitaine v Commission, C-521/09 P, EU:C:2011:620, paragraph 146 and the case-law cited). The reasoning of a decision consists in a formal statement of the grounds on which that decision is based. The grounds may be adequate even though they set out reasons which are incorrect (order of 12 July 2012, Dover v Parliament, C-278/11 P, not published, EU:C:2012:457, paragraph 36 and the case-law cited).

72 Claims and arguments intended to deny that a measure is well founded are irrelevant in the context of a plea alleging the lack or inadequacy of a statement of reasons (see judgment of 15 December 2021, HB v EIB, T-757/19, not published, EU:T:2021:890, paragraph 71 and the case-law cited). That is true, in the present case, of the arguments formally put forward by the applicants in support of the complaint alleging failure to discharge the obligation to state reasons, but by which they essentially dispute the well-foundedness of using discounted cash receipts as the appropriate value for calculating fines.

73 In any event, in the present case, the Commission justified the use of discounted cash receipts as a proxy for the value of sales to the

requisite legal standard, as is apparent from paragraphs 66 to 68 above, by finding, in essence, that that value was consistent with the logic of point 13 of the Guidelines on the method of setting fines and that it made it possible to reflect the economic importance of the infringement and the relative weight of the undertakings in it, as the value of sales did.

74 It follows that, contrary to what the applicants claim, the Commission did not merely refute the alternative value which they proposed, but gave reasons for its decision to use discounted cash receipts as a proxy for the value of sales, in particular in the context of the grounds seeking to refute the arguments which they put forward during the administrative procedure to demonstrate that that choice was incorrect. Moreover, contrary to what is argued by the applicants, the Commission was not required to give reasons why 'a trader will be a net receiver of cash flows … across … EIRDs', since the setting of HSBC's fine in the 2021 Decision is in no way based on such a finding (see paragraph 82 below).

75 In so far as, by that complaint, the applicants are claiming that there is inadequate reasoning as regards the level of the reduction factor applied by the Commission to cash receipts, that is consistent with the complaints put forward in the third plea and will be examined during the examination of those complaints.

76 It follows that the complaint alleging failure to discharge the obligation to state reasons via-à-vis the Commission's use of discounted cash receipts as a proxy for the value of sales must be rejected.

77 In the second place, it is appropriate to examine whether the Commission made an error of assessment by using discounted cash receipts as the proxy for the 'value of sales' within the meaning of the Guidelines on the method of setting fines. That involves, inter alia, examining whether the approach favoured by the Commission made it possible to take into account the netting inherent in EIRDs, since those contracts give rise to both receipts and payments, as is argued by the applicants.

78 In that regard, as a preliminary point, the Court notes that, according to paragraphs 15 and 16 of the Guidelines on the method of setting fines, in determining the value of sales by an undertaking, the Commission is to take that undertaking's best available figures. Where the figures made available by an undertaking are incomplete or not reliable, the Commission may determine the value of its sales on the basis of the partial figures it has obtained and/or any other information which it regards as relevant and appropriate.

79 In the present case, in its request for information of 12 October 2012, the Commission asked to be provided with four types of data capable of allowing it to assess the value of sales of the banks concerned, namely the total notional amount, the net profit on financial operations, the net cash settlements and the cash receipts. It ultimately decided, in the exercise of its discretion, to rely on the cash receipts to which it applied a reduction factor of 98.849%.

80 First, the Court finds that, contrary to what the applicants maintain, the approach favoured by the Commission in the present case makes it possible to reflect the value of sales and therefore the economic importance of the infringement within the meaning of the case-law cited in paragraph 62 above (see, to that effect, judgments of 24 September

2019, HSBC Holdings and Others v Commission, T-105/17, EU:T:2019:675, paragraphs 322 and 323; of 20 December 2023, JPMorgan Chase and Others v Commission, T-106/17, under appeal, EU:T:2023:832, paragraph 588; and of 20 December 2023, Crédit agricole and Crédit agricole Corporate and Investment Bank v Commission, T-113/17, under appeal, EU:T:2023:847, paragraphs 481 and 482). As is clear, in essence, from recital 23 of the 2021 Decision, the cash receipts generated by the cash flows that each bank obtained from its portfolio of EIRDs linked to any Euribor tenor and/or EONIA make it possible to reflect the business of the banks concerned on the EIRD market and therefore the importance of the infringement at issue, which related to factors relevant to the determination of the cash flows under EIRDs.

81 None of the arguments put forward by the applicants demonstrates that the Commission made an error of assessment in using discounted cash receipts, in the present case, as a proxy for the value of sales within the meaning of point 13 of the Guidelines on the method of setting fines.

82 First of all, the applicants are incorrect in so far as they claim that the value of discounted cash receipts does not take account of the particularities of EIRD contracts and of how they are traded, in particular the fact that those contracts involve both cash receipts and cash payments. As is apparent from recital 26 of the 2021 Decision, those particularities of the derivatives market in general and of EIRDs especially were taken into account by the Commission in the determination of the reduction factor to be applied to cash receipts, that factor being an integral part of the determination of the proxy for the value of sales. In so far as the applicants claim that the methodology for determining the reduction factor does not take proper account of those specificities of EIRDs, the Court finds that they do not put forward any specific and precise arguments in support of their claim. In so far as, by those arguments, the applicants seek to claim that the Commission made errors of assessment in determining the reduction factor, in particular as regards the determination of the level of netting inherent in the EIRD sector, they are essentially consistent with the complaints put forward in the context of the third plea and will be examined when that plea is examined (see, in particular, paragraphs 136 to 146 below).

83 Next, the Court rejects the applicants’ argument that cash receipts give an incomplete and distorted picture of the trading activity in so far as it is the difference between payments and receipts that distinguishes a profitable transaction from a transaction that does not generate a profit. It is apparent, in essence, from that argument that the applicants are claiming that the value to be used in calculating the fines in the present case must reflect the profitability of the EIRD contracts. However, the Court points out that the ‘profitability’ of the sector affected does not constitute a reference value for the purpose of setting a fine (see, to that effect, judgment of 19 May 2010, KME Germany and Others v Commission, T-25/05, not published, EU:T:2010:206, paragraphs 98 to 100).

84 Lastly, the Court also rejects the applicants’ argument that the ‘shortcomings’ of cash receipts in reflecting the economic importance of the infringement were ‘compounded’ by the fact that the data on which the Commission relied had been compiled by the banks according to different methods, in particular as regards the netting and product scope data.

85 In that regard, the Court finds that the applicants do not put forward any specific argument capable of demonstrating how the determination of cash receipts by the banks according to different methods would be such as to call into question the very principle of using discounted cash receipts as a proxy for the value of sales. The argument that using data calculated according to different methodologies does not provide reliable data as regards the value of sales concerns the actual application, in the present case, of the methodology based on cash receipts determined by the banks according to those different methodologies and does not in itself show that the Commission erred in choosing to use discounted cash receipts in order to determine a proxy for the value of sales.

86 Second, the applicants are also incorrect in so far as they claim that discounted cash receipts are not a suitable indicator of HSBC's relative weight in the infringement, in particular with regard to its limited or peripheral participation in the infringement.

87 The Court notes that such an argument relates to the taking into account of the applicants' lesser involvement in the infringement. The applicants' limited involvement in the infringement was taken into account by the Commission when determining the level of the adjustment to the basic amount of the fine due to mitigating circumstances. Those assessments by the Commission are the subject of the fifth plea in law and will be examined in the context of the examination of that plea.

88 Furthermore, in any event, discounted cash receipts do indeed reflect HSBC's relative weight in the infringement, as the Commission submits, in so far as they are based on HSBC's cash receipts in the period during which it participated in the infringement, since those cash receipts constitute a value to which the infringement directly or indirectly relates in accordance with point 13 of the Guidelines on the method of setting fines.

89 As regards the applicants' argument that the cash receipts of each undertaking do not reflect the 'the cash-flow affected by HSBC's infringing conduct', the Court notes that, since those considerations also apply with regard to the proxy for the value of sales, the concept of that value of sales referred to in point 13 of the Guidelines on the method of setting fines, admittedly cannot extend to encompassing sales made by the undertaking in question which do not come within the scope of the alleged cartel. It would, however, be contrary to the goal pursued by that provision if that concept were to be understood as applying only to turnover achieved by the sales in respect of which it is established that they were actually affected by that cartel (see judgment of 12 November 2014, Guardian Industries and Guardian Europe v Commission, C-580/12 P, EU:C:2014:2363, paragraph 57 and the case-law cited). Point 13 of the Guidelines on the method of setting fines concerns all transactions involving the products that are the subject of the anti-competitive conduct at issue (see, to that effect, judgment of 16 June 2011, Team Relocations v Commission, T-204/08 and T-212/08, EU:T:2011:286, paragraphs 63 to 66).

90 Third, in so far as the applicants submit that a different value – such as the potential effect that HSBC's infringing conduct at issue might have had – would be more appropriate to reflect adequately the economic importance of the infringement or HSBC's relative weight in it, it is clear in particular from the research note submitted by the applicants in support

of that argument that the purpose of such an approach is to estimate the one-off expected net profit from EIRD transactions on the dates of the conduct at issue, specifically on 19 March 2007, as the Commission noted, in essence, in recital 62 of the 2021 Decision. In that regard, the Court endorses the Commission's argument that, contrary to what is maintained by the applicants, the values corresponding to the one-off net profit of the transactions do not make it possible to estimate the importance of HSBC's infringement or its relative weight in that infringement any more appropriately than discounted cash receipts.

91 The Commission is correct in so far as it points out that the importance of an infringement goes beyond its alleged or calculated effects in terms of the participants' net profits. The approach favoured by the applicants would result only in the undertakings being 'relieved' of such potential profit from the transactions in question and thus that approach would deprive the fine of both its punitive effect in respect of HSBC's infringement and its deterrent effect on the undertakings involved in the infringement and other undertakings, as the Commission noted in recitals 63 and 65 of the 2021 Decision.

92 It follows that a restriction on the value to be taken into account for the purposes of determining the importance of the infringement and the relative weight of the undertakings in that infringement by reference to the 'potential effects' of HSBC's infringing conduct – even if it were understood, as the applicants maintain, as referring to the theoretical profits which the banks could have hoped to achieve – would run counter to the logic which drove the Commission's choice of setting, in the methodology in the Guidelines on the method of setting fines, the basic amount of the fine by reference to the value of sales, that logic being to reflect the economic importance of the infringement and the weight of that undertaking's involvement in that infringement. The applicants' line of argument concerning the potential effects of HSBC's infringing conduct therefore in no way shows that it is disproportionate to use discounted cash receipts as the proxy for the value of sales.

93 Lastly, in so far as the potential effects of the conduct alleged against the applicants cannot be taken into account in the present case, it is also necessary to reject as ineffective the applicants' argument that those potential effects should be determined solely in relation to the attempt to manipulate on 19 March 2007, contrary to what the Commission stated in recitals 66 to 70 of the 2021 Decision.

94 It follows that, first, the approach favoured by the Commission is consistent with the logic underlying the choice of value of sales and, second, the applicants neither proposed a more appropriate alternative method during the administrative procedure nor demonstrated by reference to alternative data the inappropriateness of the Commission's methodology. Consequently, it cannot be concluded that the principle of using discounted cash receipts is inherently incorrect (see, to that effect, judgment of 24 September 2019, HSBC Holdings and Others v Commission, T-105/17, EU:T:2019:675, paragraph 324).

95 It follows from the foregoing that the Commission made neither an error in law nor an error in assessment in basing the calculation of the fine on discounted cash receipts used as a proxy for the value of sales. Consequently, nor did it err in not making use of the option provided for in

point 37 of the Guidelines on the method of setting fines to depart from the methodology for calculating fines set out in those guidelines.

96 Consequently, the second plea must be rejected as unfounded.

The third plea, alleging errors of assessment and an inadequate statement of reasons as regards the determination of the 98.849% reduction factor

97 By their third plea, the applicants claim that the Commission erred in its assessment of the reduction factor to be applied to cash receipts and gave inadequate reasons for applying a reduction factor of 98.849% rather than a higher rate, for example 99.9768% or at least 99.854%, as the applicants proposed. They dispute the merits of each of the elements taken into account by the Commission in calculating the reduction factor and observe that the reasons it gave to justify their relevance or calculation were inadequate. In that context, they submit, inter alia, that the Commission infringed the principles of proportionality and that the penalty must be specific to the offender; they further submit that the Commission misapplied the principle of equal treatment.

98 The Commission disputes the applicants' arguments and contends that the third plea should be rejected.

99 As noted in paragraph 11 above, in the 2021 Decision, the Commission intended to supplement the statement of reasons contained in the 2016 Decision relating to the determination of the reduction factor applied to cash receipts, which was found to be inadequate in the judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675) (see recital 8 of the 2021 Decision).

100 That uniform factor was set at 98.849%. According to the grounds set out in recitals 26 to 52 of the 2021 Decision, the Commission determined that level of the reduction factor by taking four elements into account. First, it examined the level of netting inherent in derivatives trading in general, which gave rise to the initial reduction factor of 90.5%. Second, it determined the level of netting inherent to the EIRD sector in particular, which had the effect of increasing the reduction factor by 3% to 93.5%. Third, it assessed the scale of price variations in the EIRD sector, which had the effect of increasing the reduction factor to 98.77%. Fourth, it made a final adjustment of 0.079% in accordance with the methodology applied in Decision (2013) 8512 final of 4 December 2013 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39914, Euro Interest Rate Derivative (EIRD) (Settlement)), adopted in respect of the undertakings that had decided to participate in the settlement procedure ('the settlement decision').

101 As was pointed out in paragraph 61 above, the Commission enjoys a wide discretion as regards the method of calculating fines for infringements of the EU competition rules. Moreover, it is clear from case-law that that discretion relates to the choice of factors to be taken into account for the purposes of determining the amount of fines, such as, inter alia, the particular circumstances of the case, its context and the dissuasive effect of fines, without the need to refer to a binding or exhaustive list of the criteria which must be taken into account (see judgment of 8 February 2007, Groupe Danone v Commission, C-3/06 P, EU:C:2007:88, paragraph 37 and the case-law cited).

102 However, as was pointed out in paragraph 22 above, when reviewing a decision imposing a fine, the EU Courts cannot use the Commission's margin of discretion – either as regards the choice of the factors taken into account in the application of the criteria mentioned in the Guidelines on the method of setting fines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.

103 Moreover, as was recalled in paragraph 71 above, the obligation laid down in the second subparagraph of Article 296 TFEU to state adequate reasons is an essential procedural requirement, which must be distinguished from the question whether the reasoning is well founded, which goes to the substantive legality of the measure at issue. In that vein, the statement of reasons required must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent EU Court to exercise its jurisdiction to review legality. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which an individual decision is based is, therefore, in addition to permitting review by the EU Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged (see judgment of 29 September 2011, Elf Aquitaine v Commission, C-521/09 P, EU:C:2011:620, paragraphs 146 to 148 and the case-law cited; judgment of 11 July 2013, Ziegler v Commission, C-439/11 P, EU:C:2013:513, paragraphs 114 and 115).

104 In addition, the requirement to state reasons must be assessed by reference to the circumstances of the case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom the measure is of concern within the meaning of the fourth subparagraph of Article 263 TFEU, may have in obtaining explanations. It is not necessary for the statement of reasons 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 (see judgment of 29 September 2011, Elf Aquitaine v Commission, C-521/09 P, EU:C:2011:620, paragraph 150 and the case-law cited; judgment of 11 July 2013, Ziegler v Commission, C-439/11 P, EU:C:2013:513, paragraph 116).

105 With respect to a decision imposing a fine, the Commission must state the reasons, particularly with regard to the amount of the fine and the method of calculation (judgment of 27 September 2006, Jungbunzlauer v Commission, T-43/02, EU:T:2006:270, paragraph 91). It is for the Commission to 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).

106 The circumstances of the present case, within the meaning of the case-law cited in paragraph 104 above, are characterised by two notable features.

107 First, the Commission decided, in the present case, to apply the methodology in the Guidelines on the method of setting fines. It therefore chose to apply a methodology in which, for the reasons set out in paragraph 62 above, the determination of the 'value of sales' played a central role, even though it had noted in recital 22 of the 2021 Decision that EIRDs did not generate any sales in the usual sense.

108 Therefore, it was essential that the statement of reasons in the contested decision should enable the applicants to verify whether the proxy chosen by the Commission may be vitiated by an error enabling its validity to be challenged and the Court to exercise its jurisdiction to review legality (judgment of 24 September 2019, HSBC Holdings and Others v Commission, T-105/17, EU:T:2019:675, paragraph 346).

109 Second, in the approach taken by the Commission the reduction factor plays an essential role because the amount of cash receipts to which it applies is particularly large (judgment of 24 September 2019, HSBC Holdings and Others v Commission, T-105/17, EU:T:2019:675, paragraph 347).

110 It follows from the foregoing that, in the circumstances of the present case, since the Commission decided to determine the basic amount of the fine by applying a figures-based model in which the reduction factor played an essential role, it was necessary that the undertakings concerned be placed in a position to understand how it had arrived at a reduction factor set at 98.849% and that the Court be in a position to carry out an in-depth review, in law and in fact, of that factor of the 2021 Decision, in accordance with the case-law cited in paragraph 22 above (judgment of 24 September 2019, HSBC Holdings and Others v Commission, T-105/17, EU:T:2019:675, paragraph 348).

111 In the light of those considerations, it is necessary to examine the arguments put forward by the applicants in order to challenge the various elements used to determine the reduction factor in the present case.

– Determination of the level of netting inherent in derivatives trading in general (recitals 29 to 31 of the 2021 Decision)

112 In recitals 29 and 30 of the 2021 Decision, with regard to the first element for determining the reduction factor, the Commission relied on the netting inherent in derivatives trading in general, assessed according to the International Swap Dealer Association (ISDA) as involving a reduction of between 85 and 90%. It is apparent from recital 31 of the 2021 Decision that the Commission took the highest level of that assessment (90%) and added an additional security margin of 0.5% to it, thus bringing the reduction factor to 90.5%.

113 As regards the first element for calculating the reduction factor, the applicants, first, call into question the appropriateness and relevance of the data from the ISDA research note, claiming that that note relates to data that are different from those relating to the netting between incoming and outgoing payments ('payment netting') observed in derivatives, namely that it relates to 'close-out netting' between two parties. Consequently, the data from the ISDA research note are not

relevant for the purpose of establishing the level of netting inherent in derivatives trading. Second, the applicants allege that the statement of reasons is inadequate as regards the level of the additional security buffer set by the Commission at 0.5%.

114 The Commission contests those arguments.

115 In that regard, in the first place, as regards the argument concerning the data from the ISDA research note, the Commission explained in recital 80 of the 2021 Decision, in response to a similar argument put forward during the administrative procedure, that, even if the netting at issue occurred in different circumstances – namely, in the first place, a default by one party in the case of 'close-out netting' and, in the second case, the regular context of business in the case of 'payment netting', their values reflected, in any event, the underlying payments and could therefore serve as a basis for estimating industry-wide netting. According to the Commission, the two concepts are therefore linked. There is no indication that use of close-out netting would lead to a lower netting factor than payments netting.

116 The applicants do not put forward any arguments calling that assessment into question.

117 In addition, the Court finds that the Commission justified using the ISDA data by the fact that they were public data respected throughout the industry (recital 80 of the 2021 Decision), which is not in itself disputed by the applicants.

118 While criticising the relevance of the data from the ISDA research note, the applicants do not offer alternative, better quality data concerning netting in the OTC derivatives sector.

119 The applicants may well claim that such better data can be found in the form of the netting ratios of the banks actually operating in the EIRD sector at the material time or the median netting ratio in that sector, calculated on the basis of those data submitted by the banks. However, the Court finds that using those data would call into question the entire methodology applied by the Commission, which, as the Commission submits, is based on all the elements taken into account which are interdependent and cumulative (recital 81 of the 2021 Decision), the netting inherent in the EIRD sector being only one of the elements of that methodology. Consequently, basing the calculation of the fine on the netting inherent in the EIRD sector would have called into question the relevance of the other elements taken into account by the Commission, as the latter contends.

120 In so far as, by that argument, the applicants seek to claim that the netting ratios of banks in the EIRD sector or the median of those factors constitute a more appropriate reduction factor than one determined using the methodology that the Commission had chosen in the present case, the Court points out that those netting ratios are lower than the reduction factor adopted by the Commission and amount to a percentage of between 85.9 and 95.8%, the median netting ratio being 95.36%. Their application would therefore have resulted in significantly higher fines, as the Commission observed in recitals 81 to 83 of the 2021 Decision.

121 In the second place, as regards the complaint alleging inadequate reasoning with regard to the level of the additional security buffer of 0.5%, applied when determining the first element for calculating the reduction factor, the Commission stated, in recital 84 of the 2021 Decision, that that

adjustment, which was in the parties' interests, had been decided in the exercise of its discretion when setting the fine, that its level could only be limited inasmuch as it was added to the highest value of the range resulting from the ISDA research note (that is to say 90% of the range of between 85 and 90%) and that it respected the deterrence purpose of the methodology for calculating fines, while taking a conservative approach to public data. Furthermore, it is apparent from footnote 42 to recital 31 of the 2021 Decision that the Commission 'used the same figure [of 90.5%] in similar financial services cases'.

122 That statement of reasons in respect of the additional security buffer is adequate, contrary to what the applicants maintain, to enable them to ascertain the reasons for the measure and to enable the Court to exercise its jurisdiction to review the Commission's assessments, within the meaning of the case-law referred to in paragraph 103 above. In particular, the Commission explained adequately its weighting and evaluation of the elements taken into consideration in order to determine the level of the additional security buffer for the first element in determining the reduction factor, in accordance with the case-law cited in paragraph 105 above.

123 The applicants' complaint that the statement of reasons was inadequate must therefore be rejected.

124 Furthermore, the Court finds that the applicants have not put forward any specific argument to challenge the merits of those reasons.

125 Consequently, all of the applicants' complaints concerning the first element for calculating the reduction factor must be rejected.

– Determination of the level of netting inherent to the EIRD sector (recitals 32 to 41 of the 2021 Decision)

126 In recitals 32 to 34 of the 2021 Decision, the Commission stated that, for the second element, it had taken into account the netting specifically inherent to the EIRD sector, which it had obtained by calculating the median point of the individual netting figures of the banks involved in the infringement on the basis of the data submitted by those banks relating to cash receipts and net cash settlements. On the basis of that calculation, the Commission determined that the level of netting inherent to the EIRD sector was 95.36%.

127 Then, in the exercise of its discretion in setting fines, the Commission considered it useful to compare the netting factor inherent to the EIRD sector with that of a comparable industry, namely the yen Interest Rate Derivatives (YIRD) sector. It is apparent from that comparison that the median netting factor of the EIRD sector (95.36%) during the period of the infringement was 2.36% higher than in the relevant comparison sector (93% for the YIRD sector) and, therefore, that using a reduction factor of 90.5% would underrepresent the level of netting in the EIRD sector and give rise to the application of an inappropriately high proxy for value of sales. The Commission therefore concluded that it was appropriate to increase the level of the reduction factor of 90.5% resulting from the first calculation stage by three percentage points (rather than the actual 2.36%), as was done in the settlement decision and therefore in accordance with the principle of equal treatment, thus giving an intermediate reduction factor of 93.5% (recitals 35 to 41 of the 2021 Decision).

128 The applicants dispute those assessments, maintaining that the netting factor inherent to the EIRD sector of 95.36%, as calculated by the Commission on the basis of the individual netting ratios of the banks involved in the infringement, was substantiated, relevant and sufficient, with the result that it could be taken into account for the second element. Consequently, there was no need additionally to compare it with the netting factor in a different sector, namely the YIRD sector.

129 The applicants dispute the merits of the reasons put forward by the Commission to support that choice and claim that there is a failure to state reasons concerning, first, the justification for that comparison and, second, the calculation of the level of netting in the YIRD sector. The Commission is also incorrect and contradicts the 2016 Decision in so far as it claims that, by using the individual netting ratios of the banks concerned, it was not necessary to take account of the scale of price variations for EIRDs compared to cartels in conventional industries.

130 The Commission contests those arguments.

131 In that regard, in the first place, the Court rejects the applicants' complaint alleging that the Commission failed to meet its obligation to state reasons as concerns the justification for its choice of carrying out, as part of the second element, a comparison with the YIRD sector and the level of netting in that sector.

132 The Commission stated, in recitals 82 and 87 of the 2021 Decision, that the use of industry-wide derivatives netting data, adjusted on the basis of a comparison between the netting ratios of the banks involved in the infringement and those involved in the YIRD case, that is to say, two global derivatives industries, provided a more reliable and robust basis for determining a netting factor in the EIRD sector overall than relying solely on the netting figures of the banks involved in the infringement.

133 Similarly, in recital 37 of the 2021 Decision, the Commission explained that the relevant netting factor in the YIRD industry was calculated according to a methodology equivalent to that used to calculate the netting factor for the EIRD industry, described in recitals 33 and 34 of the 2021 Decision. Moreover, the individual netting ratio of the banks involved in the YIRD case is set out in footnote 47 of the 2021 Decision.

134 Even though the applicants state that HSBC was not involved in the YIRD case and that it did not have access to the data used by the Commission, despite its request, they do not put forward any complaint challenging that refusal to grant access and, as they confirmed at the hearing in response to an oral question put by the Court, rely on that fact solely as a contextual element as regards their complaint alleging infringement of the obligation to state reasons concerning the methodology used by the Commission to calculate the netting factor in the YIRD sector.

135 In the present case, the reasons of the 2021 Decision, set out in paragraphs 132 and 133 above, are sufficient to enable the applicants to ascertain the reasons which led the Commission to base the second element on the comparison with the YIRD sector rather than solely on the netting ratios of the banks concerned, as well as the method used to calculate the relevant netting factor for the YIRD sector, and for the EU Courts to exercise their jurisdiction to review, within the meaning of the case-law cited in paragraph 103 above.

136 In the second place, nor are the applicants well founded in so far as they complain of errors of assessment made by the Commission in determining the value of the netting inherent to the EIRD sector on the basis of a comparison with the same value in respect of the YIRD sector, rather than on the netting levels of the banks involved in the infringement.

137 As the Commission noted in recitals 82 and 87 of the 2021 Decision in response to the applicants' similar arguments put forward during the administrative procedure, the second element used in the calculation of the reduction factor concerns the netting inherent 'in the EIRD sector' and not only the netting of a particular group of banks involved in the infringement (see paragraph 132 above). Thus, in order to determine a netting factor appropriate for the EIRD sector as a whole, a comparison with another interest rate derivatives sector, for example the YIRD sector, for which it already had data as a result of the investigation carried out in parallel with that in the EIRD sector, and in view of the fact that settlement decisions in the YIRD sector and the EIRD sector had been adopted on the same day, provides a more reliable and solid basis for the value sought, namely at the level of netting in the EIRD sector, than to rely solely on figures from the banks involved in the infringement. That approach forms part of the steps taken by the Commission to ensure compliance with the principle that the fines in the EIRD sector must be proportionate to those imposed in the YIRD sector, as the Commission stated, in essence, in recital 39 of the 2021 Decision.

138 Such a comparison is also justified, as the Commission has pointed out, by the fact that the factor obtained for the first element relates to netting for the entire derivatives sector, which it was justified to adjust to take account, specifically, of netting in the interest rate derivatives sectors, to which the EIRD sector belongs.

139 The applicants' arguments seeking to call into question the relevance of the comparison, as part of the second element, of the netting levels in the EIRD and YIRD sectors must therefore be rejected.

140 Nor can the Court accept the applicants' argument that, contrary to what the Commission maintains, the methodology which it followed is not more favourable to them than using the average of the netting ratios of the banks involved in the infringement, which amounts to 95.36%, since the Commission used, for the second element of the calculation, the value of 93.5%.

141 The Court points out, as the Commission did in recital 81 of the 2021 Decision, that its methodology is based on cumulative and interdependent elements which, with regard to the first three steps, led to a reduction factor of 98.77%, which is therefore higher than the reduction factor resulting from using only the average netting ratios of the banks involved in the infringement (see recitals 46 and 90 of the 2021 Decision).

142 As the Commission submits in recitals 42 and 88 to 91 of the 2021 Decision, taking into account the scale of the price variations between the two sectors for the third element is justified in order to ensure that the comparison between the EIRD and YIRD sectors correctly reflects the relative differences between the two sectors compared (see, in particular, footnote 50 of the 2021 Decision).

143 The applicants seem to concede this point to the Commission in so far as they accept that, if the Commission had calculated the level of netting inherent in the EIRD sector on the basis of the individual netting

ratios of the banks concerned, it would not have been necessary to compare the scale of price variations between the EIRD and YIRD sectors, because the figure of 95.36% ‘has no link to the YIRDs industry’.

144 However, the applicants submit that, if that were the case, it would be necessary to take account of the scale of the price variations between the EIRD sector and traditional sectors, as the Commission stated in recital 646 of the 2016 Decision (see paragraph 162 below), and, consequently, to increase the reduction factor resulting from a median of the netting levels of the banks concerned. Had the Commission followed the approach they had proposed, the discount factor would rise to 99.9768%.

145 That argument is consistent with those put forward for the purposes of challenging the third element for determining the reduction factor and will be examined when that element is examined (see paragraphs 162 to 167 below).

146 Subject to the above, the applicants’ complaints alleging infringement of the obligation to state reasons and errors of assessment concerning the second element for determining the reduction factor must be rejected.

– The determination of the scale of price variations in the EIRD sector (recitals 42 to 49 of the 2021 Decision)

147 In recitals 42 to 49 of the 2021 Decision, the Commission explained that the third element it used in determining the reduction factor consisted of the determination of the specific scale of price variations in the EIRD sector during the period of the infringement, obtained by comparing the levels of the scale of price variations between the Yen Libor six-month rate and the Euribor six-month rate. The Commission deduced from that comparison that the scale of variation of any given basis point in the infringement identified in the 2016 Decision was therefore 5.3 times lower than the scale of the price variations of the six-month Yen Libor rate. Applying the relatively low impact of an overcharge in the EIRD sector for the purposes of determining the reduction factor of 93.5%, as it results from the second element, thus led the Commission to make a rounded adjustment to 98.77%, following the approach adopted in the settlement decision, that is to say an increase of 5.27 percentage points.

148 The applicants dispute that assessment, arguing that the third element for calculating the reduction factor does not take proper account of the level of price variations of EIRDs either with regard to the YIRD sector or with regard to traditional cartels. Relying on a report which they produced, the applicants state, in essence, that, because of the differences in the way in which the Yen Libor and Euribor reference rates are calculated and, in particular, due to the size of the respective panels, the potential effect of the infringement in the form of a manipulation of the Euribor rate is 10 times lower than the scale price variations of the Yen Libor. By applying that significantly lower impact of overcharging in the EIRD sector to the adjusted EIRD netting ratio of 93.5%, the Commission would have arrived at an intermediate reduction factor of 99.854% instead of 98.77%.

149 According to the applicants, that factor should, in any event, have been increased to that level of 99.854%, or even to 99.9768%, if the intermediate factor to be used was the median of the netting ratios of the banks concerned, namely 95.36%, because of the lesser extent of the

price variations in the EIRD sector compared to traditional cartel cases, where the average overcharge was, according to the applicants, 200 times higher than the average overcharge caused by the infringement in the EIRD sector.

150 The applicants submit that, by failing to take sufficient account of the relative scale of price variations in the EIRD sector, the Commission infringed the principle of proportionality and the principle that the penalty must be specific to the offender.

151 The Commission contests those arguments.

152 In the first place, the Court observes that, as stated in paragraph 141 above, the comparison with the YIRD sector for the third element is consistent with the logic of the methodology applied by the Commission, which consists of several interdependent and cumulative stages.

153 The alternative calculations proposed by the applicants with a view to showing that the Commission allegedly underestimated the level of price variations in the EIRD sector, which is substantially lower than the overcharging of prices in the YIRD sector, do not call into question the results of the comparison made by the Commission for the third element.

154 First, it is apparent from the report on which the applicants rely in that regard that the conclusion that 'the potential effect of the infringement identified in the [2016] Decision was more than 10 times … lower than the scale of price variation of the 6m Yen Libor' is based on the comparison between the 6m Yen Libor rate and the 3m Euribor rate and not the 6m Euribor rate as in the Commission's calculations, which was acknowledged by the applicants at the hearing.

155 As regards that discrepancy in the tenors taken into account in the report as compared with the tenors taken into account by the Commission, the applicants argued at the hearing that the analysis carried out in the report concerned Yen Libor and Euribor tenors which were actually concerned by the infringing conduct at issue in the two cartels and, in particular, by HSBC's infringing conduct in the context of the cartel at issue in the present case, which relates to the 3m Euribor.

156 In that regard, the Court finds that, in the context of the third element for determining the uniform reduction factor applied to the cash receipts of all the parties to the infringement, the Commission sought to establish the specific scale of price variations in the EIRD sector during the period of the infringement, and therefore in respect of the infringing conduct that was the subject of the 2016 Decision, and not the scale of price variations of the EIRDs caused by the HSBC's specific infringing conduct.

157 According to the Commission, its decision to base the comparison on the 6 month Yen Libor and Euribor tenors – rather than the 3 month tenors – was justified by the fact that they were common tenors used in both sectors, which therefore played an important role in the conduct that was the subject of the 2016 Decision and in the Yen Libor rate decision. It also noted, in footnote 52 of the 2021 Decision, that the importance of the 6m Euribor rate was borne out by the fact that that tenor was the most important in terms of cash receipts, as was apparent from the data submitted by the banks involved in the infringement, which was used to calculate the median of the individual netting ratios of those banks for the

second element. Those findings are not in themselves disputed by the applicants.

158 Additionally, in any event, even if it were appropriate to take into account the Euribor rate tenors affected by HSBC's infringing conduct, it is apparent from the 2016 Decision, as confirmed in that regard by the General Court and the Court of Justice, that HSBC had participated in the single and continuous infringement in the form of the manipulation of the 3m Euribor rate on 19 March 2007 and any potential repeat of that manipulation and in infringing conduct in the form of unlawful conduct in the form of exchanges on mids (judgment of 24 September 2019, HSBC Holdings and Others v Commission, T-105/17, EU:T:2019:675, paragraph 273). However, that infringing conduct did not concern only the 3m Euribor rate, but the various tenors of that rate.

159 In addition, it is clear from the report produced by the applicants that the dates of the actual manipulations were excluded from the overcharging analysis, with the result that the argument that account should be taken of the Yen Libor and Euribor tenors that were actually subject to manipulation or HSBC's infringing conduct cannot be based on the findings reached in that report.

160 Furthermore, the report in question seeks to demonstrate, in essence, that it would have been more difficult to produce 'effects of similar magnitude in terms of basis points' in the EIRD sector than in the YIRD sector, since Euribor is calculated on the basis of the submissions of a panel of banks which is much larger than in the case of Yen Libor. However, the objective pursued by the Commission by the third element of the calculation of the reduction factor was not to assess the impact on the final rate of an individual submission by a bank that was a party to the cartel and thus to establish the impact of the infringement on the Euribor and Yen Libor level.

161 It follows that the findings in the report produced by the applicants do not call into question the third element for calculating the reduction factor.

162 In the second place, in so far as the applicants claim that the comparison of the relative scales of price variations between the EIRD and YIRD sectors does not allow account to be taken of the difference in that regard with the traditional cartel sectors whereas the taking into account of that difference had been referred to in the 2016 Decision, the Court notes that, as regards the third element for determining the reduction factor, the Commission did in fact find, in recital 646 of the 2016 Decision, that, on account of the particular features of the EIRD sector, the cartel at issue in the present case caused significantly lower overcharge than the overcharge of 20% generally caused by cartels in classic industries.

163 However, in response to a similar argument put forward by the applicants in the administrative procedure, the Commission stated, in recital 47 of the 2021 Decision and, in essence, in recitals 98 and 99 of that decision, that a reduction factor over and above that representing the netting factor inherent in the EIRD sector also had the effect of taking into account the potential lower price overcharge in the derivatives sector than in traditional cartel cases where no such reduction factor is usually applied. It added, in recital 89 of the 2021 Decision, that the use of a netting factor to reduce HSBC's cash receipts had already 'netted' most of the price variations made from the increased cash receipts pursuant to a

favourable interest rate movement and therefore accounted for 'any difference in price variations relative to other industries'.

164 In that regard, the Court notes, as the Commission did, that the very existence of the reduction factor reflects, in the present case, the particularities of the EIRD sector as compared with the traditional sectors in respect of which the Commission generally does not take into account the scale of price variations when setting fines. It is settled case-law that the Commission is not obliged to take account of the specific impact of a cartel or the absence of such an impact as a factor in assessing the gravity of the infringement for the purposes of calculating the fine, since that gravity is to be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (see, to that effect, judgment of 28 June 2005, Dansk Rørindustri and Others v Commission, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 241 and the case-law cited). To oblige the Commission, at the stage of calculating the amount of the fine, to take into account the actual impact of the infringement on the market would have the consequence of imposing on it an obligation to which, according to settled case-law, it is not bound for the purposes of applying Article 101 TFEU where the infringement, like the one at issue in the present case, has an anti-competitive object (see, to that effect, judgment of 3 September 2009, Prym and Prym Consumer v Commission, C-534/07 P, EU:C:2009:505, paragraph 64 and the case-law cited).

165 The applicants claim, however – without providing any further clarification – that the application of a reduction factor at the level chosen by the Commission in the present case does not automatically and necessarily mean that that factor had already netted most price variations and therefore that it correctly takes into account the specificities of the EIRD industry in which the scale of price variations is, according to recital 646 of the 2016 Decision, 'significantly' lower than in traditional sectors.

166 In that regard, the Court recalls that the Commission is not bound to apply a precise mathematical formula, either for the total amount of the fine or where it is broken down into different elements (see, to that effect, judgment of 29 September 2011, Arkema v Commission, C-520/09 P, EU:C:2011:619, paragraph 93, and of 16 June 2011, Heineken Nederland and Heineken v Commission, T-240/07, EU:T:2011:284, paragraph 350 and the case-law cited).

167 Thus, in the exercise of its discretion and given that there is no requirement that it rely on a precise mathematical formula, the Commission was entitled to conclude that applying a reduction factor – which is usually not used when calculating fines in respect of cartels in traditional sectors – made it possible to take account of the scale of price variations in the EIRD sector which was lower than the overcharge in those traditional sectors.

168 In the third place, and in any event, the Court finds, as the Commission did in recitals 95 and 100 of the 2021 Decision, that, even assuming that the methodology followed by the applicants, which was based on the report which they submitted and which sought to assess the difference in price overcharge in, on the one hand, the EIRD sector and,

on the other, the YIRD sector and traditional sectors, was correct, the reduction rates resulting from those calculations (99.854% and 99.9768% respectively) meant that the fine imposed on HSBC did not reflect either the economic importance of the infringement or HSBC's relative weight in the infringement, as required by the Guidelines on the method of setting fines (see paragraph 63 above), and would deprive the fine of its deterrent effect. In the present case, such reduction factors would bring the fine to a much lower level than the fines imposed in cartels in traditional sectors and would deprive the fines of their deterrent effect.

169 In the light of the foregoing, the applicants have not shown that the Commission made errors of assessment as regards the third element for determining the reduction factor and that, consequently, it infringed the principle of proportionality and the principle that the penalty must be specific to the offender. The complaints which they put forward in that regard must therefore be rejected.

– The final adjustment of the reduction factor to bring it to the level applied in the settlement decision (recitals 50 to 52 of the 2021 Decision)

170 In recitals 50 to 52 of the 2021 Decision, the Commission stated that, as the fourth element used to determine the reduction factor to be applied to cash receipts, it adjusted that reduction factor upwards by 0.079 percentage points to give the same reduction factor as that applied in the settlement decision, namely 98.849%. The Commission considered that, in the absence of circumstances justifying proceeding otherwise and in accordance with the principle of equal treatment, the calculation of the fine under the standard administrative procedure should follow the same method of calculation as that used in the settlement procedure.

171 The applicants dispute that assessment. The Commission infringed the principle of equal treatment in that, in essence, by stating that it had adjusted the reduction factor in order to apply the same factor as that taken into account in the 2013 settlement decision, it rendered all the calculations in the 2021 Decision otiose. That adjustment shows that the Commission was always going to apply the same reduction factor as it had applied in the settlement decision without reflecting HSBC's limited involvement in the infringement as compared with that of the addressees of that decision, in particular Barclays plc, or the lesser extent of price variations in HSBC's alleged infringement. In any event, the Commission fails to discharge its obligation to state reasons in so far as it does not explain why a uniform factor should be applied to the settling parties and HSBC.

172 The Commission contests those arguments.

173 In that regard, in the first place, it must be borne in mind that, in response to an oral question put by the Court, the applicants stated that their complaint alleging failure to meet the obligation to state reasons referred to the first sentence of recital 104 of the 2021 Decision, according to which, 'given that HSBC [had] not established objective reasons for a different reduction factor to be applied to HSBC's cash receipts, there [was] no need to depart from the approach applied to the settling parties as regards the reduction factor'.

174 In that regard, the Court finds that that sentence must be read in the light of the arguments put forward by HSBC during the administrative procedure, referred to in recital 103 of the 2021 Decision, according to which it was not necessary for the same methodology for determining the

reduction factor to be applied to the settling parties and to the non-settling parties as HSBC's submissions on the scale of price variations are 'objective reasons' for applying a different factor to HSBC's cash receipts and that, in any case, the application of a pre-determined factor in a staggered hybrid procedure would be an infringement of HSBC's rights of defence.

175 It is clear from recitals 92 to 102 of the 2021 Decision that the Commission rejected the applicants' arguments concerning the scale of the price variations put forward with regard to the third element for determining the reduction factor.

176 Additionally, in the second sentence of recital 104 of the 2021 Decision, the Commission explained that applying the same reduction factor to HSBC's cash receipts as the reduction factor applied to the settling parties does not constitute a breach of HSBC's rights of defence since the Commission had heard HSBC's views on the parameters applied to determine that factor in its response to the Commission's letters of 8 May 2020 and 16 April 2021.

177 Read together, those recitals of the 2021 Decision enable the applicants to understand that, by stating, in recital 104 of that decision, that 'HSBC has not established objective reasons for a different reduction factor to be applied to HSBC's cash receipts', the Commission was referring to the fact that it had rejected HSBC's arguments during the administrative procedure seeking to establish that a reduction factor other than the one applied to the settling parties had to be applied to it. That reasoning is therefore sufficient for the applicants to be able to challenge the Commission's finding in recital 104 of the 2021 Decision and for the Court to be able to exercise its jurisdiction to review.

178 The complaint alleging failure to discharge the obligation to state reasons is therefore unfounded and must be rejected.

179 In the second place, as regards the complaints alleging that the Commission infringed the principle of equal treatment by applying a uniform reduction factor to the applicants and to the settling parties, the Court notes that the principle of equal treatment is a general principle of EU law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union. According to settled case-law, that principle requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified (see judgment of 11 July 2013, Team Relocations and Others v Commission, C-444/11 P, not published, EU:C:2013:464, paragraph 186 and the case-law cited; judgment of 11 July 2013, Ziegler v Commission, C-439/11 P, EU:C:2013:513, paragraph 132 and 166).

180 In addition, it is settled case-law that, when the amount of the fine is determined, there cannot, by the application of different methods of calculation, be any discrimination between the undertakings which have participated in the same infringement of Article 101 TFEU (judgment of 12 November 2014, Guardian Industries and Guardian Europe v Commission, C-580/12 P, EU:C:2014:2363, paragraph 62 and the case-law cited; see, to that effect, judgment of 20 May 2015, Timab Industries and CFPR v Commission, T-456/10, EU:T:2015:296, paragraph 74 and the case-law cited).

181 The Commission referred to that principle in recital 52 of the 2021 Decision while stating that no circumstances had arisen in the course of the standard procedure that would justify departing from applying it in the present case (see also paragraph 173 above).

182 It follows that the Commission was entitled in the present case to apply to HSBC the same methodology for calculating the fine as the methodology followed in the settlement decision, including as regards the final adjustment of the reduction factor.

183 Applying the same adjustment in respect of the fourth element as the one which had been applied in the settlement decision does not make the other stages of the determination of the reduction factor otiose, contrary to what the applicants submit. First, the Court finds that the Commission was required to explain the reasons which led it to determine the reduction factor to be 98.849%, in order to fill the gaps in the statement of reasons for the 2016 Decision highlighted by the Court in its judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675) (see paragraph 99 above). Second, those other steps for determining the reduction factor remain relevant in so far as they are intended to enable HSBC effectively to challenge the methodology devised by the Commission, insomuch as HSBC was not a party to the settlement procedure in which that same methodology had been applied (see paragraph 176 above).

184 The applicants are also incorrect in so far as they maintain that the Commission infringed the principle of equal treatment by failing to take account – when determining the reduction factor, and in particular in the context of the fourth element – of their limited involvement in the infringement at issue as compared with, in particular, the settling parties. According to the applicants, the Commission thus erred in treating the different situations of the participants in the infringement in the same way. They also seem to be arguing that HSBC's lesser involvement in the infringement constitutes an 'objective reason' for not applying the same reduction factor to HSBC's cash receipts in the present case as the reduction factor applied to the other participants in the infringement.

185 In that regard, first, the Court finds that it is clear from recital 26 of the 2021 Decision that the reduction factor is intended to take account of the particularities of the EIRD sector as a whole and not to reflect the individual situations of the banks involved in the infringement.

186 Second, the Commission took account of the applicants' lesser involvement in the infringement, both as regards the lower degree of intensity of contacts in which HSBC participated and in respect of its minor role in the infringement, by granting them a reduction of 15% on account of mitigating circumstances (see paragraph 34 above). In that regard, the Court notes that, in order to comply with the principle that penalties must be specific to the offender, it is sufficient that the final amount of the fine reflects the differences in the situations of the various participants, without there being any need for the Commission to differentiate the treatment of the participants at each stage of the calculation of the amount of the fine (judgment of 13 September 2013, Total Raffinage Marketing v Commission, T-566/08, EU:T:2013:423, paragraph 454). In that context, it is appropriate to note that the Commission also made the amount of the fine specific to the applicants in other calculation stages. The relative weight of HSBC in the infringement is reflected by the fact

that the reduction factor which is uniform is applied to HSBC's own cash receipts (see paragraph 27 above). In addition, the Commission also took into account HSBC's individual involvement in the infringement when determining the duration multiplier (see paragraph 31 above).

187 Accordingly, the Commission did not infringe the principle of equal treatment by applying the same discount factor to HSBC's cash receipts as that applied to the cash receipts of the other participants in the infringement. Nor does HSBC's lesser involvement in the infringement constitute an 'objective justification' requiring the Commission to depart from applying that uniform factor to HSBC in the present case.

188 In the light of the foregoing, the complaints put forward with regard to the fourth element for determining the reduction factor must be rejected as unfounded and, accordingly, the third plea must be rejected in its entirety.

The fourth plea, alleging an error of assessment as regards the gravity of the infringement and breach of the principles of equal treatment and proportionality

189 By their fourth plea, the applicants argue that the Commission applied an excessive gravity factor and an 'additional amount' in breach of the principles of equal treatment and proportionality.

190 In the first place, they claim that HSBC's infringement must be considered less serious than the Commission found, first, in the absence of any evidence of harm arising from the 'infringement' and in order to reflect the 'distinction in culpability' between HSBC's conduct and more serious infringements, such as a multipartite horizontal price-fixing cartel; second, because the exchanges with regard to mids in which HSBC was involved resulted in more favourable prices being quoted to customers; and third, because HSBC's involvement in the infringement was narrower and short lived. Accordingly, the applicants submit that the gravity factor should be less than 15%.

191 In the second place, according to the applicants, in imposing the additional amount of 18%, the Commission failed to take into account that the manipulation on 19 March 2007, in which HSBC participated, was a one-off event with no broader impact on price competition in the EIRD market. In addition, that event took place over 14 years ago and has not been repeated. The other exchanges in which HSBC participated are not among 'the most harmful restrictions of competition' within the meaning of the Guidelines on the method of setting fines in so far as they did not amount, inter alia, to horizontal price-fixing. In any event, setting the additional amount at 18% is disproportionate and a breach of the principle of equal treatment between HSBC and Barclays plc, and is vitiated by an inadequate statement of reasons.

192 The Commission disputes the applicants' arguments.

193 In that regard, the Court notes that, in order to determine the amount of a fine, it is necessary to take account of the duration of the infringements and of all the factors capable of affecting the assessment of their gravity, such as the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the European Union (see judgment of 8 December 2011, Chalkor v Commission, C-386/10 P, EU:C:2011:815, paragraph 56

and the case-law cited, and of 26 September 2018, Infineon Technologies v Commission, C-99/17 P, EU:C:2018:773, paragraphs 196 and 198 and the case-law cited).

194 In addition, when determining the amount of the fine, objective factors such as the content and duration of the anti-competitive conduct, the number of incidents and their intensity, the extent of the market affected and the damage to the economic public order must be taken into account. The analysis must also take into consideration the relative importance and market share of the undertakings responsible and also any repeated infringements (see judgment of 8 December 2011, Chalkor v Commission, C-386/10 P, EU:C:2011:815, paragraph 57 and the case-law cited).

195 According to settled case-law, the principle of proportionality, which is one of the general principles of EU law, requires that the acts of the EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objective pursued, and where there is a choice between several appropriate measures recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued (judgments of 13 November 1990, Fedesa and Others, C-331/88, EU:C:1990:391, paragraph 13, and of 15 July 2015, Trafilerie Meridionali v Commission, T-422/10, EU:T:2015:512, paragraph 373).

196 In the procedures initiated by the Commission in order to penalise infringements of the competition rules, the application of that principle requires that fines must not be disproportionate to the objectives pursued, that is to say, by reference to compliance with those rules, and that the amount of the fine imposed on an undertaking for an infringement in competition matters must be proportionate to the infringement, seen as a whole, having regard, in particular, to the gravity thereof. In particular, the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account to assess the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified (see judgment of 15 July 2015, Trafilerie Meridionali v Commission, T-422/10, EU:T:2015:512, paragraph 374 and the case-law cited).

197 In the interests of transparency the Commission adopted the Guidelines on the method of setting fines, in which it indicates the basis on which it will take account of one or other aspect of the infringement and what this will imply as regards the amount of the fine.

– The gravity factor

198 In order to challenge the level of the gravity factor applied in the present case by the Commission when it determined the basic amount of the fine imposed on HSBC, in the first place, the applicants submit that the Commission has not proved that the conduct in which HSBC had participated was likely to have had negative effects on the EIRD market, in particular on their price, and that, at the very least, exchanges on 'mids' would enable traders to offer more favourable prices to customers.

199 In that regard, the Court finds that the effects on the market may indeed be taken into consideration by the Commission when it assesses the gravity of the infringement among the 'numerous factors' to which reference is made in paragraph 164 above. However, those factors are of crucial importance only in the case of agreements, decisions or concerted practices which do not have as their direct object the prevention,

restriction or distortion of competition, and which are therefore liable to come within the scope of Article 101 TFEU only in view of their actual effects. As was pointed out in paragraph 164 above, to require the Commission, when calculating the amount of the fine, to take into account the actual impact of the infringement on the market would have the effect of imposing on it an obligation to which it is not bound for the purposes of applying Article 101 TFEU where the infringement in question has an anticompetitive object.

200 Therefore, it is sufficient that the level of the gravity factor is justified by other factors capable of influencing the determination of gravity, such as the very nature of the infringement and its geographic scope (see, to that effect, judgment of 16 July 2020, Nexans France and Nexans v Commission, C‑606/18 P, EU:C:2020:571, paragraph 105).

201 In the present case, the level of the gravity factor is fully justified by the circumstances taken into account by the Commission in recitals 107 and 108 of the 2021 Decision.

202 The conduct at issue in the present case, in so far as it related to factors essential to the pricing of EIRDs, is among the most harmful restrictions of competition (see, to that effect, judgment of 21 December 2023, European Superleague Company, C‑333/21, EU:C:2023:1011, paragraphs 162 and 163). In that context, the Court of Justice held that the assertion, even if it were established, that an exchange of information on ‘mids’ allowed traders to offer more favourable prices to customers was insufficient to raise reasonable doubts as to whether the exchanges in question were sufficiently harmful to competition (see, to that effect, judgment of 12 January 2023, HSBC Holdings and Others v Commission, C‑883/19 P, EU:C:2023:11, paragraph 198 to 205).

203 Moreover, the practices at issue are particularly harmful in so far as they are liable not only to distort competition on the EIRD market, but also, more broadly, to compromise the trust placed in the banking system and the financial markets as a whole and their credibility. As the Commission found in recital 108 of the 2021 Decision, without those aspects being disputed by the applicants, the affected benchmark rates which are reflected in the pricing of EIRDs apply to all participants in the EIRD market. In addition, since those rates are euro-based, they are of paramount importance for the harmonisation of financial conditions in the internal market and for banking activities in the Member States.

204 Lastly, with regard to the geographic scope of the infringement, as is clear from recital 108 of the 2021 Decision, the cartel covered at the very least the entire EEA, with the result that the conduct at issue was capable of having an impact on the banking activities of all Member States.

205 In the absence of any evidence submitted by HSBC calling into question the Commission’s reasoning concerning the nature of the infringement and its geographic scope, referred to in paragraphs 202 to 204 above, which constitute the various factors taken into consideration in that regard in the 2021 Decision, the Court finds that the applicants’ arguments referred to in paragraph 198 above do not call into question the level of the gravity factor applied in the present case, in particular in the light of the principle of proportionality.

206 In the second place, the applicants claim that the fact that HSBC’s infringement was more limited and of a shorter duration should also have

led the Commission to find that HSBC's infringement was less serious and to apply a gravity factor of less than 18% to HSBC.

207 In that regard, the Court recalls that the specific situation of each participant in the infringement may be taken into consideration by the Commission at the various stages of the calculation of the fine (see paragraph 186 above).

208 As regards the relative gravity of an undertaking's participation in an infringement and the particular circumstances of the case, the Commission may take them into account either when assessing the gravity of the infringement within the meaning of Article 23 of Regulation No 1/2003 or when adjusting the basic amount in the light of mitigating and aggravating circumstances (see, to that effect, judgment of 26 September 2018, Infineon Technologies v Commission, C-99/17 P, EU:C:2018:773, paragraph 199 and the case-law cited). This applies, in particular, to the assessment of the gravity of the participation in a single and continuous infringement committed by several undertakings (see, to that effect, judgment of 11 July 2013, Team Relocations and Others v Commission, C-444/11 P, not published, EU:C:2013:464, paragraph 103).

209 Thus, in the present case, since the Commission took into account the duration of HSBC's participation in the infringement when determining the duration multiplier, in accordance with point 24 of the Guidelines on the method of setting fines (see paragraph 31 above), and HSBC's particular role in the single and continuous infringement in respect of mitigating circumstances (see paragraph 34 above), the applicants' argument that the gravity factor applied in the present case is contrary to the principle of equal treatment and the proportionality principle in that it does not reflect HSBC's shorter and more limited participation in the infringement compared with that of the main players cannot succeed.

210 It follows that the present complaint must be rejected.

– The deterrence factor

211 The Court recalls that, in so far as the power to impose fines granted to the Commission by Article 23(2) of Regulation No 1/2003 is intended to enable it to carry out the task of supervision conferred on it by EU law – which includes, in particular, suppressing illegal activities and preventing them reoccurring (see judgment of 7 June 2007, Britannia Alloys & Chemicals v Commission, C-76/06 P, EU:C:2007:326, paragraph 22 and the case-law cited) – the purpose of specifically including an entry fee in the amount of the fine is, according to point 25 of the Guidelines on the method of setting fines, to 'deter undertakings from even entering into horizontal price-fixing … agreements' such as the ones at issue in the present case. It is clear that, since the basic amount of the fine is calculated on the basis of the duration of the participation in the infringement, there is a risk that, in the event of infringements of a short duration – such as the one in the present case – the basic amount may prove to be insufficient to ensure that the fine is a deterrent, a risk which the inclusion of the entry fee in the amount is intended to prevent (see, to that effect, judgment of 13 December 2013, HSE v Commission, T-399/09, not published, EU:T:2013:647, paragraph 125).

212 Under point 25 of the Guidelines on the method of setting fines, the entry fee is to be imposed irrespective of the duration of the infringement.

213 It is also clear from case-law that it is not necessary, in determining the rate of the entry fee, to take account of the specific characteristics of the infringement committed by each of the participants taken individually, since the factors listed in the Guidelines on the method of setting fines for the determination of that rate are all aimed at evaluating the infringement of the competition rules of the European Union, taken as a whole (see judgment of 14 May 2014, Reagens v Commission, T-30/10, not published, EU:T:2014:253, paragraph 247 and the case-law cited).
214 It follows that neither the principle of equal treatment nor the proportionality principle require the entry fee to be adjusted according to the greater or lesser significance of the involvement in the infringement of each addressee of the contested decision (see, to that effect, judgment of 13 December 2013, HSE v Commission, T-399/09, not published, EU:T:2013:647, paragraphs 126, 127 and 131).
215 Consequently, contrary to what the applicants claim, the deterrence factor does not have to reflect the individual involvement of each undertaking in the infringement, which was taken into account in the present case under the mitigating circumstances. Similarly, that deterrence factor does not have to reflect the various durations of involvement of the undertakings implicated, since duration was taken into account as part of the duration multiplier, which is not disputed in the present case by the applicants.
216 Since, as is apparent from the judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675), as confirmed in that regard by the judgment of 12 January 2023, HSBC Holdings and Others v Commission (C-883/19 P, EU:C:2023:11), the Commission was fully entitled to find that HSBC participated in the infringement at issue, it was also entitled to impose on it a fine the amount of which included the entry fee in order to pursue the deterrence objective in accordance with the case-law cited in paragraph 211 above.
217 In addition, the Commission may set the percentage of the value of sales referred to in point 25 of the Guidelines on the method of setting fines and taken into account in order to calculate the entry fee at the same level for all the cartel participants. Setting the same percentage for all the cartel participants does not mean that the same entry fee has been determined for all those participants. Since that fee is a percentage of the value of each cartel participant’s sales in relation to the infringement, it will be different for each participant, depending on the differences in the value of participants’ sales (see judgment of 13 December 2013, HSE v Commission, T-399/09, not published, EU:T:2013:647, paragraph 132 and the case-law cited).
218 It follows that the applicants’ argument that, in essence, an ‘additional amount’ for the purpose of deterrence set at the same level for all the participants leads to a disproportionate penalty and unequal treatment on account of HSBC’s limited participation in the infringement, which was a one-off and of short duration, must be rejected.
219 In those circumstances, the applicants’ argument alleging failure by the Commission to discharge its obligation to state reasons is ineffective in that, in essence, it did not explain the reasons which led it to impose the same ‘entry fee’ on HSBC and Barclays.

220 Furthermore, the Court must also reject the applicants' arguments alleging that the Commission erred in failing to take account, when imposing the additional amount, of the fact that the infringement at issue took place 14 years ago and was not repeated. The applicants base that line of argument on the purpose of the additional amount, that being to deter undertakings from engaging in anti-competitive practices. Through that line of argument, the applicants seek to show that, when the fine was imposed in 2016, let alone in 2021, 'there was no basis for suggesting that HSBC needed to be deterred from committing the same or [a] similar infringement again'.

221 In that regard, the Court finds that any repeated infringement is among the factors to be taken into consideration in the analysis of the gravity of the infringement in question, specifically by increasing the amount of the fine due to aggravating circumstances (see paragraph 194 above) (see, to that effect, judgment of 17 June 2010, Lafarge v Commission, C-413/08 P, EU: C: 2010:346, paragraphs 63 to 65 and the case-law cited).

222 However, the fact that the infringement was not repeated does not mean that an additional amount cannot be imposed by the Commission in accordance with the principles referred to in paragraphs 211 to 215 and 217 above.

223 In the present case, in the absence of any evidence put forward by HSBC calling into question the reasoning set out by the Commission in recital 117 of the 2021 Decision and in recital 107 of that decision, to which recital 117 refers, as regards the nature of the infringement, its geographic scope, and the circumstances referred to in paragraphs 202 and 204 above which constitute the various elements taken into consideration when determining the 'additional amount' as a deterrence factor, the Court finds that the Commission cannot be criticised as far as concerns the level of that amount applied in the present case when calculating the fine imposed on HSBC.

224 Lastly, the fact put forward by the applicants that the regulatory framework for financial services at national and EU levels has evolved since the infringement is irrelevant, as the Commission submits, because the 'additional amount' is imposed for deterrent purposes under EU competition law.

225 It follows that the present complaint must be rejected as unfounded and, accordingly, the fourth plea must be rejected in its entirety.

The fifth plea, alleging that the amount of the fine is disproportionate

226 The applicants submit that the fine imposed on them is disproportionate having regard, first, to HSBC's more peripheral role in the infringement as compared with that of the main players and other non-settling parties, second, to the pro-competitive nature of its conduct in the market, and third, to the significantly shorter duration of its participation in the infringement. In addition, the fine imposed on HSBC is excessive in the light of the conclusions of the Court in the judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675), which warrant a larger reduction on account of mitigating circumstances than the one applied in the 2021 Decision.

227 The Commission disputes the applicants' arguments.

228 The Court recalls that, according to settled case-law, where an infringement has been committed by several undertakings, it is

appropriate, when setting the amount of the fines, to consider the relative gravity of the participation of each of them, which implies in particular that the roles played by each of them in the infringement for the duration of their participation in it should be established. That conclusion follows logically from the principle that penalties must fit the offence, according to which an undertaking may be penalised only for acts imputed to it individually; that principle applies in any administrative procedure that may lead to the imposition of sanctions under EU competition law (see judgment of 25 October 2005, Groupe Danone v Commission, T-38/02, EU: T: 2005:367, paragraphs 277 and 278 and the case-law cited).

229 In accordance with those principles, point 29 of the Guidelines on the method of setting fines provides for the basic amount of the fine to be varied by reference to a number of mitigating circumstances, which are specific to each undertaking involved. That point lays down, in particular, a non-exhaustive list of the mitigating circumstances that may be taken into account.

230 According to the third indent of point 29 of the Guidelines on the method of setting fines, the basic amount of the fine may be reduced on account of mitigating circumstances, in particular where the undertaking provides evidence that its participation in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreements, it actually avoided applying them by adopting competitive conduct in the market. According to the same provision, the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since that will already be reflected in the basic amount.

231 First, the applicants submit that the Commission erred as far as it failed to take into account HSBC's especially minor role in the infringement, including with respect to the other non-settling parties, in particular in view of the significantly smaller number of chats involving the HSBC trader and the fact that those chats took place over a shorter period.

232 In that regard, the Court finds that it is true that, as is apparent from the case law cited in paragraph 228 above, the minor role played by an undertaking in an infringement must be taken into consideration, in terms of the number and intensity of the instances of anti-competitive conduct, when the fine is determined.

233 However, the lower intensity of HSBC's participation in the collusive practices comprising the infringement at issue was indeed taken into account by the Commission in its assessment of the mitigating circumstances (see paragraph 34 above).

234 In so far as the applicants maintain that HSBC should benefit on that basis from a reduction in excess of the rate of 15% applied by the Commission, the Court finds that, in view of the nature of the infringement, the participation in the conduct by the HSBC trader was, by its nature, as consequential as that of the main players, with the result that the reduction in the basic amount of the fine of 15% on account of mitigating circumstances sufficiently reflects the lower intensity of that participation. Furthermore, the Court also finds that, in view of the short duration of HSBC's participation in the infringement, namely a period of six weeks from 12 February to 27 March 2007 (see paragraph 2 above), which is reflected by the duration multiplier, participation in a dozen

exchanges cannot be regarded as 'sporadic' and therefore as justifying a greater reduction on the basis that that participation was of lower intensity.

235 Second, contrary to what is claimed by the applicants, no further reduction of the fine is justified due to the allegedly pro-competitive nature of HSBC's conduct. As is apparent from paragraph 199 above, the effects on the market of the conduct at issue, including the pro-competitive effects, may be taken into consideration among the 'numerous factors' involved in assessing the gravity of the infringement. However, those factors are not of crucial importance in the case of practices, such as those at issue in the present case, which have as their direct object the prevention, restriction or distortion of competition.

236 Even assuming that the pro-competitive effects of the conduct at issue must be taken into account, in the present case, for the purposes of assessing the mitigating circumstances, the exchanges in question increased transparency only for the traders participating in those exchanges, to the detriment of the other competitors, which significantly reduced uncertainty on the market and resulted in competition conditions which were not the normal conditions of the EIRD market (see, to that effect, judgment of 12 January 2023, HSBC Holdings and Others v Commission, C-883/19 P, EU:C:2023:11, paragraphs 117, 118, and 202 to 205). Those exchanges were therefore harmful to competition. The applicants have not put forward, in the context of the present action, what the circumstances having pro-competitive effects resulting from those exchanges – thereby allowing them to be granted a further reduction on account of mitigating circumstances – might be. That argument must therefore, in any event, be rejected as unfounded.

237 Third, the applicants submit that the Commission failed to take sufficient account of the Court's findings in the judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675).

238 In that regard, the Court recalls (see paragraph 5 above) that it has held previously that the chats of 9 and 14 March 2007 in which the HSBC trader participated could not be regarded as constituting restrictions of competition by object (judgment of 24 September 2019, HSBC Holdings and Others v Commission, T-105/17, EU:T:2019:675, paragraph 194) and that HSBC's participation in a single and continuous infringement can be upheld only in respect, first, of its own conduct in that infringement and, second, of the conduct of other banks to the extent that they form part of the EURIBOR rate manipulation of 19 March 2007 and any potential repeat of that manipulation (judgment of 24 September 2019, HSBC Holdings and Others v Commission, T-105/17, EU:T:2019:675, paragraph 273).

239 The Commission took due account of those circumstances by granting the applicants an additional reduction of 5% of the basic amount of the fine. For the same reasons as those set out in paragraph 233 above, a greater reduction on account of mitigating circumstances is not justified in order to reflect those findings of the Court. As the Commission maintains, the conduct which HSBC has been found to have undertaken is particularly serious, particularly in the light of the fact that the manipulation of 19 March 2007 constituted an important part of the overall plan pursued by the participants in the cartel (see recital 124 of

the 2016 Decision) and in view of the risk that the infringements such as that one pose to competition in the EEA and to the provision of financial services in the European Union (see recital 134 of the 2021 Decision).

240 In the light of the foregoing, the applicants' arguments seeking to challenge the 15% rate of reduction granted by the Commission due to mitigating circumstances on the basis that the Commission had failed to observe the principle of proportionality, the principle of equal treatment and the principle that the penalty must be specific to the offender cannot succeed. Consequently, the fifth plea in law must be rejected as unfounded.

241 In the light of the foregoing, the claims for annulment of Article 1 of the 2021 Decision and Article 2(b) of the 2016 Decision, as amended, must be rejected.

The claim seeking a reduction in the amount of the fine

242 In the alternative, the applicants ask the Court to reduce the amount of the fine imposed on them in the 2021 Decision and thus, in essence, to exercise its unlimited jurisdiction, in particular to reduce the value of sales by increasing the reduction factor, substantially reduce the gravity percentage and the additional amount to below 15% and reduce the fine by an additional 20% on account of mitigating circumstances. The applicants base their claim on the arguments put forward in the context of the five pleas examined above, and ask the Court, inter alia, to take account of the fact that that infringement had no real impact on the market when it assesses the gravity of the infringement at issue.

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

244 The exercise of that unlimited jurisdiction does not amount to a review of the Court's own motion, and the proceedings are inter partes. It is, in principle, for the applicant to raise pleas in law against the decision at issue and to adduce evidence in support of those pleas. It is for the applicant to put forward complaints seeking to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement (see, to that effect, judgment of 26 September 2018, Infineon Technologies v Commission, C-99/17 P, EU:C:2018:773, paragraph 194 and 195 and the case-law cited).

245 The EU Courts are authorised to take account of all the factual circumstances in order, if necessary, to amend the amount of the penalty (see, to that effect, judgments of 3 September 2009, Prym and Prym Consumer v Commission, C-534/07 P, EU:C:2009:505, paragraph 86 and the case-law cited, and of 10 November 2021, Google and Alphabet v Commission (Google Shopping), T-612/17, under appeal, EU:T:2021:763, paragraph 605).

246 It follows that, by exercising its unlimited jurisdiction, the EU Courts may also, if necessary, make different findings from those made by the Commission to determine the amount of the fine imposed (judgment

of 21 January 2016, Galp Energía España and Others v Commission, C‑603/13 P, EU:C:2016:38, paragraph 75).

247 In that regard, the exercise by the Court of its unlimited jurisdiction involves, in accordance with Article 23(3) of Regulation No 1/2003, taking into consideration, with respect to each undertaking sanctioned, the seriousness and duration of the infringement at issue, in compliance with the principles of, inter alia, adequate reasoning, proportionality, the individualisation of penalties and equal treatment, and without it being bound by the indicative rules defined by the Commission in its guidelines, even where the latter may give guidance to the EU Courts when they exercise their unlimited jurisdiction (see judgment of 21 January 2016, Galp Energía España and Others v Commission, C‑603/13 P, EU:C:2016:38, paragraph 90 and the case-law cited).

248 Therefore, it is appropriate to ascertain, in the light of all the evidence in the file, especially that put forward by the applicant, whether the Court should substitute, under its unlimited jurisdiction, a different amount for the fine than that adopted by the Commission, on the grounds that the latter amount is not appropriate (see, to that effect, judgment of 17 December 2015, Orange Polska v Commission, T‑486/11, EU:T:2015:1002, paragraph 227).

249 In the present case, it is apparent from examining the pleas in the action that no illegality or irregularity vitiates the 2021 Decision, since all the arguments raised by the applicants in support of their pleas have been rejected. In so far as the claim for a reduction of the amount of the fine seeks to have the Court draw conclusions for the purpose of the amount of the fine from those alleged illegalities or irregularities, that claim must therefore be rejected (see, to that effect, judgment of 17 December 2015, Orange Polska v Commission, T‑486/11, EU:T:2015:1002, paragraph 226).

250 In addition, even assuming that the infringement at issue in the present case and the conduct alleged against HSBC in that regard did not have any real impact on the market, as the applicants claim, in the light of the nature of the infringement and its geographic scope, as set out in paragraphs 202 to 204 above, and in view of the fact that the HSBC trader undertook the unlawful conduct agreed on 19 March 2007 by making contact with the person responsible for submitting rates in order to ask that person to issue a 3m Euribor quote in line with what had been agreed with the Barclays trader (see recital 322 of the 2016 Decision) (judgment of 24 September 2019, HSBC Holdings and Others v Commission, T‑105/17, EU:T:2019:675, paragraphs 79 and 90), the Court concludes, in the exercise of its unlimited jurisdiction and in the light of the principle that the penalty must be specific to the offender, the proportionality of the penalty and its deterrent effect, that there is no need to amend the amount of the fine set in the 2021 Decision.

251 Consequently, the Court rejects the head of claim seeking a reduction of the amount of the fine imposed on the applicants.

Costs

252 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. Dismisses the action;

2. Orders HSBC Holdings plc, HSBC Bank plc and HSBC Continental Europe to pay the costs.

Kowalik-Bańczyk Buttigieg Hesse

Delivered in open court in Luxembourg on 27 November 2024.

V. Di Bucci S. Papasavvas

Registrar President

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